NORTH CAROLINA REPORTS

VOL. 248

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1958

FALL TERM, 1958

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1958

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2 Iredell Law	"	24	"
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2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
8 Iredell Equity	"	43	"
Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
1 Jones Equity	"	54	"
2 Jones Equity	"	55	"
3 Jones Equity	"	56	"
4 Jones Equity	"	57	"
5 Jones Equity	"	58	"
6 Jones Equity	"	59	"
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Phillips Law	"	61	"
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In quoting from the *reprinted* Reports counsel will cite always the marginal (*i.e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1958—FALL TERM, 1958

CHIEF JUSTICE:

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ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICES:

W. A. DEVIN,
M. V. BARNHILL.

ATTORNEY-GENERAL:

MALCOLM B. SEAWELL.[1]

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
RALPH MOODY,
CLAUDE L. LOVE,
HARRY W. McGALLIARD,
PEYTON B. ABBOTT,
KENNETH WOOTEN, JR.,
F. KENT BURNS,
BASIL L. SHERRILL.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

[1] Appointed 15 April 1958 upon resignation of George B. Patton.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

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

SECOND DIVISION

HAMILTON H. HOBGOOD	Ninth	Louisburg.
WILLIAM Y. BICKETT	Tenth	Raleigh.
CLAWSON L. WILLIAMS	Eleventh	Sanford.
HEMAN R. CLARK	Twelfth	Fayetteville.
RAYMOND B. MALLARD	Thirteenth	Tabor City.
C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
HENRY A. McKINNON[1]	Sixteenth	Lumberton.

THIRD DIVISION

ALLEN H. GWYN	Seventeenth	Reidsville.
WALTER E. CRISSMAN	Eighteenth	High Point.
L. RICHARD PREYER	Eighteenth	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
F. DONALD PHILLIPS	Twentieth	Rockingham.
WALTER E. JOHNSTON, JR.	Twenty-First	Winston-Salem.
HUBERT E. OLIVE	Twenty-Second	Lexington.
ROBERT M. GAMBILL[2]	Twenty-Third	North Wilkesboro.

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J. FRANK HUSKINS	Twenty-Fourth	Burnsville.
JAMES C. FARTHING	Twenty-Fifth	Lenoir.
FRANCIS O. CLARKSON	Twenty-Sixth	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh	Gastonia.
ZEB V. NETTLES	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.	Twenty-Ninth	Marion.
GEORGE B. PATTON[3]	Thirtieth	Franklin.

SPECIAL JUDGES.

GEORGE M. FOUNTAIN	Tarboro.
SUSIE SHARP	Reidsville.
J. B. CRAVEN, JR.	Morganton.
W. REID THOMPSON	Pittsboro.

EMERGENCY JUDGES.

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

1 Appointed 15 April 1958 upon resignation of Malcolm B. Seawell.
2 Appointed 16 June 1958 to succeed J. A. Rousseau, deceased.
3 Appointed 16 June 1958 upon resignation of Dan K. Moore.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
HUBERT E. MAY	Second	Nashville.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Smithfield.
ROBERT D. ROUSE, JR.	Fifth	Farmville.
WALTER T. BRITT	Sixth	Clinton.
LESTER V. CHALMERS, JR.	Seventh	Raleigh.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
MAURICE E. BRASWELL	Ninth	Fayetteville.
WILLIAM H. MURDOCK	Tenth	Durham.

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HARVEY A. LUPTON	Eleventh	Winston-Salem.
HORACE R. KORNEGAY	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
GRADY B. STOTT	Fourteenth	Gastonia.
ZEB A. MORRIS	Fifteenth	Concord.
B. T. FALLS, JR.	Sixteenth	Shelby.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT S. SWAIN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
CHARLES M. NEAVES	Twenty-first	Elkin.

FIRST DIVISION

FIRST DISTRICT

Judge Bundy

Camden—Sept. 22; Nov. 3†.
Chowan—Sept. 8; Nov. 24.
Currituck—Sept. 1; Oct. 6†.
Dare—Oct. 20.
Gates—Oct. 13(A).
Pasquotank — Sept. 15†; Oct. 13†; Nov. 10*; Dec. 1† (2).
Perquimans—Oct. 27.

SECOND DISTRICT

Judge Stevens

Beaufort—Sept. 1†; Sept. 15*; Oct. 13†; Nov. 3*; Dec. 1†.
Hyde—Oct 6; Oct. 27†.
Martin—Aug. 4†; Sept. 22*; Nov. 17† (2); Dec. 8.
Tyrrell—Aug. 25†; Sept. 29.
Washington—Sept. 8*; Nov. 10†.

THIRD DISTRICT

Judge Moore

Carteret—Oct. 13†; Nov. 3†.
Craven—Sept. 1 (2); Sept. 29† (2); Oct. 27†; (A); Nov. 10; Nov. 24† (2).
Pamlico—Aug. 4 (2).
Pitt—Aug. 18 (2); Sept. 15† (2); Oct. 6 (A); Oct. 20†; Oct. 27; Nov. 17; Dec. 8.

FOURTH DISTRICT

Judge Parker

Duplin—Aug. 25; Sept. 1†; Oct. 6*; Nov. 3*; Dec. 1†(2).
Jones—Sept. 22; Oct. 27†; Nov. 24.
Onslow—July 14‡ (A); Sept. 29; Nov. 10† (2).
Sampson—Aug. 4 (2); Sept. 8† (2); Oct. 13*; Oct. 20†; Nov. 17* (A).

FIFTH DISTRICT

Judge Bone

New Hanover—July 28*; Aug. 4†; Aug. 18*; Sept. 8† (2); Sept. 29*; Oct. 6† (2); Oct. 27* (2); Nov. 17† (2); Dec. 1* (2).
Pender—Sept. 1†; Sept. 22; Oct. 20†; Nov. 10.

SIXTH DISTRICT

Judge Frizzelle

Bertie—Aug. 25; Sept. 1†; Nov. 17 (2).
Halifax—Aug. 11† (2); Sept. 29† (2); Oct. 20*; Dec. 1 (2).
Hertford—July 21(A); Sept. 8; Sept. 15†; Oct. 13.
Northampton—Aug. 4; Oct. 27 (2).

SEVENTH DISTRICT

Judge Morris

Edgecombe—Sept. 15*; Oct. 6* (2); Nov. 8† (2).
Nash — Aug. 18*; Sept. 8†; Sept. 22†; Sept. 29*; Oct. 20† (2); Nov. 17*(2); Dec. 1† (A).
Wilson—July 14*; Aug. 25*(2); Sept. 22† (A) (2); Oct. 20* (A) (2); Dec. 1† (2).

EIGHTH DISTRICT

Judge Paul

Greene—Oct. 6†(A); Oct. 13*(A); Dec. 1.
Lenoir—Aug. 18*; Sept. 8†(2); Oct. 6† (2); Oct. 20* (2); Nov. 17† (2); Dec. 8.
Wayne—Aug. 11*; Aug. 25†(2); Sept 22† (2); Nov. 3(2); Dec. 1† (A).

SECOND DIVISION

NINTH DISTRICT

Judge Williams

Franklin—Sept. 15† (2); Oct. 13*; Nov. 24† (2).
Granville—July 21; Oct. 6†; Nov. 10 (2).
Person—Sept. 8; Sept. 29† (A) (2); Oct. 27.
Vance—Sept. 29*; Nov. 3†.
Warren—Sept. 1*; Oct. 20†.

TENTH DISTRICT

Judge Clark

Wake—July 7* (A) (2); July 21† (A); Aug. 4†; Aug. 11* (2); Aug. 25†; Sept. 1* (2); Sept. 1† (A) (2); Sept. 15† (2); Sept. 29* (A) (2); Oct. 6† (2); Oct. 20† (2); Oct. 27* (A) (2); Nov. 3† (2); Nov. 17* (2); Nov. 17† (A) (2); Dec. 8*.

ELEVENTH DISTRICT

Judge Mallard

Harnett—Aug. 11†; Aug. 25* (A); Sept. 8† (A) (2); Oct. 6† (2); Nov. 10* (A) (2).
Johnston—Aug. 18; Sept. 22†(2); Oct. 20; Nov. 3† (2); Dec. 1 (2).
Lee—July 28*; Aug. 4†; Sept. 8*; Sept. 15†; Oct. 27*; Nov. 17†.

TWELFTH DISTRICT

Judge Hall

Cumberland—Aug. 4†; Aug. 11*; Aug. 25* (2); Sept. 8† Sept. 22* (2); Oct. 6† (2); Oct. 20†(2); Nov. 3*(2); Nov. 24† (2); Dec. 8*.
Hoke—Aug. 18; Nov. 17.

THIRTEENTH DISTRICT

Judge Carr

Bladen—Oct. 20*; Nov. 10†.
Brunswick—Sept. 15; Oct. 13†.
Columbus—Sept 1* (2); Sept. 22† (2); Oct. 6*; Oct. 27† (2); Nov. 17* (2).

FOURTEENTH DISTRICT

Judge McKinnon

Durham—July 7* (A) (2); July 28 (2); Aug. 25*; Sept. 1†; Sept. 8* (2); Sept. 29* (2); Oct. 13† (2); Oct. 27* (2); Nov. 10† (2); Nov. 24 (2); Dec. 8*.

FIFTEENTH DISTRICT

Judge Hobgood

Alamance—July 14† (A); July 28†; Aug. 11* (2); Sept. 8† (2); Oct. 13* (2); Nov. 10† (2); Dec. 1*.
Chatham—Aug. 25†; Oct. 6; Oct. 27†; Nov. 3; Nov. 24.
Orange—Aug. 4*; Sept. 22† (2); Dec. 8.

SIXTEENTH DISTRICT

Judge Bickett

Robeson—July 7† (A); Aug. 11*; Aug. 25† Sept. 1* (2); Sept. 15† (2); Oct. 6† (2); Oct. 20* (2); Nov. 10† (2); Nov. 24*.
Scotland—July 21†; Aug. 18; Sept. 29†; Nov. 3† Dec. 1 (2).

THIRD DIVISION

SEVENTEENTH DISTRICT
Judge Crissman

Caswell—Nov. 10* (A); Dec. 1†.
Rockingham—Sept. 1* (2); Sept. 22†(A) (2); Oct. 13†; Oct. 20* (2); Nov. 17† (2); Dec. 8*.
Stokes—Sept. 29*; Oct. 6†.
Surry—July 7† (2); Sept. 15* (2); Nov. 3† (2); Dec. 1 (A).

EIGHTEENTH DISTRICT
Schedule A—Judge Armstrong

Guil. Gr.—July 7*; July 21*; Aug. 25*; Sept. 1†; Sept. 8* (2); Sept. 29* Oct. 6* (2); Oct. 20*. Nov. 3*; Nov. 10† (2) Nov. 24*; Dec. 1*.
Guil. H. P.—July 14*; Sept. 22*; Oct. 27*; Dec. 8*.

Schedule B—Judge Phillips

Guil. Gr.—Sept. 8† (2); Sept. 22† (2); Oct. 6† (2); Oct. 20† (2); Nov. 17† (2).
Guil. H. P.—Sept. 8† (A); Oct. 13† (A); Nov. 3† (2).

NINETEENTH DISTRICT
Judge Johnston

Cabarrus—Aug 18*; Aug. 25†; Oct. 6(2); Nov. 3† (A) (2).
Montgomery—July 7 (A); Sept. 22†; Sept. 29; Oct. 27 (A).
Randolph—July 14† (A); Sept. 1*; Nov. 3† (2); Nov. 24†; Dec. 1* (2).
Rowan—Sept. 8 (2); Oct. 20† (2); Nov. 17*.

TWENTIETH DISTRICT
Judge Olive

Anson—Sept. 15*; Sept. 22†; Nov. 17†.
Moore—Aug. 11* (A); Sept. 1† (2); Nov. 10.
Richmond—July 14*; July 21†; Sept. 29*; Oct. 6†; Dec. 1† (2).
Stanly—July 7; Oct. 13† (2); Nov. 24.
Union—Aug. 18† (A); Aug. 25; Oct. 27 (2).

TWENTY-FIRST DISTRICT
Judge Gambill

Forsyth—July 7† (2); July 21 (2); Aug. 25†§; Sept. 1 (2); Sept. 8† (A) (2); Sept. 22† (2); Oct. 6 (2); Oct. 20† (2); Nov. 3 (2); Nov. 17† (2); Dec. 1 (2); Dec. 1† (A) (2).

TWENTY-SECOND DISTRICT
Judge Gwyn

Alexander—Sept. 22.
Davidson—Aug. 18; Sept. 8†(2); Oct. 6†; Nov. 10 (2); Dec. 8†.
Davie—July 28; Sept. 29†; Nov. 3.
Iredell—Aug. 25; Sept. 1†; Oct. 13†; Oct. 20 (2); Nov. 24† (2).

TWENTY-THIRD DISTRICT
Judge Preyer

Alleghany—Aug 25; Sept. 29.
Ashe—Sept. 8†; Oct. 20*.
Wilkes—July 21; Aug. 11 (2); Sept. 15† (2); Oct. 6; Oct. 27† (2); Nov. 10(A) Dec. 1.
Yadkin—Sept. 1*; Nov. 10† (2); Nov. 24.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge Campbell

Avery—July 7 (A) (2); Oct. 13 (2).
Madison—July 21*; Aug. 25† (2); Sept. 29*; Oct. 27†; Dec. 1*; Dec. 8†.
Mitchell—July 28† (A); Sept. 8 (2).
Watauga—Sept. 22*; Nov. 3† (2).
Yancey—Aug. 4; Aug. 11 † (2); Nov. 17 (2).

TWENTY-FIFTH DISTRICT
Judge Clarkson

Burke—Aug. 11; Sept. 29 (2); Nov. 17.
Caldwell—Aug. 25; Sept. 15† (2); Dec. 1 (2).
Catawba—July 28 (2); Sept. 1† (2); Nov. 3 (2); Nov. 24†.

TWENTY-SIXTH DISTRICT
Schedule A—Judge Froneberger

Mecklenburg—July 7* (A) (2); July 28* (2); Aug. 11† (A) (2); Aug. 25† (2); Sept. 8†; Sept. 15† (2); Sept. 29* (2); Oct. 13†; Oct. 20† (2); Nov. 3†; Nov. 10† (2); Nov. 24†; Dec. 1* (2).

Schedule B—Judge Nettles

Mecklenburg—Aug 11† (3); Sept. 1* (2); Sept. 15† (2); Sept. 29† (2); Oct. 13† (2); Oct. 27* (2); Nov. 10† (2); Nov. 24†; Dec. 1† (2).

TWENTY-SEVENTH DISTRICT
Judge Pless

Cleveland—July 7 (2); Sept. 22† (2); Oct. 20*; Nov. 24† (A) (2).
Gaston—July 21*; Aug. 4†(A) (2); Sept. 15*; Oct. 6† (2), Nov. 10* (2); Dec. 1†(2).
Lincoln—Sept. 1 (2).

TWENTY-EIGHTH DISTRICT
Judge Moore

Buncombe—July 7* (A) (2); July 21† (A); July 28† (3); Aug 18† (A); Aug. 18*; Aug. 25† (3); Sept. 15† (A); Sept. 15*; Sept. 22† (3); Oct. 13* (2); Oct. 20 † (A); Oct. 27† (3); Nov. 17* (A) (2); Nov. 17†; Nov. 24† (3).

TWENTY-NINTH DISTRICT
Judge Huskins

Henderson—Oct. 13; Nov. 17† (2).
McDowell—Sept. 1 (2); Sept. 29† (2).
Polk—Aug. 25.
Rutherford—Sept. 15†* (2); Nov. 3*†(2).
Transylvania—Oct. 20 (2); Dec. 1†.

THIRTIETH DISTRICT
Judge Farthing

Cherokee—July 21; Nov. 3 (2).
Clay—Sept. 29.
Graham—Sept. 1.
Haywood—July 7; Sept. 15† (2); Nov. 17 (2).
Jackson—Oct. 6 (2).
Macon—July 28; Dec. 1 (2).
Swain—July 14; Oct. 20.

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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, second Monday in January and July. HERMAN A. SMITH, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; MRS. RUTH R. MITCHELL, Deputy Clerk; MRS. RUTH STARR, Deputy Clerk; MR. JAMES M. NEWMAN, Chief Courtroom Deputy.

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.
HUGH E. MONTEITH, Ass't. U. S. Attorney, Asheville, N. C.
ROY A. HARMON, United States Marshal, Asheville, N. C.
THOS. E. RHODES, Clerk, Asheville, N. C.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed written examinations of the Board of Law Examiners as of the 9th day of August, 1958:

ALLSBROOK, RICHARD BROWN.....Roanoke Rapids
BALL, RICHARD EDWARD.....Raleigh
BAREFOOT, NAPOLEON BONAPARTE.....Wilmington
BARNHILL, HENRY GRADY, JR.....Whitakers
BATTLE, FRED GORDON, JR.....Greensboro
BELCHER, NATHANIEL LEE.....Plymouth
BELL, CALVIN WARNER.....Rocky Mount
BENNETT, THOMAS STEPHEN.....Morehead City
BLADES, LEMUEL SHOWELL, III.....Elizabeth City
BRILEY, WILLIAM FRAZIER.....Burlington
BRITT, WILLIAM EARL.....Fairmont
BROOKS, LEONARD HOWARD.....Wilson
BROUGHTON, HOWARD CHALK.....Hertford
BROWNE, HERBERT HOWARD, JR.....Statesville
BUCKNER, DAVID ERNEST, JR.....Greensboro
BUTLER, JESSE LEWIS, JR.....Clinton
CAFFREY, WILLIAM DANIEL.....Durham
CAMPBELL, CARLYLE, JR.....Charlotte
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CHRIST CHRIST.....Tryon
CLARK, GILES ROBERTSON.....Elizabethtown
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COMER, JOHN FITZGERALD.....Greensboro
CONOLY, JAMES HALBERT, JR.....Greensboro
CREASY, THOMAS CLAIBORNE, JR.....Charlotte
CREECH, WILLIAM AYDEN.....Smithfield
DAGENHART, LARRY JONES.....Fayetteville
DAVID, EDWARD JOSEPH.....Fayetteville
DEAN, CHARLIE LOUIS, JR.....Fuquay Springs
DEARMON, EDD WOLFE, JR.....Charlotte
DENISON, RICHARD LINDSEY.....Winston-Salem
DOWNING, HAROLD DEAN.....Fayetteville
ELLIS, JAMES MILTON.....Tarboro
EUBANK, LUTHER JOSEPH, JR.....New Bern

EVANS, DAVID SAVAGE ..... Raleigh
EVANS, ROBERT MAYER ..... Durham
FISHER, ROBERT WAYNE ..... Canton
FLYTHE, JOSEPH JOHNSON ..... Conway
FOUTS, DANIEL WATSON ..... Burnsville
FROST, OAKLEY CALDWELL ..... Greensboro
GAGE, GASTON HEMPHILL ..... Charlotte
GAINES, ROBERT EDWARD ..... Gastonia
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Given over my hand and the seal of the Board of Law Examiners this 30th day of November, 1958.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1958

BERYL KINROSS-WRIGHT v. VERNON KINROSS-WRIGHT.

(Filed 19 March, 1958)

1. Divorce and Alimony § 16½—

A judgment in an action for divorce allowing alimony, or a judgment in an action for alimony without divorce, does not terminate the action, but such action remains pending for motions for modification or enforcement of the provisions for alimony, and the jurisdiction of the court over the parties continues for the purpose of such motions upon notice without service of new process, even though neither party is a resident of this State at the time of service of such notice.

2. Judgments § 18: Courts § 2—

Once the jurisdiction of a court attaches, it exists for all time until the cause is fully and completely determined.

3. Courts § 2: Divorce and Alimony § 16½—

A decree for alimony which provides that the husband should pay, in addition to a stipulated sum per month, a designated percentage of his gross income above a certain sum, is not affected by the fact that the husband thereafter moves to a state having a community property law under which half of his earnings belong to his wife and remarries, since such decree is governed by and must be interpreted in accordance with the laws of the state rendering it.

4. Divorce and Alimony § 11—

The amendment to G.S. 50-11 by the 1955 Session Laws is not applicable to decrees for alimony rendered prior to the effective date of the statute.

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

APPEAL by defendant from *Williams, J.*, at March 1957 Civil Term, of DURHAM.

Civil action for allowance of alimony without divorce pursuant to provisions of G.S. 50-16, heard March 5 and 6, 1957, upon petition of defendant for modification and clarification of judgment of *Martin, S. J.*, dated 3 September, 1953, as No. 669 at Fall Term 1957, and carried over to Spring Term 1958.

Upon the conclusion of the hearing the parties agreed that the court might take all matters in controversy under advisement, and make findings of fact and conclusions of law, and render judgment thereon out of term and out of the district.

And "upon the admissions in the pleadings, the evidence adduced by the parties upon the hearing and stipulations of counsel, and the record, the court" made findings of fact and conclusions of law and upon facts found and conclusions of law, entered judgment as follows:

"FINDINGS OF FACT

"1. * * * The original summons was issued under date of February 13, 1952, and at that time, both plaintiff and defendant were residents of Durham County, North Carolina.

"2. * * * under date of March 5, 1952 an interlocutory order for subsistence and counsel fees was entered herein by Honorable R. Hunt Parker, Judge presiding.

"3. The cause came on for final hearing before Honorable Grover A. Martin, Judge presiding, on September 3, 1953, at which time a jury trial having been waived, the court found the facts to be as alleged in plaintiff's complaint and entered judgment awarding subsistence and counsel fees to the plaintiff and awarding plaintiff custody of the minor children born of the marriage. No exceptions were noted to this judgment by either party and there was no appeal taken therefrom.

"4. The material portions of said judgment of September 3, 1953, now in controversy, are contained in the numbered paragraphs thereof, which read as follows:

'1. That defendant pay to the plaintiff on or before the first day of each and every calendar month hereafter, beginning September 1, 1953, the minimum sum of $250.00 or 20% of his gross income, whichever is greater, for the support and maintenance of herself.

'2. That defendant pay to the plaintiff on or before the first day of each and every calendar month hereafter, beginning September 1, 1953, the minimum sum of $50.00 for each child, or 5% of his gross

income for each child, whichever is greater, for the support and maintenance of each of the two children born of the marriage of plaintiff and defendant.

'3. That defendant shall furnish to plaintiff on or before the first day of April of each year, beginning April 1, 1954, a true copy of his Federal Income Tax Return for the preceding calendar year, authenticated by a certified public accountant, lawyer or other person preparing same for defendant, and if defendant's gross income, without adjustments, as shown on said tax return for the preceding year exceeds the sum of $14,000, a sum equal to 20% of the excess over $14,000 divided by 12, shall be added to each monthly payment due plaintiff under paragraph 1 above, for the next ensuing 12 months, beginning with the first day of April of the then current year, and a sum equal to five percent of such excess divided by 12, shall be added to each monthly payment due plaintiff for each child under paragraph 2 above, for the next ensuing 12 months beginning with the first day of April of the then current year. It is the intent of this paragraph to provide for the payment to the plaintiff of any deficiency which may be found to exist in favor of plaintiff and the children when the amounts due them under paragraphs 1 and 2 for the year in question, are calculated on a percentage of gross income basis, as set forth in said paragraphs, and all sums paid under this paragraph shall be considered in discharge of the remainder of defendant's obligation for the previous year only.'

"5. Following the entry of the aforesaid judgment, the plaintiff instituted an action against the defendant in the Superior Court of Durham County, N. C., on October 30, 1953, for an absolute divorce upon the grounds of two years separation; the defendant accepted service of summons in said action * * * and filed a verified answer therein * * * admitting all of the allegations of the complaint. The action was tried * * * and upon affirmative answers by the jury to the issues submitted by the court, judgment of absolute divorce was entered on said date, * * * Said judgment contained the provision that 'this judgment be entered without prejudice to the rights of the plaintiff and her minor children under the terms of that certain judgment entered in an action pending in this court entitled "Beryl Kinross-Wright v. Vernon Kinross-Wright," dated September 3, 1953 and signed by Hon. Grover A. Martin, Judge presiding, which said judgment shall remain in full force and effect.'

"6. The defendant had requested plaintiff to bring an action against him for absolute divorce; he knew that the aforesaid action commenced on October 30, 1953, was to be instituted before the summons was in fact filed; and he agreed to and later paid all court costs and

attorneys' fees in connection therewith.

"7. The defendant moved his residence from Durham, North Carolina, to Houston, Texas, in January of 1953, and following the entry of the aforesaid absolute divorce decree, in November of 1953, the defendant married one Marjorie Stout on December 19, 1953. The plaintiff, Beryl Kinross-Wright, has not re-married.

"8. The terms incorporated in the judgment entered herein, dated September 3, 1953, had been the subject of correspondence between the defendant, his attorney and plaintiff's attorney prior to the entry of said judgment, and under date of July 29, 1953, defendant wrote to his attorney and told him that he agreed to paragraphs 1, 2 and 3 of the judgment. Defendant also said in this letter:

'This would mean, as I understand it, that my wife gets $250 per month and my children $100 per month. When my gross income rises above $14,000, my wife and children together get a straight 30%. This would mean, for example, that if my gross income rose to $20,000, my family would get $6,000 per annum, which would be a marked increase.'

"9. Following the entry of said judgment of September 3, 1953, defendant commenced making the payments due thereunder, and for the remainder of the year 1953, beginning as of September 1, 1953, defendant paid to the plaintiff the minimum aggregate sum of $350 due under paragraphs 1 and 2 of said judgment.

"10. During the year 1954, defendant paid to plaintiff the minimum aggregate sum of $350 each month due under paragraphs 1 and 2 of said judgment. Defendant also complied with the remaining requirements of said judgment with respect to life insurance policies and payment of counsel fees.

"11. During the year 1955, defendant paid to plaintiff the minimum aggregate sum of $350 each month, payable under the provisions of paragraphs 1 and 2 of said judgment, and some time prior to September 13, 1955, defendant mailed to plaintiff a certified copy of his Federal Income Tax Return for the taxable year 1954, which showed that defendant's gross income, without adjustments, for the year 1954 was $20,808.34. Defendant deducted from this figure the sum of $6,221.69 for business expenses, leaving a total of $14,586.65, or an excess of $586.65 over $14,000. Thirty percent of this excess was $175.99 of which defendant paid to the plaintiff the sum of $102.69, representing 7/12th of the amount already accrued, according to defendant's calculation, over and above the $350 per month minimum payments, which were made in the year 1954. Defendant

thereafter, acting upon advice of counsel, declined to make any further payments to the plaintiff other than the minimum sums set forth in paragraphs 1 and 2 of the judgment, and has made no such payments to this date.

"12. Defendant's gross income, without adjustments for the year 1955, was in amount of $25,698.78.

"13. The plaintiff is a British subject and is not an American citizen. She returned to her former home in London, England, in June 1954, taking with her the two children born of the marriage of plaintiff and defendant, and she has resided there ever since. Plaintiff has applied for a visa on which to return to United States and has testified that she intends to return to this country about August of 1957; that she will bring the children with her; and that she intends that all of them shall become American citizens.

"14. The defendant is a naturalized American citizen and resides in Houston, Texas. He is employed by the School of Medicine of Baylor University at a salary of approximately $13,000 per year. Defendant is a licensed physician, specializing in psychiatry, and in addition to his duties with Baylor University, he practices his profession for his own account from which he realizes a gross income of at least $12,000 to $13,000 annually. Defendant is furnished an office and secretary by Baylor University, and he is reimbursed for certain travel expenses which he is required to make in connection with his profession and employment. Defendant incurs certain other expenses in connection with his profession which are not reimbursed. For the year 1954, he deducted from his gross income of $20,808.34, the sum of $6,221.69 for business expenses for purposes of his Federal Income Tax Return, leaving a balance of $14,586.65 as his net income after adjustments. For the tax year 1955 defendant deducted from his gross income of $25,698.78, the sum of $7,578.36 for business expenses, leaving a net income, after adjustments, as shown on his income tax return for that year, in the amount of $18,120.42.

"15. By his second wife, the former Marjorie Stout, the defendant has one child, Elizabeth Kinross-Wright, who was born January 28, 1956. Defendant's present wife is a qualified psychologist, and at the times under consideration here, 1954 and 1955, she was gainfully employed.

"16. Defendant made a general appearance in this action under date of February 20, 1957, and filed a 'Petition for Modification and Clarification' of the aforesaid judgment of September 3, 1953, contending that in view of the 1955 Amendment to G.S. 50-11, plaintiff is no longer entitled to payments of alimony in any amount under

said judgment; that in any event, the court should exercise its discretion to relieve defendant of any further payments for her own support and maintenance thereunder; that in the alternative, that the term 'gross income' as used in said judgment be re-defined to exclude expenditures made in the ordinary course of petitioner's practice as a physician and not to include income which, under the community property laws of Texas, will be the income and property of his wife; that the date on which defendant is required to furnish a certified copy of his income tax return to plaintiff be changed from April 15th to May 15th; and that the court grant the defendant such further modification and clarification of said judgment as it may deem just and equitable.

"17. The plaintiff filed a demurrer to defendant's said petition under date of March 1, 1957, alleging that this court is without jurisdiction to modify or clarify the former judgment; that the 1955 Amendment to G.S. 50-11 does not affect said judgment; and that defendant's petition does not allege his financial inability to comply with the judgment nor that the plaintiff and the minor children awarded support and maintenance payments thereunder are not in need of same.

"18. Under date of February 21, 1957, plaintiff made a general appearance in this action and filed her petition alleging the failure of the defendant to comply with the judgment of September 3, 1953, with respect to the payment of 30% of his gross income in excess of $14,000 annually, and asked that the court ascertain the amount due plaintiff by defendant under said decree and that the defendant be required to pay reasonable counsel fees to plaintiff's attorney for services rendered subsequent to September 3, 1953, and that judgment be rendered therefor.

"19. On the date scheduled for the hearing on the aforesaid petitions, March 5, 1957, defendant filed a special appearance and motion to dismiss plaintiff's petition, alleging that this court is without jurisdiction to consider the same and grant the relief sought for the reason that plaintiff is no longer a resident of North Carolina nor of the United States; that the defendant is a resident of Texas; that the children of the marriage are no longer domiciled in North Carolina; and that the judgment of absolute divorce obtained by plaintiff in November 1953, bars any further action by the plaintiff in this cause. Thereafter, and on the same date, March 5, 1957, defendant filed answer to plaintiff's said petition, denying the material allegations thereof and renewing his prayer for relief as set forth in his own petition for modification and clarification.

"20. Plaintiff and defendant were each properly served with notice of the hearing to be held herein on March 5, 1957, and each appeared in person with counsel at the hearing.

"21. The matter of the custody of the two minor children born of the marriage of plaintiff and defendant is not in controversy in this proceeding. The defendant was granted the right and privilege to visit with said children at all reasonable times both in the interlocutory and final decrees entered herein. Plaintiff has never denied defendant this right of visitation. Defendant did not avail himself of this privilege, however, between the time he moved to Houston, Texas in Jan. of 1953 and June 1954 when plaintiff returned with the children to her home in England. Defendant knew that plaintiff contemplated taking the children back to England, and he raised no objection to this. Defendant writes to the children on their birthdays and at Christmas, and he sends them each a check for $20.00 on their birthdays and at Christmas making a total of $40.00 a year for each of them.

"22. Because of the lower living costs, plaintiff and the two children are able to maintain a higher standard of living in England on the $350.00 per month which defendant has been paying pursuant to the judgment of September 3, 1953, but the $100.00 per month allocated in said decree for the support and maintenance of the children is not adequate for their support, and plaintiff spends the greater portion of all the money paid to her for the support of the children. Plaintiff is not employed, and she feels that she should devote her time to the care of the children.

"23. Defendant has not alleged nor offered any evidence tending to show that he is not financially able to comply with the terms of the judgment of September 3, 1953, and there is no evidence before the court to show that the amounts required to be paid under said judgment are unreasonable nor unnecessary to support the plaintiff and the children in a manner commensurate with defendant's station in life.

"24. Defendant's gross income without adjustments for the year 1954 was $20,808.34; the excess of this sum over $14,000 was $6,808.34 and thirty percent of this latter figure was $2,042.50. Defendant paid to plaintiff $102.69 of this amount leaving a balance of $1,939.81, no part of which has been paid.

"25. The excess of defendant's gross income without adjustments ($25,698.78) over $14,000 for the year 1955 was $11,698.78; thirty percent of this latter figure was $3,509.63, no part of which has been paid by defendant to the plaintiff.

"26. The defendant in failing to pay the balances set forth in the two immediately preceding paragraphs acted in good faith and upon advice of counsel, and defendant is not in willful contempt of this court.

"27. Since the rendition of the judgment of September 3, 1953, the date for filing Federal income tax returns has been changed from March 15th to April 15th.

"28. Since September 3, 1953 plaintiff's attorneys, Dupree, Weaver & Montgomery of Raleigh, North Carolina, have rendered valuable services to plaintiff in connection with this litigation, said services consisting of voluminous correspondence, legal research, extended negotiations with defendant's counsel, preparation of pleadings, conferences with plaintiff, attendance upon hearings and preparations of legal briefs. Said services have required at least 24 days, and the court finds the reasonable value thereof to be $1200.00. Plaintiff's counsel have also incurred out-of-pocket expenses in this connection for such items as telephone, photo-copying, travel and transcript of testimony in the amount of $82.40."

Upon the foregoing findings of fact the court made the following:—

"CONCLUSIONS OF LAW

"1. This court has jurisdiction of the persons of plaintiff and defendant.

"2. The jurisdiction of this court having attached at a time when both plaintiff and defendant were residents of Durham County, North Carolina, and the action in its nature being one of which continuing jurisdiction is exercised, such jurisdiction was not thereafter divested by the removal of the parties from Durham County.

"3. The fact that the plaintiff is a non-resident alien does not divest the court of jurisdiction.

"4. The judgment of September 3, 1953 directed payment of money by the defendant to the plaintiff and he thereupon became indebted to the plaintiff as the installments came due. When the defendant became in arrears in the payment of the installments, this court on plaintiff's application has the right judicially to determine the amount due and enter its judgment accordingly.

"5. The judgment of September 3, 1953 was not affected by the 1955 amendment to G.S. 50-11 nor by the decree of absolute divorce obtained by plaintiff on November 9, 1953.

"6. The judgment of September 3, 1953 is to be construed accord-

ing to the laws of North Carolina and without regard to the community property laws of the State of Texas where defendant now resides.

"7. Paragraphs 1, 2 and 3 of said judgment are to be construed in the light of the circumstances of the parties as of the date of its rendition unaffected by any change in the marital status or residence of the parties subsequent to that date.

"8. Paragraphs 1 and 2 of said judgment require payment by defendant to plaintiff of a total of thirty percent of his gross income for support of plaintiff and the minor children, but a minimum payment of $350.00 per month in any event. Paragraph 3 of the judgment provides the method by which defendant's gross income may be ascertained and when the percentage payments of the excess of the gross income over $14,000 are to be paid. This paragraph must be read in the light of the circumstances of the parties as of the time of the rendition of the judgment unaffected by any subsequent change in defendant's marital status or the community property laws of Texas.

"9. When said judgment is so construed, it follows that the defendant is indebted to plaintiff in the amount of the unpaid balance of thirty percent of the excess of his gross income over $14,000 for the year 1954, or $1,939.81, with interest thereon from March 1, 1955, the date on which the last installment of said indebtedness became due; and defendant is indebted to plaintiff in the amount of thirty percent of the excess of his gross income over $14,000 for the year 1955, or $3,509.63 with interest thereon from March 1, 1956, the date on which the last installment of said indebtedness became due.

"10. Defendant is not entitled under his pleadings nor under the law to any retrospective modification of the judgment of September 3, 1953 as to any amount already accrued and due thereunder, nor as to the method of ascertaining same, but plaintiff is entitled to judgment therefor to be enforceable by the issuance of execution.

"Upon the basis of the foregoing conclusions of law it is now

"ORDERED, ADJUDGED AND DECREED as follows:

"1. That the plaintiff's (sic defendant's) petition for modification and clarification filed herein under date of February 20, 1957 be, and the same is hereby denied as a matter of law and in the discretion of the court, and that plaintiff's demurrer thereto be and the same is hereby sustained.

"2. That defendant's special appearance and motion to dismiss filed

herein under date of March 5, 1957 be and the same is hereby overruled.

"3. That pursuant to her petition filed herein under date of February 21, 1957 that plaintiff have and recover of the defendant the sum of $1,939.81 with interest thereon at the rate of six percent per annum from March 1, 1955; that plaintiff have and recover of the defendant the sum of $3,509.63 with interest at six percent per annum thereon from March 1, 1956; and that plaintiff have and recover of the defendant the costs of this action accrued to the date of entry of this judgment which costs shall include the sum of $1200.00 payable to Dupree, Weaver & Montgomery, attorneys for plaintiff, for services rendered and the sum of $82.40 payable to Dupree, Weaver & Montgomery, attorneys for plaintiff in reimbursement of out-of-pocket expenses incurred by said attorneys in connection with this litigation.

"4. That this judgment be enforceable by the issuance of execution, but said remedy shall be without prejudice to any other remedies available to plaintiff under the laws of this or any other State for the enforcement hereof."

Defendant excepts to certain findings of fact and to certain conclusions of law, and to the rendition and signing of judgment, and appeals to Supreme Court and assigns error.

Dupree & Weaver, for Plaintiff, Appellee.

M. Michael Gordon, of the Texas Bar, Everett, Everett & Everett for Defendant, Appellant.

WINBORNE, C. J.: In the light of the facts found as hereinabove set forth, appellant, defendant, states in brief filed herein, as involved on this appeal, several questions, among which are:

1. "Was it within the court's jurisdiction and discretion to entertain this litigation?" The answer is "Yes". See *Barber v. Barber*, 216 N.C. 232, 4 S.E. 2d 447; *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340; *Land Bank v. Davis*, 215 N.C. 100, 1 S.E. 2d 350; *Barber v. Barber*, 217 N.C. 422, 8 S.E. 2d 204.

In the first *Barber* case, *supra*, this Court said: "An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until the judgment is satisfied * * * Motion affecting the judgment but not the merits of the original controversy may be made in the cause * * * This is particularly true of judgments allowing alimony in divorce actions and in actions for alimony without divorce, in which it may not be said that the judgment is in all respects final * * * Such actions are always open for motions in the cause to determine the amount of arrearage and to obtain the remedies per-

mitted by statute for the enforcement of the order for alimony. It was not required that a new summons be served upon the defendant. Notice of motion under the statute was sufficient. This notice was duly served."

The Court continues: "It appears from this record, as stated, that the defendant is in court and is subject to its jurisdiction, on notice to hear and determine motions in the cause. Want of jurisdiction of the court in such matters may not be challenged by special appearance. The right of the plaintiff to make the motion may not be thus questioned."

Indeed the second *Barber* case, *supra,* establishes that the proper procedure for recovering arrears in alimony payments is by motion in the cause. The Court there held that "An order for the payment of alimony is *res judicata* between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the orders for changed condition of the parties."

Defendant, however, contends that the *Barber* cases are not controlling because the wife there was still a resident of North Carolina. This would not seem to make a difference. For once jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined. See *Michigan Trust Co. v. Ferry,* 228 U.S. 346, 33 S. Ct. 550 57 L. Ed. 867, where Justice Holmes, writing for the Court, stated: "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute."

2. Did the court err in holding that Texas Community Property Law has no applicability, even though defendant has been a Texas resident since January 1953? While there seems to be a paucity of decided cases on this subject, appellee cites and relies upon two cases involving property settlement agreements incident to divorce actions which reject the applicability of the Community Property Law. They are (1) *Alexander v. Alexander,* 64 F. Supp. 123, affirmed 158 F. 2d, 429, Cert. Den. 330 U.S. 845, 67 S. Ct. 1086, 91 L. Ed. 1290; Headnote 3 in 158 F. 2d, 429, epitomizes the opinion there. It is this: "Where defendant was required by a Missouri separation agreement, approved by a divorce decree, to pay plaintiff a percentage of defendant's annual gross income in excess of a specified amount, and defendant thereafter remarried and moved to Texas, where one-half

of the earnings of a husband belong to wife, defendant could not invoke Texas law to reduce his gross income by one-half in computing amount due plaintiff under agreement and all computations were required to be made under Missouri law."

The Court speaking thereto had this to say: "This being a Missouri contract, it must be presumed that when the parties used the term 'gross income' they meant and understood 'gross income' as that term is understood in Missouri and under Missouri law there can be no doubt what appellant's income was, for instance in 1943, under the Missouri law had he remarried in Missouri * * *.

"Of course, he could go to Texas, but when he did he did not take the contract with him. It remained in Missouri, so to speak, a Missouri contract subject to Missouri law, and subject to the interpretation under that law. His removal to Texas did not change a Missouri contract into a Texas contract. His obligations under the contract still depended under the law of Missouri, the place where the contract was made. When he executed this contract in Missouri, he fixed his liability under the canopy of the Missouri law, and he remains thereunder until the performance of the contract is completed."

The provisions of the separation there are strikingly similar to the judgment in the present case in that it provided that the defendant supply a copy of the income tax return for the purpose of computing defendant's gross income.

The second case is *Arthur v. Arthur* (California) 305 P. 2d, 171, where the husband was to pay a percentage of his "earnings". Headnote 1 reflects the ruling of the Court: "In property settlement agreement making the 'earnings' of the husband the measuring stick by which to determine amount to be paid for support of wife and children, quoted word was used to indicate amount produced, and not what might be left after deducting community interest of husband's second wife."

The reasoning in these two cases, *Alexander v. Alexander, supra,* and *Arthur v. Arthur, supra,* appears to be sound, and may well be applied with approval to the factual situation in the instant case.

3. Another question is this: "Was the court free to disregard the 1955 amendment to G.S. 50-11?" An affirmative answer to this question is found in the case of *Rayfield v. Rayfield,* 242 N.C. 691, 89 S.E. 2d 399, opinion by *Parker, J.* It is stated that "The amendment to G.S. 50-11 by the General Assembly in 1955 Session Laws, Chapter 872, by its express language, is not applicable to defendant's judgment for subsistence rendered in 1941." It is noted that the amendment became effective January 1, 1956. And in instant case the judgment was rendered in 1953. Hence the amendment is inapplicable here. See also *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867.

All authorities cited and relied upon by appellant have been considered.

Moreover, other questions raised by appellant have been duly considered, and do not appear to present new principles. Hence express treatment of them in this opinion is not deemed necessary.

For reasons stated the judgment from which appeal is taken is Affirmed.

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

EARL WILLIAMS, ADMINISTRATOR OF THE ESTATE OF ROBERT EARL WILLIAMS, DECEASED v. FULTON McSWAIN, CARL JESSUP, HARRY WOMBLE AND JACK WOMBLE.

(Filed 19 March, 1958)

1. Negligence § 4f—

The owner of property is liable to an invitee for injuries caused by dangerous conditions which are known, or which should have been known, by the property owner and which are unknown and not to be anticipated by the invitee.

2. Same—

An invitee is not a mere licensee but is one who goes upon the property of another by express or implied invitation.

3. Boating - Evidence held insufficient to show negligence on part of owners of beach in breaching duty to invitee.

Defendants, under permit from the Department of Conservation and Development, operated certain concessions on a lake owned and operated by the State as one of its parks. G.S. 113-8. Plaintiff's intestate was injured when struck by a boat while intestate was swimming in the waters of the lake. There was no evidence that intestate entered the waters from the beach owned by defendants or that he intended to use such beach, nor evidence that defendant owners had designated the area for swimming, but to the contrary, it did appear that the State regulations did not permit owners of beaches to erect any sign in the waters in the lake or to mark or chart any area prohibited to boats. *Held:* The evidence fails to support plaintiff's allegation of negligence of defendant owners in failing to warn intestate of danger from boats, or even that intestate was an invitee of defendants.

5. Same—

Intestate was fatally injured when struck by a propeller of a commercial boat, carrying passengers for hire, while intestate was swimming in the waters of a lake owned by the State. Plaintiff alleged that the owner of the boat was negligent in entrusting it to an immature and reckless master. *Held:* In the absence of any evidence to support the allegations as to the careless and reckless nature of the boat master, recovery cannot be predicated upon such theory.

6. Same—

A person operating a boat in waters frequented by bathers or other

boats is under duty to maintain such lookout as a reasonably prudent person would maintain to discover and avoid injury to others lawfully using the waters, and is chargeable with the knowledge which such lookout would disclose, but in the absence of some warning to the contrary, the duty of lookout is limited to objects on or above the surface of navigable waters.

7. **Same—Negligence is not presumed from the mere fact of injury.** Intestate was killed when struck by the propeller of a commercial boat owned by one defendant and operated by him on a State Lake under license from the Department of Conservation and Development. The evidence further tended to show that the injury was inflicted near a barrel-type buoy placed in the lake by the Department. The evidence failed to disclose the speed of the boat or whether intestate was submerged at the time of the injury, or whether intestate was hidden from view by the buoy, etc. *Held:* The evidence is insufficient to show that the injury resulted from negligent speed of the boat or the failure of the boat captain to maintain a proper lookout.

APPEAL by defendants from *Frizzelle, J.*, September 1957 Term of SAMPSON.

Plaintiff seeks compensation for the death of his intestate asserted to have been caused by the negligent acts of defendants Womble and Jessup, the employee and agent of defendant McSwain. Defendants denied the asserted negligence and pleaded contributory negligence. The jury answered the issues of negligence in the affirmative, contributory negligence in the negative, and fixed the amount of plaintiff's damages. Judgment was entered on the verdict and defendants appealed.

Butler & Butler for plaintiff appellee.

Hester & Hester, Nance, Barrington & Collier, and Rudolph G. Singleton, Jr. for defendant appellants.

RODMAN, J. Upon the conclusion of plaintiff's evidence, defendants made appropriate motions to nonsuit, electing not to offer any evidence. Their motion was overruled. The exception then taken is here urged as a ground for reversing the judgment.

The evidence on which plaintiff relies to support the verdict comes almost entirely from admissions made in the answers of defendants. The facts disclosed by the evidence may be summarized as follows:

Robert Earl Williams, plaintiff's intestate, his eighteen-year-old son, finished high school in July 1954. He was a healthy, smart, and intelligent boy, six feet one inch in height, and weighed 160 pounds. On the forenoon of Sunday, 25 July 1954, he was swimming in White Lake. He died as a result of injuries sustained when struck by the propeller of a motorboat. White Lake, one of the "Carolina bays," is owned by the State, G.S. 146-7, operated as one of the State's parks pursuant to G.S. 113-8. The Department of Conservation and Development, acting under G.S. 146-8, promulgated regulations applicable to White Lake. The regulations, after reciting the statutory

authority under which they were promulgated, recite: ". . . all public use shall be in accordance with the following State Lakes Regulations which are herewith legally posted. The purpose of these regulations is the coordination of all uses of the State Lakes in order to promote the best use for the most people."

Defendants Womble owned property on the lake known as Goldston's Beach. There they operate certain concessions including a bathhouse. They rent dressing rooms and bathing suits to patrons. Goldston's Beach is a popular resort having a large patronage. Defendants Womble, under permit from the Department of Conservation and Development, have erected and maintained a pier into the lake. The lake is much used for swimming and boating.

Defendant McSwain is the owner of a motorboat which was, in July 1954, operated for him by defendant Jessup. This boat is used to transport passengers on the lake. Defendants Womble permitted McSwain to dock his boat at their pier to receive and discharge passengers. For the exercise of this privilege McSwain paid Womble 25% of the gross revenue from the operation of his boat. There were no signs on the Womble pier announcing the fact that motor boats docked there.

tances from bathers and other boats. Reckless operation of a boat or operation of a boat in such manner as to endanger other person is pro-

Other beaches and concessions were operated by owners of other properties fronting on the lake. Some of these beaches and consessions adjoined the property of the defendants Womble.

Among the regulations issued by the Department were Nos. 20, 21, and 22, which provide:

"*Regulation No. 20.* BOATS. WHERE PROHIBITED. Except to leave or go to dock, pier, or other landing place, no motor boat shall be operated within a designated or marked safety zone. When within the safety zone, every motor boat shall be under full control. When within the safety zone, every motor boat shall be operated at its minimum operating speed and shall leave and go to dock, pier, or other landing place on a course parallel to and immediately adjacent to dock, pier, or other landing place, except as provided in *Regulation No. 31.* WATER SKIING, surfboarding, etc.

"*Regulation No. 21.* PERMISSION TO LAND REQUIRED. No commercial boat shall dock or land at any pier without first having obtained written permission to do so from the owner thereof. No private boat shall dock or land at any pier without first having obtained permission to do so from the owner thereof.

"*Regulation No. 22.* RECKLESS OPERATION PROHIBITED. All boats must at all times be operated at safe speeds and at safe distances from bathers and other boats. Reckless operation of a boat or operation of a boat in such manner as to endanger other person is pro-

hibited. No person under the influence of intoxicants shall operate a boat."

Plaintiff alleged: About 10:00 a.m. on 25 July 1954 his intestate was swimming at Goldston's Beach "in an area between the pier and buoys erected by the North Carolina Department of Conservation & Development and *designated as a swimming area by the defendants* when and where a Criss(sic) Craft Motor boat owned by Fulton McSwain, and operated by Carl Jessup, an employee of defendants, with paying passengers thereon and while in the regular course and scope of his employment as driver of said commercial motor boat and as a common carrier, hauling passengers for hire, ran into plaintiff's intestate, striking him with the propeller and killing him." (Italics supplied.)

McSwain, answering this allegation of the complaint, admitted: "Robert Earl Williams was swimming in the waters of White Lake in an area between the Goldston Pier and buoys placed and maintained by the North Carolina Department of Conservation and Development, and that while so doing he was struck by a motor boat owned by Fulton McSwain and operated by Carl Jessup." Except for the admission thus made, the quoted allegation of plaintiff was denied by McSwain. Defendants Womble admitted: "Robert Earl Williams was swimming in the waters of White Lake in an area between the pier erected by these answering defendants under permit with the North Carolina Department of Conservation and Development and near buoys which had been erected and which were maintained by the North Carolina Department of Conservation and Development and that while so doing he was struck by a motor boat operated by Carl Jessup . . ." Otherwise the defendants Womble denied the quoted allegation of plaintiff.

Plaintiff alleged and defendants admitted that they had not roped off or marked by buoys or otherwise any route for boats to use in approaching or leaving Womble's pier. Regulation No. 32, promulgated by the Department, prohibits the erection of any structures or buoys except upon the issuance of a permit by the Department. The complaint alleges and the case on appeal states that the deceased was struck by the propeller of the McSwain boat. It is admitted that the injuries thus inflicted resulted in death. The buoys put out by the Department in 1954 were floating barrel type. The buoys were about 75 feet beyond the end of the Womble pier.

The complaint particularizes the negligence of defendants in this manner: (1) Carl Jessup "proceeded from the pier towards the buoys in a careless, reckless and negligent manner, under the circumstances and without keeping a proper lookout for bathers within the bathing area and with a heedless and wanton disregard of the rights and safety

of said bathers"; (2) he was negligent in operating the boat at a speed greater than was reasonable and prudent under the circumstances and conditions then existing and contrary to and in violation of the regulations promulgated by the Department of Conservation and Development; (3) he operated the boat where he well knew bathers were likely to be and were swimming; (4) he operated the boat at a speed and in a manner so that he could not observe swimmers in the water for a distance in which said motorboat could be stopped; (5) he operated the boat without keeping a proper and careful lookout; (6) he was a minor under eighteen years of age, had been operating a boat for two years, defendants knew that he was of a careless and reckless nature, was not mature, and was not a fit and suitable person to operate a commercial speed boat on White Lake; (7) defendants failed to erect signs on the premises warning bathers that boats operated in the swimming area.

The allegations are ample to support the verdict in plaintiff's favor; but it is not sufficient merely to allege negligent conduct. Plaintiff has the burden of offering evidence to support his allegations. Hence the crucial question in this case: Is there any evidence to support any of the allegations of negligence? If so, which?

Plaintiff argues that the defendants Womble are liable because of their failure to warn their invitee, plaintiff's intestate that McSwain's motorboat docked at their pier, that he should keep a lookout for it, and upon its approach should give way to it. To maintain this position, plaintiff must show that his intestate was in fact an invitee of defendants Womble.

"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 which are unknown and not to be anticipated by the invitee." *Harris v. Department Stores Co.*, 247 N.C. 195.

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

"(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

"(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

"(c) invites or permits them to enter or remain on the land without exercising reasonable care

"(i) to make the condition reasonably safe, or

"(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to

receive, if the possessor is a public utility." Restatement Torts, sec. 343.

"An invitee is one who goes upon the property of another by the express or implied invitation of the owner or the person in control. A license implies permission and is more than mere sufferance; an invitation implies solicitation, desire, or request." *Jones v. R.R.*, 199 N.C. 1, 153 S.E. 637; *Adams v. Enka Corp.*, 202 N.C. 767, 164 S.E. 367; *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408; 65 CJS 508; 38 Am Jur 754.

The evidence in this case discloses that plaintiff's intestate was injured in one of the State's public parks under the control and management of a State agency. True the evidence shows the defendants Womble provided facilities by which persons might make use of and enjoy the recreational opportunities provided by the State; but Womble was not the only person who provided these facilities. There is evidence that others provided similar facilities. There is no evidence that plaintiff's intestate entered the waters of White Lake from the bathing beach maintained by Womble. There is no evidence that plaintiff's intestate ever intended to make use of Womble's bathing beach. It is alleged, but there is no evidence to support the allegation, that the place where plaintiff's intestate was injured *was designated by defendants as a swimming area.* The evidence is that the buoys were put out by the Department of Conservation and Development.

The regulations did not permit defendants Womble to erect any sign in the waters of White Lake or to mark or chart any area prohibited to boats in their use of White Lake. The right to so act was reserved by the Department. To impose liability on Womble, it was necessary to show not only that plaintiff's intestate was an invitee or licensee of Womble and had entered a place under the control or supervision of Womble, but the use of this area was hazardous and that plaintiff's intestate could not reasonably be expected to know and appreciate and understand the hazard. The evidence does not disclose the size of the McSwain boat. The fact that it was engaged regularly in carrying passengers would indicate that it was of substantial size. Regulations promulgated by the Department required motorboats, when approaching or leaving a pier, to do so on a course parallel with the pier and to be operated at a minimum speed. It is alleged, but there is no evidence to show, that the injury was inflicted by a boat departing from Womble's pier. There is not the slightest suggestion in the evidence that plaintiff's intestate could not or did not see this motorboat. The evidence offered by plaintiff fails to disclose any breach of duty on the part of the defendants Womble to plaintiff's intestate. Because of that failure Womble's motion to nonsuit should have been allowed.

Plaintiff asserts that McSwain was negligent in numerous respects. Does the evidence which has been introduced support any of these

allegations? It is alleged that Jessup, captain and master of McSwain's boat, was "of a careless and reckless nature and was not mature and was not a fit and suitable person to operate a commercial speed boat on White Lake . . ." This allegation was denied. Plaintiff offered no evidence to support it. It is alleged that the boat was being operated at a speed greater than was reasonable and prudent. The record is barren of any evidence as to the speed of the boat.

One who operates a boat in waters frequented by bathers or other boats is obligated to maintain such lookout as a reasonably prudent person would exercise to discover and avoid injury to others lawfully using the waters. The operator is chargeable with the knowledge which such a lookout would disclose. Did Jessup, as master of the boat, fail to maintain a proper lookout as plaintiff alleges? The record furnishes no answer unless it be found in the fact that the boy was struck by the propeller of the boat. The evidence is that the injury was inflicted near a barrel-type buoy. Was the bather hidden from view by this buoy? The fact that he was struck by the propeller indicates that he was submerged at the time of the injury. Did the boy swim under water from behind the buoy into the path of the approaching boat? One can, on this record, only speculate as to whether a proper lookout would have disclosed the youth in the path of the boat. Without some warning to the contrary, the duty of those in charge of a boat to maintain a lookout is limited to objects on or above the surface of navigable waters.

Plaintiff's intestate, as a citizen of the State, had a right to bathe in White Lake and enjoy the recreational facilities provided by the State. McSwain, the owner of a motorboat licensed by the Department of Conservation and Development, likewise had a right to operate his boat on the waters of White Lake and to provide boat rides to other citizens of the State who preferred that form of recreation to swimming. Each was chargeable with the duty of acting as a reasonably prudent man under existing conditions. The burden rested on the plaintiff to establish fault on the part of defendants proximately causing the injury. We think the language of Brogden, J., is appropriate to the picture painted by this record. He said: "This testimony creates a legal fog of such low visibility as to prevent the watchful and alert eye of the law from discovering liability for actionable negligence." *Adams v. Enka Corp., supra; Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879; *Smith v. Oil Corp.,* 239 N.C. 360, 79 S.E. 2d 880; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Pack v. Auman,* 220 N.C. 704, 18 S.E. 2d 247.

The motion to nonsuit made by defendants Jessup and McSwain was soundly lodged and should have been allowed.

The judgment is

Reversed.

WILEY THOMAS WILLIAMSON AND MILDRED B. WILLIAMSON, ADMINISTRATORS OF THE ESTATE OF RONEY M. WILLIAMSON, v. MORRIS WILSON RANDALL.

(Filed 19 March, 1958)

1. Automobiles § 17—

It is unlawful for the driver of a vehicle along a servient highway to fail to stop and yield the right of way as required by stop signs duly erected, but such failure is not contributory negligence *per se*, but is only evidence upon the issue to be considered with other facts adduced by the evidence. G.S. 20-158(a).

2. Same—

The operator of a vehicle along the dominant highway is under no duty to anticipate that the operator of a vehicle along the servient highway will fail to stop as required by statute, and in the absence of anything which gives or should give him notice to the contrary, he is entitled to assume and act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will stop before entering the intersection.

3. Same—

The driver of a vehicle along the dominant highway does not have the absolute right of way in the sense that he is not bound to exercise ordinary care in regard to vehicles traveling along the servient highway.

4. Automobiles § 39—

While physical facts at the scene of the accident may tend to indicate excessive speed in proper instances, when plaintiffs rely upon the physical facts and other evidence of a circumstantial nature, they must establish attendant facts and circumstances which reasonably warrant the legitimate inference of actionable negligence from the facts established and not such as merely raise a conjecture or speculation.

5. Automobiles § 36—

Negligence is not presumed from the mere fact of injury.

6. Automobiles § 42g— Evidence held to disclose contributory negligence as matter of law on part of motorist entering intersection from servient highway.

The evidence disclosed that defendant was traveling along the dominant highway and had knowledge that stop signs had been erected before the intersection along the servient highway, that he saw the car driven by plaintiffs' intestate, on his right, approaching the intersection, and that immediately upon seeing that car enter the intersection, he applied his brakes, skidded some 44 feet and struck intestate's car with such force as to knock it against a tree in the southeast corner of the intersection, throwing the securely fastened front seat of the car out and throwing intestate some 13 feet to the right of his car, and pushing defendant's car into intestate's car on its right up to its windshield, etc. *Held:* Irrespective of any negligence on the part of defendant, the evidence discloses that intestate could have seen defen-

dant's car approaching and that intestate drove directly into the intersection across its path, constituting contributory negligence barring recovery as a matter of law.

7. Automobiles § 45—

Where the evidence discloses that defendant, traveling along the dominant highway, immediately put on his brakes upon seeing the car of plaintiffs' intestate enter the intersection from the servient highway, the evidence is insufficient to present the issue of last clear chance, since it does not disclose that defendant, after he saw or by the exercise of due care should have seen that intestate was not going to yield the right of way, then had sufficient time to have avoided the collision.

APPEAL by plaintiffs from *Paul, J.*, January Term 1958 of WILSON.

Civil action to recover damages for an alleged wrongful death.

From a judgment of nonsuit entered at the close of plaintiffs' evidence, plaintiffs appeal.

Lucas, Rand & Rose, Naomi E. Morris and Gardner, Connor & Lee for Plaintiffs, Appellants.

Thorp & Thorp and Broughton & Broughton for Defendant, Appellee.

PARKER, J. The collision, in which plaintiffs' intestate, a man 61 years of age, was killed, occurred about 7:30 a.m. on 27 February 1957 within the intersection of Rock Ridge Road and of Bullock School Road (also called the old Raleigh Road) at a place called Stott's Crossroads. Rock Ridge Road is a hard-surfaced highway running generally north and south: the width of the hard-surfaced part of this highway north of the intersection is 19 feet, south of it 20 feet. Bullock School Road is a hard-surfaced highway running generally northwest and southeast: the width of the hard-surfaced part of this highway is 18 feet. There are Highway Stop Signs on Bullock School Road: one on this road as it intersects Rock Ridge Road from the west, and one on it as it intersects the same road on the east. The Stop Sign on the southwesterly side of Bullock School Road facing eastbound traffic is approximately 34 feet from the center of the intersection of these highways.

Plaintiffs' intestate was driving a 1957 Plymouth automobile, practically new, in an easterly direction on Bullock School Road, and was approaching the intersection at Stott's Crossroads at the time the defendant driving a 1954 Plymouth automobile on Rock Ridge Road in a southerly direction was approaching the same intersection. Plaintiffs' intestate was alone, and so was the defendant. In the collision plaintiffs' intestate was killed. The only living eyewitness to the collision was the defendant.

Plaintiffs introduced in evidence a written statement made by the defendant, the relevant part of which is: "I was en route to school travelling south on a rural paved road known as the Rock Ridge Road.

I was alone. The weather was cloudy, road dry and visibility good. The road was of asphalt construction, open country district and speed limit 55 miles per hour. As I approached Stott's Crossroads of which old Raleigh Road intersects, I saw a vehicle to my right heading east. At this time I cannot say definitely how many feet I was from the intersection. The other car was much nearer the intersection at this time than my car. I am well acquainted with this intersection as I travel it each day and know that there is a stop sign on the road the other car was travelling before entering intersection. I cannot say if the other car stopped or slowed up. It started into the intersection and I immediately applied brakes. My vehicle went into a solid skid. The front of my car struck the adverse vehicle in its left side. The force of impact knocked the other car up against a tree in the south-east corner of intersection. My car came to a stop beside the other car entangled it in its left side. I walked around to the other car and saw a man lying on the ground a few feet from the right side of the adverse car. . . . My vehicle was in good mechanical condition, good brakes and steering gear."

Aaron Etheridge, who arrived at the scene shortly after the collision, testified for plaintiff: "The 1954 Plymouth was pushed into the 1957 Plymouth between the wheel of the 1957 Plymouth up to its windshield, especially on the right-hand side. The 1954 Plymouth was pushed into and inside of the 1957 Plymouth up to the windshield of the 1954 Plymouth . . . . The righthand front of the 1957 automobile was up against this oak tree. The oak tree was slightly mashed into the Plymouth, or the fender, rather, and the headlight was pressed against the tree and wrapped around the tree." Etheridge saw the dead body of plaintiffs' intestate lying 13 feet from the right side of the 1957 Plymouth. The seat of this car was between the body and the car. There was no front seat in the 1957 Plymouth when he looked into it.

The left side of the 1957 Plymouth was torn all to pieces: it was "just bent almost flat." Its frame, which is a little heavier than an average car because it is a box frame, was bent, and its whole side panel, door, steering column, steering wheel, front fender and floor-board were pushed in and wrinkled up. The 1957 car had other damage. The 1957 Plymouth had a door with a safety catch, which locks the door when it is pushed to. A witness said: "When the door is closed on this car you can't open that door unless you move the handle. You can't hardly knock it open. . . . The seat shown on the ground was attached to the floor of the car. It had some brackets in the floor and the seat is attached to the brackets. It has eight steel rivets holding the mechanism of this bottom of the seat that moves the seat up and down. This mechanism is attached to the brackets in the seat and

is held by eight steel rivets . . . . They were broken off." The right-hand door of the 1957 Plymouth was bent by the seat hitting the door, when it went out of the car.

This is the testimony of Aaron Etheridge as to the skid marks he saw at the scene immediately after the collision: "I saw heavy skid marks on the Sims-Rock Ridge Road running from north to south — they were on the right-hand side. I would say that the easterly skid mark was approximately 18 inches from the center line of the Rock Ridge-Sims highway. They bore slightly to the left. I measured the heavy skid marks and they were 44 feet long starting from where it started skidding at to the center of the intersection. The straight skid marks were 44 feet long and bearing slightly to the left of the straight line on this highway. There were other skid marks there. Where the heavy skid marks stopped, some more skid curved right on around to this tree. . . . The straight skid marks ended near the center of the intersection. I measured the skid marks from the point where the straight skid marks stopped to the cars that were at the tree, and they were 54 feet long."

At a point about 200 feet north of the intersection there is an embankment approximately 7.8 feet higher than the intersection and approximately 3.8 feet higher than the Rock Ridge Road at that point, which embankment diminishes in height to the intersection. There are approximately one or two pecan trees pretty close to the embankment, and three, four or five pecan trees there. Between the embankment and the highway is a road ditch. On the southwest side of Bullock School Road near the intersection is a tobacco barn, on the southeast side of this road as it approaches the intersection is a frame store.

Plaintiffs' second assignment of reror is to the entry of the judg-permit Aaron Etheridge and Floyd Nichols to testify that the Bullock School Road accommodated more vehicular traffic than the Rock Ridge Road, and that several school busses crossed this intersection every school day.

Plaintiff's second assignment of error is to the entry of the judgment of involuntary nonsuit at the close of their evidence.

Plaintiffs' evidence shows that facing their intestate, as he drove a 1957 Plymouth automobile easterly on Bullock School Road, and approached the intersection of this highway with Rock Ridge Road, was a Highway Stop Sign on the southwesterly side of Bullock School Road approximately 34 feet from the center of the intersection of these two highways. The time was 7:30 a. m. The weather was cloudy, road dry and visibility good.

By the express provisions of G.S. 20-158(a) it was unlawful for plaintiffs' intestate to fail to stop the automobile he was driving in obedience to this Highway Stop Sign, and yield the right of way to

defendant's automobile approaching the intersection on Rock Ridge Road, the designated main travelled or through highway. This statute further provides, "No failure so to stop, however, shall be considered contributory negligence *per se* in any action at law 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 the plaintiff in such action was guilty of contributory negligence."

This Court said in *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17: "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."

This Court also said in *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373: "However, the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, nothwithstanding his favored position, to observe ordinary care. . . ."

Is the evidence of the plaintiffs, considered most favorably in their behalf, sufficient to carry the case to the jury that the defendant, who was on the dominant, through highway, failed to exercise ordinary care toward traffic approaching on an intersecting highway, which had on it a Highway Stop Sign?

As defendant approached the intersection, he saw an automobile, which plaintiffs' intestate was driving, approaching the intersection on Bullock School Road from the west headed east. There is no evidence as to the speed of the automobile driven by plaintiffs' intestate, nor is there any evidence as to whether this automobile stopped or slowed up before entering the intersection. When this car entered the intersection, the defendant immediately applied his brakes, and his car went into a solid skid. After the collision there were heavy skid marks 44 feet long from where defendant's car started skidding to the center of the intersection where the collision occurred. Certainly, there is no evidence tending to show that defendant failed to keep a reasonably careful lookout, and to keep looking, for as soon as the 1957 Plymouth entered the intersection he applied his brakes. The embankment to defendant's right and the trees on and near the embankment did not prevent defendant from seeing the approaching 1957 Plymouth.

No eyewitnesses testified as to the speed at which defendant's auto-

mobile was being operated. However, plaintiffs contend that the solid skid marks 44 feet long, the curving skid marks 54 feet long from the place where the solid skid marks stopped to where the two automobiles stopped, the damage to the 1957 Plymouth with the front part of defendant's automobile in it up to the windshield, the ejection of plaintiffs' intestate and the front seat through the 1957 Plymouth's right door, which has a safety catch, and other physical facts, permit a reasonable inference that defendant was driving at a speed greater than was reasonable and prudent under the conditions then existing, and was not keeping his automobile under reasonable control, and this is further true because their excluded evidence tends to show that Bullock School Road accommodated more vehicular traffic than the Rock Ridge Road, and several school busses crossed the intersection every school day. In support of their contention plaintiffs cite this statement from *Adcox v. Austin and McIntyre v. Austin,* 235 N.C. 591, 70 S.E. 2d 837: "The impact and destructive results of the collision itself could properly be regarded as tending to indicate excessive speed. 'There are a few physical facts which speak louder than some of the witnesses.' "

This Court said in *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879: "When, in a case such as this, the plaintiff must rely on the physical facts and other evidence which is circumstantial in nature, he must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendant."

The plaintiffs, to carry their case to the jury against the defendant on the ground of actionable negligence, must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts. *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258.

"An inference of negligence cannot rest on conjecture or surmise." *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670.

Negligence is not presumed from the mere fact that plaintiffs' intestate was killed in the collision. *Robbins v. Crawford,* 246 N.C. 622, 99 S.E. 2d 852.

There is no evidence as to what speed defendant's automobile must have been travelling, when it hit the 1957 Plymouth automobile on its left side, to go into the 1957 Plymouth automobile up to the windshield of defendant's automobile, nor as to the strength of the side of the 1957 Plymouth automobile to resist the impact of such a blow as it received. Viewing the evidence of plaintiffs, including the excluded evidence, in its light most favorable to them, we find no support for any reasonable inference that defendant was operating his automobile under the circumstances then existing at a speed greater than was reasonable and proper, or that he was not keeping his automobile

under reasonable control, or that there was any negligence on his part, which was a proximate cause of the collision and resulting death of plaintiffs' intestate.

There is no evidence that plaintiffs' intestate stopped at the Highway Stop Sign. The sole evidence on this point is the defendant's statement offered in evidence by plaintiffs: "I cannot say if the other car stopped or slowed up." The only reasonable conclusion that can be drawn from the evidence is that plaintiffs' intestate, whether he stopped at the Highway Stop Sign or not, failed to exercise due care to yield the right of way to defendant's automobile approaching the intersection on the dominant highway, and which he could have seen approaching the intersection if he had looked to his left — the defendant saw him—, but instead negligently drove the 1957 Plymouth automobile directly into the intersection across the path of defendant's approaching automobile. Irrespective of the defendant's negligence, if any, unquestionably the negligence of plaintiffs' intestate was a proximate cause of the collision. This suffices to bar recovery herein. *Edens v. Freight Carriers,* 247 N.C. 391, 100 S.E. 2d 878; *Robbins v. Crawford, supra; Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Edwards v. Vaughn and Mims v. Vaughn,* 238 N.C. 89, 76 S.E. 2d 359; *Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239; *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

The defendant in his answer pleaded as a defense contributory negligence of plaintiffs' intestate. Whereupon, plaintiffs filed a reply pleading the last clear chance or discovered peril doctrine. *Dowdy v. R. R. and Burns v. R. R.,* 237 N.C. 519, 75 S.E. 2d 639; *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337. Such doctrine is not applicable to the evidence in the instant case. The evidence is insufficient to support a jury verdict that the defendant, after he saw or by the exercise of due care should have seen that plaintiffs' intestate was not going to yield him the right of way, then had sufficient time to enable him in the exercise of due care to have stopped his automobile, or otherwise to have acted, so as to avoid the collision.

What the Court said in *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571, is applicable here: "In the circumstances thus disclosed by the record, we are constrained to hold that the demurrer to the evidence should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence."

The judgment of involuntary nonsuit entered below is
Affirmed.

STATE OF NORTH CAROLINA EX REL NORTH CAROLINA UTILITIES COMMISSION v. NEW HOPE ROAD WATER COMPANY, AND L. L. McLEAN, d.b.n. McLEAN COMMUNITY WATER SYSTEM.

(Filed 19 March, 1958)

1. Utilities Commission § 5—

On appeal from the Utilities Commission the courts have jurisdiction to determine whether the Commission had statutory authority to entertain the proceedings and jurisdiction to enter the order. G.S. 62-26.10.

2. Utilities Commission § 2— Sale of right to tap into private water main for service by municipality does not constitute owner a public utility.

Respondents constructed a water main from the end of the municipal lines to their properties for better use of such properties and also permitted others to tap into the lines laterally upon the payment of a fee, and the municipality, upon written statement that the right to tap in had been purchased, installed meters and furnished water to the purchasers direct, respondents owning no laterals between the point where the taps were made in their lines and the residences or other buildings served thereby. *Held:* Respondents were not selling water to any one, at any time, for compensation or otherwise, and were not public utilities within the meaning of G.S. 62-65 (e) 2, and therefore the Utilities Commission had no jurisdiction to order respondents to improve their facilities so as to provide an adequate supply of water.

APPEAL by the Utilities Commission from *Froneberger, J.*, at Chambers in Gastonia, North Carolina, 24 October 1957. From GASTON.

This is an appeal from a judgment rendered by his Honor P. C. Froneberger, Resident Judge of the Twenty-Seventh Judicial District, reversing an order of the North Carolina Utilities Commission (hereinafter called Commission), requiring the respondents to apply to the Commission for a Certificate of Public Convenience and Necessity and to enlarge and improve their facilities for furnishing water to the general public.

The facts pertinent to this appeal are as follows:

1. The New Hope Water Company (hereinafter called New Hope) is a corporation formed over thirty years ago by sixteen families residing on the New Hope Road, southeast of the city limits of Gastonia. The corporation was originally formed by these families for the purpose of constructing a 6-inch water line from the corporate limits of the City of Gastonia along the New Hope Road to the North Carolina Orthopedic Hospital. New Hope later built several lateral lines extending from its 6-inch line. Shortly after the 6-inch line was installed, the corporation installed from the end of its 6-inch line, which ended at what is known as Armstrong Circle, a real estate development located across the New Hope Road from the Orthopedic Hospital, a 2-inch line to the E. P. Lewis Property, which property lies between the Orthopedic Hospital and the property referred to here-

inafter as the McLean property. New Hope for many years sold taps at $150.00 each; later the tap fee was reduced to $100.00 each. New Hope expended approximately $18,000 to $20,000 in constructing its lines and has had no income except from the sale of taps. It now has a surplus of approximately $2,000.

2. About 25 or 30 years ago, R. C. McLean, the father of the respondent L. L. McLean, trading as McLean Community Water System (hereinafter called McLean), paid New Hope $500.00 for the right to extend the 2-inch line from the Lewis property to his own premises, a distance of approximately one mile. Between the Lewis property and the end of the McLean 2-inch line, there are 32 houses, all of which have tap-ins on the McLean line. With the exception of about two houses, which were built before the death of R. C. McLean, L. L. McLean either built the houses and put the water in them or sold tap-ins along the line in order that the people might have water service. McLean has had no income from his line except from the sale of taps for which he has charged $150.00 each. His line cost approximately $5,000.

3. It has been the uniform practice of New Hope and McLean to give the purchaser of a tap a statement or letter to that effect, which the purchaser used in applying to the City of Gastonia for the installation of the tap and the meter. The City of Gastonia has made these installations, furnished water to the purchasers, and collected for it monthly. These respondents own no line or laterals between the point where the taps are made in their respective lines and the residences or other buildings served pursuant thereto.

4. The evidence in the hearing before the Utilities Commissioner pursuant to the order to show cause, supports the findings of fact of the Commissioner (1) that New Hope and McLean have sold tap-ins to all applicants applying therefor; (2) that the water lines of these respondents are not sufficient to furnish the purchasers of the taps sold by them an adequate supply of water; and (3) that the inadequacy of the pipeline facilities has created a serious health problem among these water users.

Other crucial findings of fact are as follows:

(a) That New Hope "is a corporation and owns pipeline facilities extending along New Hope Road eastwardly from the City of Gastonia to the Perry Lewis farm, a distance of approximately two miles, with certain laterals extending therefrom, for furnishing water to the general public for compensation. * * *"

(b) McLean "is now, and has been for many years, the owner of water mains or pipeline facilities extending along New Hope Road east of Gastonia from the Perry Lewis farm eastwardly for a distance of more than one mile, and a lateral from said line southwardly from

New Hope Road along McLean Avenue, a distance of several hundred feet, for furnishing water to the general public for compensation."

The Commissioner concluded as a matter of law that both New Hope and McLean are public utilities within the meaning of GS 62-65(e) and recommended that they be ordered to apply to the Utilities Commission for Certificates of Public Convenience and Necessity as required by law, and further recommend that they "forthwith and within 90 days from the date of this order enlarge and improve their facilities for furnishing water to the general public for compensation to the extent that such facilities will provide an adequate supply of water to meet the needs and requirements of the customers receiving water from said facilities and will remove any danger or threat to the health of the water users from these facilities."

The Commission entered an order accordingly. The respondents filed exceptions to the pertinent findings of fact, conclusions of law and to the order, which were overruled, and they appealed to the Superior Court upon similar exceptions.

Judge Froneberger heard this matter in Chambers on the exceptions of the respondents, and each of them. His Honor sustained the exceptions and reversed the order of the Commission; and further held that the facts found by the Commission and excepted to by the respondents do not constitute these respondents public utilities as defined in the Statutes of North Carolina, and dismissed the proceeding. The Commission appeals, assigning error.

Attorney General Patton, Asst. Attorney General F. Kent Burns, for the State, appellant.

Wm. H. Abernathy, Henry Whitesides, for defendant McLean, appellee.

Hugh W. Johnson, for defendant, New Hope, appellee.

DENNY, J. The sole question for decision on this appeal is whether or not the respondents are public utilities within the meaning of GS 62-65(e) 2, which reads as follows: "The term 'public utility,' when used in this article, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this State equipment or facilities for: Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation."

The Commission has no jurisdiction over these respondents unless they are public utilities within the meaning of GS 62-65(e) 2. GS 62-27. Moreover, the General Assembly has vested in the courts of this State the power to review proceedings before the Commission and to determine whether or not the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are, among other things, in excess of the statutory authority or jurisdic-

tion of the Commission, or unsupported by competent, material and substantial evidence. GS 62-26.10.

While it is apparent from the evidence that these respondents have sold taps to all persons applying therefor, they had no choice in the matter if they are public utilities. *Halifax Paper Co. v. Sanitary District,* 232 N.C. 421, 61 S.E. 2d 378.

In the last cited case, it is said: "A public utility, whether publicly or privately owned, 'is under a legal obligation to serve the members of the public to whom its use extends, impartially and without unjust discrimination * * * A public utility must serve alike all who are similarly circumstanced with reference to its system, and favor cannot be extended to one which is not offered to another, nor can a privilege given one be refused to another.' 43 Am. Jur., 599; 51 C.J., 7. This is in accord with our decisions. *Public Service Co. v. Power Co.,* 179 N.C. 18, 101 S.E. 593; *Solomon v. Sewerage Co.,* 133 N.C. 144, 45 S.E. 536; *Griffin v. Water Co.,* 122 N.C. 206, 30 S.E. 319."

In 73 C.J.S., Public Utilities, section 2, page 993, it is said: "It has been stated that the true criterion by which to determine whether a plant or system is a public utility is whether or not the public may enjoy it of right or by permission only *(Johnson City v. Milligan Utility District,* 38 Tenn. App. 520, 276 S.W. 2d 748; *Junction Water Co. v. Riddle,* 108 N.J.Eq. 523, 155 A 887; *Richardson v. Railroad Commission,* 191 Cal. 716, 218 P 418; *Springfield Gas Co. v. Springfield,* 292 *Ill.* 236, 127 N.E. 739) * * * and an attempt to declare a company or enterprise to be a public utility where it is inherently not such, is, by virtue of the guaranties of the federal Constitution, void wherever it interferes with private rights of property or contract * * * and the question whether or not a particular company or service is a public utility is a judicial one which must be determined as such by a court of competent jurisdiction." *Natatorium Co. v. Erb,* 34 Idaho 209, 200 P 348.

The case of *Austin, et al v. City of Louisa* (Court of Appeals of Kentucky), 264 S.W. 2d 662, was filed for a declaration of rights against the City of Louisa, the Louisa Water Commission, and three individuals, Lonnie Boggs, H. T. Kerns and Con Limmings. The individuals, Boggs, Kerns and Limmings, as well as the plaintiffs, owned homes on Inez Road, just east of the City of Louisa. Some time in 1949 the appellees, Boggs, Kerns and Limmings, built at a cost of $1,500 a private water line from their homes to a water main in the City of Louisa.

Subsequently, Bobbs and his associates permitted neighbors to tap onto the line in question, until at the time the action was brought approximately 22 families in all were using it. Each neighbor who tapped onto the line paid the original builders $100.00 and signed a contract whereby he or she agreed not to hold the original builders responsible

for loss of service. In addition, each person agreed to share the expense of maintenance. The taps and meters were installed by the Water Department of the City of Louisa. The City of Louisa sold water through the private line and collected therefor.

A Mr. Griswold paid the $100.00, signed the contract and constructed a tap line from the original one to his house. He then permitted the plaintiff Austin to tap his lateral line and obtain service without paying the tap fee of $100.00 or signing the contract required by the original builders of the line. The Court said: "Any rights appellants may have had to receive water depended necessarily upon the willingness of Boggs, Kerns and Limmings to permit appellants to tap onto the private line. * * *

"Nor do we feel that appellants have any grievances against Boggs, Kerns and Limmings which are cognizable at law. Clearly, the latter persons, are not, as appellants contend, operating a public utility so as to bring them within the regulatory jurisdiction of the Public Service Commission. The fee of $100 and the additional conditions in the contract, signed by some twenty or more neighbors who were permitted to use this limited line, represent a reasonable means of spreading the cost of construction and maintenance of the line. Moreover, the three men have meters installed in their homes and pay the city for the water used by them, just as any user within the city would be required to do. It is obvious that this is not a case of distribution of water 'for compensation' by Boggs and associates, KRS 278.010(d), as would make the Boggs line a public utility."

Section 278.010, Kentucky Revised Statutes, reads as follows: "(3) 'Utility' means any person, except a water district organized under Chapter 74 or a city, who owns, controls, operates or manages any facility used or to be used for or in connection with: (d) The diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation." The legal effect of this statute is identical with our own.

In *Overlook Development Co. v. Public Service Commission,* 101 Pa.Super.Ct. 217, 306 Pa. 43, 158 A 869, it was held that a land company which plotted a tract of land owned by it for development purposes, sold lots and contracted with a water company for a supply of water through the main constructed by the land company at its own expense and owned by it, did not engage in the business in supplying water to the public by reason of the fact that it permitted those to whom it sold lots and several neighboring owners to connect with its main and be served with water through it by the water company. The Court further held: " * * * The mere fact that this water main became a facility of the water company did not destroy the private character of the main, nor render it subject to use by the water com-

pany in supplying water to the public generally, or to any portion of the public as such. If this be not so, then one cannot construct a water main on his own land, connect it with a main of a public service company, and receive service through it from the company without impressing it with a public use which would require him to permit any other person in the neighborhood who might desire service from the company, to connect with his main. * * * A public utility may be compelled under proper circumstances to extend its facilities to accommodate the public, but the private property of an individual cannot be appropriated for that purpose without due process and without making or securing compensation." See Anno: Public Utility—Incidental Service, 18 ALR 764; 93 ALR 248; 132 ALR 1495. Cf. *Allen v. Railroad Commission,* 179 Cal. 68, 175 P 466.

In our opinion, the mere fact that these respondents own the respective water lines or mains described hereinabove, and that such lines are used by the City of Gastonia for selling water for compensation, does not support the findings of fact to the effect that the respondents are engaged in selling water to the general public for compensation within the meaning of GS 62-65(e) 2, and are, therefore, public utilities. The respondents have not sold water to any one, at any time, for compensation or otherwise. Moreover, the City of Gastonia can only furnish water service through these private lines to a party who has purchased a tap from the owners thereof. The City has no right to sell a tap on these lines, neither does it have the right to install one without permission of the respective owners thereof. Consequently, we hold that these respondents are not public utilities within the meaning of the provisions of the above statute. Hence, the judgment of the court below is

Affirmed.

WALTER CURRIN v. ERNEST L. WILLIAMS, RICHARD A. WILLIAMS, A MINOR, AND ERNEST L. WILLIAMS, GUARDIAN AD LITEM FOR RICHARD A. WILLIAMS, A MINOR.

(Filed 19 March, 1958)

1. Automobiles § 17—

A motorist is guilty of negligence as a matter of law if he fails to stop in obedience to a red traffic light as required by municipal ordinance, G.S. 20-169, and such negligence is actionable if it proximately causes the death or injury of another.

2. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper when and only when the evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.

3. Automobiles § 17—

The fact that a motorist enters an intersection facing a green traffic control signal does not relieve him of the duty to maintain a proper lookout, keep his vehicle under reasonable control, and operate it at a speed and in such manner as not to endanger or be likely to endanger others upon the highway, but nevertheless, he may assume and act upon the assumption that motorists facing the red light will observe the rules of the road and stop in obedience to the traffic signal.

4. Same—

Whether a motorist entering an intersection faced with a green traffic control signal is guilty of contributory negligence as a matter of law in failing to look for traffic on the intersecting street depends upon whether such failure was a proximate cause of the collision with a car entering the intersection against the red traffic light, and nonsuit for such failure is proper only if he could or should have seen that the other car would not stop in obedience to the red light in time to have avoided the collision.

5. Automobiles § 42g— Evidence held not to show contributory negligence as a matter of law on part of motorist in failing to see that motorist facing red light would not stop.

The evidence tended to show that plaintiff entered the intersection while the traffic control signal facing him was green, and that the front of his car struck the right side of defendant's car, which entered the intersection from plaintiff's left while the traffic control signal facing him was red, and that the collision occurred approximately in the center of the intersection. *Held:* Nothwithstanding evidence that plaintiff maintained no lookout for traffic along the intersecting street, the evidence does not warrant the sole conclusion that defendant was operating his car in such manner as to put plaintiff on notice that defendant would not stop in obedience to the signal in time for plaintiff to have avoided the collision had plaintiff looked, and therefore the evidence does not disclose contributory negligence as a matter of law, but the issue was properly submitted to the jury.

APPEAL by defendant (Richard A. Williams) from *Burgwyn, E. J.*, December Term, 1957, of NASH.

Civil action growing out of a collision that occurred Sunday, December 9, 1956, between 9:45 and 10:00 a.m., within the intersection of Grace Street and Western Avenue, Rocky Mount, N. C., between a Chevrolet car, owned and operated by plaintiff, and a Studebaker car, operated by Richard A. Williams, now sole defendant herein.

Plaintiff alleged that Richard A. Williams was operating the Studebaker as agent for Ernest L. Williams, originally a defendant herein; but the issue raised by defendants' denial of this allegation was answered against plaintiff.

Plaintiff's action was instituted April 29, 1957. Richard A. Williams was then twenty years of age. Originally, he was represented herein by guardian *ad litem*. He became twenty-one on November 14, 1957, and thereupon assumed the defense of the action.

The jury found that plaintiff's injuries and damage were caused by the negligence of defendant; that plaintiff was not contributorily negligent; and that plaintiff was entitled to recover $10,000.00 for personal injuries and $499.00 for damages to his car.

From judgment, in accordance with the verdict, defendant excepted and appealed, assigning errors.

Valentine & Valentine for plaintiff, appellee.

Dupree & Weaver, David R. Cockman and Walter Lee Horton, Jr., for defendant, appellant.

BOBBITT, J. No question is raised as to the sufficiency of the evidence to support the finding that defendant was guilty of actionable negligence; but defendant stresses his contention that the evidence, considered in the light most favorable to plaintiff, established that plaintiff, as a matter of law, was guilty of contributory negligence. On this ground, he insists that the court erred in denying his motion for judgment of involuntary nonsuit.

Plaintiff was driving south on Grace Street. Defendant, accompanied by his wife, was driving west on Western Avenue. Thus, defendant approached the intersection from plaintiff's left.

On May 10, 1956, the City of Rocky Mount, as authorized by GS 20-169, adopted an ordinance providing for the regulation of traffic at this intersection by automatic traffic control signals. The automatic traffic control signal device was installed and in operation prior to and at the time of the collision.

Section 2 of the ordinance, in pertinent part, provided: "(c) When a green signal light is shown traffic shall proceed on that street; when the amber signal light appears all vehicles which have not yet reached the street intersection shall stop at the intersecting street as marked by the police department. Vehicles which have crossed the street line at the time the amber light appears shall proceed across the intersection. When a red or amber light is shown no vehicle shall cross the street line as marked in the street by the police Department. (d) When the green light is shown vehicles shall immediately proceed across the street in the direction indicated by said light."

The ordinance provided that "it shall be unlawful for any person to disobey such a signal."

"Since the ordinance is designed to guard the safety of persons using the public streets of the municipality, a motorist is negligent as a matter of law if he fails to stop in obedience to a red traffic light as required by the ordinance, and his negligence in that particular is actionable if it proximately causes the death or injury of another." *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25; *Troxler v. Motor Lines*, 240 N.C. 420, 82 S.E. 2d 342.

There was no evidence (1) as to where, if at all, the police had marked the line(s) at which vehicles should stop, and (2) no evidence that either motorist was confronted by an amber light.

There was plenary evidence to the effect that, as plaintiff approached and entered the intersection, the signal light was green for traffic on Grace Street and red for traffic on Western Avenue. Indeed, defendant frankly testified that he started into the intersection when the signal light facing him was red.

Other features of the factual situation are as follows:

The collision occurred on a fair, sunshiny morning, in a residential district. The intersecting streets, each paved and thirty feet wide, were straight, level and dry. There was nothing on the northeast corner to obstruct plaintiff's view of westbound traffic on Western Avenue or to obstruct defendant's view of southbound traffic on Grace Street. Both drivers, on account of past use thereof, were familiar with the intersection.

The cars collided approximately in the center of the intersection. As plaintiff expressed it, "it was pretty much in the main cross where I was struck at." Defendant crossed directly in front of plaintiff. The impact was between the front of plaintiff's car and the right side of defendant's car. After the impact, both drivers lost control. Plaintiff's car went 76 feet, stopping in the yard of the house located on the southwest corner. Defendant's car went a total distance of 176 feet, first striking the south curb of Western Avenue, west of the intersection, and thereafter coming to rest on the north side of Western Avenue.

The only evidence as to the speed of the cars was as follows: Plaintiff testified that he "was not going very fast—not over 15 or 20." Defendant testified that, as he approached and entered the intersection, he "was going about 20 miles per hour, maybe a little more."

Plaintiff testified: "I was going south on Grace Street under a green light and I observed the broadness of a street ahead view and I saw nobody coming anywhere . . ." Also: "I was looking ahead of me as I entered that intersection. My range of vision extended the breadth of the street and there was no one in my range of vision at that time." Also: "I had not seen this other car at all until I was hit."

Defendant testified: "I did not see Mr. Currin's car before this collision."

These excerpts from plaintiff's testimony, elicited on cross-examination, are emphasized by defendant: "At the speed I was going I could have stopped my car in ten feet. If I had seen the man coming I could have. I did not see him coming. I was looking down the road, but my cross-view would have given me some distance." Also: "Q You did not look to your left nor your right? A No. I didn't look sideways. I was looking forward."

Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the undisputed evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Wright v. Pegram,* 244 N.C. 45, 92 S.E. 2d 416; *Dennis v. Albemarle,* 243 N.C. 221, 90 S.E. 2d 532.

In *Wright v. Pegram, supra,* Higgins, J., states the rule as established by prior decisions as follows: ". . . a motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. (Citation) Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal." *Cox v. Freight Lines, supra; Hyder v. Battery Company, Inc.,* 242 N.C. 553, 89 S.E. 2d 124; *Troxler v. Motor Lines, supra.*

But the mere fact that plaintiff failed to look to observe traffic conditions on Western Avenue east of the intersection is insufficient to establish that plaintiff was contributorily negligent as a matter of law. Whether such failure to look was a proximate cause of the collision depended upon whether, if he had looked, what he would or should have seen was sufficient to put him on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. Defendant was chargeable with notice of what he would have seen had he exercised due care to keep a proper lookout. *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Smith v. Buie,* 243 N.C. 209, 90 S.E. 2d 514.

In *Hyder v. Battery Company, Inc., supra,* this Court decided that, notwithstanding plaintiff had the green light when he entered the intersection, the evidence that defendant's truck was approaching along the intersecting street at 40 to 50 miles per hour was sufficient *to warrant the submission* of the issue of contributory negligence. In *Wright v. Pegram, supra,* this Court decided that, where plaintiff had the green light when he entered the intersection but defendant was approaching along the intersecting street at 35 to 40 miles per hour, the evidence did not establish contributory negligence as a matter of law. In *Troxler v. Motor Lines, supra,* where plaintiff alleged that defendant Letter entered the intersection on the green light, the demurrer of this defendant was sustained because the complaint alleged no facts sufficient to put this defendant on notice that her codefendant would not obey the red traffic control signal facing him on the intersecting street. In *Cox v. Freight Lines, supra,* the decision was that

the issue of contributory negligence was for submission to the jury in accordance with appropriate instructions as indicated therein. The factual situation in *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354, is readily distinguishable.

While *Marshburn v. Patterson, supra,* involved a failure of defendant to stop in obedience to a stop sign rather than a red traffic control signal, the reasoning underlying decision impels a like result in the present case. In *Marshburn v. Patterson, supra,* the evidence was conflicting. There was evidence that the driver on the servient street "was going unusually fast . . . was going too fast to stop . . . The speed was from 50 to 60 m.p.h." On the other hand, there was evidence that the car on the servient street was traveling at a speed of only 25 to 30 miles per hour. The operator of the Marshburn vehicle, which was proceeding on the dominant street, testified that, as he approached the intersection, he did not look either to the right or to the left. This Court held that the evidence to the effect that the speed of the car traveling on the servient street was only 25 to 30 miles per hour raised for jury determination (1) whether the driver on the dominant street was put on notice that the driver on the servient street would not obey the stop sign and yield the right of way; and if so, (2) whether the driver on the dominant street was then a sufficient distance away to reduce his speed and avoid the collision.

Under the evidence here presented, we cannot say that the only reasonable inference or conclusion that may be drawn therefrom is that defendant was operating his car in such manner as to put plaintiff on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. We conclude that it was proper to submit the issue of contributory negligence to the jury.

Other assignments of error brought forward and discussed in appellant's brief relate to (1) alleged prejudicial questions and comments by the presiding judge, and (2) features of the charge. Each of these assignments has been carefully considered, but none discloses error deemed sufficiently prejudicial to warrant a new trial.

In connection with the charge, the court erred *in defendant's favor* when he instructed the jury, in substance, that the failure of a motorist to stop in obedience to a red traffic light, as required by the ordinance, "is not negligence *per se,* or in itself, but is some evidence thereof which may be considered with other facts in the case in determining whether or not he was negligent." It is noted that the provisions of GS 20-158(a) relate to a failure to stop in obedience to a stop sign. As indicated above, the violation of a valid ordinance requiring a motorist to stop in obedience to a red traffic control signal is negligence *per se.*

No error.

BLANCHE IVEY LUCAS v. CLIFFORD LESLIE WHITE AND WIFE, MARION D. WHITE; LAWRENCE A. FREEMAN AND JESSE H. DUNSCOMB.

(Filed 19 March, 1958)

1. Pleadings § 24: Trial § 23f—

Plaintiff must make out his cause according to the allegations of the complaint, and a fatal variance between the allegation and proof compels nonsuit.

2. Automobiles § 15—

A motorist driving on his right side of the highway may assume that vehicles approaching from the opposite direction will observe the rules of the road and remain on their right side of the center line, and while the right to rely upon such assumption is not absolute, it does obtain unless there is something to put him on notice that the driver of an approaching car is in a helpless condition or for some cause will not remain on his right side of the highway.

3. Automobiles § 41c— Allegations and evidence held not to disclose anything to put driver on notice that approaching car would not remain on its side of the highway.

Plaintiff's allegation and evidence were to the effect that she was riding as a passenger in a car driven by the appealing defendant on its right side of the highway, and that a car approaching from the opposite direction suddenly swerved to its left over the center of the highway and collided with the car in which plaintiff was riding. There was evidence that the approaching car had been wobbling from one side of the highway to the other prior to the collision, but plaintiff's allegations were to the effect that it had proceeded in an unswerving line in its lane of travel until halted by the collision. *Held:* Disregarding the evidence at variance with the allegations, there was no evidence of anything to put the defendant on notice that the driver of the other car would not observe the rules of the road until it was too late for defendant to have avoided the collision, and nonsuit was proper.

4. Automobiles § 40: Evidence § 42a—

A statement by defendant driver to plaintiff upon his visit to her in the hospital after the accident that "he felt like it was partly his fault," *is held* a legal conclusion, determinable alone by the facts.

APPEAL by plaintiff from *Moore (Clifton L.) J.*, at September 1957 Term, of NEW HANOVER.

Civil action to recover for personal injuries sustained by plaintiff as result of alleged actionable negligence of defendant Jesse H. Dunscomb,—who is the only defendant in court.

The record of case on appeal discloses without controversy that

a collision occurred about 2:16 A.M., on September 4, 1955, between an automobile operated by defendant Dunscomb, in which plaintiff was riding, and traveling south along S. Front Street, in the city of Wilmington, North Carolina, and an automobile operated by one Freeman, alleged to be an agent of defendants White, hereinafter referred to mainly as the White car or vehicle, and occasionally as the Freeman car or vehicle, traveling north along said S. Front Street.

Upon trial in Superior Court plaintiff, Blanche Ivey Lucas, testified in pertinent part as follows: " * * * Jesse Dunscomb * * * had a blue Oldsmobile convertible * * * We were driving south on South Front Street, and I looked up and saw this car wobbling meeting us, as I saw the lights. It was raining some but not as much as it had been, and the street was wet from the rain. The vehicle approaching us was going north and the lights were wobbling, or weaving. I noticed it wobbling or weaving by the lights * * * The approaching vehicle was about 275 feet from our car when I first noticed it wobbling. I was sitting on the front seat of our car. When I noticed that, I moved up on the edge of the seat so I could see it clearly, and as it got closer, about 100 feet closer, I looked at Jesse and said 'Look out'. When the approaching car was 100 feet from us it was wobbling across the line, and I saw he would hit us if something was not done. I turned to Jesse and said 'Look out, Jesse', and I turned around and by the time I turned around my head went in the windshield. I was looking at Dunscomb when I told him to look out, and he did not respond or answer. He was looking straight ahead * * * he did not put on his brakes. The brakes were not applied at all on his car before the collision. He did not turn his vehicle to the right to avoid striking this other car coming down on his side of the road; if he had, he would have had plenty of room to get off on the shoulder. He was driving right close to the white line. There were no cars parked on the right-hand side of the road along there. There were no obstructions up ahead that would prevent Mr. Dunscomb from seeing the other vehicle approaching. I saw it clearly. Mr. Dunscomb did not blow his horn at any time. There were no cars coming on our right-hand side of the road right opposite us. He did not turn to either direction to avoid a collision.

"Our car was going about 30 miles an hour. He did not slacken speed. In my opinion, the approaching car was going about 45 miles an hour. When the two cars collided my head went in the windshield and it knocked me backwards and my head was cut open * * * I was carried to the hospital.

"Mr. Dunscomb, the defendant, visited me about 10 o'clock the Sunday morning after the accident. I was in my room in the hospital. Mr. Dunscomb told me he was sorry it had to happen, and he almost

rather it was him than me, and that he felt like it was partly his fault. My brother was in the room * * * and he heard the conversation between us."

Then on cross-examination plaintiff continued: "I alleged, 'Despite the fact that he saw or by the exercise of due care and diligence should have seen the approach of the said Dunscomb vehicle on the said wet street, that operator of said White vehicle continued to drive said White vehicle northwardly at an unabated speed of 35 miles per hour or more.' In article 22 of this amended complaint, I allege as follows: 'Until its forward progress was halted or changed by collision with the said Dunscomb vehicle the *said White vehicle proceeded northwardly at an unabated speed in an unswerving line of travel in the said southbound traffic lane of the said highway.*' (Emphasis supplied) That is my signature to the original complaint * * * That is my signature on the amended complaint. We were in the southbound traffic lane on the right side of the road, and they crossed over the white line. When I first saw the White vehicle * * * it was wobbling. When it turned into our lane it was not running in a straight line. In the complaint I swore it was traveling in a straight line or it would have hit us directly in front; it had to come in some to get us.

"I do not know how many feet a car will travel in a second when it is running 35 miles per hour. In my direct examination, I said it was running around 45, I guess. He started across the white line into our line when he was about 100 feet away. I said Mr. Dunscomb's car was going around 30 miles an hour. He was in a 35 mile travel zone. I did not see anything on the left as these cars were meeting to prevent that approaching car from turning back into his northbound lane if he had wanted to. There was no car traveling on our left side, or right side, at that time. We had passed the intersection of Alabama Street. I don't remember a place marked off for cars to pass on the west side of the street. I don't remember a house there with a concrete wall or coping by the edge of the street. I had known Sgt. Dunscomb for a year and had been going with him for some time. After the wreck we did not go together very long."

C. E. Mason, of police department of city of Wilmington, as witness for plaintiff, testified in pertinent part: " * * * On the night in question I was called to South Front Street where an accident had taken place * * * Mrs. Lucas was still in Dunscomb's car when we got there * * * The Dunscomb car was within his right lane on the road that night. I would say it was a foot and a half or two feet from the white line. The other vehicle was all in the south-going lane except possibly the right rear wheel, which was on the line * * * There is a lane for parked cars on each side of the road. When I arrived at the scene * * * I do not recall there being any parked cars on the

right-hand side of the road. * * * The accident happened north of the intersection of Alabama Avenue."

And this witness testified that " * * * the White car was in contact with the Dunscomb car on the left of the Dunscomb car and more to the left of the White car then to the right of it."

Defendant Dunscomb, reserving exception to denial of his motion for judgment as of nonsuit, entered when plaintiff first rested her case, as witness for himself, testified: "* * * The night of September 4, 1955, I was driving south on South Front Street, and it was raining, and this other automobile was traveling north on South Front Street in a normal manner. It was going straight down the north side of the road. I was on the right side of the road. The other car was traveling to my left. I was driving and this other automobile within a few feet suddenly swerved into my lane of traffic * * * there was no time for me to do anything. I noticed it was in my lane of traffic and at the same time the accident happened, I was in the process of putting on my brakes when the accident happened. I attempted to turn to the right at the same time. Mrs. Lucas was riding in the car with me. The left front end of the oncoming car struck the left front of my automobile. I was traveling about 30 miles an hour. My lights were burning and visible. I went to see Mrs. Lucas in the hospital, but do not recall making a statement to her that I felt it was partly my fault. Mrs. Lucas did not claim to me that it was my fault * * *."

Then on cross-examination, defendant Dunscomb continued: "I can't say the exact distance the Freeman car was from my car the time I first saw it, possibly 400 or 500 feet, maybe more. I observed nothing unusual about its approach. I had it in my view all the time. There was nothing whatever peculiar or unusual about its approach until it suddenly swerved into my lane of traffic. It swerved into my car. (Witness then read paragraph 22 of the answer, admitting the allegations of paragraph 22 of the complaint). Then continuing, the witness said: "It (the oncoming car) didn't wobble. It was not running straight down the southbound lane * * * It turned suddenly into the southbound lane of traffic when it was approximately 100 feet away. From that point it proceeded in an unswerving line directly down the southbound lane. At the time I knew there was going to be an accident, I attempted to turn and put on brakes, but at that time the accident happened."

And, continuing, the witness further stated: "I recall Mrs. Lucas saying 'Look out, Jesse', she had no sooner got the words said than the collision happened. We noticed it in my lane at the same time she said, 'Look out, Jesse.' I don't recall making any statement to her, or in her presence, or in the presence of her brother, of it being partly my fault. There was no way for the accident to be my fault

* * * I deny making such statement * * * My automobile must have been a couple of feet to the right of the white line at the time of the collision * * * as close as I can remember the White vehicle was entirely on my lane at the point of the collision * * *."

Defendant then offered without objection paragraphs (or articles) 20, 21, 22, 23, 25, 28, and 19 of the amended complaint.

At the close of all the evidence motion of answering defendant for judgment as of nonsuit was allowed, and from judgment entered in accordance therewith plaintiff appeals to Supreme Court, and assigns error.

Lonnie B. Williams, Otto K. Pridgen, II, Clayton C. Holmes for Plaintiff Appellant.

Isaac C. Wright for Defendant Appellee

WINBORNE, C. J.: Appellant states this as the question involved on this appeal: "Is nonsuit proper where evidence tends to show that defendant observed or should have observed an approaching vehicle weaving across the road and in the left-hand lane and made no effort to avoid the collision although he could have done so?" In the light of the allegations of the complaint, paragraph 22, the answer is Yes.

Plaintiff must make out her case according to her allegations, that is, *secundum allegata*. The court cannot take notice of any proof unless there is a corresponding allegation. And where there is a material variance between the allegation and proof, such defect may be taken advantage of by motion for judgment as of nonsuit. *Brady v. Beverage Co.*, 242 N.C. 32, 86 S.E. 2d 901, citing *Whichard v. Lipe*, 221 N.C. 53, 19 S.E. 2d 14. *Wilkins v. Finance Co.*, 237 N.C. 396, 75 S.E. 2d 118; *Lyda v. Marion*, 239 N.C. 265, 79 S.E. 2d 726; *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786, and numerous other cases cited therein and annotated thereon.

Applying this principle to the evidence shown in the record, and eliminating the evidence at variance with the allegation, there is no evidence of negligence by defendant as a proximate cause of the injury of which complaint is made.

In this connection it is provided by statute, G.S. 20-148, that "drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." *Hoke v. Greyhound Corp.*, 226 N.C. 692, 40 S.E. 2d 345.

The plaintiff's allegation and evidence tends to show that defendant was driving on his right side of the highway, at a lawful and moderate rate of speed, thirty miles per hour in a thirty-five mile zone, had the car under control, and, as in *Morgan v. Saunders*, 236

N.C. 162, 72 S.E. 2d 411, after his car was struck by the White car, it still remained on the right side of the highway near the center line.

Indeed, this Court has declared in many cases "that the driver of an automobile who is himself observing the law (GS 20-148) in meeting and passing an automobile proceeding in the opposite direction has the right ordinarily to assume that the driver of the approaching automobile will also observe the rule and avoid a collision." So wrote Devin, C. J., in *Morgan v. Saunders, supra,* citing *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607; *Hancock v. Wilson,* 211 N.C. 129, 189 S.E. 631; *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707; *Brown v. Products Co., Inc.,* 222 N.C. 626, 24 S.E. 2d 334; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593.

While the right of a motorist to assume that a driver of a vehicle coming from the opposite direction will obey the law and yield one-half the highway, or turn out in time to avoid collision, and to act on such assumption in determining the manner of using the road is not absolute, there is nothing in the record on this appeal to show, or to put defendant on notice, that the driver of the White car was in a helpless condition or from any cause unable to turn his automobile to the right of the center of the road in passing the Dunscomb car.

Lastly, in respect to the alleged remark made by defendant to plaintiff, at the hospital, which he denies, "that he felt like it was partly his fault," we find it said in *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887, opinion by *Stacy, C. J.,* speaking of a similar remark in that case, "Even so, the conclusion is a legal one, determinable alone by the facts."

In accordance therewith the statement if so made by defendant to plaintiff in hospital in the instant case is not sufficient, standing alone, to make out a case for the jury.

Hence the judgment as of nonsuit is

Affirmed.

J. W. BRYANT, JR. v. ATLANTIC COAST LINE RAILROAD COMPANY (ORIGINAL DEFENDANT), AND WHITE CONSTRUCTION COMPANY (ADDITIONAL DEFENDANT).

(Filed 19 March, 1958)

Master and Servant § 25a: Torts § 6—

An employee injured while engaged in his duties in interstate commerce cannot sue the railroad employer and a third person tort feasor

in the same action, nor may the railroad employer file a cross-action against such third person tort feasor upon allegations of indemnity and primary and secondary liability, since there is no common legal right in the action under the Federal Employers' Liability Act and the right of action against the third person tort feasor.

APPEAL by plaintiff and by defendant, Atlantic Coast Line Railroad Company from *Fountain, S. J.*, at March 1957 Civil Term of EDGECOMBE.

Civil action to recover for personal injuries.

The original action was begun 19 May, 1956, against defendant, Atlantic Coast Line Railroad Company only, under the Federal Employers' Liability Act to recover damages for personal injuries as proximate result of negligence. On 16 June, 1956, plaintiff was allowed to file an amendment to his complaint so as to bring in as additional defendant White Construction Company, for whom summons was issued and served.

The plaintiff amended complaint by striking all of it, and inserting in lieu thereof an entire complaint, of which these are pertinent allegations:

"5. That as plaintiff is informed and believes, at said time and prior thereto, the defendant, Atlantic Coast Line Railroad Company, was an interstate railroad, engaged in interstate commerce, and using its said property and equipment in interstate commerce subject to the requirements of the Federal Employers' Liability Act.

"6. That on the day in question the weather was somewhat cloudy and a light misty rain had been falling for some time prior to the time that the plaintiff was engaged in switching defendant Atlantic Coast Line Railroad Company's train cars onto the side track belonging to White Construction Company.

"7. That after the plaintiff had switched out and placed certain cars belonging to the defendant railroad onto the side track belonging to White Construction Company and placed a hand brake on the rear car left on the White Construction Company track as required by the defendant railroad, the plaintiff started down the side ladder of the defendant Atlantic Coast Line Railroad Company's train car and the plaintiff's foot was on the second or third grab iron from the bottom when the plaintiff's foot slipped because of some foreign oily, slick substance negligently permitted to be on said grab irons.

"8. That the defendant, Atlantic Coast Line Railroad Company, and the White Construction Company owed the plaintiff the duty to keep the right of way for the side track free of all commodities, rubbish, trash, or other objects which might prove a danger to those engaged in railroad operations on said side track, and the White Construction Company was negligent in leaving near said side track a

car mover, said car mover being a type of pinch or crowbar with a Fulcrum built on the end of it and used by said White Construction Company to pinch cars along the track to the point desired.

"9. That as a result of the negligence of the defendant railroad in allowing said foreign oily, slick substance to be on the grab irons, making it hazardous and unsafe for the plaintiff to go about his employment, the plaintiff's foot slipped and caused him to lose his handhold which caused the plaintiff to fall from the defendant railroad's train car and when plaintiff fell to the ground, the plaintiff's right foot struck a car mover which had been negligently left too near the side track belonging to White Construction Company by the said White Construction Company or its agents or employees, where it was dangerous and constituted a hazard to defendant railroad's employees who were switching defendant railroad's train cars, causing the plaintiff's right foot to turn over when it struck the said car mover.

"10. That as a direct and proximate result of the negligence of the defendant, Atlantic Coast Line Railroad Company, and White Construction Company in not providing the plaintiff with safe equipment and a clear area to work the plaintiff was severely and permanently injured in a manner to be hereinafter described."

Defendant Railroad Company, answering the complaint, denied the material allegations of negligence, and pleaded as a cross-action against defendant White an alleged "side track" or indemnity contract, as follows:

"AND FOR A FURTHER ANSWER AND DEFENSE and by way of CROSS-ACTION against White Construction Company, this defendant says:

"1. On July 14, 1953, said corporation entered into a sidetrack Agreement with this defendant, the original of which will be presented when the same becomes necessary during the trial of this case; but paragraph 8 (e) of said agreement is as follows: 'The Industry agrees to keep the right of way for said sidetrack free of all commodities, rubbish, trash or other objects which may prove a danger to those engaged in the operation of said railroad; and will indemnify the railroad from all claims and demands which may be made against it by reason of any loss, damage or injury growing out of, or caused by the failure of the industry to keep the right of way for said sidetrack free from obstructions and objects as aforesaid.'

"2. White Construtions Company violated the terms of the aforesaid agreement in that it failed to keep the right of way of its sidetrack free of objects which may prove a danger to those engaged in railroad operations on said track; but, to the contrary, left its car mover so close to the track that it constituted a hazard to those so engaged; and, as a result thereof, plaintiff received such injuries as he did re-

ceive. A car mover is a type of pinch or crowbar with a fulcrum built onto the end of it and is used to pinch cars along the track to the point the White Construction Company wished them to be placed.

"3. Under the terms of the aforesaid agreement the White Construction Company undertook to indemnify this defendant against loss arising out of said company's failure to keep said car mover in a safe place. So that, if plaintiff is entitled to recover of this defendant, the liability of this defendant would be secondary to the liability of the White Construction Company."

Defendant White demurred to the complaint of plaintiff, and also to the cross-action of defendant Railroad Company. Upon hearing on these demurrers the presiding judge (1) overruled the demurrer of defendant White to the complaint of plaintiff, and allowed said defendant time to answer or otherwise plead; and (2) sustained the demurrer to the cross-action of defendant Railroad Company—adding, "but this judgment shall not be prejudicial to the rights of the defendant Atlantic Coast Line Railroad Company under its alleged agreement with the defendant White Construction Company so far as future proceedings may be concerned."

To this judgment, the record shows "Atlantic Coast Line Railroad Company, and the White Construction Company excepted," and that "This is plaintiff Bryant's Exception No. 1. This is defendant ACL's Exception No. 1."

Defendant White then answered the complaint, denying any negligence on its part, and setting up as further answer and defense, and as a plea in bar of the plaintiff's alleged cause of action lack of jurisdiction to bring the answering defendant into an action under Federal Employers' Liability Act, intervening negligence of Railroad Company, and contributory negligence of plaintiff.

Defendant White for a fourth answer and defense, and as a cross-action in favor of White Construction Company against its co-defendant, Atlantic Coast Line Railroad Company, averred primary-secondary liability, and asked that appropriate issue be submitted to that effect.

Defendant Railroad Company then answered the cross-action, setting out substantially the same allegations as in its original cross-action against defendant White. White replied to this answer of Railroad Company, pleading as *res judicata* the matter set up in defendant Railroad Company's answer at March Term 1957, when judgment was rendered on White's demurrer.

The cause coming on for hearing, upon the plea in bar of defendant White Construction Company to plaintiff's alleged cause of action, and the court being of opinion that the plea in bar should be allowed, so adjudged and dismissed the action as to defendant White Construc-

tion Company. To this judgment plaintiff and defendant Railroad Company excepted, (Exception No. 2 as to each), and appeal to Supreme Court assigning error.

Fountain, Fountain, Bridgers & Horton for Plaintiff Appellant
M. V. Barnhill, Jr., Leggett & Taylor, F. S. Spruill for ACL RR Company, Appellant.
White and Aycock for Defendant Appellee, White Construction Company.

WINBORNE, C. J.: In the light of contentions set fourth in joint brief of appellants, plaintiff and defendant Atlantic Coast Line Railroad Company, the determinative question raised on this appeal seems to be whether this Court should now reverse its decision rendered in 1944 in the case of *Wilson v. Massagee*, 224 N.C. 705, 32 S.E. 2d 335. As to this, it is interesting to note that at that time and in that case another railroad was taking opposite position to that now taken in present case. But be that as it may, while we have here a personal injury action, and there a wrongful death case,—and while here plaintiff, having brought his action under Federal Employers' Liability Act against the defendant Railroad Company, and now seeks in same action to recover of White Construction Company under common law, the principle applied in *Wilson v. Massagee, supra,* is the same, and this Court adheres to its decision there.

In that case, *supra,* this Court said: " * * * as against the original defendant, the right of plaintiff to sue for the alleged wrongful death of her intestate arose only by virtue of the statute, G.S. 28-173 * * * The right of action given under this statute, G.S. 28-173, did not exist at common law, and rests entirely on the statute * * *

"On the other hand, as against the Southern Railway Company the right of plaintiff to sue for the alleged wrongful death of her intestate, who at the time of his injury and death was employed in the interstate operations of the Railway Company, arose exclusively under and by virtue of the Federal Employers' Liability Act, 45 USCA, sections 51-59 * * *

"While before this Federal Employers' Liability Act was passed by Congress, the liability of common carriers by railroad engaged in interstate commerce for injuries to, or death of their employees while engaged in such commerce was governed by the laws of the several states, the Act took possession of the field of liability in such cases and superseded all State laws upon the subject (citing cases).

"Thus the right of plaintiff to sue the original defendants for damages for the death of her intestate arose upon an entirely separate and distinct statute from that under which her right to sue the railway company arose. The plaintiff has no right, under the Federal Employers'

Liability Act, to sue and maintain an action against the original defendants. Nor does she have any right, under the State statute giving right of action for wrongful death, to sue and maintain an action against the railway company. Hence, plaintiff did not have a common legal right of action against the original defendants and the railway company."

It is noted that the court reserved to defendant Railroad Company rights under its alleged agreement with White Construction Company "so far as future proceedings may be concerned."

For reasons stated the judgment from which appeal is taken is Affirmed.

ROBERT P. CALDWELL AND WIFE, DOROTHY G. CALDWELL, AND OTHERS ON BEHALF OF THEMSELVES AND ALL OTHER PARTIES OWNING LOTS NOS. 1 THROUGH 15, INCLUSIVE, OF THE HARRIET HANNA ESTATE LANDS AS SHOWN ON PLAT OF SAME RECORDED IN PLAT BOOK 3 AT PAGE 116 IN THE OFFICE OF THE REGISTER OF DEEDS FOR GASTON COUNTY, WHO MAY COME IN AND BE MADE PARTIES PLAINTIFF, *v.* ANNIE BELLE BRADFORD AND HER HUSBAND, WILLIAM O. BRADFORD.

(Filed 19 March, 1958)

1. Appeal and Error § 22—

A sole exception to the judgment and assignment of error that the court erred in signing the judgment and in his conclusions and findings of fact for that they were against the weight of, and not sustained by, the evidence, is a broadside assignment of error unsupported by exception, which does not present for review the competency or sufficiency of the evidence upon which the findings are based.

2. Deeds § 16b—

Where the owners of contiguous lots sign an agreement making the lots subject to residential restrictions, and thereafter, because of the change in character of the neighborhood, the owners of 85 per cent of the property subject to the restrictions execute a release from and revocation of such restrictions, a court of equity may refuse to enjoin the violation of the residential restrictions on the ground that the enforcement of the restrictions would be unjust and inequitable.

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

Plaintiffs seek to enjoin defendants from using certain of their property for business purposes in violation of an alleged valid and enforceable restrictive covenant.

A jury trial was waived; and the parties agreed "that the Court hear this matter, find the facts and render judgment thereon."

The hearing was "upon the complaint and the answer . . . , asked to be taken as and deemed to be affidavits by the respective parties, together with the exhibits attached . . ., and upon the agreed statement of facts."

The court's findings of fact include the following:

"3. That the character of the community in which the lots in controversy are located had undergone a change in that Wilkinson Boulevard has become a business area instead of a residential area.

"4. . . . that ninety (90%) per cent of the owners of more than eighty-five (85%) per cent of the property which was allegedly restricted, released, waived, and revoked said restrictions by signing that agreement (defendants' Exhibit A) . . . and that said agreement . . . constituted a cancellation by agreement of said owners.

"5. . . . that there are now and have been at all times since the plaintiffs acquired Lots Nos. 2 and 3 . . ., 3 tourist homes in the lots referred to . . .; that one tourist home has cabins adjacent thereto and used in connection therewith and that said tourist homes have been openly operated and that the plaintiffs have acquiesced in the operation of said tourist homes for years prior to the institution of this action; and that said tourist homes constitute businesses and were in violation of said restrictive covenants.

"6. That the restrictions contained in the plaintiffs' EXHIBIT A are not beneficial to the property described in the Complaint, but, on the contrary, are detrimental and injurious due to the fact that said property is much more valuable as business property than it is as residential property.

"7. . . . that said property has been designated as 'neighborhood trading' zone under the 'Zoning Ordinance for the City of Gastonia' as adopted on the 24th day of October, 1950.

"8. . . . that it would be unjust and inequitable to require the enforcement of the purported restrictions for that the lots of the defendants are valuable as business property, and that its value as business property is much greater than its value as residential property."

The agreed statement and the exhibits disclose, *inter alia*, the facts set out below, which are stated to explain the significance of the court's said findings.

Plaintiffs own Lots 2 and 3, and defendants own Lots 14 and 15, as shown on recorded map (dated August 24, 1929) of the Harriet Hanna Estate property.

The map, although referred to repeatedly, was not included in the record on appeal. Presumably, Lots 1-15, inclusive, as shown thereon, front on Highway 29 (Wilkinson Boulevard) and consist of contiguous lots numbered consecutively, e.g., Lot 1 adjoins Lot 2, Lot 2 adjoins Lot 3, etc.

"There are more than 25 numbered, and several unnumbered, lots" shown on said map; but the record does not indicate the location of the numbered lots (other than Lots 1-15, inclusive), nor does it indicate the location of the unnumbered lots.

Plaintiffs rely upon their Exhibit A, a recorded agreement dated February 28, 1939, which, *according to its recitals,* was executed by the owners of Lots 1-15, inclusive, whereby the parties agreed to bind themselves, their heirs, executors, administrators and assigns, "to restrict and they do hereby restrict" Lots 1-15, inclusive, as shown on said map, to use for residential purposes only. This agreement sets forth that it is made "in consideration of the purchase of Lot No. 13 . . . by Van A. Covington, and others, and for valuable considerations." According to recitals therein, "certain parties (had) started to erect a warehouse on Lot No. 13 . . . and the owners of the other lots . . . objected," and thereupon the owner sold Lot 13 "to S. M. Stewart, Trustee for himself, and others." In respect of Lot 13, this agreement was executed by "S. M. Stewart, Trustee." It was not executed by Van A. Covington or other person identified as a beneficial owner of Lot 13.

The recitals in said agreement of February 28, 1939, were erroneous in two respects, viz.:

1. Lot 2, one of the lots now owned by plaintiffs, was then owned by Harry F. McArver. He did not sign the agreement nor was he named therein as a party.

2. "A triangular portion of said Lots 14 and 15" was then owned by Lillian McLean Mason. She did not sign the agreement nor was she named therein as a party. The record does not reveal the location, dimensions, etc., of said "triangular portion of said Lots 14 and 15."

On February 16, 1956, when this action was commenced, the defendants "owned the residue of Lots 14 and 15"; but "the defendants, under mesne conveyances, now hold record title to that triangular portion as a valuable part of their property on Wilkinson Boulevard in the City of Gastonia."

When the case was heard, plaintiffs owned Lots 2 and 3, of which Lot 2 was never subject to the restriction or purported restriction, and defendants owned Lots 14 and 15, of which the said "triangular portion" was never subject to the restriction or purported restriction. Presumably, Lots 4-13, inclusive, lie between plaintiffs' Lot 3 and defendants' Lot 14.

Defendants' Exhibit A is a recorded agreement dated October 27, 1955, executed by "all of the . . . owners of Lots 1 through 15, with the exception of the plaintiffs herein," whereby they did "absolutely and forever, revoke, terminate, cancel and render null and void" the agreement of February 28, 1939, "insofar as said Agreement relates

to the restriction of said Lots Nos. 1 to 15, inclusive, for the use of residential purposes only," and provided that said agreement "shall be binding upon and shall inure to the benefit of the undersigned and their respective heirs, distributees, personal representatives, successors and assigns." The parties to defendants' Exhibit A set forth therein facts that impelled them to make and execute said agreement, including facts tending to show that the property had undergone a radical, substantial and fundamental change in character, that is, from residential property to business property.

The court adjudged that plaintiffs were not entitled to the injunctive relief sought, dismissed the action and taxed plaintiffs with the costs.

Plaintiffs excepted and appealed.

L. B. Hollowell and Verne E. Shive for plaintiffs, appellants.
O. A. Warren and Wade W. Mitchem for defendants, appellees.

BOBBITT, J. Plaintiffs' only exception is "to the signing and entering of the . . . Judgment"; and plaintiffs' only assignment of error is "that the Court erred in signing the judgment, . . . and in his conclusions and findings of fact upon the evidence for that they were against the weight, and not sustained by, the evidence."

To the extent plaintiffs' assignment of error purports to challenge the court's findings of fact it is not supported by exception. Moreover, it is broadside. It does not present for review the competency or sufficiency of the evidence upon which the findings of fact are based. Whether the findings of fact support the judgment and whether error of law appears on the face of the record are the only questions presented by plaintiffs' exception, appeal and assignment of error. *Weddle v. Weddle*, 246 N.C. 336, 98 S.E. 2d 302, and cases cited.

We pass, without decision, whether plaintiffs' Exhibit A was sufficient, as of February 28, 1939, to impose upon Lots 14 and 15, except said "triangular portion," a residential use restriction, enforceable by the owner of Lot 3, one of the two lots now owned by plaintiffs; for, assuming the validity of such restriction as of February 28, 1939, on legal principles discussed fully in *Shuford v. Oil Co.*, 243 N.C. 636, 91 S.E. 2d 903, and cases cited, the said findings of fact fully support the judgment.

Since all owners of Lots 1-15, inclusive, except plaintiffs, executed the agreement of October 27, 1955, defendants' Exhibit A, plaintiffs' declaration, set forth in the caption, to the effect that this action was instituted on behalf of themselves and *all other parties* owning Lots 1-15, inclusive, "who may come in and be made parties plaintiff," would seem unrealistic.

Affirmed.

THE CITY OF HENDERSONVILLE v. SALVATION ARMY, AND ANY UNKNOWN PERSONS WHO MAY HAVE AN INTEREST IN THE NOTES, SECURITIES, LIENS AND OTHER EVIDENCES OF INDEBTEDNESS MENTIONED IN THE COMPLAINT.

(Filed 19 March, 1958)

Judgments § 25: Municipal Corporations § 34: Parties § 10—

Where the proceeding foreclosing a street assessment lien upon service by publication is in all respects regular on its face, and the municipality purchases at the foreclosure, and thereafter conveys the property, motion in the cause to set aside the judgment on the ground of defective service should not be heard without the joinder of the purchasers of the land, who are the real parties in interest, since the ultimate relief must depend upon the recovery of the land from the purchasers, who would have no recourse against the city if their title should prove invalid.

APPEAL by plaintiff from *Campbell, J.*, at November Term, 1957, of HENDERSON.

Motion in the cause by the defendant to set aside judgments and proceedings in a foreclosure suit for alleged want of jurisdiction.

The suit was brought in 1940 to foreclose city paving assessment liens against a lot belonging to the defendant. The plaintiff, relying on service by publication, obtained judgment by default decreeing that the lot be sold by a commissioner. At the sale the lot was bid in by the plaintiff City of Hendersonville. Following confirmation, the commissioner conveyed the lot to the City by deed dated 20 November, 1940, duly registered in the Public Registry of Henderson County. Thereafter, by deed dated 18 September, 1943, the City sold and conveyed the lot to Charles J. McFadden and wife, Eva J. McFadden. This deed was filed for registration 4 October, 1943, and is duly recorded.

The motion in the cause was filed by the defendant in April, 1957. It was heard by the clerk after notice to the plaintiff City of Hendersonville. No notice or process of any kind was served on the McFaddens, and they have made no appearance. The clerk entered judgment denying the motion. On appeal to the Superior Court, Judge Campbell found facts as follows:

"1. That summons was issued in this cause in favor of the plaintiff, *City of Hendersonville v. Salvation Army*, on the 12th day of March 1940, and that a printed form Complaint *verified by the Mayor of Hendersonville* with his facsimile signature stamped thereon, was filed on the same date as the issuance of summons. (Italics added.)

"2. That the said complaint contained the allegation, that the defendant was a nonresident of the State of North Carolina and could not after due diligence be found within the State of North Carolina, and thereupon *the Clerk entered an Order* which was stamped with the facsimile signature of George W. Fletcher, Clerk of the Superior

Court of Henderson County, directing that service of summons be had by publication, according to law. (Italics added.)

"3. That no affidavit to obtain service by publication was filed other than contained in the complaint.

"4. That at the time of the institution of the said suit there were located in the State of North Carolina more than twenty posts, citadels and offices of The Salvation Army, and one of said citadels and offices was located in Asheville, Buncombe County, North Carolina, the adjoining County to Henderson; that upon the foregoing facts from the record in this cause the court is of the opinion that no due diligence on the part of the plaintiff or the Sheriff was exercised in an effort to serve the defendant with summons personally as required by law."

On the facts found the court concluded that the defendant was never served "with summons as contemplated and required" by law, and that the court "acquired no jurisdiction of the Salvation Army . . ." Judgment was entered reversing the clerk and decreeing that the judgments and all proceedings in the foreclosure suit be set aside. From this judgment the plaintiff appeals.

Arthur B. Shepherd and B. A. Whitmire for plaintiff, appellant.
Carl W. Greene and Guy Weaver for defendant, appellee.

JOHNSON, J. Aside from court costs, the plaintiff City of Hendersonville has no pecuniary interest in the outcome of this proceeding. The land which it purchased at the foreclosure sale has been sold and conveyed to McFadden and wife. If the title acquired by them should prove invalid, they have no recourse on the City. *Wilmington v. Merrick*, 234 N.C. 46, 65 S.E. 2d 373; *Turpin v. Jackson County*, 225 N.C. 389, 35 S.E. 2d 180. Accordingly, the McFaddens are now the real parties in interest. Yet they were neither pleaded into the case nor given notice of the proceeding below.

In this state of the record the McFaddens would not be bound by the outcome of the instant proceeding, nor would the final adjudication of this phase of the proceeding affect title to the land as against the McFaddens. However, since the defendant's single purpose and ultimate objective can be nothing short of recovery of the land from the McFaddens, we think they should be pleaded into the case and, with title to the land placed in issue, given an opportunity to defend before the instant challenge to the foreclosure proceeding is finally adjudicated. The foreclosure proceeding, including service by publication, being regular on its face (*Brown v. Doby*, 242 N.C. 462, 87 S.E. 2d 921), the McFaddens may call to their aid defenses which are not available to the plaintiff City. *Harrison v. Hargrove*, 109 N.C. 346, 13 S.E. 939; S. c., 120 N.C. 96, 26 S.E. 936; *Glisson v. Glisson*, 153 N.C. 185, 69 S.E.

55; *Rawls v. Henries,* 172 N.C. 216, 90 S.E. 140; *Livestock Co. v. Atkinson,* 189 N.C. 250, 126 S.E. 610; *Graham v. Floyd,* 214 N.C. 77, 83, 197 S.E. 873. See also *Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449; *Parker v. Trust Co.,* 235 N.C. 326, 69 S.E. 2d 841; *Doyle v. Brown,* 72 N.C. 393; McIntosh, North Carolina Practice and Procedure, Second Ed., Sec. 1715.

We have not overlooked the decisions in *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311, and *Harrison v. Hargrove, supra* (109 N.C. 346), wherein this Court did not challenge piecemeal procedure similar to that sought to be followed by the defendant in this case. However, in a case like this one we think the ends of justice require that the entire controversy, including the question of title to the land, should be adjudicated in a single trial or hearing. See *Glisson v. Glisson, supra* (153 N.C. 185). See also *White v. White,* 179 N.C. 592, 103 S.E. 216, wherein *Clark, C. J.,* speaking for the Court in a case factually similar to the instant one, said, at bottom of page 601: "We think the present owner of the property, the Protestant Episcopal Church, as devisee of Mrs. White, should have been a party defendant."

We intimate no opinion as to the merits of the ruling below. The judgment is vacated without prejudice to either side. The cause will be remanded for proceedings as herein directed. Let each party pay half the costs.

Remanded.

J. C. MOBLEY v. JESSE BROOME AND A. R. EDISON.

(Filed 19 March, 1958)

1. False Imprisonment § 3—

A cause of action for false imprisonment is barred after the expiration of one year from plaintiff's release from custody by the giving of bond, nothwithstanding that the criminal prosecution in which the arrest took place is not terminated until less than one year before the institution of the action. G.S. 1-54(3).

2. Assault and Battery § 3—

A civil action for assault and battery incident to an unlawful arrest is, apart from the false imprisonment, barred by the lapse of one year from the alleged assault.

3. Limitation of Actions § 18—

While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where the bar is properly pleaded and all the facts with reference thereto are admitted, the question of limitation becomes a matter of law.

MOBLEY *v.* BROOME.

APPEAL by plaintiff from *Huskins, J.*, at October Civil Term, 1957, of GASTON.

Civil action for false imprisonment and assault.

Upon the call of the case, the court took up for consideration the defendants' motion for judgment on the pleadings. In the course of the hearing, these facts were admitted by the parties:

"1. That on the 6th day of June 1953, the defendants, Jesse Broome and A. R. Edison, were police officers in the Town of Dallas, North Carolina, and in their capacity as such officers, arrested the plaintiff and put him in jail, charging him with being publicly drunk, with assaulting the defendants, and with resisting arrest.

"2. That the plaintiff, J. C. Mobley, made bond the following day, that is, the 7th day of June 1953; that the said J. C. Mobley remained free on bond until his trial and conviction in the Superior Court at the October 1953 Term, at which time he was again locked up for about one-half day; that at that time he again made bond and remained out on bond until the final decision of the Supreme Court on the 1st day of July 1954, following which he was completely discharged.

"3. That the plaintiff was tried in the Recorder's Court in the Town of Dallas, convicted of all three charges, and appealed to the Superior Court of Gaston County.

"4. That at the October Term of 1953 of the Superior Court of Gaston County, the plaintiff was tried and acquitted by the jury on the charge of public drunkenness, but convicted by the jury on the charge of assault on the officers (the defendants in this case) and upon the charge of resisting arrest, and was sentenced to serve a total of nine months on the roads.

"5. That the plaintiff J. C. Mobley appealed to the Supreme Court of North Carolina, and on the 1st day of July 1954, the Supreme Court reversed the conviction as the same fully appears in 240 N.C. 476.

"6. That thereafter, on November 24, 1954, the plaintiff instituted this action against the defendants for false imprisonment and assault,

. . .

"7. The plaintiff, through his counsel states in open court that he prosecutes this action on the theory that it is the (sic) action for false arrest, false imprisonment, and an assault upon him by the officers, the defendants in this case, and not upon the theory of malicious prosecution or abuse of process."

Upon the foregoing agreed facts, the court concluded that the plaintiff's cause of action is barred by the statute of limitations of one year (G. S. 1-54), duly pleaded by the defendants. Judgment was entered dismissing the action, from which the plaintiff appeals.

Ernest R. Warren and Hugh W. Johnston for plaintiff, appellant.
Mullen, Holland & Cooke for defendants, appellees.

JOHNSON, J. "False Imprisonment is the illegal restraint of one's person against his will. It generally includes an assault and battery, and always, at least, a technical assault." *Hoffman v. Hospital,* 213 N.C. 669, 670, 197 S.E. 161. "A false arrest is one means of committing a false imprisonment, . . ." 35 C. J. S., p. 502.

"The right of action for false imprisonment accrues at the beginning of the imprisonment but does not become complete until the termination thereof, the tort being regarded as divisible." 35 C. J. S., p. 577.

By the weight of authority, an action for false imprisonment will lie irrespective of the termination of the prosecution in which the imprisonment occurred. 35 C. J. S., p. 577; 25 C. J. p. 528. Cf. *Jackson v. Parks,* 216 N.C. 329, 4 S.E. 2d 873. It is otherwise as to malicious prosecution. *Taylor v. Hodge,* 229 N.C. 558, 50 S.E. 2d 307.

In the case at hand, the plaintiff's right of action for false imprisonment accrued at the time of his unlawful arrest. His cause of action was complete when he was released from custody by the giving of bond, and limitations then began running. His cause of action for false imprisonment was completely barred at the end of one year therefrom, by virtue of G. S. 1-54 (3). This is so notwithstanding the criminal prosecution in which the arrest took place continued within the limitations period. The pendency of the criminal prosecution in nowise affected or tolled the running of the statute of limitations. *Dusenbury v. Keiley,* 8 Daly 537, 58 How. Pr. 286, affirmed 85 N. Y. 383, 61 How. Pr. 408; 35 C. J. S., p. 578.

Any right of action the plaintiff may have had for assault and battery, apart from false imprisonment, in connection with the arrest on 6 June, 1953, was also barred by the one-year statute of limitations, G.S. 1-54 (3), before the commencement of the instant action on 24 November, 1954.

Ordinarily, the bar of the statute of limitations is a mixed question of law and fact. But where the bar is properly pleaded and all the facts with reference thereto are admitted the question of limitations becomes a matter of law. *Currin v. Currin,* 219 N.C. 815, 15 S.E. 2d 279; *Ewbank v. Lyman,* 170 N.C. 505, 87 S.E. 348. See also *Perry v. Southern Surety Co.,* 190 N.C. 284, 129 S.E. 721; *Butts v. Screws,* 95 N. C. 215. Here the admitted facts show that the plaintiff's cause of action was barred before the action was instituted. The ruling below so holding will be upheld.

Affirmed.

STATE v. THURMAN LEE PITT

(Filed 19 March, 1958)

1. Intoxicating Liquor § 9b—

Upon defendant's plea of not guilty to an indictment under G.S. 18-48, the State has the burden of proving beyond a reasonable doubt defendant's possession of alcoholic beverages upon which the Federal or State tax had not been paid, and that the beverages contained alcohol exceeding 14 per cent by volume.

2. Intoxicating Liquor § 9d—

Evidence that whisky belonging to defendant was found on defendant's premises, that the whisky was not ABC whisky, together with stipulations that the containers bore no stamps, is sufficient to be submitted to the jury in a prosecution under G.S. 18-48.

3. Same—

Testimony that the beverage found in defendant's possession was whisky is sufficient to show that the alcoholic content of the beverage was more than 14 per cent by volume.

4. Criminal Law § 80—

The fact that a witness testifying as to a competent admission of defendant identifies himself as a probation officer does not in itself render the testimony incompetent on the ground that the jury might infer from the position of the witness that defendant had been convicted of a criminal offense in some other case.

5. Intoxicating Liquor § 9c—

It is competent for a witness who has testified that he has had experience in examining whisky and that he could tell the difference between ABC whisky and whisky not sold in ABC stores, to testify that the whisky in question was not ABC whisky, the weight of the testimony being for the jury.

6. Intoxicating Liquor § 9f—

While the beverage must contain alcohol exceeding 14 per cent by volume in order to warrant conviction under G.S. 18-48, an instruction in one instance that the alcoholic content must be 14 per cent or more will not be held for prejudicial error when all the evidence is to the effect that the beverage contained more than 14 per cent of alcohol by volume, it being apparent that the instruction could have neither misled nor confused the jury.

7. Same—

The failure of the court to define the term "*prima facie* evidence" in charging upon the presumption arising when containers of alcoholic beverage do not bear the State or Federal stamps, *held* not prejudicial in the absence of request.

8. Criminal Law § 107—

The failure of the court to charge on a subordinate, as distinguished from a substantive, feature of the case will not be held for prejudicial

error in the absence of request for such instruction.

Johnson, J., dissents.

APPEAL by defendant from *Bundy, J.*, October, 1957 Term, EDGECOMBE Superior Court.

This criminal prosecution originated before the recorder's court and upon arraignment the defendant demanded a jury trial. Whereupon the case was transferred to the Superior Court of Edgecombe County. In the superior court the grand jury returned the following bill of indictment:

> "THE JURORS FOR THE STATE upon their oath present, That Thurman Lee Pitt, late of the County of Edgecombe, on the 31st day of August, in the year of our Lord one thousand nine hundred and fifty-seven, with force and arms, at and in the county aforesaid, unlawfully and willfully did have in his possession 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, against the form of the statute in such case made and provided and against the peace and dignity of the State. May, Solicitor."

The State called three witnesses. Two ABC officers testified they procured a search warrant for the defendant's premises, which consisted of a store on the ground floor and living quarters on the second floor. The officers saw the defendant pick up three bottles behind his building. Two pints of whisky were found at the place where the defendant had picked up the other bottles. In the living quarters of the building the officers found two one-half gallon fruit jars and one pint bottle of whisky concealed in a trap under a linoleum rug. An empty bottle and a funnel with the odor of whisky were also found in the living quarters. The officers testified the jars and the bottle containing the whisky had no stamps indicating the taxes had been paid. One of the witnesses, over objection, testified that he had been an ABC officer for more than 11 years and that he could identify ABC whisky; and that the whisky found in and about the defendant's premises was not ABC whisky.

Jimmy Miles, a witness for the State, over objection testified that he was a probation officer; that he had a conversation with the defendant about the whisky here involved and the defendant admitted it was his. The court denied the motion to strike and also denied the defendant's motion for a mistrial based on the probation officer's testimony. From a verdict of guilty and judgment thereon, the defendant appealed.

George B. Patton, Attorney General, Claude L. Love, Assistant Attorney General, for the State.

Weeks & Muse, By: T. Chandler Muse, for defendant, appellant.

HIGGINS, J. For the benefit of law enforcement officers and the profession, the bill of indictment is set out in full because of the accuracy with which it charges an offense under G. S. 18-48. The plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all essential elements of the offense: (1) Possession; (2) the Federal or State tax had not been paid, G. S. 18-48; (3) alcoholic content exceeding 14 per cent by volume, G. S. 18-60. The defendant contends the State's evidence is insuffiicent to prove any of these essentials and that a verdict of not guilty should have been directed.

1. The whisky was found concealed in a trap in the defendant's living quarters. He admitted to the officers and to the State's witness Miles that it belonged to him. Evidence of possession, therefore, was sufficient.

2. One of the officers testified he had been an ABC officer for more than 11 years, during which time he had had experience in examining whisky and that he could tell the difference in ABC whisky and whisky not sold in ABC stores. "I can smell of it and tell the difference. . . . It (the whisky introduced in evidence) is not ABC whisky." This evidence was competent. Its weight was for the jury. It is stipulated that the containers bore no stamps. This evidence was sufficient to go to the jury and to support the finding the taxes had not been paid.

3. The State offered evidence that the beverage found in the defendant's possession was whisky. It was introduced in evidence and inspected by the jury. For the reasons stated in the case of *State v. May,* decided today, this evidence is sufficient to show the alcoholic content was more than 14 per cent.

Over objection, the State's witness James E. Miles, testified: "I am a probation officer. . . . I have had occasion to talk with the defendant, on the 10th of this month. . . . He stated to me that a gallon and three pints of whisky was found at his house . . . and that it was his."

The defendant moved to strike this evidence and when the motion was denied, he moved for a mistrial and excepted to the court's refusal to grant the motion. The defendant insists the probation officer's testimony with respect to his conversation with the defendant was equivalent to telling the jury the defendant had been convicted of a criminal offense in some other case and was in fact equivalent to offering evidence of defendant's bad character. The answer is that the probation officer testified only that the defendant admitted his ownership of the whisky found in his house and introduced in evidence. The defendant had made the same admission to the officers and the admission was already in evidence without objection. The record does

not disclose the reason for the probation officer's conference with the defendant, and the evidence the witness was a probation officer served to identify him. His evidence related solely to the whisky involved in the case. That it conveyed to the jury any other meaning is entirely speculation.

The defendant assigns as error the admission of the officers' evidence that the whisky involved was "nontaxpaid"; that the testimony was the statement of a conclusion. At first the court sustained the defendant's objection and refused to admit such evidence, with the comment, "Better qualify him a little more." After the witness testified he knew the difference between whisky sold in ABC stores and whisky made illegally and not under government supervision, the officer was permitted to say, "It is not ABC whisky." See *State v. Merritt*, 231 N.C. 59, 55 S.E. 2d 804.

The defendant assigns as error the charge of the court to the effect that the State must prove the alcoholic content of the beverage to be 14 per cent or more. However, the court had read G. S. 18-60 and stated the alcoholic content must be more than 14 per cent. The other statements in the charge to the effect that the alcoholic content must be 14 per cent or more could neither have confused nor misled the jury. There was no evidence that the alcoholic content was 14 per cent and no more. The court further charged: "The law says that a container which does not bear either a revenue stamp of the Federal Government or any of the Boards of the State of North Carolina shall constitute *prima facie* evidence that the taxes have not been paid." The court did not define the term, "*prima facie* evidence." Technically, the court should have done so. However, the oversight, in the absence of a request, is not deemed sufficient to constitute reversible error. Failure to charge on a subordinate - not a substantive - feature of a trial is not reversible error in the absence of request for such instruction. *State v. Stevens*, 244 N.C. 40, 92 S.E. 2d 409; *State v. Wallace*, 203 N.C. 284, 165 S.E. 716.

The defendant's attorneys have been diligent in their efforts to protect his rights. The record, however, fails to show error of substance.

No Error.

Johnson, J. dissents.

STATE v. JOE T. MAY

(Filed 19 March, 1958)

1. Intoxicating Liquor § 9a—

Under G S. 18-2 the warrant or indictment should charge the unlawful possession or sale of intoxicating liquors; under G.S. 18-48 it should charge the unlawful possession of alcoholic beverages upon which the

taxes imposed by law have not been paid; under G.S. 18-50 it should charge the unlawful possession for sale, or sale, of illicit liquors.

2. Intoxicating Liquor § 9d—

Testimony of witnesses that 21 pint bottles containing "whisky" were found on defendant's premises is sufficient to be submitted to the jury and support a finding that the alcoholic content of the liquid was in excess of 14 per cent by volume within the purview of G.S. 18-60, since whisky means an alcoholic beverage distilled from grain with an alcoholic content of from 50 to 58 per cent by volume.

3. Intoxicating Liquor § 9c—

Testimony based on taste, sight, and smell is admissible to show alcoholic content of a liquid.

APPEAL by defendant from *Sink, E. J.*, October, 1957 Term, PITT Superior Court.

This criminal prosecution originated in the Municipal Recorder's Court of the City of Greenville upon an affidavit and warrant which charged the defendant (1) with the unlawful possession of intoxicating liquors on which the taxes levied by the Congress of the United States and by the State of North Carolina had not been paid; and (2) the unlawful possession of "said nontaxpaid liquor . . . for the purpose of sale." From a conviction and judgment, the defendant appealed to the Superior Court of Pitt County. Trial in the superior court resulted in a conviction on both counts. From a judgment imposing a fine of $250.00 on the first count and 20 months imprisonment on the second count, the defendant appealed.

George B. Patton, Attorney General, Harry W. McGalliard, Ass't. Attorney General, for the State.

Martin L. Cromartie, Jr., Weeks & Muse, By: Cameron S. Weeks and T. Chandler Muse, for defendant, appellant.

HIGGINS, J. This case comes here from a county in which ABC stores are operated. The warrant on which the defendant was tried is a part of the record and is before us. The first count charges the unlawful possession of *intoxicating liquors* on which the taxes had not been paid. The question whether the count charged an offense under G. S. 18-2 or under G. S. 18-48 was neither raised in the superior court nor here. The superior court treated the charge as having been laid under G. S. 18-48 (the ABC Act). The section makes unlawful the possession of *alcoholic beverages* on which the Federal and State taxes had not been paid. *Alcoholic beverage* is defined as any beverage containing more than 14 per cent alcohol by volume, G. S. 18-60. The sale or possession of *intoxicating liquors* is made unlawful by G. S. 18-2 (the Turlington Act). *Intoxicating liquor* is defined as any beverage

containing one-half of one per or more of alcohol by volume, G. S. 18-1. Possession for sale or sale of *illicit liquors* is made unlawful by G. S. 18-50.

To be accurate, therefore, a warrant or indictment should charge: (1) Under the Turlington Act, G. S. 18-2, the unlawful possession or sale of *intoxicating liquors*: (2) Under the ABC Act, G. S. 18-48, the unlawful possession of *alcoholic beverages* upon which the taxes imposed by the laws of the Congress of the United States or by the laws of this State had not been paid: (3) Under the ABC Act, G. S. 18-50, for the unlawful possession for sale, or sale, of *illicit liquors* or the sale of any liquors purchased from the county stores. The Turlington Act is still in force in this State, except as modified by the ABC Act. *State v. Welch,* 232 N.C. 77, 59 S.E. 2d 199; *State v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; and the two acts must be construed together. Attention is called to the wording of the different statutes and to what this Court has said about them in the cases herein cited, with the hope that hereafter warrants and bills of indictment may be drawn to fit the offenses intended to be charged. *State v. Harrelson,* 245 N.C. 604, 96 S.E. 2d 867; *State v. Poe,* 245 N.C. 402, 96 S.E. 2d 5; *S. v. Tillery,* 243 N.C. 706, 92 S.E. 2d 64; *State v. Ritchie,* 243 N.C. 182, 90 S.E. 2d 301; *State v. Hill,* 236 N.C. 704, 73 S.E. 894; *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537; *State v. Welch, supra; State v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804; *S. v. Barnhardt, supra; S. v. Peterson,* 226 N. C. 255, 37 S.E. 2d 591; *State v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629; *State v. Fields,* 201 N.C. 110, 159 S.E. 11.

The defendant's assignments of error Nos. 6 and 7 present the question of the sufficiency of the evidence to go to the jury. The particular contention is that the evidence was insufficient to warrant the jury in finding that the beverage contained more than fourteen per cent alcohol by volume.

The witnesses testified that 21 pint bottles containing whisky were found in the defendant's grocery store—19 of them concealed in a trap under the stove, and two concealed in a trap behind a table. The bottles did not bear stamps indicating the Federal or State tax had been paid on the contents. The bottles and contents were identified, introduced in evidence, and examined by the jury. The officers testified the bottles contained whisky. Was the evidence sufficient to support the finding the alcoholic content was in excess of fourteen per cent by volume?

" 'Whisky' is a generic term with a very definite, special, well-defined, and well-known meaning, common in the United States, as denoting an alcoholic beverage . . . distilled from grain, with a specific gravity corresponding approximately to an alcoholic strength of forty-four to fifty per cent by weight and fifty to fifty-eight per cent by

volume." 48 C.J.S., Intoxicating Liquors, Sec. 13, p. 145.

Testimony based on taste, sight, and smell is admissable to show alcoholic content. 78 ALR 439; *State v. Fields, supra; State v. Buck,* 191 N.C. 528, 132 S.E. 151; *State v. Sigmon,* 190 N.C. 684, 130 S.E. 854. In addition to the officers' evidence that the beverage was whisky, the jury made its own inspection.

The court charged the jury: "The defendant contends that this evidence should not satisfy you beyond a reasonable doubt that the alcoholic or nontaxpaid beverage within the contemplation of the statute, has 14 per cent alcoholic content by volume. . . . The State . . . contends to the contrary, that the samples that have been offered and that you have been permitted to smell, see and examine, . . . should satisfy you that it (alcoholic content) is greatly in excess of 14 per cent . . . Whether it (alcoholic content) be found by a chemist or by some other technical process is not necessarily material. It is material that you be satisfied beyond a reasonable doubt that this was alcoholic beverage as provided by the statute. . . .

"If you feel satisfied as to either or both charges beyond a reasonable doubt, you would render a verdict of guilty and if you have a reasonable doubt as to either or both charges, as to such charge or charges, . . . it would be your duty to say not guilty."

There may be some very technical objection to the language of the charge, but the evidence and issues were simple and there is nothing to indicate the jury was misled or confused.

On the second count (unlawful possession for sale), the court placed upon the State the burden of proving the intoxicating liquors contained 14 per cent of alcohol by volume. The statute placed upon the State only the burden of proving the defendant unlawfully had illicit liquors in his possession for sale. The charge certainly was as favorable as the defendant had any right to expect. The evidence was ample to go to the jury and to sustain the verdict and judgment.

No Error.

STATE v. ARTHUR JACKSON ROACH

(Filed 19 March, 1958)

1. Criminal Law § 97—

Argument of the solicitor, in contradiction of the testimony of defendant's witnesses as to his good character, that the solicitor could have gotten at least one hundred people to come and testify as to defendant's bad character, is improper as permitting the solicitor to impeach defendant's credibility and defendant's substantive evidence of good character by witnesses the solicitor could have called but did not.

2. Criminal Law § 163—

When a grossly prejudicial argument is the subject of timely objection, even in a prosecution for a misdemeanor, it should appear with reasonable certainty that its harmful effect has been removed, and in this case mere instruction of the court for the jury not to consider the improper argument *is held* not to render it harmless in view of its grossly improper character and the subsequent argument of the solicitor.

APPEAL by defendant from *Burgwyn, E. J.*, September, 1957 Criminal Term, GASTON Superior Court.

Criminal prosecution upon a bill of indictment charging the defendant with the unlawful operation of a motor vehicle upon a public highway. The jury returned a verdict of guilty. From the judgment that the defendant pay a fine of $100.00 and the costs, he appealed.

George B. Patton, Attorney General, Claude L. Love, Assistant Attorney General, for the State.

Gaston, Smith and Gaston, By: Harley B. Gaston, for defendant, appellant.

HIGGINS, J. The defendant was arrested by a highway patrolman about dark on April 28, 1957. The arresting officer followed the defendant on Highway No. 29 for a distance of three-tenths-mile, saw him cross over the center line in the four-lane highway, pull back to the extreme right lane, then cross to a sandwich shop on the left side of the highway. After examining the defendant's driver's license, the patrolman said he smelled alcohol on the defendant's breath. "He said he had not been drinking, but he was a diabetic; that the doctor would not allow him to drink. . . . I called Patrolman Burris by radio, and when he came, we both talked to Mr. Roach and told him we were arresting him for driving under the influence. My opinion is that he was under the influence. . . . The reason that I called Mr. Burris was that I figured I needed more than just myself to take it to court since he had beaten an officer before (acquitted) and two officers were better than one. . . . I found no intoxicants on him." Patrolman Burris corroborated the arresting officer to the extent that at the time he arrived he smelled alcohol on the defendant's breath and, "my opinion is that he was definitely under the influence."

The defendant testified he had just left Ranlo about ten minutes before his arrest and that he had not been drinking. Mr. Moton testified he saw the defendant a few minutes (about 10) before his arrest; that he did not smell any liquor on the defendant's breath. "He was as normal as he is now. My opinion is that he was not under the influence of alcohol." Mr. Wise was with Mr. Moton and gave evidence to the same effect. A number of witnesses testified to the defendant's good character.

During the argument to the jury the solicitor made this statement: "They talk about me not bringing in any witnesses to testify about the defendant's bad character. I tell you I could get a number of people, at least one hundred, to come in here and testify to his bad character."

The presiding judge stated that he had not been listening to the solicitor's argument. However, when the defendant informed the court of the above argument, "the court instructed the jury not to consider it."

Concluding his argument, the solicitor said: "A man I say to you isn't worthy of belief in this case. I say to you that—sincerely that I say he's not worthy of belief in this case; and I'm glad he's sitting here in this courtroom and can hear me say it, because I'm saying it, and I mean it when I say it."

The defendant did not object to the last remarks at the time they were made and the court did not caution the jury with respect to them. Apparently the exception was entered after verdict.

The evidence with respect to the defendant's intoxication was sharply conflicting. Two officers testified they smelled alcohol on the defendant's breath and in their opinion he was "under the influence." The defendant protested his innocence at the time of his arrest and testified thereto on the trial. Two men saw him three miles from the place of his arrest and ten minutes before that event. Both testified they talked with him. They did not detect alcohol on his breath and he was as normal as he is now. Five men testified to his good character—none to the contrary. In the argument the solicitor, who is authorized by the Constitution to speak for the people of the State, told the jury: "I tell you I could get a number of people, at least one hundred, to come in here and testify to his bad character."

The solicitor had the right to argue the defendant's evidence was not worthy of belief, but the argument should have been based on the contradicting evidence of the officers or on the defendant's demeanor upon the stand. It was improper for the solicitor to base the argument on the one hundred witnesses whom he might have called, but did not call.

So manifestly improper was the solicitor's statement it is doubtful whether the harmful effect was removed by direction not to consider it. The further arguments of the solicitor, though unobjected to until after verdict, serve to rekindle any flame left unextinguished by the court's attempt at correction. To permit the solicitor to impeach the defendant's good character by a hundred witnesses he could have called not only weakened the defendant's testimony as a witness, but robbed him of substantive evidence of his innocence. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254; *State v. Minton*, 234 N.C. 716, 68 S.E. 2d

844. When a grossly prejudicial argument is the subject of timely objection, even in a misdemeanor, it should appear with reasonable certainty its harmful effect has been removed, otherwise the victim should be permitted to go before another jury. The line of demarcation between legitimate and illegitimate debate has been discussed in the following cases and many others therein cited: *State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656; *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542.

For reasons here indicated, the defendant is awarded a New Trial.

IN THE MATTER OF THE FORECLOSURE OF JOHN G. HARDIN, JR.
JOHN G. HARDIN, JR., APPELLANT
JAMES O. MOORE, TRUSTEE AND MARSH LAND COMPANY, APPELLEES

(Filed 19 March, 1958)

1. Appeal and Error §49—

In the absence of an exception to any finding of fact, the facts set forth in the court's findings must be accepted as established.

2. Appeal and Error § 19—

A statement that a certain procedural step was taken, appearing only in the assignment of error and not supported by the record, cannot be advanced as the basis for a legal contention.

3. Mortgages § 33b—

The discretionary power of the clerk to refuse to accept an upset bid unless the bidder also gave compliance bond, G.S. 45-21.27(b) is not properly presented by allegations setting up equitable grounds for enjoining foreclosure or confirmation, G.S. 45-21.34. Further, whether an appeal would lie from such refusal of the clerk, *quaere?*

APPEAL by John G. Hardin, Jr., from *Dan K. Moore, J.,* August 12, 1957, Civil Term of MECKLENBURG.

This appeal is from a judgment dismissing "the purported or attempted appeals" of John G. Hardin, Jr., from actions of the clerk relating to the foreclosure of a deed of trust.

At a foreclosure sale on March 18, 1957, by James O. Moore, Trustee, under power of sale in deed of trust executed by John G. Hardin, Jr., and wife, Hilda A. Hardin, which secured an indebtedness to Marsh Land Company, the Administrator of Veterans Affairs became the last and highest bidder at $8,232.31. The trustee, in his report thereof, requested the clerk to "require compliance bond in addition to upset bid deposit in the event of an upset bid."

On March 25, 1957, John G. Hardin, Jr., the mortgagor, by "Geo. Fitzgerald, Atty.," filed an upset bid of $8,693.93 and deposited $461.62 with the clerk in compliance with GS 45-21.27(a). The clerk, without requiring a bond conditioned on compliance with said upset bid, ordered a resale.

At the resale on May 6, 1957, the $8,693.93 bid of John G. Hardin, Jr., was the last and highest bid; and the trustee so reported.

On May 13, 1957, Harry F. Luecke, by "Geo. Fitzgerald, Atty.," filed an upset bid of $9,178.63 and deposited $484.70 with the clerk in compliance with GS 45-21.27(a). The clerk, without requiring a bond conditioned on compliance with said upset bid, ordered a second resale. (On May 15, 1957, the clerk refunded to John G. Hardin, Jr., the $461.62 deposited on March 25, 1957. The receipt therefor was signed in behalf of John G. Hardin, Jr., by "Geo. Fitzgerald, Atty.")

At the second resale, on June 17, 1957, the $9,178.63 bid of Harry F. Luecke was the last and highest bid; and the trustee so reported.

On June 25, 1957, John G. Hardin, Jr., attempted to file an upset bid and to make the deposit required by GS 45-21.27(a); but the clerk, under GS 45-21.27(b), required that he give bond conditioned on his compliance with his attempted upset bid. John G. Hardin, Jr., refused to give such compliance bond; and, on account of such refusal, the clerk refused to accept the attempted upset bid and deposit.

Thereupon, on June 25, 1957, George L. Fitzgerald, as attorney for John G. Hardin, Jr., filed *with the clerk* a notice of appeal from the clerk's said refusal to accept his attempted upset bid and deposit. In substance, this notice set forth that the clerk's "judgment" was "contrary to law and evidence" in that (1) the amount of the Luecke bid, $9,178.63, was "totally inadequate and . . . far less than the reasonable market value of said property"; (2) if all the money he (the mortgagor) had paid had been properly applied by Marsh Land Company no default would have occurred; and (3) certain usurious charges had been made by Marsh Land Company.

No upset bid (other than Hardin's said attempted upset bid) was made; and on July 2, 1957, the clerk ordered the trustee to make a deed to Harry F. Luecke, his heirs or assigns, upon payment of his $9,178.63 bid.

On July 16, 1957, George L. Fitzgerald and Harrell & Fitzgerald, as attorneys for John G. Hardin, Jr., filed *with the clerk* a notice of appeal from said order of July 2, 1957, repeating therein the grounds stated in said notice of June 25, 1957, and setting forth in addition that the clerk's order of July 2, 1957, was "premature and illegal" because "an appeal is now pending to the Superior Court from *a prior order* of the Clerk . . . dated June 25, 1957." (Italics added)

On August 12, 1957, James O. Moore, Trustee, and Marsh Land Company, through counsel, under special appearance, moved that "the attempted or purported notices of appeal in this proceedings by John G. Hardin, Jr., be quashed, vacated or set aside," on the ground that "the purported notices of appeals, and each of them, . . . were not . . . given or served on James O. Moore, Trustee, and Marsh Land Company, or either of them within ten (10) days from the date of the filing of the purported notices of appeals, and that notices were not waived by the said James O. Moore, Trustee, or Marsh Land Company."

The said motion was heard by Judge Moore at term time. Counsel for appellant and appellees were present and participated in the hearing.

The court, "finding as facts from the record in this proceedings that the notices of appeal by the Appellant dated the 25th day of June 1957 and the 16th day of July 1957, . . . were not, and neither of them, was served on the Appellees or either of them, as provided in and required by Section 1-272 of the General Statutes of North Carolina, and that service of such notices has not been waived by either of the Appellees," allowed the motion and dismissed "the purported or attempted appeals of the Appellant, John G. Hardin, Jr., dated the 25th day of June 1957 and the 16th day of July 1957, respectively."

John G. Hardin, Jr., excepted and appealed.

Harrill & Fitzgerald for appellant.

Helms, Mulliss, McMillan & Johnston and Wm. H. Bobbitt, Jr., for appellees.

PER CURIAM. Appellant's sole assignment of error is that Judge Moore should not have signed said judgment because "a copy of each appeal was mailed to R. Paul Jamison, attorney for respondents, and receipt of same was acknowledged in open court."

There is no exception to any of the court's findings of fact. *Weddle v. Weddle*, 246 N.C. 336, 98 S.E. 2d 302. Hence, we must accept as established the facts set forth in the court's findings. In re *Estate of Cogdill*, 246 N.C. 602, 99 S.E. 2d 785.

The statement, quoted above, appears only in appellant's assignment of error. Nothing in the record supports it. Thus, there is no basis for consideration of appellant's contention that, under GS 1-585 and 1-586, the mailing of notice of appeal to counsel and his receipt thereof is sufficient to constitute compliance with GS 1-272.

It is noteworthy that appellant, in his attempted or purported appeals from the clerk, did not assert as grounds therefor that the bond required exceeded the limitation specified in GS 45-21.27(b), or that the clerk did not have authority to require such bond, or that the

clerk abused his discretion in making the requirement. The grounds asserted, if established, would seem to bear upon whether appellant, had he brought an action under GS 45-21.34, would be entitled to equitable remedies referred to therein.

It is noted that the clerk made no formal order on June 25, 1957. He simply refused to accept or recognize an upset bid unless the bidder gave a compliance bond required as authorized by GS 45-21.27(b) in addition to the cash deposit required by GS 45-21.27(a). *Quaere:* Does an appeal lie from such refusal? It is further noted that the clerk's order, directing the trustee to execute and deliver a deed to Luecke, is dated July 2, 1957, and that the said purported notice of appeal therefrom is dated July 16, 1957, and was filed *with the clerk* on July 16, 1957.

Affirmed.

MARY HUNT v. IVAN BRYANT DAVIS, POLLY McCULLEN DAVIS AND THE WILSON DAILY TIMES, INC., A NORTH CAROLINA CORPORATION.

(Filed 19 March, 1958)

1. Appeal and Error § 19—

The rules governing appellate procedure are mandatory, and when appellant fails to comply, the appeal may be dismissed.

2. Same—

An assignment of error must show what question is intended to be presented without the necessity of paging through the record to find the asserted error, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient.

3. Appeal and Error § 45—

Where it is determined that the asserted agent was not negligent, nonsuit as to the party sought to be held liable upon the doctrine of *respondeat superior* cannot be harmful.

APPEAL by plaintiff from BUNDY, J., December 1957 Civil Term of WILSON.

Plaintiff seeks compensation for injuries sustained when struck by an automobile driven by defendant Ivan Davis. She alleges: The automobile was owned jointly by the individual defendants, used for family purposes, and was, at the time complained of, engaged in the joint business of the defendants Davis; Ivan Davis, an employee of the corporate defendant, was at the moment of her injury engaged

in the business of his employer; her injuries were due to the negligent manner in which he operated the automobile.

Answers were filed by the individual defendants and by the corporate defendant. Each denied any negligence on the part of Ivan Davis, the driver. Each pleaded contributory negligence on the part of plaintiff. Each denied that Ivan Davis was an agent, servant, or employee of the corporate defendant.

When plaintiff rested, defendants moved for nonsuit. The motion was allowed as to the corporate defendant but denied as to the individual defendants. An exception was properly noted to the allowance of the motion to nonsuit as to the corporate defendant. Individual defendants then offered evidence. At the conclusion of all of the evidence they renewed their motion to nonsuit. The motion was overruled, and issues as to the negligence of the defendant Ivan Davis, liability of Polly Davis, contributory negligence, and damages were submitted to the jury. The first issue reading: "Was the plaintiff injured by the negligence of the defendant Ivan Bryan Davis, as alleged in the Complaint?" was answered in the negative. The other issues were not answered. Judgment was entered dismissing the action as upon nonsuit as to the corporate defendant and in conformity with the verdict as to the individual defendants. Plaintiff excepted and appealed.

George H. Windsor for plaintiff appellant.

Gardner, Connor & Lee for defendants Ivan Bryan Davis and Polly McCullen Davis, appellees.

Taylor, Allen & Warren, attorneys for defendant The Wilson Daily Times, Inc., appellee.

PER CURIAM. Defendants Davis moved to dismiss the appeal for failure to comply with our rules prescribing the method of preserving exceptions and presenting assignments of error.

Plaintiff assigns error in this manner: "ASSIGNMENT #1: EXceptions 1 (R p 18), 2 (R p 23), 3 (R pp 23-24), 4 (R p 25), 5, 6 (R pp 26-27), 7, 8, 9 (R p 27).

"Errors relate to the undue and improper limitations and restrictions imposed by the Court on plaintiff in examination of witnesses and exclusion of offered evidence going to the negligence of the defendant Ivan Davis."

"ASSIGNMENT # 6, EXCEPTIONS 26 (R p 58), 27, 28 (R pp 59-60), 29, 30 (R p 61), 31 (R p 62), 32, 33 (R p 63), 34, 35 (R pp 64-65), 36, 37 (R pp 65-66), 38 (R p 66), 39, 40 (R pp 67-68).

"Errors relate to the charge of the Court pertaining to Issue # 1. The Court did not properly explain the law, burden of proof. The

Court did not explain the applicability of the law of negligence to the evidence before the Court, as required by GS 1-180."

Rules covering appellate procedure in this Court appear as Appendix 1 in Volume 4A of the General Statutes. They are also published in 221 N.C. Reports, p. 544, et seq. the rules are mandatory, and when appellant fails to comply, he may anticipate a dismissal. *Tillis v. Cotton Mills,* 244 N.C. 587, 94 S.E. 2d 600; *Baker v. Clayton,* 202 N.C. 741, 164 S.E. 233; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Calvert v. Carstarphen,* 133 N.C. 25.

Under the rules, asserted error must be based on an appropriate exception, and the errors relied on must be properly assigned. See Rules 19 and 21. We have repeatedly said that these rules require the assignment of error to show what question is intended to be presented for consideration without the necessity of paging through the record to find the asserted error. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *Armstrong v. Howard,* 244 N.C. 598, 94 S.E. 2d 594; *Allen v. Allen,* 244 N.C. 446, 94 S.E. 2d 325; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Seed Co. v. Cochran & Co.,* 203 N.C. 844, 165 S.E. 354; *Greene v. Dishman,* 202 N.C. 811, 164 S.E. 342. These cases demonstrate the inadequacy of plaintiff's assignments of error as they relate to her appeal from that portion of the judgment denying plaintiff's right to recover from the individual defendants. The motion to dismiss is allowed.

Plaintiff's exception and assignment of error as it relates to the judgment of nonsuit is in proper form and complies with our rules. It is, however, not necessary to consider an exception and assignment of error when it is apparent that the error, if any, is harmless. Liability of the corporate defendant is predicated on the doctrine of *respondeat superior.* It has been determined that the asserted agent was not negligent, and plaintiff is bound by that adjudication by the dismissal of her appeal. Since liability of the master or employer can only rest on a finding that the agent or employee was negligent, no harm can come to plaintiff by adjudging the evidence insufficient to establish the asserted agency.

As to the individual defendants the appeal is
Dismissed.

As to the corporate defendant the judgment is
Affirmed.

IN THE MATTER OF THE WILL OF LUKIE L. TENNER, DECEASED.

(Filed 19 March, 1958)

Wills § 13—

In those instances not coming within the exceptions enumerated in the statute, the marriage of the testator after the execution of the will revokes it *in toto* and not only to the extent necessary to permit the widow to share in the estate. G.S. 31-5.3.

APPEAL by propounders from *Pless, J.*, November 1957, Schedule A, Civil Term of MECKLENBURG.

Caveat by the widow to the will of her deceased husband, Lukie L. Tenner.

All the evidence shows these facts: On 3 March 1951 Lukie L. Tenner duly executed his will devising and bequeathing in fee simple all his property to his two brothers, Sol Tenner and Albert Tenner, with a provision that if either be dead at the death of the testator his share shall go to the survivor, and appointing them, or the survivor, executors of his will. On 25 November 1951 Lukie L. Tenner married Willie Mae Irby Tenner. Lukie L. Tenner died 27 July 1957. On 28 August 1957 the executors named in the will tendered the will of Lukie L. Tenner duly executed on 3 March 1951 for probate, and it was duly admitted to probate in common form. On 12 September 1957 Willie Mae Irby Tenner filed a caveat to her husband's will, alleging that, pursuant to G. S. 31-5.3, it was revoked by her husband's subsequent marriage to her. No children were born of the marriage. Lukie L. Tenner left surviving at his death his two brothers named in his will, two sisters, and the issue of a deceased sister.

The widow having given bond, pursuant to the provisions of G. S. 31-33, the clerk of the Superior Court transferred the proceeding to the Superior Court for trial and issued citations to the interested parties.

Three issues were submitted to the jury. In answer to these issues the jury found that the paper writing offered for probate as the last will and testament of Lukie L. Tenner, deceased, was duly executed according to law; that subsequent to the execution of his will Lukie L. Tenner married Willie Mae Irby Tenner; and that the paper writing offered for probate, and each part thereof, is not the last will and testament of Lukie L. Tenner.

From judgment in accordance with the verdict, the propounders appeal.

Weinstein and Muilenburg for Propounders, Appellants.
Ralph V. Kidd and Archibald C. Rufty for Caveator, Appellee.

PER CURIAM. G.S. 31-5.3 provides that "a will is revoked by the subsequent marriage of the maker, except as follows. . . ." The two

exceptions set forth in the statute do not apply in the instant proceeding.

The contention of the propounders is that when a man marries a woman subsequent to making his will, that G. S. 31-5.3 does not revoke the will in its entirety, but revokes it only to the extent necessary to permit the wife to share in his estate as if her husband had died intestate, and otherwise his will is to remain in full force and effect. Pursuant to their theory of the law, they assign as errors the failure of the court to submit an issue to the jury as to such partial revocation of the will; the failure of the court to instruct the jury that "under the evidence in this case the entire will should not be revoked but only so much thereof should be revoked as may be necessary to allow the caveator to share in said estate to the extent provided by law if the testator had died intestate, otherwise the provisions of the will shall remain in full force and effect as written and attested to"; the court's submission to the jury of the third issue "Is said paper writing offered for probate, and each part thereof, the last will and testament of Lukie L. Tenner, deceased?"; and the court's instruction to the jury on the third issue to the effect that if the jury should find from the evidence that Lukie L. Tenner married Willie Mae Irby Tenner subsequent to the execution of his will, the jury should answer the third issue No.

The object of G. S. 31-5.3 is set out as plainly as language can do it. The statute provides that a person's subsequent marriage *ipso facto*, with certain exceptions, revokes all prior wills made by such person. The statute does not provide for any partial revocation, as contended by the propounders. *Sinclair v. Travis*, 231 N. C. 345, 353, 57 S. E. 2d 394, 400; *Potter v. Clark*, 229 N. C. 350, 49 S. E. 2d 636; *In re Will of Coffield*, 216 N. C. 285, 4 S. E. 2d 870; *In re Will of Watson*, 213 N.C. 309, 195 S.E. 772; *Moore v. Moore*, 198 N.C. 510, 152 S.E. 391; *In re Will of Bradford*, 183 N. C. 4, 110 S. E. 586; *Means v. Ury*, 141 N. C. 248, 53 S. E. 850. See *Sawyer v. Sawyer*, 52 N. C. 134; *Winslow v. Copeland*, 44 N. C. 17.

All of the propounders' assignments of error are overruled. In the trial below we find

No Error.

JOHN H. FORTNER v. MEDFORD DEITZ

(Filed 19 March, 1958)

APPEAL by plaintiff from *Huskins, J.*, at October-November 1957 term of SWAIN.

Civil action to recover for personal injury sustained by plaintiff as

result of alleged negligence of defendant.

Plaintiff testified in substance that he entered into an oral contract with defendant by which defendant was to level off and build service station site for plaintiff and his brother,—defendant to furnish bulldozer for which plaintiff was to pay defendant $2.00 a truck load of dirt. One McMahan was sent by defendant to do the work. On 7 May, 1956, McMahan had ridden the bulldozer about an hour with plaintiff and showed him how to operate it. And next morning plaintiff was out on the job before anyone else. Later McMahan came and told plaintiff to get up on the bulldozer, and he did so. He couldn't start it. One Cagle, a worker there, started it for him and, though he had no experience in doing so, plaintiff began to operate it back and forth leveling dirt, and that bank gave way and the dozer started over; but the brakes would not stop it. Plaintiff also testified that he knew that the bulldozer is a dangerous instrument in the hands of somebody who doesn't know how to operate it; that he was inexperienced in operating it; that he did not know how to operate it; that even so, he got up on it and tried to operate it; and that he doesn't remember just what did happen.

From judgment as of nonsuit entered at close of his evidence, plaintiff appeals to Supreme Court and assigns error.

T. M. Jenkins, R. B. Morphew for Plaintiff Appellant.
Williams and Williams for Defendant Appellee

Per Curiam. The only assignment of error presented for decision on this appeal is based upon exception to entry of judgment as of nonsuit.

Taking the evidence offered upon trial below, as shown in the record of case on appeal, in the light most favorable to plaintiff, as is done in testing its sufficiency to withstand motion for judgment as of nonsuit, there is lack of evidence from which actionable negligence is shown, or may be inferred. Indeed it is speculative as to what caused the accident.

But if it should be conceded that there is evidence of negligence on the part of defendant, the evidence clearly establishes, as a matter of law, contributory negligence of plaintiff. No new principle of law is involved. Hence the judgment as of nonsuit is

Affirmed.

D. E. WILSON v. JOSEPH BROWN KENNEDY

AND

MRS. D. E. WILSON v. JOSEPH BROWN KENNEDY AND D. E. WILSON, ADDITIONAL DEFENDANT.

(Filed 26 March, 1958)

1. Automobiles § 48—

On defendant driver's claim against plaintiff's driver for contribution in the event of recovery by plaintiff passenger, defendant is entitled to have the evidence tending to support the claim reviewed in the light most favorable to him in passing on motion to nonsuit, and nonsuit should not be allowed thereon if defendant's evidence, when so viewed, supports the allegations for contribution.

2. Automobiles § 17—

G.S. 20-158(c) deals only with red and green lights at intersections outside of municipal corporate limits and is inapplicable to a traffic light within a municipality having red, green and amber lights.

3. Evidence § 2—

The courts will not take judicial notice of municipal ordinances.

4. Automobiles § 17—

Where the municipal ordinance governing traffic control signals having red, green and amber lights is not introduced in evidence, the different signals will be given that interpretation which a reasonably prudent operator of a motor vehicle should and would understand and apply; when a motorist is faced with the red traffic light, he is required to stop, when faced by the amber light, he is warned that red is about to appear and that it is hazardous to enter, the amber light being for the purpose of affording a motorist who has entered on the green light an opportunity to clear the intersection before the cross traffic is invited to enter.

5. Same—

A green traffic signal does not guarantee safe passage through an intersection, but the driver entering an intersection while faced with the green light must nevertheless exercise the care of a reasonably prudent person under similar conditions.

6. Automobiles §§ 42g, 48— Evidence of plaintiff's negligence in entering intersection controlled by traffic lights held to take issue of contributory negligence to jury and present right to contribution.

Plaintiff driver and plaintiff passenger were proceeding south on a two-lane street into an intersection controlled by traffic signals having red, green and amber lights. Defendant's car entered the intersection from plaintiffs' right from the southernmost lane of the six-lane intersecting street. In plaintiff passenger's action against defendant it was established that her injuries resulted from defendant's negligence. Computations from testimony as to the speed at which plaintiff's car was being driven and the distances involved permitted inferences that plaintiff entered the intersection after the amber light had appeared or that he entered the intersection even after the light had turned red. *Held:* The evidence was sufficient to be submitted to the jury on the question of plaintiff driver's negligence, which, if found in the affirmative, would constitute contributory negligence barring his recovery against defendant, and would entitle defendant to contribution in the payment of the claim of plaintiff passenger, and judgment of nonsuit on the claim for contribution is reversed, and a new trial is awarded in plaintiff driver's action for failure to submit the issue of contributory negligence.

APPEAL by defendant Kennedy from *Froneberger, J.*, December 1957 Civil Term, GASTON.

This litigation grows out of the collision between a Ford automobile owned and operated by plaintiff D. E. Wilson and a Nash automobile owned and operated by defendant Kennedy. The collision occurred about 3:00 p.m., Sunday, 22 January 1956, at the intersection of Franklin and Linwood Avenues in Gastonia.

Franklin Avenue. (U.S. Highway 29) runs east and west. It is sixty feet wide and is divided into six lanes for vehicular travel, three lanes for eastbound traffic and three for westbound traffic. It is intersected by Linwood Avenue, which is thirty-six feet wide. Linwood Avenue runs about fifteen degrees east of north; hence the intersection is not a right angle.

East and west traffic on Franklin Avenue is separated by a double yellow line painted on the highway. On the west side of the intersection this yellow line terminates in a concrete "island" about thirty feet long, the eastern end of which is twenty-two feet west of the projection of the western line of Linwood Avenue at the intersection. Just east of the concrete island is a crosswalk indicated by lines painted on the highway.

A line is painted on the highway to indicate the inside or northernmost lane for eastbound traffic. At and prior to the collision this lane was occupied by a large truck. A Chevrolet station wagon owned by P. E. Zachary occupied the middle eastbound lane. Defendant Kennedy, headed east, was using the south or outside lane of Franklin Avenue.

Linwood Avenue north of the intersection is a two-way highway, one for southbound traffic, the other for northbound traffic.

Movement of traffic across the intersection is regulated by traffic lights. There are four of these lights, so placed as to be readily observable to motorists traveling in each direction. The lights are arranged on a 50-second cycle, i.e., a red interval, then a green interval, then an amber interval, then back to red. Green-amber shows half of the 50-second cycle, and amber takes 2½ seconds of that interval. When green or amber is showing, red shows to opposing traffic at the intersection.

It is alleged that the traffic lights were installed and maintained in conformity with an ordinance of Gastonia. No evidence was offered to support that allegation. An employee of the electric department of Gastonia testified that he supervised the lights, and to the time intervals.

Plaintiff Wilson was traveling south on Linwood Avenue. He was driving. His wife was sitting on the front seat with him. His brother and sister-in-law were in the back seat. The Wilson car was traveling

at a speed estimated by plaintiff and his witnesses at 15, 20, or 25 m.p.h. The intersection is a 35-mile speed zone. The collision occurred in the southwestern quadrant of the intersection. The Ford was then in the southbound lane of Linwood Avenue and in front of the two southernmost eastbound lanes of traffic on Franklin Avenue.

Wilson, alleging that the collision was due to the negligent operation of Kennedy's car, seeks compensation for personal injuries and property damage. Mrs. Wilson, his wife, and a passenger in the Ford, seeks compensation for personal injuries. They allege that defendant was operating his vehicle at an excessive rate of speed, in excess of 35 m.p.h., that he failed to maintain a proper lookout, that they, the plaintiffs, entered the intersection with a green light and were practically through the intersection when Kennedy, disregarding the traffic lights, entered the intersection and ran into them. Kennedy denied all allegations of negligence. He asserted the collision was due solely to the negligence of the operator of the Ford in failing to keep a proper lookout, operating at an unlawful rate of speed, and in total disregard of traffic lights, the Ford having entered the intersection when the traffic light warned its operator not to do so. Kennedy asserted that Wilson by his negligence contributed to the injury sustained by Mrs. Wilson, and that he, Kennedy, was entitled to contribution. He also alleged that the collision was caused solely by the negligence of Wilson, operator of the Ford, and asserted a claim against him for damages to the Nash. On motion of Kennedy, Wilson was made an additional defendant. Wilson answered Kennedy's pleadings and denied any negligence on his part. He reasserted the allegations of negligence on Kennedy's part as alleged in his (Wilson's) suit against Kennedy, and by way of counterclaim asserted his right to recover his damages as asserted in his original suit. The causes were consolidated for trial. At the conclusion of defendant's evidence the court allowed the motion of additional defendant Wilson to nonsuit Kennedy's claim for contribution and Kennedy's counterclaim. He did not submit an issue of contributory negligence by Wilson, but submitted the cases to the jury on issues relating only to the negligence of defendant Kennedy and damages. The jury answered the issues as to defendant's negligence in the affirmative and assessed damages in each case. Judgments were entered for each plaintiff on the verdicts. Kennedy's counterclaim and cross-action were dismissed by nonsuits in the respective judgments. Defendant Kennedy excepted and appealed.

Ernest R. Warren and Helms, Mulliss, McMillan & Johnston for D. E. Wilson, appellee.

Carpenter & Webb for defendant Joseph Brown Kennedy, appellant.

RODMAN, J. Defendant's exceptions do not present any question which involves the right of the plaintiff Mrs. Wilson to compensation

in accord with the verdict in her case. His exceptions present only the asserted negligence of D. E. Wilson, operator of the Ford, (a) as a basis for contribution for payment of the judgment obtained by Mrs. Wilson, (b) as a bar to recovery by Wilson, the operator, of his claim for damages, (c) as the basis for liability by Wilson to defendant for damages to Kennedy's car as asserted in the counterclaim.

When the court allowed the motion of the additional defendant, Wilson, to nonsuit Kennedy's claim for contribution to compensate Mrs. Wilson for the injuries she sustained in the collision, it determined and adjudged that Wilson, the operator of the Ford, did not negligently contribute to the collision and the injuries sustained by Mrs. Wilson. If Wilson was not negligent in producing or contributing to the collision, there could, of course, be no negligence which would defeat Wilson's claim for damages; if, however, Wilson is chargeable with negligence proximately contributing to the collision, it bars Wilson's right to recover from Kennedy and entitles Kennedy to contribution for payment to Mrs. Wilson.

On Kennedy's claim for contribution he was, as to Wilson, a plaintiff, *Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773, and as such is entitled to have the evidence in support of his claim viewed in the light accorded plaintiffs in passing on motions to nonsuit. If the evidence, when viewed in the light most favorable to him, supports his allegations, its weight and credibility was for the jury.

Since Linwood Avenue crosses Franklin Avenue at an oblique angle, the distance through the intersection is somewhat in excess of the width of Franklin Avenue. There is evidence that the right front of the Ford and the left front of the Nash were damaged in the collision. This fact and the other testimony as to the location of the vehicles at the moment of impact would tend to indicate that the Ford had traveled perhaps as much as 50 or 55 feet across the intersection at the moment of impact. At a speed of 15 m.p.h., as fixed by the operator of the Ford, it was traveling 22 feet per second; at a speed of 25 m.p.h., a permissible inference from other testimony, it was traveling approximately 37 feet per second. At either speed he could traverse the intersection in less than four seconds.

Kennedy testified that he saw the light on his street turn green before he reached the intersection, and that he proceeded into the intersection on a green light. To his left, traveling in an easterly direction was the Zachary station wagon and the truck. They had reached the intersection ahead of him and had stopped at the crosswalk for a red light; but there is evidence to the effect that they had started to move eastwardly before Kennedy reached the intersection. Zachary, operator of the Chevrolet station wagon occupying the center lane for eastbound traffic, testified:

"When the Nash entered into the intersection, the traffic signal was green. It had been green for some period of time prior to the Nash entering the intersection. It had been green at last four seconds, and possibly as much as six or seven seconds."

Mrs. Zachary, an occupant of the station wagon testified:

"At the moment of the collision the traffic light was green for traffic traveling east on Highway #29. It had been green approximately five seconds. After the collision, the two automobiles scooted over to the corner of the intersection together, the southeast corner."

The evidence is uncontradicted to the effect that when the traffic light shows green on either Franklin or Linwood, it would show red on the other. Nor is it contradicted that when the green is followed by amber, it would continue to show red on the other avenue.

On the testimony the jury might find that Kennedy had a green light for four or five seconds before the collision. At a speed of 15 m.p.h. Wilson would have traveled in four seconds more than 85 feet after the light showed red on Linwood Avenue and 150 feet or more after the amber light first showed on Linwood Avenue. Since Wilson had only traveled 50 or 55 feet or thereabouts in the intersection when the collision occurred, the jury could find that the red light came on before Wilson reached the intersection and that the amber light came on when he was 100 feet or more north of the intersection.

True this evidence is sharply in conflict with Wilson's evidence that he entered the intersection on a green light. But if the evidence offered is sufficient to show negligence on the part of Wilson, Kennedy is entitled to have a jury ascertain the facts. There is other evidence which a jury might find sufficient to establish Wilson's negligence.

Since the jury can find from the evidence that Wilson entered the intersection when confronted with either a red or amber light, would that fact permit a jury to find that Wilson was negligent? This case is unlike *Currin v. Williams, ante,* p. 32, and *Cox v. Freight Lines,* 236 N.C. 72, 75 S.E. 2d 25. In this case no statute gives interpretation or legal effect to the traffic lights. G.S. 20-158(c) is confined to red and green lights at intersections outside of municipal corporate limits. It makes no reference to amber lights and can have no effect here since this intersection is within the corporate limits of Gastonia. What the ordinances of Gastonia provide is speculative. The evidence does not disclose. We cannot take judicial notice of municipal ordinances. *S v. Clyburn,* 247 N.C. 455.

Unaided by statute or ordinance, the meaning and force to be given to the traffic light at this intersection is that meaning which a reasonably prudent operator of an automobile should and would understand and apply. *Coach Co. v. Fultz,* 246 N.C. 523. Traffic signals of the kind

here described are in such general use that it is, we think, well known by motor vehicle operators that a red traffic light is a warning that the highway is closed in order to permit those using the intersecting highway safe passage through the intersection. Hence, prudence dictates that he should stop. The meaning of the amber light is likewise recognized. It cautions but not in the positive tones of the red light. It warns that red is about to appear, and that it is hazardous to enter. It affords those who have entered on the green light the opportunity to proceed through the intersection before the crossing traffic is invited to enter. *Jackson v. Camp & Brown Produce Co.*, 88 S.E. 2d 540 (Ga.); Blashfield Automobile Law, sec. 1040, perm. ed. The green light indicates that the motorist may proceed. It does not guarantee safe passage through the intersection. The driver accepting the invitation must continue to exercise the care of a reasonably prudent person under similar conditions.

With these meanings which the jury could apply to the traffic lights and the evidence on which a jury could find that the Ford entered the intersection when warned not to do so by a red light or when cautioned not to do so by an amber light, it was for the jury to determine whether Wilson's conduct was negligent and a proximate cause of the collision and resulting injuries. *Wright v. Pegram*, 244 N.C. 45, 92 S.E. 2d 416; *Hyder v. Battery Co., Inc.*, 242 N.C. 553, 89 S.E. 2d 124; *Cox v. Freight Lines, supra.*

If the jury determines that Wilson's negligence proximately contributed to the collision and injuries, that negligence would (1) entitle Kennedy to contribution for the payment of the judgment which Mrs. Wilson has obtained, and (2) defeat any claim which Wilson might have for injuries to his vehicle. If the jury answers the issue of Wilson's negligence in the negative, he is entitled to have the jury fix the amount of his damages.

Since the jury has ascertained, in an action in which Mrs. Wilson, the defendant Kennedy, and Wilson, the operator of the Ford, are all parties, that Kennedy negligently operated his motor vehicle, which was at least one of the causes of the collision, it necessarily follows that Kennedy is not entitled to recover of Wilson on Kennedy's counterclaim.

The judgment fixing defendant's liability to Mrs. Wilson as ascertained by the jury is affirmed. The judgment dismissing defendant's claim for contribution is reversed. The judgment imposing liability on defendant Kennedy for damages to plaintiff D. E. Wilson is erroneous.

As to plaintiff Mrs. D. E. Wilson—Affirmed

As to additional defendant D. E. Wilson—Reversed

As to plaintiff D. E. Wilson—New Trial.

J. W. GRIFFIN v. A. V. BLANKENSHIP, TRADING AS A. V. BLANKENSHIP ENGINEERING COMPANY, AND ERNEST B. WILSON

(Filed 26 March, 1958)

1. Negligence § 19b(1)—

Upon motion for nonsuit in an action to recover for personal injuries negligently inflicted, the evidence must be considered in the light most favorable to plaintiff to determine its sufficiency to carry the case to the jury on the question of actionable negligence.

2. Negligence § 1—

The operator of a bulldozer in grading land and clearing it of stumps and brush is under legal duty to exercise that degree of care which a reasonably prudent person would exercise to avoid injuring persons having a legal right to be near the machine.

3. Negligence § 17—

In order to recover damages for an injury on the ground of negligence, plaintiff must prove not only negligence, but must also prove by the greater weight of the evidence that such negligence was the proximate cause or one of the proximate causes of the injury.

4. Negligence § 9—

Foreseeability is an integral factor of proximate cause.

5. Negligence § 19b(1)— Evidence held insufficient for jury on issue of negligence on part of operator of bulldozer.

Plaintiff's evidence was to the effect that he had contracted for the use of a bulldozer and operator to grade and clear a street of stumps and brush, the street being partially on his land, and that while he was standing some 10 feet off the right of way, a sapling, which was being pushed along by the bulldozer with a pile of other saplings, brush and rubbish, hit a stump and was thrown against plaintiff's leg. There was no evidence that the bulldozer was operated negligently or in an unusual or improper manner, or facts or circumstances from which such negligence could be legitimately inferred. *Held:* The evidence fails to establish either negligence or proximate cause on the part of the operator of the bulldozer.

APPEAL by plaintiff from *Craven, Special Judge,* October 7 Special Civil Term 1957 of MECKLENBURG.

This is a civil action to recover for personal injuries sustained by the plaintiff as a result of the alleged negligence of the defendants.

Plaintiff and his wife owned a small tract of land in Mecklenburg County near Toddville Road on Pinebrook Circle. The land adjoins a tract owned by Mr. C. E. Burke. Plaintiff and Mr. Burke decided to open a street along their boundary line forty feet wide, twenty feet on plaintiff's land and twenty feet on Burke's land, for a distance of approximately 600 feet, leading from Pinebrook Circle. Plaintiff caused

his property along the proposed street to be divided into building lots, and had the proposed street surveyed and staked out by a professional surveyor.

The plaintiff contracted on behalf of himself and Mr. Burke with a representative of the defendant A. V. Blankenship Engineering Company, hereinafter called Blankenship, to grade the street with a bulldozer. Blankenship was to furnish a bulldozer and an operator to do the work for $10.00 an hour. It was understood that the street was to be cleared by the owners, or at least the timber was to be cut down before the grading was to be done. The stumping, clearing away of limbs, small bushes, etc., including the grading, was to be done by Blankenship.

The bulldozer and equipment were sent to the premises in question on 11 May 1956. The defendant Ernest B. Wilson was the operator of the bulldozer. The plaintiff had pointed out to Mr. Wilson the stakes showing the boundaries of the street sometime prior to the day the grading was begun. Just before the work actually started, the plaintiff said to Mr. Wilson, "Now we have this timber and all, and I have a lot over here and I would like to push this rubbish over on it." Mr. Wilson said, "We won't push it over on that lot, it will damage your trees. We will push it up and burn it." It was agreed that the stumps, trees, and rubbish that had been left in the street area would be pushed into a pile in the middle of the street and burned. The plaintiff thereafter set fire to the pile of rubbish and assisted in burning it. Meantime, Mr. Wilson was proceeding to push treetops and other rubbish upon the pile of burning rubbish.

Mr. Ted S. Lewis had cut the trees in the street area and it was understood that in return for his labor he was to have all the merchantable timber. After setting fire to the pile of rubbish, the plaintiff and Mr. Lewis watched Mr. Wilson finish up at the end of the street next to Pinebrook Circle. The bulldozer was then headed towards the dead end of the street. The plaintiff said to Mr. Lewis, "If you want to save that timber on the other end we better go down and throw it out. If we don't it will be pushed up and burned." The plaintiff and Mr. Lewis crossed the street that was being graded, now called Burke Drive, and went into the woods a distance of approximately twenty feet and were about 250 feet from Pinebrook Circle and about 350 feet from the dead end of the street. The plaintiff saw some poison ivy hanging from the trees. Being allergic to poison ivy, he stepped back towards the street about five feet. He testified, "I could hear the bulldozer running, making right much noise. There were trees around me * * * trees all over the whole place. Quite a few clusters of trees, standing. * * * As I stood about 15 feet in the woods from the edge of the road, I was looking out into the road * * * I could see the operator but

couldn't see the dozer. I could see through the cluster of trees. I could see the man sitting on the dozer. * * * As he came on down, I stood there* * * looking * * * I could see him, the driver, as the dozer moved on down. In a few minutes something hit me, my leg, and knocked me to the ground. * * * There was a blade on the front end of the dozer. The dozer was sitting to east of the center of the street and back toward the dead end of the street from me. At the time the tree hit me it was right across from me * * * When the tree hit me I was knocked to the ground. It hit my left leg below the knee * * * As I was on the ground I saw the tree. The stump end of the tree hit me, it had been sawed off * * * the sawed-off end next to me was 4 to 5 inches in diameter, the trunk end. The pole or tree extended from where I was lying to the front of the blade of the bulldozer." The accident occurred about one and one-half hours after the work was started. The bulldozer was stopped immediately after the accident.

Plaintiff offered in evidence the adverse examination of the defendant Wilson, the operator of the bulldozer at the time of the accident. He testified, "It was a pine tree that hit Mr. Griffin in the leg. The bulldozer came in contact with the top end of the pine tree. The pine tree was about four inches through at the trunk end. It was sticking out there about eight or ten feet, I would say. But I don't know how long it was because most of it was under the trees I was pushing. * * * It was just in the pile of trees * * * on the bottom of the pile * * * and the trunk was sticking out. I had not completed my stumping at the time. * * * The blade of my dozer was 11 feet 6 inches wide, and the dozer was 8 feet wide. * * * I was on a D-7 Caterpillar * * * about five feet from the ground * * *. Sitting down my eyes were about eight feet from the ground * * *. I could see the left end of the blade on the ground, but not to the right. You sit on the back end of the Caterpillar. I have never measured the length of the Caterpillar but it is about 18 feet long * * *. On the right-hand side you can see the top of the blade at the end. * * * I did not see the pine tree because it was dragging along beside the tractor. It hit a stump * * * It was out to the side of the tractor * * *. It was not sticking out from the tractor and blade * * *. It was dragging back and come off of something there in this open place where Griffin was standing and, when it hit the stump, it flew around like that and hit Griffin. * * *" Q. "Before it hit the stump and as it was dragging, was it dragging along parallel with the tractor?" A. "No, it was not dragging along parallel with the tractor when it hit the stump. The stubble and stuff was along back here, I guess, I did not see it. If it had been sticking straight out, I would have seen it. It came out from behind the stubble against the single stump, bounced, slid over and hit Griffin. It bounced out of the right of way when it left the stump. * * * The pile of brush I was pushing

when they got off the right of way was bigger than the tractor * * * they were around 50 feet from the dozer when they actually got off the right of way. * * * As I came up, Mr. Lewis walked back, about twice the distance that he was, somewhere in the neighborhood of ten to twelve feet from the right of way. * * * At the time the tree hit Mr. Griffin, he was somewhere around * * * six or eight feet * * * I would say, off the right of way. * * * I first knew that the pole that struck Mr. Griffin was attached to my equipment when it flew out and hit him."

The evidence of this witness further tends to show that when the tractor was stopped, its blade was about even with Mr. Griffin. He testified, "I jumped off the tractor and took one step and was to Mr. Griffin * * * At the time the pine pole was still attached to the brush heap in front of the blade. From the end of the blade to the end of the pole was approximately eight feet. I later pushed the pole and other rubbish into the pile after we got Mr. Griffin to the car."

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.

Richard M. Welling, for plaintiff, appellant.

Kennedy, Covington, Lobdell & Hickman, Eugene M. Anderson, Jr., for defendants, appellee.

DENNY, J. This appeal turns on whether or not the plaintiff's evidence, when considered in the light most favorable to him, as it must be when considering a motion for judgment as of nonsuit, is sufficient to carry the case to the jury on the question of actionable negligence. *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727, *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209.

The plaintiff devotes a substantial part of his brief in arguing that the defendant operator of the bulldozer was not an employee of the plaintiff. Therefore, he contends that both the defendant operator and his employer, the owner of the equipment, are responsible to the plaintiff for the injuries he sustained, citing *Hodge v. McGuire,* 235 N.C. 132, 69 S.E. 2d 227.

It is not necessary to determine whether the operator of Blankenship's bulldozer was an employee of the plaintiff or of Blankenship if the plaintiff's evidence is insufficient to establish actionable negligence against the defendant Wilson. "Actionable negligence exists only where one whose acts occasion injury to another owes to the latter a duty created either by contract or by operation of law which he has failed to discharge. There must be an act or omission by which a legal duty or obligation to the complaining party is breached and there must be

a causal connection between the breach of duty and the injury." *Truelove v. R.R.*, 222 N.C. 704, 24 S.E. 2d 537.

The operator of the bulldozer on the occasion involved herein, owed to the plaintiff the duty to exercise due care in the operation and manipulation of the bulldozer.

In *Butler v. Allen*, 233 N.C. 484, 64 S.E. 2d 561, this Court said: "The due care required in fixing responsibility for negligence is the rule of the prudent man. The standard is always that care which a reasonably prudent man should exercise under the same or similar circumstances. . . ."

To recover damages for an injury, it is not only necessary to prove a negligent act but it is equally necessary to show by the greater weight of the evidence that such negligent act was the proximate cause or a proximate cause of the injury.

An integral factor necessary to constitute proximate cause is foreseeability. *Cranfield v. Winston-Salem*, 200 N.C. 680, 158 S.E. 241; *McIntyre v. Elevator Co.*, 230 N.C. 539, 54 S.E. 2d 45.

In the case of *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796, it is said: "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446; *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808; *Brady v. R.R.*, 222 N.C. 367, 23 S.E. 2d 334; *Hiatt v. Ritter*, 223 N.C. 262, 25 S.E. 2d 756; *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331.

There is no evidence on this record which tends to show that the defendant Wilson operated the bulldozer negligently or in an unusual or improper manner, or that in its operation there were any facts or circumstances from which negligence on his part may be legitimately inferred. *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34; *Rockey v. Ernest*, 367 Pa. 538, 80 A 2d 783.

In our opinion, the evidence does not show facts sufficient to warrant the inference that the operator of the bulldozer could reasonably have foreseen that the sapling, which was being pushed along with a pile of other saplings, brush and rubbish, would fly out and injure the plaintiff, who was standing in the woods and off of the right of way. *Osborne v. Coal Co., supra; Gant v. Gant, supra.* Consequently, we hold there was no error in sustaining the motion for judgment as of nonsuit.

Affirmed.

AGNES E. GOLDBERG v. UNITED LIFE AND ACCIDENT INSURANCE COMPANY, CONCORD, NEW HAMPSHIRE.

(Filed 26 March, 1958)

1. Assault and Battery § 4—
No words, however violent or insulting, justify a blow.

2. Homicide § 7—
Where one person voluntarily and unlawfully strikes another, and the person so struck falls and hits his head, resulting in a fatal concussion, the death is a homicide.

3. Insurance § 39—
Plaintiff's evidence tended to show that insured was voluntarily and unlawfully struck by another, causing insured to fall and hit his head upon the floor, resulting in fatal hemorrhage. *Held:* Plaintiff's evidence discloses death from homicide within the exclusion provision of the double indemnity clause sued on, and therefore nonsuit was correctly entered in her action to recover double indemnity.

4. Trial § 24a—
Where defendant's affiirmative defense is established by plaintiff's own evidence, nonsuit may be entered.

APPEAL by plaintiff from *Pless, J.*, at 4 November, 1957, Term of MECKLENBURG.

Civil action to recover upon double indemnity provisions of two life insurance policies issued by the defendant to Herman P. Goldberg, who died of a fractured skull following a fall to the floor after being assaulted and struck by Dr. V. A. Black.

Each policy insured the life of Herman P. Goldberg in the amount of $10,000 and contained a stipulation for double indemnity of $10,000, in terms as follows: "The United Life and Accident Insurance Company, upon receipt of due proof of the death of the Insured while said policy and this agreement are in force, promises to pay DOUBLE INDEMNITY . . . , in the event that such death should result directly and independently of all other causes from bodily injury effected solely through external, violent, and accidental means . . . *provided such death shall not have resulted from homicide, . . .* " (Italics added.)

The face amount of each policy was paid by the insurance company to the widow, Agnes E. Goldberg, in the total amount of $20,000, but the company refused to make payment under the double indemnity provisions, and thereupon this action was instituted.

The plaintiff in her complaint alleges generally that the death of the insured "resulted directly and independently of all other means from bodily injury effected solely through external, violent, and acci-

dental means," within the meaning of the policies. And, specifically, she alleges:

"9. That on or about January 14, 1955, Herman P. Goldberg was at the Elks Club in the City of Charlotte, State of North Carolina, . . .

"10. That on said date, one Dr. V. A. Black struck the said Herman P. Goldberg in the face with his hand or fist.

"11. That the said Herman P. Goldberg, immediately thereafter and as a result thereof, fell to the floor, his head striking the said floor and causing a fracture of the skull and a sub-dural hemorrhage.

"12. That as a result of said injuries the said Herman P. Goldberg died on Jan. 14, 1955."

The defendant by answer denies that the insured met his death by accidental means within the coverage of the policies, and by way of affirmative defense alleges that the death of the insured resulted from homicide, a cause of death expressly excluded from the double indemnity insuring agreements.

The plaintiff's witness Harry McKinnon testified as follows:

"I was at the Elks Club on January 14, 1955, at the time Mr. Goldberg was injured. I was at one end of the room with my back towards the parties concerned. I entered the building just a short while before the incident, passed through the building into the back end of the receiving counter. While I was standing there I heard a conversation being carried on and all of a sudden a noise and when I turned around I saw Mr. Goldberg at an angle to the floor approximately hitting the floor. His head bounced off the floor. His whole body struck it, too. I had talked with Mr. Goldberg when I walked in as a matter of greeting."

On cross-examination the witness McKinnon testified:

"The incident took place in the club room, which is in the basement floor, . . . At the time I saw Mr. Herman Goldberg and Dr. V. A. Black, they were in some manner of discussion; . . . Dr. Black and Mr. Goldberg were in proximity of each other. After I had passed and gone on, I did hear some words and then heard a noise and after that I turned around. To the best of my knowledge, after I turned around I saw Mr. Goldberg fall to the floor. I heard the terminology 's.o.b.' used. It came from the vicinity of where Mr. Goldberg was. Immediately after I heard the words 's.o.b.,' I heard the noise and scuffle. When I heard the noise or scuffle, I turned around and saw Mr. Goldberg practically at the floor. His head hit the floor. I went over to the place where Mr. Goldberg and Dr. Black were immediately after it happened. I heard Dr. Black say that Goldberg called him a 's.o.b.,' and that he would hit any man that did. According to my testimony, I did

not indicate that anyone called anyone a s.o.b.; however, the terminology was used. I did not see anyone strike anyone; however, I did hear the noise. Whether he was struck or pushed or what have you, I don't know. I did hear the term 's.o.b.' used. I think Dr. Black generally did state that he (Goldberg) called him a 's.o.b.' and that he did hit him."

Dr. Albert A. Kossove, a medical expert who was present at the autopsy, testified in part:

"The autopsy revealed the cause of his (Goldberg's) death. The findings were that there was a rather large fracture of the skull in the occipital or back of the head region and that there was extensive subdural hemorrhage as well as hemorrhage in the spaces of the brain called intra-ventricular hemorrhage. My opinion as to the cause of the injury is that he received a strong blow on the head or the head striking any hard object."

At the close of the plaintiff's evidence, the defendant's motion for judgment as of nonsuit was allowed. From judgment entered in accordance with this ruling, the plaintiff appealed.

Alvin A. London and Richard L. Kennedy for plaintiff, appellant.
Pierce, Wardlow, Knox & Caudle for defendant, appellee.

JOHNSON, J. Conceding, without deciding, that the plaintiff's evidence in some aspects is sufficient to show *prima facie* that the insured met his death through accidental means within the insuring provisions of the policies, even so, the evidence discloses conclusively that the insured met his death by homicide as the result of being struck by Dr. Black. True, it may be inferred that Dr. Black was incited to action by the insulting language of the insured and that in striking the blow he had no intent to kill. Nevertheless, the rule is that no words, however violent or insulting, justify a blow. *Lewis v. Fountain*, 168 N.C. 277, 84 S.E. 278; *Palmer v. R.R.* 131 N.C. 250, 42 S.E. 604; 6 C. J. S., Assault and Battery, Sec. 91, p. 943. And death having resulted from the voluntary, unlawful act of Dr. Black, i.e.; an assault and battery, it was death by "homicide" within the meaning of the exception clauses of the policies. 40 C. J. S., Homicide, Sec. 58; 29 C. J., p. 1150. See also *S. v. Knight*, 247 N.C. 754 102 S.E. 2d 259; *S. v. Hovis*, 233 N. C. 359, 64 S. E. 2d 564; *United Life & Accident Ins. Co. v. Prostic*, 169 Md. 535, 182 A. 421. These things appearing as the only reasonable inferences deducible from the testimony received in evidence, the judgment of nonsuit entered below will be upheld on the ground that the defendant's affirmative defense of homicide was established as a matter of law by the plaintiff's evidence. Where a defendant's affirmative defense is so established, nonsuit may be entered. *Hedgecock v. Ins. Co.*, 212 N. C. 638, 194 S. E. 86; *Butler v.*

Ins. Co., 213 N. C. 384, 196 S. E. 317; *Thomas-Yelverton Co. v. Ins. Co.*, 238 N. C. 278, 77 S. E. 2d 692; *Jarman v. Offutt*, 239 N. C. 468, 80 S. E. 2d 248.

In *Hedgecock v. Ins. Co., supra*, at p. 641, the rule is stated this way: "When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered."

Affirmed.

J. A. SHINGLETON v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION AND C. A. MANNING.

(Filed 26 March, 1958)

1. Ejectment § 15—

In an action for recovery of land and for trespass, plaintiff has the burden, upon defendant's denial, of proving both his title and the trespass of defendant.

2. Same—

In an action for the recovery of land, plaintiff must rely upon the strength of his own title and prove same by one of the methods recognized by law.

3. Same—

When the State is not a party, title is conclusively presumed to be out of the State, G.S. 1-36, but there is no presumption in favor of either party to the action, and plaintiff remains under burden of showing title in himself.

4. Adverse Possession § 15—

A deed is color of title only for the land designated and described in it.

5. Ejectment § 17—

Where, in an action to recover land, plaintiff relies, as a link in his chain of title, upon a commissioner's deed in tax foreclosure, but fails to offer in evidence the judgment roll in such foreclosure proceeding, there is a *hiatus* in plaintiff's chain of title, and nonsuit is proper.

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

APPEAL by plaintiff from *Morris, J.*, at October 1957 Term, of PENDER.

Civil action to recover land, and for trespass thereon.

Plaintiff alleges in his complaint that the North Carolina Wildlife Resources Commission is the successor in interest, title and claim to the North Carolina Department of Conservation and Development;

and the defendant C. A. Manning is its employee; that plaintiff is the owner and in possession of a ninety-two acre tract of land, in Topsail Township, Pender County, North Carolina, and more particularly described as therein set forth.

And plaintiff further alleges in his complaint that defendants claim some interest in said lands and are trespassing thereon, and interfering with possession of plaintiff in manner stated to his damage, and, thereupon, prays judgment that he be declared the owner of said land; that defendants be enjoined from trespassing thereon; and that he recover as damages an amount specified and for cost and general relief.

The defendant North Carolina Wildlife Resources Commission demurred to the complaint upon grounds that it is a State agency and cannot be sued, and the demurrer was sustained and action dismissed as to it.

Defendant C. A. Manning also demurred to the complaint upon grounds stated. However, the court overruled his demurrer, and gave him time to answer.

And, answering, this defendant, Manning, admits the allegation of the complaint that the North Carolina Wildlife Resources Commission is the successor in interest, title and claim of the North Carolina Department of Conservation and Development; and that he is its employee. But, for lack of sufficient information, defendant Manning denies the allegations of plaintiff as to his ownership and possession of the lands described in the complaint; and denies that he has trespassed upon lands of plaintiff. On the other hand, he admits "that the defendant North Carolina Wildlife Resources Commission claims an interest in said lands, and as employee and agent of said Wildlife Resources Commission in the capacity of Refugee Assistant, he has had the supervision and control of the said lands described in article third of the plaintiff's complaint." Defendant Manning also denies other allegations of the complaint.

In Superior Court, plaintiff stipulated that "his 92-acre claim of land as set forth in his complaint herein lies entirely within the boundaries of the claim of the North Carolina Wildlife Resources Commismission as set out by map of L. B. Hopkins, dated April 4, 1941."

Upon trial in Superior Court, plaintiff offered in evidence three deeds under which he claims that he, and those under whom he claims, had open, notorious, and continuous adverse possession for sufficient length of time to ripen title: First: A deed from R. A. Nixon and others to H. C. Congleton, dated may 29, 1905, recorded June 17, 1905, in Book 44, page 297. The court held that this deed does not constitute color of title, but admitted it in evidence. Exhibit A.

Second: A deed from Nick Congleton, Fannie Congleton, F. L. Batson, Minnie Batson, W. F. Blake and Cary Blake, grantors, to Neuse

Lumber Company, dated ".....day of August, 1917," probated September 4, 1917 and recorded September 1917, in Book 110, page 379, of Pender County Registry. Exhibit B.

Third: A deed from L. R. Bradshaw, Commissioner, pursuant to a judgment of the Superior Court of Pender Court in an action entitled *"Pender County v. Neuse Lumber Company, Inc., to J. A. Shingleton,"* (who is the plaintiff), dated and filed for registration April 27, 1955. Exhibit C.

Plaintiff, appellant, claims that the several descriptions in these deeds cover the land in question, and that the parties thereto have had sufficient possession to ripen title in him, and to support a finding that the deed, Exhibit C, conveyed to him title in fee. This is controverted by defendant.

Motion of defendant for judgment as of nonsuit at close of plaintiff's evidence was allowed. And from judgment entered in accordance therewith plaintiff appeals to Supreme Court and assigns error.

I. C. Wright for Plaintiff Appellant
Attorney General George B. Patton for the State of North Carolina
Corbett & Fisler for Defendant Appellee

WINBORNE, C. J. Did the trial court err in granting judgment as of nonsuit? This is the determinative question on this appeal. Pertinent decisions of this Court dictate negative answer.

When in an action for the recovery of land, and for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to title of plaintiff, and as to trespass of defendant,—the burden of proof as to each being on plaintiff. *Mortgage Co. v. Barco,* 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Meeker v. Wheeler,* 236 N.C. 172, 72 S.E. 2d 214; *Cherry v. Warehouse Co.,* 237 N.C. 362, 75 S.E. 2d 124; *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600; *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593; *Jones v. Turlington,* 243 N.C. 681, 92 S.E. 2d 75; *Hayes v. Ricard,* 245 N.C. 687, 97 S.E. 2d 105; *Scott v. Lewis,* 246 N.C. 298, 98 S.E. 2d 294.

Indeed, in such action plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142, and applied in numerous cases,—some of the late ones being *Locklear v. Oxendine, supra; McDonald v. McCrummen,* 235 N.C. 550, 70 S.E. 2d 703; also *Meeker v. Wheeler, supra.*

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to

the action, G. S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; also *Smith v. Benson, supra,* and *Locklear v. Oxendine, supra.*

In the light of such presumption, plaintiff in the present action, assuming the burden of proof, has elected to show title in himself by adverse possession, under known and visible lines and boundaries and under color of title, which is one of the methods by which title may be shown. In pursuing this method a deed offered as color of title is such only for the land designated and described in it. *Davidson v. Arledge,* 88 N. C. 326; *Smith v. Fite,* 92 N. C. 319; *Barker v. R.R.,* 125 N.C. 596 34 S.E. 701; *Johnston v. Case,* 131 N.C. 491, 42 S.E. 957; *Smith v. Benson, supra; Locklear v. Oxendine, supra.*

Indeed the principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between the several occupants. See *Locklear v. Oxendine, supra; Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340; *Meeker v. Wheeler, supra.*

Plaintiff, relying upon adverse possession of predecessors in his chain of title, offers a deed to the Neuse Lumber Company, Inc., and then he offers a deed to himself from a commissioner, purporting to act under authority of judgment in a tax foreclosure proceeding. But the judgment roll in such proceeding is not offered in evidence. This creates a break in plaintiff's chain of title. *Kelly v. Kelly,* 241 N. C. 146, 84 S.E. 2d 809. In this *Kelly* case it is stated: "In the instant case, neither the interlocutory judgment of foreclosure nor the final decree of confirmation of sale pursuant thereto, was introduced in the trial below. The failure to introduce such documents left a break in defendants' chain of title. The action should have been nonsuited." See also *Kelly v. Kelly,* 246 N.C. 174, 97 S.E. 2d 872.

However, this will not preclude plaintiff from bringing another action if the facts in respect to the tax foreclosure are accordant with law.

Hence this Court expresses no opinion as to other matters presented on this record.

Affirmed.

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

G. W. NAGLE, JR. v. HERBERT BOSWORTH

(Filed 26 March, 1958)

Bills and Notes § 18½: Trial § 31d—

In this action on a note, defendant set up the affirmative defense of material alteration. The case was submitted to the jury on the two issues of execution of the note and the amount of recovery. *Held:* An instruction that the burden of proof on the first issue was on plaintiff to prove due execution of the instrument and on defendant to prove his defense of material alteration must be held prejudicial as tending to confuse the jury.

BOBBITT, J., concurs in result.

APPEAL by defendant from *Farthing, J.*, at December 1957 Regular Civil Term of BUNCOMBE.

Civil action to recover on promissory note.

Plaintiff alleges in his complaint that on or about 15 June, 1955, and for value received, defendant executed and delivered to him a certain promissory note bearing said date in the sum of $3,324.00, copy of which is attached to complaint, payable 1 January, 1956, and bearing interest from date at the rate of six per cent per annum; and that the whole of said note is due and payable after repeated demands and payment refused.

Defendant, answering, denies the material allegations as set forth in the complaint, and for further answer and defense, and by way of counterclaim for affirmative relief, defendant avers and says: That prior to 15 June, 1955, plaintiff and defendant were operating together as a partnership under an oral agreement; that on said date plaintiff and defendant signed a written dissolution of this partnership whereby defendant executed to plaintiff a note in the amount of three hundred twenty-four ($324.00) Dollars as consideration for the release of all plaintiff's rights to the assets of the partnership; and that on said date defendant handed to plaintiff $387.50 cash, which belonged to defendant, and requested that plaintiff deposit the same to defendant's account at the Bank of Asheville; that plaintiff agreed to do so, but that plaintiff took said sum of money and wrongfully converted it to his own use and failed and refused, and continues to fail and refuse to deliver same to defendant or to deposit the same in the bank to credit of defendant.

And "4. That defendant is advised, informed and believes, and so alleges, that the plaintiff has altered the note which the defendant issued to the plaintiff on June 15, 1955, as aforesaid, by adding the words 'Three Thousand' immediately before the words 'Three Hundred Twenty-Four' and by adding the figure '3' immediately preceding the figures '$324' on said note; that plaintiff made said altera-

tions on said note with the fraudulent intent and design to wrongfully deprive the defendant of his money.

"5. That in truth and in fact the defendant is not indebted to the plaintiff, but rather plaintiff is indebted to the defendant in the sum of $53.50, together with interest on the same from June 15, 1955.

"Wherefore, this answering defendant prays the court as follows:

"1. That the plaintiff take nothing by this action and that the same be dismissed.

"2. That the defendant have and recover of the plaintiff the sum of $53.50, together with interest from June 15, 1955, until paid * * *."

Upon trial in the Superior Court the following proceedings were had:

Plaintiff identified, and offered testimony tending to prove the execution by defendant and delivery to plaintiff of a paper writing purporting to be a promissory note under seal, for one-half interest in property of a partnership existing between them, all as alleged in the complaint, payment of which is due, and refused by defendant. And after offering the paper writing in evidence plaintiff rested his case.

Defendant, thereupon reserving exception to denial of his motion for judgment as of nonsuit then made, testified and offered evidence tending to support the averments and the counterclaim set forth in his answer.

The case was submitted to the jury upon these two issues which the jury answered as indicated.

"1. Did the defendant execute and deliver to the plaintiff for valuable consideration a note in the amount of $3,324.00, as described in the complaint? Answer: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,324.00."

Defendant tendered two other issues pertaining to his counterclaim, which the court refused to submit.

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

Williams & Williams, William C. Morris, Jr., for Plaintiff Appellee
McLean, Gudger, Elmore & Martin for Defendant Appellant.

WINBORNE, C. J. Among the assignments of error defendant, appellant, stresses for error several portions of the charge, particularly with respect to the burden of proof,—all of which it would seem arise out of the difficulty in submitting the case on the first issue as it relates to both allegations of the complaint, and as affirmative defenses of defendant, upon the first issue, that is, upon one issue rather than two or more. For instance, the court stated: "Now, ladies and gentle-

men of the jury, the court will mention burden of proof to you. The burden of proof on the first issue, *on the first part of it,* is on the plaintiff * * * (emphasis inserted)." Just what is meant by the phrase emphasized, is not clear, for the issue is not divided into parts.

And, again, defendant points to these instructions: "Now, if the plaintiff has satisfied you from the evidence, and by its greater weight, that the defendant did execute this note and deliver it to the plaintiff, in the amount of $3,324.00, as described in the complaint, then the plaintiff makes out what we call a *prima facie* case in his favor and shifts the burden of proof then over to the defendant. The defendant must then go forward to satisfy you from the evidence, and by its greater weight, that he insists and contends here the note was altered, materially altered, a material alteration in this note, and the court charges you that where a negotiable instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against the party who has himself made, authorized or assented to the alterations, and subsequent endorsers." And again, "So if the defendant has satisfied you from the evidence and by its greater weight that there was a material alteration in this note, as the defendant insists and contends, then it would be your duty to answer that issue No."

Considering these portions of the charge it is problematical as to whether an average citizen would be able to differentiate the dual burden of proof, thus set forth, upon the single issue. Therefore, this Court is of opinion and holds that the exceptions so pointed out are meritorious, and that a new trial is in order. In so ordering, it is suggested that separate issues as to affirmative pleas set up in defendant's answer, and supported by evidence, be submitted.

For reasons stated, let there be a

New Trial.

BOBBITT, J. concurs in result.

O'DELL HILL AND J. C. HILL v. ROBERT L. DAWSON, SR. AND ZODIE CUNNINGHAM AND W. S. CUNNINGHAM, GARNISHEES.

(Filed 26 March, 1958)

Attachment § 11—

Where plaintiffs recover judgment against defendant in the main action, in which the garnishees are served, G.S. 1-440.22, and there is no attack upon the validity of the attachment nor demand for a jury trial for dissolution of the attachment, G.S. 1-440.36, plaintiffs are entitled to summary judgment on the undertaking signed by defendant and one of the garnishees for the release of the property from the attachment, the property having been sold and being incapable of delivery in kind to plaintiffs.

APPEAL by Zodie Cunningham and husband W. S. Cunningham, Garnishees, from *Stevens, J.*, November Term 1957 of LENOIR.

Civil action to recover $1,092.21, with interest, for groceries and merchandise sold and delivered by plaintiffs to the defendant Robert L. Dawson, Sr., during the years 1954 and 1955, which amount is due and unpaid.

In the year 1956 the defendant Robert L. Dawson, Sr., was a tenant on the farm of Zodie Cunningham, and husband W. S. Cunningham. He had 7 to 8 acres of tobacco. Dawson was to receive one-half the tobacco crop, less what amount was due the Cunninghams. After the institution of the action and the filing of their complaint plaintiffs secured from the Clerk of the Superior Court of Lenoir County, pursuant to the provisions of G. S. 1-440.10 *et seq.*, an order to attach and safely keep all the property of Robert L. Dawson, Sr., within the county of Lenoir, which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiffs' demand, together with the costs and expenses. At the time of the issuance of the original order of attachment the said Clerk, pursuant to G.S. 1-440.22, issued a summons to Zodie Cunningham and husband W. S. Cunningham, as garnishees. Zodie Cunningham and husband W. S. Cunningham filed an answer to the summons of garnishment. On the day of the issuance of the order of attachment the Sheriff of Lenoir County made a return to the court on the order of attachment that in execution of the order of attachment he had levied on one Farmall Cub Tractor and approximately 8,000 tobacco sticks of ungraded tobacco, estimated to be about 18,000 pounds of tobacco, and on the same day, pursuant to G.S. 1-440.24, he served on the garnishees a notice of levy in the garnishment proceeding upon any and all property held in their possession for the account, use, or benefit of the defendant Robert L. Dawson, Sr. On 4 September 1956 Robert L. Dawson, Sr., and Zodie Cunningham gave an undertaking in the amount of $2,100.00, in the usual form, for the return of the property seized by the sheriff by virtue of the order of attachment. This undertaking recites at its beginning: "Whereas, the Sheriff of Lenoir County, under this process, has taken from the defendant the defendant's share of all that tobacco cultivated and harvested by the defendant as tenant on the lands of Zodie Cunningham and husband, W. S. Cunningham."

The only evidence offered by the defendant and the garnishees was the testimony of W. S. Cunningham. On direct examination Mr. Cunningham was asked, "How much was sold from Mr. Dawson, Sr.'s portion?" He replied: "In different places. September 24, 1956, he sold 742 pounds for net $386.60. This was another one, I presume it was later, some they date and some they don't; 1262 pounds brought $679.25. This one on September 20th he sold 2260 pounds brought

$1151.70. October 3rd he sold 470 pounds for $255.65. On October 4th he sold—that's one they taken in some—232 pounds brought $107.65. October 8th he sold 2020 pounds for $1088.20. On October 8th, 298 pounds for $159.25. October 8th, sold 2086 pounds $1,060.60. That was all of his tobacco." He was then asked on direct examination, "You were entitled to how much of that?" The court sustained plaintiffs' objection to the question. The garnishees excepted, but there is no answer to the question in the record. There is no evidence in the record that Dawson owed the Cunninghams anything.

The parties stipulated that the tobacco seized under the order of attachment has been sold, and is incapable of delivery in kind to the plaintiffs.

Upon issues submitted to them the jury found that the defendant Robert L. Dawson, Sr., was indebted to the plaintiffs in the amount of $1,092.21, with interest from 1 November 1955, and that the fair market value of the property seized by the sheriff by virtue of the order of attachment on the day of seizure was $4,889.10.

From a judgment that the plaintiffs have and recover from the defendant Robert L. Dawson, Sr., the sum of $1,092.21, with interest from 1 November 1955, and that plaintiffs have and recover of the defendant Robert L. Dawson, Sr., and Zodie Cunningham on their undertaking for the return of the property seized by virtue of the order of attachment the sum of $2,100.00, to be discharged upon the payment of $1,092.21 with interest from 1 November 1955, together with the costs of this action, the garnishees Zodie Cunningham and W. S. Cunningham appeal.

Jones, Reed & Griffin, for plaintiffs, appellees.
Lamar Jones, for defendants, appellants.

PER CURIAM. The record states W. S. Cunningham and Zodie Cunningham appealed. The judgment does not provide for any recovery against W. S. Cunningham. He is not an aggrieved party He has nothing to appeal from.

There is no evidence in the record that Robert L. Dawson, Sr., did not owe the full amount the plaintiffs sued for as an honest, just debt. The judgment recites that the defendant did not move before any one to dissolve the order of attachment, did not file any affidavit or offer other evidence alleging any defect entitling him to have the order of attachment dissolved, and made no demand for a jury trial for dissolution of the attachment, as provided in G. S. 1-440.36.

Upon judgment in their favor in the principal action, the plaintiffs were entitled to summary judgment in this action on the bond executed by the defendant Robert L. Dawson, Sr., and Zodie Cunningham,

and taken for their benefit herein. G. S. 1-440.46(d). See *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460.

All the assignments of error have been considered, and are overruled.

In the trial below we find

No Error.

CHARLES J. AHRENS v. LUTHER C. ROBEY

(Filed 26 March, 1958)

Appeal and Error § 46—

The discretionary ruling of the trial judge in setting aside the verdict as being contrary to the weight of the evidence is not reviewable on appeal in the absence of abuse of discretion.

APPEAL by plaintiff from Craven, Special Judge, at 16 September, 1957, Regular "B" Civil Term of MECKLENBURG.

Civil action for libel.

Issues were submitted to and answered by the jury as follows:

"1. Did the defendant write concerning the plaintiff the words in substance, as alleged in the Complaint? Answer: YES.

"2. If so, were they true? Answer: NO.

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,000.00."

The defendant, through counsel, moved the trial judge to set aside the verdict as being contrary to the weight of the evidence. The judge, "in his discretion," allowed the motion and entered judgment setting the verdict aside and directing that the case be tried *de novo*. The plaintiff appeals.

Ralph C. Clontz, Jr., for plaintiff, appellant.

Morgan, Byerly & Post and Dotson G. Palmer for defendant, appellee.

PER CURIAM. The discretionary ruling of the trial judge in setting aside the verdict as being contrary to the weight of the evidence is not reviewable on appeal in the absence of abuse of discretion. Here there is no evidence of such abuse. Therfore the appeal will be dismissed. *Goodman v. Goodman*, 201 N.C. 808, 161 S.E. 686; *In re Will of Hargrove*, 207 N.C. 280, 176 S.E. 752; *Hawley v. Powell*, 222 N.C. 713, 24 S.E. 2d 523; *Ward v. Cruse*, 234 N.C. 388, 67 S.E. 2d 257; *Williams v. Stumpf*, 243 N.C. 434, 90 S.E. 2d 688.

Appeal Dismissed.

WHITE *v.* WHITE.

HANNA DOTSON WHITE AND EARL C. WHITE, JR., EXECUTORS OF THE LAST WILL AND TESTAMENT OF EARL C. WHITE, SR., DECEASED, V. HANNA DOTSON WHITE, WIDOW; EARL C. WHITE, JR. AND WIFE, PAULINE FURR WHITE; SHIRLEY WHITE BENFIELD AND HUSBAND, DR. ROBERT H. BENFIELD; RICHARD DOTSON WHITE, UNMARRIED; EARL BRENT WHITE, MINOR; JENNIE GLYNN WHITE, MINOR; CYNTHIA DOTSON WHITE, MINOR; LAURA ELLEN BENFIELD, MINOR, ROBERT HANEY BENFIELD, MINOR; AND ALL OTHER PERSONS WHOSE NAMES ARE UNKNOWN IN BEING OR WHO MAY BE IN BEING AT OR PRIOR TO THE TIME OF THE DEATH OF HANNA DOTSON WHITE AND WHO HAVE OR MAY HAVE AN INTEREST IN THE ESTATE OR ASSETS OF EARL C. WHITE, SR., DECEASED.

(Filed 26 March, 1958)

APPEAL by guardian ad litem for minor defendants and by guardian ad litem for unknown persons, from *Moore (Dan K.), J.*, December 2, 1957, B Term, MECKLENBURG Superior Court.

Civil action by the executors for interpretation and construction of the Last Will and Testament of Earl C. White, Sr., Deceased. The cause was heard upon the verified pleadings, motions, stipulations, including the will.

Judge Moore made detailed findings of fact, stated his conclusions of law, and thereon adjudged that the testator in the will, "devised and bequeathed absolutely and in fee simple forever to his wife, Hanna Dotson White, all of the property described in his will with the exception of 35 shares of stock in Carolinas Auto Supply House which he bequeathed to his daughter, Shirley White Benfield, and 35 shares of stock in Carolinas Auto Supply House which he bequeathed to his son, Richard Dotson White." The executors were directed "to administer and distribute the estate" accordingly.

Each guardian ad litem excepted to the judgment, and appealed.

Samuel M. Millette and Paul B. Guthrey, Jr., for Guardians ad Litem, appellants.

E. McA. Currier, for defendant, appellees.

Lelia M. Alexander, for plaintiff, appellees.

PER CURIAM: The appellants assign as error the court's adjudication that it was the intent of the testator to devise and bequeath to his wife, Hanna Dotson White, in fee simple, all the property mentioned in his will except 70 shares of stock specifically devised equally between his daughter, Shirley White Benfield, and his son, Richard Dotson White. The will and the court's interpretation of it are parts of the record, and before us. The appellants conceded on the argument, and correctly so, that for them and those whom they represent to have any interest in the estate and, therefore, any standing in court, it would be necessary to construe the will as conveying a life estate only

to Hanna Dotson White, with the contingent remainder to the testator's three children, Earl C. White, Jr., Shirley White Benfield, and Richard Dotson White, with final devisees and legatees to be determined by the call of the roll at the death of the life tenant. The will does not permit of the interpretation appellants seek to have the court place upon it. In no event does the will create a contingent remainder. The appellants, therefore, have no interest in the estate, contingent or otherwise. They are not parties aggrieved by the adjudication.

The judgment of the Superior Court of MECKLENBURG County is Affirmed.

STATE v. JOHNSON H. CHURCH

(Filed 26 March, 1958)

APPEAL by defendant from *Nettles, J.*, December Term 1957 of CALDWELL.

The defendant was tried and convicted in the Recorder's Court of Caldwell County upon a warrant charging him with the illegal possession of twenty-six 16 oz. cans of beer and six pints of taxpaid whiskey. From the judgment imposed the defendant appealed to the Superior Court where he was tried *de novo* on the original warrant.

The State's evidence tends to show that on 4 October 1957, two law enforcement officers, armed with a search warrant which was read to the defendant, proceeded to search a one-room cinder block building in the City of Lenoir. In the room there was a commercial type ice box and a breakfast room table and there was one plate and one fork, but no knife. There were no cooking utensils and no clothing except what he was wearing at the time. There was a TV set but it was not hooked up. There was no merchandise there for sale. There was a three-quarter bed in the place. The officers found twenty-four pints of beer on ice and six pints of whiskey in another ice box. The defendant told the officers that he was living in the room.

The State's evidence further tends to show that over a period of several weeks while the premises were being watched by an officer, defendant had spent the first part of the night in this building but would leave and go to his home on Underdown Avenue; that he never spent a full night in this building during that period.

The defendant testified that the beer and whiskey belonged to him; that both were for his own use and that he was living there at the time the place was searched. That he and his wife were estranged at the time and he was not living with her at his home on Underdown Avenue.

The jury returned a verdict of guilty. Judgment was imposed on the verdict and the defendant appeals, assigning error.

Attorney General Patton, Ass't. Attorney General McGalliard, for the State.

W. H. Strickland, for defendant.

PER CURIAM. The State's evidence was sufficient to carry the case to the jury and to support the verdict. The determinative question to be decided by the jury was whether or not the room where the liquor was found was at the time being occupied as living quarters by the defendant. This question was fully and clearly presented to the jury in a charge free from error. It involved a question wholly within the province of the jury and the jury accepted the State's version. Under the charge, the verdict of the jury was made to turn upon the possession of the six pints of whiskey (not the beer), and whether or not the place where it was found was the home of the defendant.

No prejudicial error in the trial below has been made to appear.

No Error.

ZEYLAND McKINNEY AND WIFE, RACHEL McKINNEY v. H. M. MORTON AND WIFE, SALLIE MORTON.

(Filed 26 March, 1958)

Boundaries § 7—

Plaintiff may not take a voluntary nonsuit in a processioning proceeding.

APPEAL by defendants from *Froneberger, J.*, at September 1957 Term, of MITCHELL.

Processioning proceeding for establishment of true location of dividing line between lands of petitioners and lands of respondents as set forth in pleadings filed.

Petitioners were permitted to submit to judgment as of voluntary nonsuit. Defendants excepted thereto, and from judgment signed appeal to Supreme Court and assign error.

R. W. Wilson, for petitioners, appellees.

G. D. Bailey, W. E. Anglin, for defendants, appellants.

PER CURIAM. Where, in a processioning proceeding, the only real controversy is as to the true location of the dividing line between the lands of the petitioners and of the respondents the cause should not be dismissed as in case of nonsuit. See *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633; *Brown v. Hodges,* 230 N.C. 746, 55 S.E. 2d 498; *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501, under authority of which the judgment of voluntary nonsuit entered below is hereby

Reversed.

LOUISE LASSITER v. NORTHAMPTON COUNTY BOARD OF ELECTIONS

(Filed 9 April, 1958)

1. Constitutional Law § 3—

Where a constitutional amendment stipulates that its provisions should be indivisible and that the whole of the amendment should stand or fall together, the adoption of a subsequent amendment, predicated upon the original amendment as amended, substituting one new section and containing language implicitly recognizing the other sections of the article as then written, has the effect of incorporating and adopting anew the other sections and provisions of the articles as then appeared, freed of the indivisibility clause of the original amendment.

2. Constitutional Law § 2—

Our State Constitution is a limitation and not a grant of power, and the General Assembly has all political power not prohibited it by the Constitution.

3. Constitutional Law § 20: Elections § 2c—

The provisions of G.S. 163-28 requiring all persons applying for registration to be able to read and write any section of the Constitution as an educational qualification to the right to vote, is authorized by Article VI of the State Constitution, and, since it applies alike to all persons who present themselves for registration to vote, it makes no discrimination based on race, creed or color, and therefore does not conflict with the 14th, 15th or 17th Amendments to the Constitution of the United States.

APPEAL by plaintiff from *Paul, J.*, at August 1957 Term, of NORTHAMPTON.

Civil proceeding predicated upon denial by the Registrar of Seaboard Voting Precinct, Northampton County, North Carolina, of application of plaintiff, Louise Lassiter, 41 years of age, for registration as a voter in said precinct for the reason that she, the plaintiff, failed to submit to an educational test required by General Statute 163-28 amended, of the State of North Carolina.

Counsel for petitioner and counsel for respondents, being of opinion that the resolution of this controversy depends upon a question of law, and, having waived a jury trial in the cause, consented that the court might hear and resolve said matter upon an agreed statement of facts, stipulate the following:

"1. That the petitioner herein, to wit, Louise Lassiter, is a Negro, is now a resident of Seaboard Voting Precinct of Northampton County, North Carolina, has been such resident continuously for more than 18 years, and was such resident on the 22nd day of June, 1957.

"2. That the said Louise Lassiter is of voting age, to wit, being more than 21 years of age and that she was of such voting age on and before the said 22nd day of June, 1957.

"3. That the said Louise Lassiter is not now one of the persons excluded from eligibility to register and vote within the contemplation, meaning and intent of Section 163-24, of General Statutes of North Carolina, and was not on the 22nd day of June, 1957, within any of the categories of persons excluded from registration and voting by said statute.

"4. That the said Louise Lassiter, by virtue of her continuous residence in and claim of continuous residence in the aforesaid Seaboard Precinct, Northampton County, North Carolina, is not eligible to register as a voter in any other precinct in the State of North Carolina.

"5. That the said Louise Lassiter is not now registered and never has been registered as a voter for the purpose of voting in the said Seaboard Precinct, nor in any other voting precinct within the State of North Carolina, nor in any other town, city or State.

"6. That on the 22nd day of June, 1957, the said Louise Lassiter, in due and normal course and within the hour limits prescribed, presented herself to the duly appointed and acting registrar of the said Sea-Board Precinct, to wit, Mrs. Helen H. Taylor, and requested to be registered as a voter for and in a special election scheduled to be held on July 13, 1957, for the voting citizens of Northampton County.

"7. That upon presenting herself to the said registrar, the said Louise Lassiter subscribed to the oath generally and usually required of applicants for registration.

"8. That following the taking of and subscribing to said oath the said registrar, to wit, Mrs. Helen H. Taylor, presented to the said Louise Lassiter a printed copy of the Constitution of the State of North Carolina and requested and required of the said Louise Lassiter that she read certain designated sections thereof.

"9. That the said Louise Lassiter declined and refused to read the proffered sections of the said Constitution, or any other section thereof, as a prerequisite to her being registered as a voter, for that the said Louise Lassiter contended and asserted and still contends and asserts that such requirement of reading said Constitution was and is unlawful, the same being in violation of the Constitution and laws of the State of North Carolina, and the Constitution and laws of the United States.

"10. That the said registrar, to wit, Mrs. Helen H. Taylor, upon the declining and refusing of the said Louise Lassiter to read the proffered sections of the Constitution of North Carolina, then and there refused to register and did not register the said Louise Lassiter

upon the ground that she, the said Louise Lassiter, failed to meet one of the prerequisites for registration, namely, reading any section of the Constitution of North Carolina in the English language.

"11. That on the same day of refusal of registration to her, upon the ground hereinbefore set forth, to wit, on the 22nd day of June, 1957, the said Louise Lassiter gave written notice to the said registrar of appeal from said denial of registration by said registrar to the Board of Elections of Northampton County.

"12. That on the 28th day of June, 1957, the appeal of the said Louise Lassiter from the denial of registration by the aforesaid registrar was heard by and before the Board of Elections of Northampton County, sitting and convened as a body and administrative board in the Courthouse building of Northampton County, in Jackson, North Carolina.

"13. That the said Board of Elections of Northampton County, being duly constituted and convened, as aforesaid, heard and entertained the aforesaid appeal of the said Louise Lassiter *de novo*.

"14. That in said hearing and as a part of said hearing to determine the eligibility of the said Louise Lassiter to register as a voter, the said Board of Elections requested of the said Louise Lassiter that she read certain designated sections of the Constitution of North Carolina from a printed copy of said Constitution supplied her.

"15. That the said Louise Lassiter declined and refused the said Board's request and requirement that she read the proffered sections of said Constitution, or any other section thereof, as a prerequisite to her being registered as a voter, for that the said Louise Lassiter contended and asserted and still contends and asserts that such requirement of reading said Constitution was and is unlawful, and the same being in violation of the Constitution and the laws of the State of North Carolina, and the Constitution and laws of the United States.

"16. That the said Board of Elections, upon the said Louise Lassiter's failing and refusing to read the proffered sections of the said Constitution, or any other sections thereof, issued a written order and directed that the said Louise Lassiter be denied registration as a voter in the Seaboard Precinct, upon the ground that she, the said Louise Lassiter, failed to meet one of the prerequisites for registration, namely, reading any section of the Constitution of North Carolina in the English language.

"17. That on the 28th day of June, 1957, the said Louise Lassiter filed and caused to be filed with the Board of Elections of Northampton County a written notice of appeal from said Board's denial of registration as a voter to the Superior Court of Northampton County.

"18. That on the 5th day of July, 1957, the appeal of the said Louise Lassiter from the said Board in said matter to the aforesaid Superior Court was docketed in said Superior Court.

"19. That the said Louise Lassiter, because of her lack of educational qualifications, on June 22, 1957, and continuously since said date until the present date, is unable to and has failed and refused to write or read, or attempt to write or read, any section of the Constitution of North Carolina, or any section of the Constitution of the United States in the English language.

"20. That aside from her failure, refusal and inability to read or write any section or sections of the Constitution of North Carolina, or any section or sections of the Constitution of the United States in the English language, the said Louise Lassiter meets the other statutory qualifications for eligibility to be registered as a voter in Seaboard Precinct, Northampton County, North Carolina.

"21. That this cause is duly before the Superior Court of Northampton County at this term in conformity with Chapter 163 of the General Statutes of North Carolina for trial or hearing and decision of the matters herein involved."

Upon these stipulations and applicable law petitioner through her counsel moved the court for directed verdict and finding in her favor. The motion was denied.

Petitioner through her counsel then made special request that the court make and enter the following finding of fact and conclusions of law, to wit:

"FINDING OF FACT

"That the Registrar of Seaboard Precinct of Northampton County and the Board of Elections of Northampton County failed and refused to register petitioner Louise Lassiter as a qualified voter upon the ground that the said Louise Lassiter failed and refused to read or write any section of the Constitution of North Carolina, as required by North Carolina General Statutes, Section 163-28, as amended.

"CONCLUSIONS OF LAW

"1. That the requirement by the Registrar of Seaboard Precinct and by the Northampton County Board of Elections, in application of the provision of Section 163-28 of General Statutes of North Carolina, as amended, that the said Louise Lassiter be able to read or write any section of the Constitution of North Carolina, as a prerequisite to being registered as a qualified voter is unlawful, the same being in violation of Article VI, Section I of the Constitution of North Carolina, and in violation of the 14th, 15th, and 17th Amendments to the Constitution of the United States.

"2. That the said Louise Lassiter is entitled to be registered as a qualified voter in Seaboard Precinct of Northampton County free of and without regard to any requirement of reading or writing any section of the Constitution of North Carolina as a prerequisite to such registration."

This special request for finding of fact and conclusions of law was denied.

Thereupon, Judge Paul, presiding at August 1957 Term, entered judgment in which it appears that "After reading and considering the agreed facts, and after hearing argument of counsel for the plaintiff and the defendant, the court is of the opinion that under said agreed facts plaintiff is not entitled to be registered as a qualified voter in Seaboard Township, Northampton County, North Carolina, for that said plaintiff does not meet the requirements of Chapter 163, Section 28, of the General Statutes of North Carolina" and "it is therefore ordered, adjudged and decreed that plaintiff is not entitled to be registered as a qualified voter in Seaboard Precinct, Northampton County, North Carolina, and that plaintiff's prayer for relief as set out in her notice of appeal to this court be, and the same is hereby denied * * *."

To the entry and signing of the foregoing judgment, plaintiff excepts and assigns a group of exceptions, and appeals to the Supreme Court of North Carolina, and assigns error.

Taylor & Mitchell, James R. Walker, Jr., for plaintiff, appellant.
E. N. Riddle, Fletcher & Lake, for defendant, appellee.
Attorney General Patton, Assistant Attorney General Ralph Moody, Amicus Curiae

WINBORNE, C. J. The immediate question on this appeal is this: Is plaintiff, upon the agreed statement of facts, entitled to register for voting without meeting the test of reading and writing any section of the Constitution of North Carolina in the English language, as required by General Statutes 163-28 as amended? The trial court was of opinion that plaintiff is not so entitled to register. This Court concurs in this ruling.

General Statutes 163-28 as amended by 1957 Session Laws of North Carolina, Chapter 287, Section 1, effective 12 April, 1957, under caption "Voters must be able to read and write; registrar to administer section," declares that "Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language," and that "it shall be the duty of each registrar to administer the provisions of this section."

And in the same act, 1957 Session Laws, Chapter 287, the General Assembly of North Carolina made provision (1) for appeal to County Board of Elections from registrar's denial of registration, G.S. 163-28.1; (2) for hearing *de novo* upon such appeal before County Board of Elections, G.S. 163-28-2; (3) appeal from judgment of County Board of Elections to Superior Court, and hearing thereon; and (4) appeal from judgment of Superior Court to Supreme Court, G.S. 163-28.3.

The plaintiff applied for registration and refused to submit to, and qualify for the educational test—that is, either to read or write any section of the Constitution of North Carolina as related in the foregoing stipulation of facts. And for this reason, and this reason alone, she was not admitted to registration.

At the outset she contends that the above provisions of G.S. 163-28 are unconstitutional by reason of conflict with the suffrage provisions of the Constitution of North Carolina.

In this connection it is appropriate to trace the history of Article VI, of the Constitution of North Carolina, omitting sections not necessary to inquiry in hand.

Beginning with the Constitution of the State of North Carolina "done in convention at Raleigh, the sixteenth day of March in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-second," the pertinent provision as to "suffrage and eligibility to office" is contained in Article VI, as amended by the Constitutional Convention of 1875, to read as follows:

"Section 1. Every male person, born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector. But no person, who upon conviction or confession in open court, shall be adjudged guilty of a felony or of any other crime infamous by the laws of this State, and hereafter committed, shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a manner prescribed by law.

"Sec. 2. Registration of Electors: It shall be the duty of the General Assembly to provide, from time to time, for the registration of all electors, and no person shall be allowed to vote without registration, or to register, without first taking an oath or affirmation to support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith * * *."

Thereafter the General Assembly of 1899 passed an act entitled

"An Act to Amend the Constitution of North Carolina," P.L. 1899, Chapter 218, abrogating Article Six of the Constitution of North Carolina, and proposing a substitute thereof, to be submitted at the next general election on May 1, 1899, but it was not so submitted. However, the General Assembly, at its adjourned session of 1900, passed another act, Chapter 2, Laws of Adjourned Session 1900, entitled "An Act Supplemental to an Act entitled 'An Act to Amend the Constitution of North Carolina,' ratified February twenty-first, eighteen hundred and ninety-nine, the same being Chapter two hundred eighteen of the Public Laws of eighteen hundred and ninety-nine" reading as follows:

"The General Assembly of North Carolina do enact:

"Section 1. That Chapter 218, Public Laws of 1899 entitled 'An Act to Amend the Constitution of North Carolina,' be amended so as to make said act read as follows: 'That Article Six of the Constitution of North Carolina be and the same is hereby abrogated, and in lieu thereof shall be substituted the following Article of the Constitution as an entire and indivisible plan of suffrage,

'Article VI

'Suffrage and Eligibility to Office

'(Section 1) Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.

'(Sec. 2) He shall have resided in the State of North Carolina for two years, in the county six months, and in the precinct, ward, or other election district, in which he offers to vote, four months next preceding the election: Provided, that removal from one precinct, ward, or other election district, to another in the same county, shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal. No person who has been convicted or who has confessed his guilt in open court upon indictment, of any crime, the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.

'(Sec. 3) Every person offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this Article.

'(Sec. 4) Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English

language; and before he shall be entitled to vote, he shall have paid on or before the first day of May, of the year in which he proposes to vote, his poll tax for the previous year, as prescribed in Article V, Section 1, of the Constitution. But no male person, who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, and no lineal descendant of any such person shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908.

'The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people of this State, unless disqualified under Section 2 of this Article: Provided, such person shall have paid his poll tax as above required.

'(Sec. 5) That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together * * * .'"

Section 9 declares that if a majority of votes be cast at the next general election in favor of this suffrage amendment, it shall go into effect on July 1, 1902.

And machinery is provided for submitting the question to a vote of the people, and for determining and declaring the result of the election, and the certification and enrollment of the amendment among the permanent records of the office of Secretary of State.

The act was in force from and after ratification—June 13, 1900.

The amendment to the Constitution was submitted to and approved by the qualified voters of the State at the next general election, and became Article VI of the State Constitution, and enrolled as required January 25, 1901.

Since the adoption of amendment last above mentioned, Article VI of the Constitution has been amended as follows:

(1) The next General Assembly at its 1919 session, passed an act, Chapter 129, entitled "An Act to Amend the Constitution of the State of North Carolina," which amended Sections 2 and 4 of Article VI as follows: "IV. By striking out the first sentence of Section 2 of Article VI, and substituting therefor the following: 'He shall reside in the

State of North Carolina for one year and in the precinct, ward or other election district in which he offers to vote, four months next preceding the election,' " and

"V. By striking out of Section 4 of Article VI the following: 'And before he shall be entitled to vote he shall have paid, on or before the first day of May in the year in which he proposes to vote, his poll tax for the previous year as prescribed in Article V, Section 1, of the Constitution.' " And the act declared that amendments IV and V as just stated be considered as one amendment and submitted to the voters of the whole State at the next general election. However, this was not done. But at the extra session of 1920 the General Assembly passed Chapter 93 of the Public Laws of that session entitled: "An act to amend Chapter 129 of the Public Laws of 1919, and to further amend the Constitution of the State of North Carolina" as follows: "Section 1, Chapter 129 of Public Laws of 1919 be and the same is hereby amended so as to hereafter read as follows: 'Sec. 2. That the Constitution of the State of North Carolina be and the same is hereby amended in manner and form as follows * * * .'

"IV. By striking out that part of the first sentence of Section 2 of Article VI ending with the word 'election' before the word 'provided', and substituting therefor the following: 'He shall reside in the State of North Carolina for one year and in the precinct, ward or other election district in which he offers to vote, four months next preceding the election.'

"V. By abrogating the following requirement of Section Four of Article VI: 'And before he shall be entitled to vote he shall have paid, on or before the first day of May in the year in which he proposes to vote, his poll tax for the previous year as prescribed by Article Five, Section 1, of the Constitution' and by abrogating the following proviso at the end of Section Four, Article VI: 'Provided such person shall have paid his poll tax as above required.' "

Moreover, the act, Chapter 93, Public Laws Extra Session 1920, declared that these amendments IV and V be considered as one amendment and submitted to the qualified voters of the whole State at the next general election. This was done, and the amendments were adopted and then enrolled by the Secretary of State on January 8, 1921.

The next amendment was proposed by the General Assembly 1945 Session Laws, Chapter 634, as follows: "Sec. 2. That Section 1 of Article VI of the Constitution of the State of North Carolina be amended to read as follows: 'Section 1. Who May Vote. Every person born in the United States, and every person who has been naturalized, 21 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, ex-

cept as herein otherwise provided.'" This act repeals all laws and clauses of laws in conflict with its provisions. And the General Assembly authorized the submission of the amendment to the qualified voters of the State in the next general election. This was done, and the amendment was adopted, and then enrolled by the Secretary of State on December 10, 1946.

Lastly, the General Assembly at its 1953 session, Chapter 972, passed an act, the terms of which re-wrote the first sentence Section 2 of Article VI, so as to reduce the length of residence for voting in a voting precinct. And this was submitted to the qualified voters of the entire State at the 1954 general election and adopted, and then enrolled December 8, 1954.

Otherwise Article VI remained as adopted in 1902, as above recited.

The appellant contends that the indivisibility clause is a "built-in extinguishment of the entire 1902 amendment," and, that, as a result, the suffrage provisions are relegated to Article VI as it appears in the Constitution of 1868 as amended by the constitutional convention of 1875, and, hence, there is no constitutional authority for the General Assembly to enact G.S. 163-28. But attention is directed to the 1945 amendment for such authority.

In this connection we find in 16 CJS 67 Constitutional Law, Section 26, this pertinent declaration of principle: "As the latest expression of the will of the people a clause in a constitutional amendment will prevail over a provision of the Constitution or earlier amendment inconsistent therewith, for an amendment to the Constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it."

So, irrespective of the questions now raised, as to the validity of the provisions of the 1902 amendment, and as to the effect thereof upon the provisions of Article VI of the Constitution of 1868 as amended by the Constitutional Convention of 1875, when the General Assembly came to consider the proposed amendment of 1945, Article VI then factually appeared intact and unchallenged. Therefore the provisions of the 1945 amendment must be considered in the light of this fact. Thus, when, as to who may vote, the General Assembly declared that "Every person born in the United States, and every person who has been naturalized, 21 years of age, and possessing the qualifications set out in this article shall be entitled to vote * * * ," the clause "possessing the qualifications set out in this article," was intended to mean, and was made certain by, the qualifications appearing upon the face of the Article VI, so unchallenged. And one of those qualifications was set forth in Section 4 of Article VI wherein it was

required that "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language."

"In the absence of constitutional inhibition part or all of an existing statute may, by specific and descriptive reference thereto, be incorporated into another statute." 82 CJS 123, Statutes Sec. 70(b).

Indeed, under such circumstances, "the provisions of a law which lapsed or has been repealed may be made a part of a new statute by referring to the law in general terms and without incorporating such provisions at length; reference may be made to an act which is repealed and succeeded by the act making the reference for the purpose of adopting provisions of the succeeded act; and repealed acts, some of which are invalid, may be adopted by reference for purposes of identification. The validity of the referring act is unaffected when it is complete within itself when read in the light of the matter so identified," 82 CJS 124, Statutes Sec. 70(b).

And this Court in *Lutz Industries v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333, opinion by *Parker, J.*, declaring that "Unless prohibited by constitutional restrictions, reference statutes are frequently recognized as an approved method of legislation to avoid encumbering the statute books by unnecessary repetition," has applied the principle.

In this light, the 1945 amendment so proposed and later adopted had the effect of incorporating and adopting anew the provisions as to the qualifications required of a voter as set out in Article VI, freed of the indivisibility clause of the 1902 amendment. And the way was made clear for the General Assembly to act.

In this connection, a doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it. 11 Am. Jur. 619—Constitutional Law.

The Constitution of North Carolina, Article 1, Sec. 2, declares: "All political power is vested in, and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

Moreover, it is noted in *Guinn v. United States*, 238 US 347, 59 L.ED. 1340, that Chief Justice White of the Supreme Court of the United States, said: "No time need be spent on the question of the validity of the literacy test, considered alone, since as we have seen, its establishment was but the exercise by the State of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted. Whether this test is so connected with the other one re-

lating to the situation on January 1, 1866, that the validity of the latter requires the rejection of the former, is really a question of State law; but in the absence of any decision on the subject by the Supreme Court of the State, we must determine it for ourselves."

In this respect, the statute, then Section 5939 of Consolidated Statutes, later G.S. 163-28, was the subject of judicial interpretation by this Court, in the case of *Allison v. Sharp,* 209 N.C. 477, 184 S.E. 27, decided 26 February, 1936. And the Court, in opinion by Clarkson, J., held it to be constitutional.

And the provisions of G.S. 163-28 apply alike to all persons who present themselves for registration to vote. There is no discrimination in favor of, or against any by reason of race, creed, or color. Hence there is no conflict with either the 14th, 15th or 17th Amendments to the Constitution of the United States.

For reasons stated, the judgment from which appeal is taken is Affirmed.

MARY K. SHAVER v. FLOYD N. SHAVER

(Filed 9 April, 1958)

1. Judgments § 20a—

All judgments are *in fieri* during the term, and, except as to consent judgments, the trial court may open, modify or vacate of its own motion any judgment rendered during the term.

2. Judgments § 27c—

A judgment, which upon its face is void, may be vacated by the court *ex mero motu* at any time.

3. Judgments § 20a—

The trial court has the inherent power at any time, upon motion or *ex mero motu,* to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth, but after the term, such power must be exercised with great caution and may not be extended to the correction of judicial errors so as to make the judgment different from that which was actually rendered.

4. Judgments § 27d—

A judgment which is regular upon the face of the record but irregular in fact requires evidence *aliunde* for impeachment and is voidable and not void, and ordinarily may be attacked only by motion in the cause made by a party to the action or persons in privity with a party, and strangers to the judgment or intermeddlers who have no justiciable grievance should not be permitted to assail the judgment.

5. Judgments § 20a—

The trial court is without power, statutory or inherent, to initiate on its own motion proceedings to vacate an irregular voidable judgment after the lapse of the term at which it was rendered.

6. Judgments § 24a—

A judgment regular upon the face of the record is presumed to be valid until the contrary is shown in a proper proceeding.

7. Process 6—

An *amicus curiae* may not assume the place of a party in a legal action, and is not a competent person under G.S. 1-98.4 to make the jurisdictional affidavit for service by publication.

PARKER, J., dissenting.

APPEAL by plaintiff from *Bickett, J.*, Regular Judge holding the Courts of the Fourteenth Judicial District, at Chambers in the City of Durham, 6 September, 1957. From DURHAM.

Haywood & Denny for plaintiff, appellant.
E. C. Bryson, Amicus Curiae.

JOHNSON, J. This is a proceeding initiated by the presiding Judge on his own motion for the purpose of opening a judgment of absolute divorce rendered at the May Term, 1946, of the Superior Court of Durham County in the case entitled "Mary K. Shaver v. Floyd N. Shaver." The cause was heard below on special appearance of the plaintiff, Mary K. Shaver (Carpenter), and motion to quash the attempted service of notice by publication on her.

This is the fourth appeal to this Court involving efforts to vacate the judgment of divorce.

In *Carpenter v. Carpenter,* 244 N.C. 286, 93 S.E. 2d 617, Stanley M. Carpenter, the second husband of Mary K. Shaver (Carpenter), instituted an action to have his marriage annulled on the ground that the divorce obtained by his wife was a nullity because of fraud and collusion practiced on the trial court by the parties to the divorce action. The plaintiff Carpenter alleged that the wife having sworn falsely in her pleadings and at the trial that she and her former husband had lived separate and apart for two years before the commencement of the divorce action, the court failed to acquire jurisdiction of the cause (G.S. 50-6), and that therefore the decree of divorce was void and of no effect. The Carpenter attack failed, however, because the alleged defects nowhere appeared on the face of the record; whereas all the necessary jurisdictional facts did appear of record, thus requiring evidence *aliunde* to establish Carpenter's allegations. This being so,

the judgment at most was voidable and not void. Accordingly, it was not subject to collateral attack by Carpenter in his independent action. Thus the Carpenter collateral attack failed.

Next, we had for consideration an appeal wherein Carpenter had moved directly in the Shaver v. Shaver cause to vacate the judgment on the same grounds alleged in his independent action. Both Shavers appeared specially and moved to dismiss on the ground that they had not been served properly with notice of the motion. The lower court overruled the motion. This Court noted that Carpenter, not being party or privy to the divorce action, was not a competent person to challenge the decree. The ruling below was reversed by this Court under *ex mero motu* application of the well established rule that strangers to the record ordinarily have no standing on which to base an application to vacate a judgment. *Shaver v. Shaver,* 244 N.C. 309, 93 S.E. 2d 614.

Carpenter's third effort to vacate the judgment was by a second motion in the Shaver v. Shaver cause, made while the proceedings involving his first motion were on appeal to this Court. After the appeal was taken, Carpenter through counsel moved in the cause that the trial court proceed upon its own motion to inquire into the validity of the judgment and declare it null and void. Again, attorneys for the Shavers appeared specially and moved to dismiss the Carpenter motion on the ground that the purported service of notice on them by publication, both of them being nonresidents of North Carolina, was invalid and that the court had not acquired jurisdiction over them, and hence that the court was without power to open the judgment. The motions to dismiss were overruled. Both defendants excepted and appealed to the Supreme Court. Notwithstanding the appeal, which rendered the court *functus officio* to deal further with the merits of the cause pending appeal, the presiding Judge entered an order citing the plaintiff, Mary K. Shaver (now known as Mary K. Carpenter and as Mrs. Stanley M. Carpenter), and the defendant, Floyd N. Shaver, to appear and show cause why the original judgment of divorce should not be declared null and void and vacated for alleged fraud and collusion practiced on the court by the Shavers. The court directed that notice of the show cause order be served on the original parties by publication. Again, they specially appeared by counsel and moved to quash the order and proceedings for want of jurisdiction of both parties and subject matter. The motions to dismiss were not ruled upon. The court proceeded to hear the matter, principally on *ex parte* affidavits presented to the court in Chambers by counsel previously appearing for Stanley M. Carpenter, then recognized by the court as appearing *amici curiae.* On the evidence presented, the trial court found facts and

entered judgment declaring the divorce judgment void *ab initio* and decreeing that it be vacated. On appeal to this Court, the judgment below was reversed. We did not reach the merits of the case. The reversal was rested on procedural grounds - that the trial court was *functus officio* to deal with the merits of the case pending appeal to this Court. *Shaver v. Shaver,* 244 N.C. 311, 93 S.E. 2d 615.

We come now to consider the fourth proceeding instituted for the purpose of vacating the judgment - the proceeding from which the instant appeal comes.

On 13 June, 1957, Judge Williams, then presiding over a criminal term of Superior Court, entered an order opening the original divorce case. The order, entered *ex mero motu* by Judge Williams, contains these recitals: (1) that a number of affidavits had been presented to the court by the district solicitor, alleging in gist that the plaintiff and the defendant did not live separate and apart during the two-year period before the commencement of the action as alleged in the complaint, but on the contrary, that the parties in fact lived together as man and wife during extended periods of time, both during 1944 and 1945; (2) that if the matters alleged in the affidavits are true, the allegations of the complaint in the divorce action and the admissions in the answer are false and were used by the parties for the purpose of perpetrating fraud and collusion on the court, in representing that they had lived separate and apart for the requisite two-year period, when in fact they had not, and that therefore the court never acquired jurisdiction of the divorce action, and the judgment entered therein is void and should be set aside; (3) that at the March, 1957, Term of Superior Court the grand jury returned a true bill charging the plaintiff, Mary K. Shaver (Carpenter), with the crime of bigamous cohabitation following her purported marriage to Stanley M. Carpenter after the entry of the foregoing judgment of divorce; (4) that the court is "of the opinion that the questions raised as to the validity of the judgment of divorce . . . , and as to whether a fraud has been perpetrated upon the court, should be resolved and set at rest . . .," but that the plaintiff and the defendant should be heard, or given an opportunity to appear before entering a final order as to the validity of the judgment. And thereupon it was ordered and decreed by the court that the plaintiff and the defendant appear before Judge Williams at the courthouse in Durham on 27 June, 1957, at 2:30 o'clock p.m., "or as soon thereafter as the matters can be heard, and show cause" why the judgment of divorce entered 27 May, 1946, should not be "vacated, set aside and declared null and void for failure of the court to acquire jurisdiction of the subject matter of the action." The order directed that a copy be served on the plaintiff and on the defendant.

The clerk's *fiat* directing the Sheriff of Durham County to serve the order on the plaintiff and defendant was returned with the notation that neither party, after diligent search, could be found in Durham County. Deputy Sheriff Mangum by separate affidavit stated that in his investigation and inquiry in trying to serve the order he learned that both parties resided outside of the State, the plaintiff, Mary K. Shaver, at 1269 Federal Drive, Montgomery, Alabama; and the defendant in Leesburg, Lake County, Florida.

On 28 June, 1957, during a term of criminal court, Judge Williams entered an order continuing the hearing until 5 September, 1957, and ordering that the plaintiff and the defendant be served by publication as provided by G.S. 1-99.2. On the same date, Judge Williams entered another order, finding that the assistance of counsel "in the further investigation and presentation of this matter" is necessary, and directed that E. C. Bryson, Esq., of the Durham Bar, be "appointed friend of the court to assist the court in the further investigation and presentation of this cause."

On 2 July, 1957, E. C. Bryson as friend of the court filed an affidavit pursuant to G.S. 1-98.4, alleging the facts in respect to the opening of the judgment by the entry of the order to show cause, and averring that, after due diligence, personal service of the order could not be had upon either the plaintiff or the defendant in the State of North Carolina. Based on this affidavit, the clerk entered an order directing that notice of the order to show cause be served on the plaintiff and the defendant by publication in the Durham Morning Herald, as provided by G.S. 1-99.2. Notice, directed to the plaintiff and to the defendant, in compliance with the provisions of the statute, was prepared and signed by the clerk, notifying them of the entry of the show cause order, and requiring them to appear before the Judge of the Superior Court on 5 September, 1957, and show cause why the judgment of divorce entered 27 May, 1946, should not be vacated and set aside. Printer's affidavit, in compliance with G.S. 1-102, was filed showing that the notice was published in the Durham Morning Herald for four successive weeks, beginning 4 July, 1957. The record also shows that copies of the order to show cause and all relevant orders, affidavits, and documents were mailed to the out-of-state addresses of the parties, and also to the firm of Haywood and Denny, attorneys, of Durham, who had appeared for the plaintiff in a prior motion in this cause (244 N.C. 309).

On 5 September, 1957, the matter came on for hearing before Judge Bickett, Judge holding the 2 September Civil Term of Court. Counsel for the plaintiff, Mary K. Shaver, filed a special appearance and motion to dismiss on the ground "that the court has not, in this pro-

ceedings, properly acquired jurisdiction over the person of the plaintiff," for that "the process under which acquisition of jurisdiction of the person of the plaintiff has been attempted is deficient, and the court does not have jurisdiction." At the hearing, all the orders, proceedings, and affidavits hereinbefore referred to were introduced in evidence by E. C. Bryson, friend of the court, and A. J. Gresham, Assistant Clerk of the Superior Court, testified that all papers, orders, and proceedings referred to had been duly filed in the office of the Clerk of the Superior Court as provided by G.S. 2-42.

Upon consideration of the evidence, and after argument of counsel, Judge Bickett overruled the motion to dismiss and entered an order decreeing that "both the plaintiff, Mary K. Shaver, and the defendant, Floyd N. Shaver, have been properly served with all process, and are properly and legally before the Court, . . ." To the foregoing ruling and order, the plaintiff excepted, and appealed.

The presiding Judge of the Superior Court may, within established limitations, open or vacate a judgment on his own motion. During a term of court, all judgments and orders are deemed to be *in fieri*. Therefore, during the term any judgment or order, except one entered by consent, ordinarily may be opened, modified or vacated by the court on its own motion. *Hoke v. Atlantic Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407; *Cook v. Telegraph Co.*, 150 N.C. 428, 64 S.E. 204. Also, a judgment which upon its face is void may be vacated by *ex mero motu* action of the judge at any time. *Deans v. Deans*, 241 N.C. 1, 84 S.E. 2d 321; *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409; *Carter v. Rountree*, 109 N.C. 29, 13 S.E. 716; McIntosh, North Carolina Practice and Procedure, 2d Ed., Sec. 1713. See also 30A Am. Jur., Judgments, Sections 693 and 697. Furthermore, the court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth. The correction of such errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. *S. v. Maynor* and *Maynor v. Tart*, 226 N.C. 645, 39 S.E. 2d 833; *Strickland v. Strickland*, 95 N.C. 471; *S. v. Warren*, 95 N.C. 674; *Walton v. Pearson*, 85 N.C. 34. But this power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. And the power to correct clerical errors after the lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered. *Bisanar v. Suttlemyre*, 193 N.C. 711, 138 S.E. 1; *Mann v. Mann*, 176 N.C. 353, 97 S.E. 175; *Creed v. Marshall*, 160 N.C. 394, 76 S.E. 270.

A judgment regular upon the face of the record, though irregular in fact, requires evidence *aliunde* for impeachment. Such a judgment is voidable and not void (*Carpenter v. Carpenter, supra* (244 N.C. 286); *Card v. Finch,* 142 N.C. 140, 54 S.E. 1009; McIntosh, North Carolina Practice and Procedure, 2d Ed., Sec. 1713), and may be opened or vacated after the end of the term only by due proceedings instituted by a proper person. *Moore v. Packer,* 174 N.C. 665, 94 S.E. 449; *Doyle v. Brown,* 72 N.C. 393; McIntosh, North Carolina Practice and Procedure, 2d Ed., Sec. 1715; 30A Am. Jur., Judgments, Sec. 713. The procedural remedy is by motion or petition in the cause and not by independent action. *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; *Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315; McIntosh, North Carolina Practice and Procedure, 2d Ed., Sec. 1715; 30A Am. Jur., Judgments. Sec. 713. Ordinarily, the persons entitled to have an irregular voidable judgment opened or vacated are the parties thereto or persons in privity with them. *Shaver v. Shaver, supra* (244 N.C. 309); McIntosh, North Carolina Practice and Procedure, 2d Ed., Sec. 1715. See also 30A Am. Jur., Judgments, Sec. 747. In *Card v. Finch, supra* (142 N.C. 140) at p. 148, it is said: "Persons who are not parties or privies and do not, upon the record, appear to be affected, will not be heard upon a motion to vacate a judgment. They have no status in Court. No wrong has been done them *by the Court.*" If the parties and privies are content to permit a judgment to stand, considerations of sound public policy require that strangers to the record or intermeddlers who have no justiciable grievance to be righted should not be permitted to assail the judgment. *Shaver v. Shaver, supra;* 30A Am. Jur., Judgments, Sec. 643.

We know of no power, statutory or inherent, vested in the Superior Court which authorizes it to initiate on its own motion proceedings to set aside an irregular voidable judgment after the lapse of the term at which it was rendered.

In the instant case we have a judgment of more than ten years standing. It is regular upon its face. The Superior Court of Durham County was without power to initiate on its own motion proceedings to vacate the judgment. Rather, it was the duty of the court to indulge the legal presumption that the judgment is valid. A judgment regular upon the face of the record is presumed to be valid until the contrary is shown in a proper proceeding. G.S. 1-221; *Card v. Finch, supra;* McIntosh, North Carolina Practice and Procedure, 2d Ed., Sec. 1713.

Moreover, it is to be noted that an *amicus curiae* may not assume the place of a party in a legal action. Nor may he take over the management of a suit. And he has no right to institute proceedings therein.

He takes the case as he finds it. 3 C. J. S., p. 1049. It follows that the *amicus curiae* was not a competent person under G.S. 1-98.4 to make the jurisdictional affidavit for service by publication on the plaintiff, Mary K. Shaver. The affidavit made by him is a nullity. Without it, there was no valid service on Mary K. Shaver. Her motion to quash should have been allowed. *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314; *Nash County v. Allen,* 241 N.C. 543, 85 S.E. 2d 921; *Comrs. of Roxboro v. Bumpass,* 237 N.C. 143, 74 S.E. 2d 436.

We have given consideration to the argument made by the *amicus curiae* to the effect that the facts of this case take it out of the general rule which requires that a direct attack on a voidable judgment may be made only by a party or privy. We have considered his contention that the proceedings below were instituted by the presiding Judge, not in the interest of any individual but solely for the purpose of protecting from fraud and subversion the processes of the administration of justice. The *amicus curiae* says in his brief that "The integrity of the judicial process and the public welfare demand that there be a hearing of this matter on the merits . . ." On this premise the able *amicus curiae* reasons that the proceedings initiated by the court below should be approved and that the court-instigated investigation should be permitted to go forward to final hearing. We cannot accept the premise or the arguments based thereon. If this judgment of divorce is subject to attack by the *amicus curiae* appointed for that purpose, then other judgments, and any number of them, are subject to be attacked the same way. If we approve the appointment of this *amicus curiae* for the performance of the duties assigned him by the court, then other *amici curiae,* and any number of them, may be appointed in like cases to work over any number of divorce judgments of long standing, or any other judgments, for that matter, in which it is suspected that fraud was perpetrated on the court. The practice could lead to a serious weakening of the rule that a motion in the cause directly attacking a judgment may be made only by a party to the action or by one in privity with a party. Moreover, to approve the unprecedented procedure adopted below would be a step toward undermining the integrity of personal and property rights acquired on the faith of judicial proceedings, as well as the public interests involved in the finality and conclusiveness of judgments.

If in the instant case the "integrity of the judicial process" stands in need of vindication from alleged fraud and false swearing, the court and the district solicitor, acting as an officer of the court, have at their command criminal remedies by which the infractions may be ferreted out and punished. These criminal remedies would seem to furnish all the means of relief needed for adequate vindication of the

integrity of the Superior Court of Durham County.

The order appealed from is reversed. The cause will be remanded with direction that the order to show cause and all subsequent proceedings based thereon be vacated and set aside.

Reversed and Remanded.

PARKER, J., dissenting: The order to show cause made by Judge Williams of his own motion on 13 June 1957, a copy of which he ordered served upon the plaintiff and the defendant, reads in part as follows:

"There having been presented to the undersigned Clawson L. Williams, Judge presiding over the June 10, 1957 Criminal Term of the Superior Court of Durham County a number of affidavits by the Honorable W. H. Murdock, Solicitor, and the Court having examined said affidavits, said affidavits having stated and alleged that the plaintiff in this cause, Mary K. Shaver (later and now known as Mary K. Carpenter and as Mrs. Stanley M. Carpenter), and the defendant, Floyd N. Shaver, did in fact reside and live together as husband and wife for extended periods of time during 1944 and 1945 and were generally regarded by friends and acquaintances during such periods as living together as husband and wife; and it appearing further to the Court from the complaint, answer and judgment entered in the above cause that the plaintiff alleged and the defendant admitted that they had separated January 1, 1944, and had continued to live separate and apart thereafter, and at no time had resumed the marital relationship existing between them, and that the action for divorce *a vinculo* on the basis of two years' separation of the parties was instituted May 10, 1946; that an answer admitting all allegations of the complaint was filed by the defendant on May 18, 1946; and that judgment of absolute divorce was entered May 27, 1946; and it further appearing to the Court that if the matters and things alleged in the affidavits presented to the Court are true and correct, that the allegations of the complaint and the admissions of the answer are false and untrue, and have been employed for the purpose of perpetrating fraud and collusion upon the Superior Court of Durham County, and that the judgment of divorce *a vinculo* heretofore entered in this cause is void and of no effect and should be vacated and set aside for the reason that his Honor Henry A. Grady, Judge presiding of (sic) the May 1947 Civil Term of the Superior Court of Durham County, was without authority to enter said judgment, the said Court not having acquired jurisdiction of the subject matter of said action, the parties to said action not having lived separate and apart for two years next preceding the institution of the action as required by law, and it further appearing to the

Court at the March 1957 Term of Durham County Criminal Court the Grand Jury returned a true bill charging the said Mary K. Shaver (now known as Mary K. Carpenter and as Mrs. Stanley M. Carpenter) with the crime of bigamous cohabitation as the result of her purported marriage to Stanley M. Carpenter, and the Court, of its own motion, based upon the affidavits presented to it and upon the bill of indictment hereinbefore referred to, being of the opinion that the questions raised as to the validity of the judgment of divorce herein referred to, and as to whether a fraud has been perpetrated upon the Court, should be resolved and set at rest by the parties to said action, and it appearing to the Court that the plaintiff and defendant should be heard, or given an opportunity to appear, before entering a final order as to the validity of the judgment of divorce herein referred to."

The majority opinion states: "The record also shows that copies of the order to show cause and all relevant orders, affidavits, and documents were mailed to the out-of-state addresses of the parties, and also to the firm of Haywood and Denny, attorneys, of Durham, who had appeared for the plaintiff in a prior motion in this cause." Mary K. Shaver had full knowledge of the order to show cause, because Emery B. Denny, Jr. appeared for her in the lower court, and the firm of Haywood and Denny appear for her in this Court.

The record shows that on 14 June 1957 Judge Williams entered an order commanding that his order to show cause entered by him on 13 June 1957 be served on Floyd N. Shaver in Leesburg, Lake County, Florida. The record shows that this order was properly served on Floyd N. Shaver on 17 June 1957 by the Sheriff of Lake County, Florida.

Therefore, the record shows that Mary K. Shaver and Floyd N. Shaver had full knowledge of the order entered by Judge Williams of his own motion on 13 June 1957.

The common law conceded to all its courts the power to vacate its judgments. The Superior Court of North Carolina is a court of record of general jurisdiction, which also exercises equity jurisdiction. The power of the Superior Court to vacate its judgments, within proper limitations, is an inherent power vested in it, independent of statute, and it may be exercised by the Superior Court on its motion. *Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315; Freeman on Judgments, 5th Ed., Vol. I, Sec. 194; 49 C. J. S., Judgments, p. 478.

"The fact that a judgment was obtained through fraud or collusion is universally held to constitute a sufficient reason for opening or vacating such judgment either during or after the term at which it was rendered. . . . Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material

circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case has been fair." 49 C.J.S., Judgments, Sec. 269. The rationale of the rule is that a court of justice necessarily has the inherent power of its own motion to keep its records clear of fraud or collusion practiced upon the court itself.

I realize that it seems to be the prevailing rule that the authority of a court to set aside a judgment for fraud after the term at which the judgment was entered is usually limited to cases where the fraud was extrinsic and collateral to the matter tried, and not a matter at issue in the trial. 49 C.J.S., Judgments, Sec. 269; Freeman on Judgments, 5th Ed., Sec. 233.

Judge Williams' order to show cause was based on the alleged grounds of fraud and collusion. The term "collusion," as applied to divorce proceedings, has been accurately defined to be "an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant." *Doeme v. Doeme,* 96 App. Div. 284, 89 N. Y. Supp. 215. Collusion in a divorce case is a particular type of fraud, perpetrated not upon the other spouse, but upon the court itself before whom the divorce is sought.

The question of collusion in this divorce case was extrinsic and collateral to the matter tried, and was not a matter at issue in the trial. If it should be considered that the decision in *Carpenter v. Carpenter,* 244 N.C. 286, 93 S.E. 2d 617, bars the Superior Court of Durham County of its own motion from proceeding to investigate the question as to whether the divorce was procured by fraud which was at issue in the trial, it does not preclude that court of its own motion from investigating and determining whether the divorce decree was procured by collusion of the parties perpetrated upon the court itself.

The State has an interest in the proper maintenance of the marital status of its citizens, and public policy forbids that the parties shall enter into any collusion to bring about a judicial dissolution of their marriage. Collusion between the parties to a divorce proceeding will ordinarily bar the granting of a decree of divorce. See Annotations in 2 A. L. R., pp. 712-714 and 109 A. L. R., pp. 848-849, where many cases are cited.

One group of cases hold that for reasons of public policy the courts will exercise their power and set aside a divorce decree, if collusion is clearly proved, and if proper application for relief is seasonably made. These courts stress the fact that relief is granted because of the interest of the state in suits for divorce, and not for the sake of

the equally guilty parties. Other courts in a number of collusion cases have refused to grant relief in accord with the equitable principle that one who was himself a party to the collusion is not entitled to have it set aside for collusion. These cases where relief is granted and relief is denied are cited in Annotations 157 A. L. R., pp. 76-79, 9. Collusion as fraud, and 22 A. L. R. 2d pp. 1333-1334, 18. Collusion as fraud. See also Annotations 2 A. L. R., pp. 714-717, and 109 A. L. R., pp. 849-854, as to vacation of a divorce decree for collusion at the instance of a party guilty of collusion.

In this proceeding the Superior Court below was not acting upon application of any person, but was acting of its own motion to ascertain if the divorce decree obtained in this case had been procured by fraud or collusion perpetrated by the parties upon the court itself. In my opinion, the Superior Court of Durham County has the inherent power of its own motion to hear and determine whether in rendering this divorce decree it did so because of collusion practiced by the parties upon the court itself, and that in doing it, it is acting to preserve the purity of its proceedings, and in the interests of the state, which is concerned with the preservation of the marriage relations of its citizens, and the court of its own motion is not precluded from doing so by the power of the criminal law to punish, if the criminal law has been violated.

The Supreme Court of the United States, in an opinion by Mr. Justice Holmes, said in *Michigan Trust Co. v. Ferry* 228 U.S. 346, 57 L. Ed. 867: "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. It applies to Article 4, Section 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause."

I think that the Superior Court of Durham County had jurisdiction over the parties in the order to show cause entered by the court of its own motion. The parties had full knowledge of the order to show cause. I vote to affirm Judge Bickett's order. I do not agree with the statement in the majority opinion directing "that the order to show cause and all subsequent proceedings based thereon be vacated and set aside."

In *Patrick v. Patrick,* 245 N.C. 195, 95 S.E. 2d 585, this Court affirmed an order of the Superior Court of Lenoir County entered at the May Term 1956 setting aside and declaring void a judgment of absolute divorce entered at the April Term 1929.

In my opinion, the order to show cause entered by the court of its own motion should be heard on its merits to determine whether the divorce decree was obtained by collusion between the parties perpetrated upon the court itself. If the order to show cause should be permitted by this Court to be heard on its merits on collusion, and if the divorce decree were vacated, we have full power to review the judgment of the court below.

ROBERT P. SLOAN, ADMINISTRATOR OF THE ESTATE OF JOE R. SLOAN, DECEASED v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 9 April, 1958)

1. Electricity § 7: Evidence § 36—

The National Electrical Safety Code, which has not been approved by the General Assembly and thus does not have the force of law in this State, is incompetent as evidence, and is properly excluded when offered as proof of safety clearance requirements between a power line and a telephone line.

2. Trial § 22a—

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable inference to be drawn therefrom.

3. Negligence § 17—

Negligence is not presumed, but in the absence of evidence to the contrary, it will be presumed that defendant exercised due care.

4. Electricity § 7—

In the absence of evidence to the contrary, it will be presumed that defendant electric company maintained proper clearance between its wires and those of a telephone company.

5. Negligence § 19b(1)—

Nonsuit is proper where plaintiff does not offer evidence to support his allegations of actionable negligence.

6. Electricity § 7— Evidence held insufficient to support allegation that defendant was negligent in failing to maintain proper clearance between telephone line and its power lines.

Plaintiff's intestate was a member of a crew stringing a new telephone line. The old telephone line ran beneath defendant's power lines. Intestate

was electrocuted while pulling a new wire over the old telephone lines when one of the old wires came in contact with defendant's energized wire. The evidence tended to show that the pulling of the new wire over the old telephone lines would cause the old lines between adjacent poles to vary several feet in height and "jump up and down." Plaintiff sought recovery on the theory that defendant was negligent in failing to maintain proper clearance between its energized lines and the old telephone lines. There was no evidence as to the clearance between the lines prior to the accident, but plaintiff introduced evidence that there was a clearance of only six or nine inches between the lines after the accident, when the new telephone wire was still hanging over the old telephone lines. *Held:* Nonsuit was proper, since the evidence as to the clearance after the accident, particularly in view of the fact that plaintiff's evidence tended to show that the operation in which intestate was engaged changed the clearance between the wires, has no probative force as to the clearance prior to the accident.

7. Evidence § 26—

While a factual situation proven to exist is assumed to continue in existence until there is proof to the contrary, ordinarily such presumption does not run backward, and proof of the existence of a condition at one time raises no inference that such condition existed prior to that time.

APPEAL by plaintiff from *Pless, J.*, September 16 "A" Term 1957 of MECKLENBURG.

This is a civil action instituted on 22 May 1956 for the alleged wrongful death of plaintiff's intestate on 18 August 1955.

On the above date the defendant maintained a power line consisting of three wires diagonally across the "Y" intersection of N.C. Highway No. 742 at its junction with U. S. Highway No. 52, approximately one and one-half miles north of Wadesboro, North Carolina. Two of these wires were energized and carried approximately 12,000 volts of electricity; the third wire was a neutral. The neutral wire was strung 42 inches below the two energized wires on the poles on either side of the telephone lines hereinafter described. The energized lines had sagged until the elevation of the power wires above the surface of the paving at the point of crossing was as follows: the neutral wire 21 feet 3 inches; one energized wire 21 feet 2 inches; the other energized wire 21 feet 9 inches. The telephone wires were located beneath the power wires, but there is no evidence as to their elevation from the ground or what space existed between them and the power wires before their position was disturbed by the operation of pulling the new telephone wire over them, as hereinafter described.

Plaintiff's intestate was an employee and member of the line crew of the North Carolina Telephone Company. He was 23 years of age and experienced in line work, having worked two years for Southern Bell Telephone Company and eighteen days immediately prior to

his death for the North Carolina Telephone Company.

The telephone company was constructing a new line for its own purposes alongside and near the southern margin of N. C. Highway No. 742 at its "Y" junction with U. S. Highway No. 52. Highway No. 52 in the area involved runs in a northwesterly direction from Wadesboro, while Highway No. 742 runs substantially east and west.

On the morning of 18 August 1955, the telephone crew, of which plaintiff's intestate was a member, went to the scene under the supervision of and accompanied by one Comer, as foreman, to string and attach the wires for the new telephone line, which were to replace the old line. Comer, without calling attention to the existence of the nearby power line, or to the condition of the wires crossing each other at that point, or any mention of danger due to the presence of the power line, without any instruction or caution to use conventional protective equipment, merely told the men to put the new wire on the new poles, and immediately left the scene and did not return until after the accident, which occurred between ten and eleven o'clock a.m.

In doing the work, a roll of new wire on a reel was placed near the base of a new telephone pole approximately 70 feet east of the old telephone line. The old line ran along the western side of U. S. Highway No. 52; the new line was to run westwardly on the south side of N. C. Highway No. 742. Plaintiff's intestate and one Lockhart Deese took the wire at the reel and began to pull it along the route the new line was to be constructed. When they reached the old line they tried to throw the new line over the old line but were unable to do so. They then caused another member of the crew to climb a telephone pole in the old line, designated as pole 2-A, which was located 26 feet northwest of the point where the new line was to cross over the old line, and throw the new line over and across the old line which consisted of six wires, two of which ended on a 10-foot cross-arm on the pole; this pole was located 33 feet 10 inches southeast of the point where the power line crossed over the telephone wires. When Deese and plaintiff's intestate, Joe R. Sloan, had pulled the wire a distance of approximately 160 feet, a telephone wire on the old line came in contact with the power line and ran along the old telephone line to the new line and electrocuted Sloan. Deese was knocked unconscious. Sloan had on leather gloves; Deese was barehanded, but Deese was at the end of the line, while Sloan was pulling the line between Deese and the point where the line crossed over the old telephone wires.

Deese testified, " * * * I did not know the power line was * * * out there. If I had I never would have put my hands on that wire to pull it * * * I would have known that by pulling that wire over there would have been a dangerous thing * * * it was liable to cause those wires

to whip together." This witness further testified that he could have seen the power line if he had looked, but that he did not look.

Archie A. Thomas, an employee of the telephone company and who was handling the reel and was knocked down by the current at the time plaintiff's intestate was killed, testified, "I knew the power wires were there. I could not keep from seeing them. They were right out there in the open. There were no trees or any obstructions at all there in the whole area. * * * If we had foreseen after we looked at the wires out there the distance between the power lines and the telephone wires, we would not even have worked on the line. We would not have even touched those telephone lines if we had thought there was any danger in those telephone wires from the distance they were from the power lines coming in contact with the electric wires overhead. * * * Yes, I looked and saw that there was clearance but I did not know how much. If it had looked to me like it would have been dangerous I would not have strung the wire at all. * * * As conditions existed before these wires were pulled across up there, there was no current flowing from the power wire to the telephone wires and to the new telephone wires. If there had been I would have felt it. Whatever caused the electricity to get on it was the result of what those boys were doing pulling that wire."

This witness further testified that it is customary when stringing new wire to take a rope and pull the wire by the rope instead of coming into direct contact with the wire. "I do not know why it was not done in this instance." Ropes were available for that purpose but were not used.

The evidence further tends to show that the cross-arm on the telephone pole between the point where the new line was being pulled over the old telephone line and the power line was 10 feet long and about 20 feet above the ground. The cross-arm was listing or in a cocked position before and after the accident. Five of the six wires on the telephone line were on the westerly side of the cross-arm. The western end of the cross-arm was lower than the other end "by 6 inches or so." The pole was split at the top.

The evidence was in conflict as to whether one could observe from the ground how much space existed between the power line and the telephone wires where they crossed. The testimony was to the effect, however, that after the accident there was a clearance of from 6 to 9 inches between the lines, with the new line still hanging over the old telephone line. Before the telephone crew returned to work on the new line, the old line that passed under the power line was cut down.

The plaintiff introduced the adverse examination of Walter F. Harper, Division Engineer for the defendant, who, among other things,

testified, "This was a primary circuit. We needed a neutral to take care of and conduct any unbalanced ampheres that might be in the line on back to the source. It is necessary to have that sort of neutral to have a power line. It did not make any difference where this neutral was located. I do not know of any practice in my experience either with the Carolina Power & Light Company or with any other electric company where the neutral is positioned on a pole with reference to the primary line as a means of protecting people or things from coming into contact with the wire maintained overhead. I don't know of any such case anywhere. The neutral is never used as a safety means of protection from contact with primary wires. We don't do anything to mark a neutral so that the public would know the neutral from a hot wire. * * * Our company also has other types of lines, transmission lines that carry the neutral on the very top of either the pole line or the steel tower line above the primary conductors. It is a common practice for Duke Power Company to put the neutral on top. I know of nothing in the literature that indicates a neutral wire should be positioned as a guard wire to safeguard people or things that come in contact with energized wires. * * * The question of clearance is in any direction, whether laterally or vertically or swash-wise in any direction."

This witness also testified, "The two primary conductors were on the end or almost on the end of an eight-foot cross-arm which would be * * * about 4 feet from the center of the pole—not quite 4 feet."

The plaintiff's evidence further tends to show that the neutral wire was fastened to the poles about 42 inches below the cross-arms; that wires fastened to cross-arms tend to sag more than wires which are fastened to the poles. Mr. Harper further testified with respect to a question as to what would cause a telephone line to be higher at one time than at another. He said, "It would be high one second and low the next. That would occur, of course, over in the span beyond pole 2-A across the road (this telephone pole was between the point where the wire was being pulled over the old line and the point where the old telephone line passed under the power line). That is the place where it would jump up and down and that may occur two or three spans away jumping up and down three, four or five feet depending on how much slack was in the wire and depending on how these fellows (Deese and Sloan) were pulling it." The evidence is to the further effect that defendant had no notice that a new telephone line was being constructed in this particular area. This witness testified also that there was "nothing to obstruct the view of anybody if they had looked from seeing the exact condition of the power line in the exact

relation to the telephone lines. There was nothing to obstruct the view. It was all out in the wide open." Mr. Harper inspected the power line the next day after the accident, at which time the old telephone line had been cut down.

It was stipulated that plaintiff's intestate, Joe R. Sloan, was an employee of the North Carolina Telephone Company; that both were subject to the North Carolina Workmen's Compensation Act, and that compensation has been paid as provided by law. It was further stipulated that the power line which crossed over the old telephone line at the place in question was constructed after the telephone line was built; that plaintiff's intestate died as a result of electrocution on 18 August 1955.

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

Richard M. Welling, Ernest S. DeLaney, Jr., for plaintiff, appellant.

Taylor, Kitchin & Taylor, Carswell & Justice, and A. Y. Arledge, for defendant, appellee.

DENNY, J. The plaintiff's assignments of error Nos. 1, 2, 3 and 4 are directed to the refusal of the court below to permit plaintiff to introduce in evidence Section 233, Table 3, page 69, of the National Electrical Safety Code, issued 15 August 1949, by the United States Department of Commerce, Bureau of Standards, which the plaintiff contends contains the clearance requirements between a power line carrying 12,000 volts and a telephone line. The defendant did not concede the correctness of the plaintiff's contention and objected to the introduction of the Code as well as the proffered evidence based thereon. These objections were sustained.

In *Lutz Industries v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333, Parker, J., in speaking for the Court, pointed out that in the 1954 Cumulative Supplement to 20 Am. Jur., Evidence, page 111 (now in 1957 Cumulative Supplement to 20 Am. Jur., Evidence, page 129), it is written: "With the apparent exception of one jurisdiction (Alabama), safety codes which have been issued by governmental departments or commissions, or promulgated by voluntary associations, for their informative value and not as regulations having the force of law, are not admissible to prove the truth of the statements therein contained."

It was also pointed out in the above opinion that in Anno:—Evidence—Safety Codes, 122 A.L.R. 644, at page 646, it is said: "That the general rule against admission in evidence, in negligence actions, of

safety codes or rules is restricted to codes or rules not having the force of law is shown by decisions in various cases involving safety rules enforceable as laws." *Lutz Industries v. Dixie Home Stores, supra; Mississippi Power & Light Co. v. Whitescarver* (C.C.A. 5th), 68 F 2d 928; *Grant v. Libby, McNeill & Libby,* 160 Wash. 138, 295 P 139; Anno:—Evidence—Safety Codes, 122 A.L.R. 644.

In the case of *Mississippi Power & Light Co. v. Whitescarver, supra,* it was held that the National Electric Safety Code (apparently similar to the Code now under consideration), issued by the United States Department of Commerce, Bureau of Standards, had been properly excluded from evidence in the action to recover from the electric company for the accidental electrocution of the plaintiff's decedent. It had been conceded that the code had no compulsive force—that no law required it—and the Court pointed out that it represented merely the opinion of the compilers, and that "its preface states that as to many matters there are conflicting views and that especially many changes had been made in this edition touching line construction and that there would be future growth and development, and criticism is invited." The Court said: "It thus appears from the book itself what we should have known anyway, that it deals not with an exact science or mathematical or factual certainties, but with a controversial and developing science in which opinions may vary and experience work great changes. Books in such a field are like medical works rather than like almanacs, mathematical tables, approved histories, census compilations or weather reports. They are at last only the expert opinions of the authors, delivered not under oath nor subject to cross-examination, without opportunity to qualify or explain them, and really without certainty that the author still adheres to the opinions expressed when the book was written."

In *Lutz Industries v. Dixie Home Stores, supra,* certain provisions of the National Electrical Code, as approved by the American Standards Association, with respect to the installation of electric wiring in buildings, had been given the force of law by our General Assembly. But, there is nothing in the record before us to indicate that any approval has been given to the National Electrical Safety Code by our General Assembly with respect to the subject under consideration that would give the Code the force of law in this jurisdiction. Hence, the rulings of the court below in excluding the offered section of the National Electrical Safety Code and the proffered evidence based thereon are sustained.

In our opinion, the only additional question raised on this appeal that merits discussion is whether or not the court below committed error in sustaining the defendant's motion for judgment as of nonsuit.

In considering a motion for judgment as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff and he is entitled to every reasonable inference to be drawn therefrom. *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209.

The plaintiff contends that the defendant negligently constructed and maintained its power line; that the defendant allowed its power line, which consisted of two energized wires and a neutral, to cross too close to the telephone lines at the intersection where plaintiff's intestate was killed. There is no evidence whatever tending to show the actual or approximate clearance between the telephone wires and the power wires at the intersecting point before the accident. This would seem to be the crucial defect in the plaintiff's evidence. There is evidence of the distance of separation after the accident, but not before. Ordinarily, without evidence to the contrary, the inference would be that the defendant had provided proper clearance.

As stated in 65 CJS., Negligence, Section 204, page 954, et seq., "Negligence on the part of the defendant, as a general rule, is never presumed but is a matter for affirmative proof. * * * the presumption is in favor of innocence or performance of duty and against the existence of negligence, and in the absence of affirmative proof it will be presumed that defendant or his servants were not guilty of negligence but exercised due care with respect to the thing or condition which caused the accident." *Martin v. United States* (U.S. Court of Appeals, D.C.C.), 225 F 2d 945; *F. W. Woolworth Co. v. Williams* (Court of Appeals, District of Columbia), 41 F 2d 970; *Bush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N.E. 2d 851; *Atlantic Coast Line R.R. Co. v. Brown*, 82 Ga.App. 889, 62 S.E. 2d 736; *Yeary v. Holbrook*, 171 Va. 266, 198 S.E. 441.

A nonsuit is proper where the plaintiff does not offer evidence to support his allegations of actionable negligence.

In *Insurance Ass'n. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416, Bobbitt, J., in speaking for the Court, said: "Ordinarily, in a negligence case, it is incumbent upon plaintiff to allege and prove facts constituting actionable negligence; and, when the evidence fails to disclose actionable negligence as alleged, nonsuit is proper. Conjecture and surmise will not suffice."

If it be conceded that the power clearance between a 12,000-volt power line and a telephone line is six feet, as contended by the plaintiff, no evidence was offered to substantiate his allegation that a proper clearance did not exist before the employees of the telephone company pulled the new wire over the old telephone wires.

Evidence was introduced tending to show the height of the wires of the defendant power company from the ground after the accident,

and there is no contention that the contact with the power line changed the position of such wires in any respect. Likewise, evidence was introduced as to the height of the telephone pole located 33 feet 10 inches southeast of the power line and the wires attached to the 10-foot cross-arm. The evidence shows that the next telephone pole to the northwest of the power line was 245 feet, making the telephone poles 278 feet 10 inches apart at the span involved; that the power line poles were 384 feet apart at the power line span involved. However, there is no evidence as to the sag of the power wires in relation to the sag in the telephone wires before the accident. The plaintiff's evidence, except that of Thomas and Harper, hereinabove set out, is unequivocally to the effect that by observing the power and telephone lines from the ground, the distance of the clearance between the power wires and the telephone wires could not be ascertained.

Ordinarily, "where a particular state of things is once proven to exist, it is often said that there is a presumption of continuance in that state without change * * *." Stansbury, North Carolina Evidence, section 237, page 491.

Conceding that a factual situation once proven is presumed to continue in existence unless there is proof to the contrary, the existence of a condition at the time of an accident is not presumed to have existed prior thereto, and particularly when the accident resulted from an operation that the evidence tends to show changed the condition and that such change was the proximate cause of the injury or one of the proximate causes thereof. Any inference or contention that the telephone wires were in the same location or condition before the accident as they were afterwards, must be predicated on evidence of such location or condition prior to the accident. The general rule in this respect is stated in 31 CJS, Evidence, section 140, page 789, as follows: "As a general rule mere proof of the existence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time, does not raise any presumption that the same condition or facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward."

Likewise, in the case of *Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses* (C.C.A. 8th), 96 F 2d 30, it is said: " * * * that while a given condition, shown to exist at a given time, may be presumed to have continued, there is not, on the other hand, any presumption that it existed previous to the time shown."

In our opinion, the evidence on this record is not sufficient to show actionable negligence on the part of the defendant.

We express no opinion on the questions argued in the defendant's brief relating to insulated negligence and contributory negligence.

The judgment of the court below is
Affirmed.

NORTH CAROLINA BOARD OF PHARMACY v. W. RONALD LANE T/A LANE'S BROOKLYN PHARMACY AND JOHN W. BALDWIN.

(Filed 9 April, 1958)

1. Controversy without Action § 2—

Where the parties submit an action to the court upon an agreed statement of facts, the facts agreed constitute the sole basis for decision.

2. Constitutional Law § 12: Pharmacy § 1—

The General Assembly, in the exercise of the police power of the State, may regulate the practice of pharmacy.

3. Pharmacy § 1—

G.S. 90-71 and G.S. 90-72, which relate to the same subject matter, are to be construed *in pari materia.*

4. Same—

G.S. 90-71 and G.S. 90-72 proscribe the dispensing and selling of drugs, as well as the compounding physicians' prescriptions, by persons not licensed as pharmacists or assistant pharmacists, except under the immediate supervision of a licensed person, and therefore, it is immaterial to the application of the statute that an unlicensed person, in dispensing a drug to a customer on prescription in the absence of a licensed pharmacist or assistant pharmacist, merely takes the designated number of tablets prepared by a manufacturer from a large container and removes them to a small container and delivers them to the customer.

5. Same—

The fact that an unlicensed person, in the absence of any licensed pharmacist or assistant pharmacist, in dispensing drugs on a prescription to a customer, has access by telephone to licensed pharmacists in other stores owned by the same employer, does not render his dispensing the drugs permissible under the statute, since the proviso of the statute requires that he act in the immediate physical presence of a licensed pharmacist or assistant pharmacist and under his personal supervision and direction.

6. Injunctions § 4g—

Ordinarily, injunction will not lie to prevent the perpetration of a crime.

7. Same—

Where a statute expressly provides that the violation of its provisions should constitute a misdemeanor and also provides that the acts therein proscribed might be enjoined, the contention that the violation of an

injunction issued under the statute would subject the offender to punishment for a criminal offense without the constitutional safeguards of indictment, trial by jury, etc., is untenable, since the punishment for violation of the injunction would be for violating an order of the court and not punishment for a crime. Constitution of North Carolina, Art. I, Secs. 12 and 13.

8. Judgments § 17b—

Where an action is instituted to enjoin definite acts proscribed by statute, the injunction issued in the action should be limited to the acts defined, and further provision enjoining defendants from doing any act in violation of the statute is too broad and should be stricken therefrom.

APPEAL by defendants from *Morris, J.*, October Civil Term, 1957, of NEW HANOVER.

Civil action to enjoin defendants from continuing certain acts alleged to constitute violations of GS 90-71 and GS 90-72.

A jury trial was waived. The parties submitted the case upon an AGREED STATEMENT OF FACTS, which, in material part, was as follows:

"FIRST: . . . the plaintiff North Carolina Board of Pharmacy is . . . the duly constituted agency of the State . . . for the purpose of regulating the practice of Pharmacy in . . . North Carolina, . . . and as such agency is authorized to sue in its name.

"SECOND: At all times herein referred to, the defendant W. Ronald Lane . . . owned and operated a drugstore known as Lane's Brooklyn Pharmacy, wherein he employed the defendant John W. Baldwin for the performance of certain duties and services in the prescription department thereof as assistant to and under the direct control of registered pharmacist R. E. Miller. . . . The defendant W. Ronald Lane also owned and operated two other drugstores, to wit, Lane's Market Street Pharmacy, and Lane's Lake Forest Pharmacy, all . . . located in the City of Wilmington, North Carolina. For the purpose of performing the functions of compounding and dispensing prescriptions, selling drugs and medicines, and complying with the laws relating to the practice of Pharmacy, . . . the defendant W. Ronald Lane, as owner and operator of the said three drugstores . . . , employed three registered pharmacists in full and complete charge of the prescription departments of these three stores on a schedule of work so that there were at least two registered pharmacists on duty in at least two of the said drugstores at all times who could be contacted by telephone or by messenger delivery, for consultation and assistance concerning any prescription to be compounded or otherwise filled in any one of the said three stores, but that on the occasions mentioned in the complaint, none of the said registered pharmacists, or any others,

were contacted with regard to the 'prescription' on which this action is based.

"THIRD: Under and by virtue of Chapter 90 of the General Statutes of North Carolina, the plaintiff North Carolina Board of Pharmacy has delegated to it by the General Assembly of North Carolina the duties and authority set forth therein, including the duty to carry out the purposes and to enforce the provisions of the said Chapter 90.

"FOURTH: Neither the defendant W. Ronald Lane nor the defendant John W. Baldwin are, or have ever been, either registered pharmacists or assistant pharmacists, within the meaning that the said terms are used in the said Chapter 90 . . .; but the defendant John W. Baldwin, prior to 5 August 1954, had had over 14 years' experience in filling and compounding prescriptions as an aid to and under the supervision of registered pharmacists in the said Brooklyn Pharmacy.

"FIFTH: The 'prescription' which was presented to the defendant John W. Baldwin on 5 August 1954 and on which this action is based, and referred to in paragraph 5 of the complaint as amended, is as follows:

ROBERT T. PIGFORD, M.D.
1015 Murchison Building
Wilmington, N. C.

Reg. No. 3900 Phone 2-1636
Name Mr. Allen Forrest No.....
Address Delco, N. C.
Rx. CN 758089 8-5-54
Luminal gr SS
#30
1 tab 2-3 times a day for nervousness

Have This Prescription Filled By
a REGISTERED PHARMACIST at
the Drug Store of your choice. R.T.P. M.D.

"SIXTH: The defendant John W. Baldwin, who was not then a registered pharmacist, or assistant registered pharmacist, and who was acting as the agent, servant, and employee of the defendant W. Ronald Lane, while the registered pharmacist was temporarily off the premises, received the above set forth 'prescription' for the purpose of supplying the tablets called for therein, and did then and there take from a large size container labeled with the trade name of the said tablets and containing a larger quantity of tablets the number of tablets called for by the said prescription, put the said specified number of tablets in a smaller container which was then delivered

to the 'customer,' and received the purchase money from the 'customer.'

"SEVENTH: The 'prescription' mentioned in paragraph 6 above did not have to be compounded or prepared from a combination of ingredients, but consisted of tablets which had been previously prepared by the manufacturer thereof, and which tablets were themselves ready for delivery to and use by the ultimate consumer except for removal from their container.

"EIGHTH: The facts set forth in paragraphs 6 and 7 above, with relation to the occurrence on 5 August 1954, are the same facts as occurred 'at various other times' referred to in paragraphs 5 and 6 of the complaint as amended; and on none of the occasions referred to in the complaint, and on which this action is based, did the defendants, or either of them, have to compound, or prepare by mixing various ingredients, the items called for by the said 'prescription,' but merely removed the prescribed number of tablets called for in the said prescription by their trade name from the stock bottle ready prepared by the manufacturer and delivered them to the ultimate consumer in the quantity specified on the said prescription.

"As to the tablets called for in the prescription set forth in paragraph 5 above, they are a drug within the meaning of the use of that term in Sections 90-71 and 90-72 of the General Statutes of North Carolina.

"NINTH: With relation to the acts set forth in paragraphs 6, 7 and 8 above, the defendant W. Ronald Lane T/A Lane's Brooklyn Pharmacy, as employer of the defendant John W. Baldwin, caused or permitted the said acts to be done by his said employee.

"TENTH: The defendant W. Ronald Lane T/A Lane's Brooklyn Pharmacy, employed and had on the payroll of the said Brooklyn Pharmacy, one or more registered pharmacists who were then and still are duly certified by the plaintiff as qualified to practice pharmacy in the State of North Carolina, but who were not, at the time of the above set forth acts, present on the premises of the said Brooklyn Pharmacy.

"ELEVENTH: The facts set forth in the foregoing paragraphs 6, 7, 8, 9 and 10, with regard to the 'filling' of prescriptions and operations of drugstores constitute a course of conduct which has, from time to time, over a period of many years, been the common practice in a great many of the drugstores throughout the State of North Carolina. The plaintiff has taken action in cases coming to its attention in which it could be established that such a course of conduct was being followed.

"TWELFTH: The facts above set forth in paragraphs 6, 7, 8, 9, 10 and 11 constitute all of the facts upon which the plaintiff North Carolina Board of Pharmacy contends that the defendants violated the Laws of the State of North Carolina with relation to practice of Pharmacy and on which this action is based."

Upon these facts, and conclusions of law based thereon, the court entered judgment as follows:

"NOW, THEREFORE, upon the foregoing findings of fact and conclusions of law, IT IS ORDERED, DECREED AND ADJUDGED that the defendants W. Ronald Lane T/A Lane's Brooklyn Pharmacy and John W. Baldwin be, and they are hereby restrained and enjoined from employing others than licensed pharmacists to perform such services as are hereinbefore set out *or performing any thing or act in violation of the provisions of General Statutes, Chapter 90.* (Our italics)

"IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the costs of this action be taxed against the defendants."

Defendants excepted and appealed, assigning errors.

Bailey & Dixon for plaintiff, appellee.
J. H. Ferguson for defendants, appellants.

BOBBITT, J. The agreed facts, on which the case was submitted, constitute the sole basis for decision. *Eason v. Dew,* 244 N.C. 571, 94 S.E. 2d 603; *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273; *Greensboro v. Wall,* 247 N.C. 516, 522, 101 S.E. 2d 413. Do these facts support the court's conclusions of law and judgment?

Statutory provisions regulating the practice of pharmacy in North Carolina comprise GS Ch. 90, Art. 4.

"Where the practice of a profession or calling requires special knowledge or skill and intimately affects the public health, morals, order, or safety, or the general welfare, the Legislature may prescribe reasonable qualifications for persons desiring to pursue such profession or calling, and require them to demonstrate their possession of such qualifications by an examination on the subjects with which such profession or calling has to deal as a condition precedent to the right to follow such profession or calling." *S. v. Ballance,* 229 N.C. 764, 770, 51 S.E. 2d 731, and cases cited.

Unquestionably, the General Assembly, in the exercise of the police power of the State, may regulate the practice of pharmacy. 17A Am. Jur., Drugs and Druggists Sec. 13; 28 C.J.S., Druggists Sec. 2. As to this, decisions in other jurisdictions are in full accord. *S. v. Collins* (N.M.), 297 P. 2d 325; *Louisiana Board of Pharmacy v. Smith,* 65

So. 2d 654; *Beeman v. Board of Pharmacy* (Mich.), 35 N.W. 2d 354; *Rosenblatt v. Board of Pharmacy* (Cal.), 158 P. 2d 199; *Stewart v. Robertson* (Ariz.), 40 P. 2d 979; Ex parte Gray (Cal.), 274 P. 974; *Reppert v. Utterback* (Iowa), 217 N.W. 545; *S. v. Wood* (S. D.), 215 N.W. 487; *Tucker v. Board of Pharmacy,* 217 N.Y.S. 217; *S. v. Hamlett* (Mo.), 110 S.W. 1082; *S. v. Hovorka* (Minn.), 110 N.W. 870; *Board of Pharmacy v. Cassidy* (Ky.), 74 S.W. 730; *S. v. Heinemann* (Wis.), 49 N.W. 818; *State Board of Pharmacy v. Matthews,* 197 N.Y. 353, 26 L. R. A. (N.S.) 1013; *People v. Roemer,* 153 N.Y.S. 323; *S. v. Kumpfert* (La.), 40 So. 365; *S. v. Forcier* (N. H.), 17 A. 577; *S. v. Foutch* (Tenn.), 295 S.W. 469, 54 A. L. R. 725; *Commonwealth v. Zacharias* (Pa.), 37 A. 185.

In *Thomas v. Board of Pharmacy,* 152 N.C. 373, 67 S.E. 925, and *McNair v. Board of Pharmacy,* 208 N.C. 279, 180 S.E. 78, in which the plaintiff, *in his efforts to obtain license,* sought a writ of mandamus to require the Board of Pharmacy to perform certain acts, the constitutionality of the legislation was not challenged. However, in *Thomas v. Board of Pharmacy, supra,* Clark, C. J., said: "The selling of drugs is an important matter to the health and lives of the public. The Legislature has carefully guarded it, by the provisions to be found in Rev., 4471-4490."

Nothing appears in the record to indicate that either defendant at any time sought to obtain license as a registered pharmacist or assistant pharmacist. Defendants' assignments of error, purporting to attack broadside the constitutionality of GS Ch. 90, Art. 4, are without merit. GS 90-85.1, the only specific provision challenged by defendants, is considered below.

Defendants' primary position is that the practice engaged in by Baldwin, the unlicensed employee, and caused or permitted by Lane, the employer-owner, of which the specific transaction of August 5, 1954, is typical, does not violate GS 90-71 and GS 90-72.

GS 90-71, in pertinent part, provides:

"It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an

aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store. And it shall be unlawful for any owner or manager of a pharmacy or drugstore or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist."

G.S. 90-72 provides:

"If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and if any person being the owner or manager of a drugstore, pharmacy, or other place of business, shall cause or permit anyone not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars."

The General Assembly has prescribed the requirements an applicant must meet to become licensed as a registered pharmacist. G.S. 90-61, G.S. 90-63; G.S. 90-64. With two exceptions (G.S. 90-61, G.S. 90-64), not relevant here, a person eligible therefor must submit to and pass an examination prepared and furnished by the Board of Pharmacy "as to his qualifications for registration as a licensed pharmacist." G.S. 90-61.

After January 1, 1939, the Board of Pharmacy had no authority to issue "an original certificate to any person as a registered assistant pharmacist"; but a person registered as an assistant pharmacist prior to that date was permitted to continue to practice as such registered assistant pharmacist. G.S. 90-63. (Note: Ch. 52, Public Laws of 1921, provided for the licensing of registered assistant pharmacists. However, except as to those who were licensed as registered assistant pharmacists prior to January 1, 1939, this provision was eliminated by Ch. 402, Public Laws of 1937, now G.S. 90-63.)

The fact that Baldwin, prior to August 5, 1954, had had over fourteen years' experience in filling and compounding prescriptions as an aid to and under the supervision of registered pharmacists, is beside the point. This is not a proceeding to establish his right to be licensed as a registered pharmacist or assistant pharmacist.

Since it was agreed that the tablets called for in the prescription "are a drug within the meaning of the use of that term" in G.S. 90-71 and 90-72, we put aside as irrelevant the fact that the tablets were prescribed by the trade name of the manufacturer and that all Baldwin did was to remove tablets from the duly labeled stock bottle, place them in a small container and deliver them to the ultimate consumer.

G.S. 90-71 and G.S. 90-72, which relate to the same subject matter, are to be construed *in pari materia*. *S. v. Hill*, 236 N.C. 704, 73 S.E. 2d 894, and cases cited.

These statutes, when so construed, provide that it shall be unlawful (G.S. 90-71) and a misdemeanor (G.S. 90-72) for any person not licensed as a pharmacist or assistant pharmacist to compound, *dispense* or *sell at retail* any drug, etc., upon the prescription of a physician or otherwise, "or to compound physicians' prescriptions *except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article.*" G.S. 90-71. (Our italics) Although the punctuation is inexact, we think it clear that the exception (italicized words) applies to dispensing drugs and selling drugs at retail as well as to compounding physicians' prescriptions. This view is supported by this further provision: "And it shall be unlawful for any owner or manager of a pharmacy or drugstore or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist." G.S. 90-71.

Defendants contend that, notwithstanding no registered pharmacist was present in person, Baldwin should be deemed "under the immediate supervision" of registered pharmacists, namely, the registered pharmacists then on duty in Lane's other stores, whom he could contact by telephone or by messenger for advice and directions. This contention poses the basic question for decision.

If defendants' said contention were accepted, the unlicensed person, in deciding whether he needed the advice or directions of a registered pharmacist, would necessarily be the sole judge of his own qualifications and competency. The exception relating to an unlicensed person contemplates that his service is to be rendered "as an aid to" as well as "under the immediate supervision of" a licensed pharmacist. G.S. 90-71 contains a proviso "that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store." The construction contended for by defendants would

write into the statute a provision it does not contain, namely, a provision to the effect that during the temporary absence of the licensed pharmacist an unlicensed person may conduct or have charge of the store.

Moreover, the legislative history of G.S. 90-71 evinces the legislative intent. The original act, Ch. 355, Sec. 3, Public Laws of 1881, used these words: "except under the supervision of a registered pharmaceutist, . . ." The amendment of 1905, Ch. 108, Sec. 4, Public Laws of 1905, introduced the present provision: "except *as an aid to* and under the *immediate* supervision of a person licensed as a pharmacist." (Our italics)

In *State v. Mullenhoff* (Iowa), 37 N.W. 329, the statute "forbid any one not a registered pharmacist to dispense medicine, except as an aid to, and under the supervision of, a registered pharmacist." Beck, J., writing the opinion, states: "The nonregistered clerk may, under the law, aid the pharmacist under his supervision. This implies that the clerk shall assist the pharmacist, who shall supervise the clerk's work. It seems to us that the pharmacist must have 'immediate personal direction and supervision' of the work." This decision (1888) indicates that our interpretation of G.S. 90-71 has been associated with the words presently used therein for at least seventy years.

Our conclusion, in agreement with the court below, is that the statute makes it unlawful for an unlicensed person either to compound or to dispense or to sell at retail any drug, either upon a physician's prescription or otherwise, unless he acts *in the immediate physical presence* of a licensed pharmacist or assistant pharmacist and *under his personal supervision and direction.*

Having determined that Baldwin, the unlicensed employee, and Lane, the employer-owner, by engaging in the practice typified by the specific transaction of August 5, 1954, acted in violation of G.S. 90-71 and G.S. 90-72, we consider defendants' remaining contention.

The said acts of the defendants, unlawful under G.S. 90-71, are criminal offenses (misdemeanors, punishable by fine) under G.S. 90-72. Plaintiff seeks no relief for what has been done but seeks to restrain defendants from continuing such unlawful practice in the future. Is plaintiff entitled to such injunctive relief?

"Ordinarily, injunction will not lie to prevent the perpetration of a crime." *Fayetteville v. Distributing Co.,* 216 N.C. 596, 5 S.E. 2d 838. The established general rule is that there is no equitable jurisdiction to enjoin the commission of a crime. *Mills v. Cemetery Park Corp.,* 242 N.C. 20, 28, 86 S.E. 2d 893; *Dare County v. Mater,* 235 N.C. 179, 181, 69 S.E. 2d 244; *Clinton v. Ross,* 226 N.C. 682, 688, 40 S.E. 2d 593, and cases cited; *Matthews v. Lawrence,* 212 N.C. 537,

538, 193 S.E. 730; *Hargett v. Bell,* 134 N.C. 394, 46 S.E. 749.

Plaintiff bases its right to injunctive relief on G.S. 90-85.1, which provides:

"The Board of Pharmacy may, if it shall find that any person is violating any of the provisions of this article, and after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court may issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of article 37 of the chapter on 'Civil Procedure': Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this article."

Defendants challenge this statutory provision, as applied to future criminal acts, as unconstitutional. Their contention is that punishment for violation of such injunction upon the basis of findings of fact made by the court without a jury would in effect constitute punishment for a criminal offense, thereby depriving them of the constitutional safeguards of indictment, trial by jury, etc., to which they are entitled under Art. I, Secs. 12 and 13, Constitution of North Carolina.

In *Matthews v. Lawrence, supra,* where the plaintiff (Board of Photographic Examiners) sought to enjoin the defendant from practicing photography, no statute authorized the plaintiff to enforce the statute by civil action for injunction. In *Mills v. Cemetery Park Corp., supra,* heard on demurrer, the allegations were held insufficient to entitle plaintiff to enjoin defendant's alleged practice of law without a license, a criminal offense under G.S. 84-4 and G.S. 84-10; but it is noted that G.S. 84-7 conferred upon solicitors, not upon private individuals, the right to bring an action (in the name of the State) for injunctive relief. (Compare: *Seawell, Attorney-General, v. Motor Club,* 209 N.C. 624, 184 S.E. 540, where the unauthorized practice of law was enjoined.) In *Clinton v. Ross, supra,* it was held that G.S. 160-179, a part of the Zoning Act, G.S. Ch. 160, Art. 14, was not a statute of general application but authorized a suit in equity to restrain the erection, maintenance, or repair of any building, structure, or land used "in violation of this article or of any ordinance or other regulation made under authority conferred thereby." It is noted that the authority for injunctive relief conferred by G.S. 160-179 differentiates the decision in *Elizabeth City v. Aydlett,* 200 N.C. 58, 156 SE 163, from the earlier decision, *Elizabeth City v. Aydlett,* 198 N.C. 585, 152 S.E. 681. It is noted further that the violation of the Raleigh Zoning Ordi-

nance was enjoined in Raleigh v. Morand, 247 N.C. 363, 100 S.E. 2d 870, upon authority of G.S. 160-179.

This is a civil action, expressly authorized by G.S. 90-85.1; and we hold that the validity of G.S. 90-85.1 is not impaired by the fact that the same acts that would constitute wilful violations of the injunction would also constitute a basis for criminal prosecutions. The contentions now made by defendants were so fully considered and answered in *Board of Medical Examiners v. Blair* (Utah), 196 P. 221, that we quote with approval this excerpt from the opinion of Gideon, J., viz.:

"It may be conceded that the power to enjoin the threatened commission of ordinary crimes has never been recognized by the courts. But we are here dealing with the right or power of the Legislature to enact and to provide means for the enforcement of regulations looking to the health of the community. If no other or worse results would or could follow the violation of the penal provisions of a statute than the arrest and punishment of any one violating such provisions, it might well be that the Legislature would not have the authority to provide a remedy by injunction. As indicated, the statute was enacted, not to provide a means of punishing those violating its provisions, but to protect the community from what, in the judgment of the Legislature, was or might be detrimental to the public health. The power of the court, while not often called into force, to prevent such an injury, has been repeatedly recognized in the decisions of the courts of this country. The authority is recognized by the quotation from *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 South. 809, by this court in the Freenor Case, as follows:

" 'The General Assembly, having the authority to attach prior conditions to the practice of medicine, was vested with the right to enforce enactments on that subject by prescribing penalties for violations of the same, either by fine, by imprisonment, or by civil remedies.'

"See, also, (Citations).

"If it be insisted, as it is, that the violation of the injunction may result in the imprisonment of the defendant, the punishment would not be for the violation of a statute, but for violating an order of the court. As concisely stated by the Supreme Court of Indiana in *State v. Roby, supra*, at page 189 of 142 Ind., at page 152 of 41 N.E. (33 L. R. A. 213, 51 Am. St. Rep. 174):

" 'It is further contended that, in case of the violation of an injunction under the civil remedy part of the act, the court might fine the defendant for contempt, for disobeying the order of injunction, and

that would make him liable to double punishment. The statement of the proposition furnishes a sufficient answer thereto. In that case he would not be punished for crime, but for contempt of court.' "

See, also, 43 C. J. S., Injunctions Sec. 124; 28 Am. Jur., Injunctions Sec. 149; *S. v. Jewett Market Co.* (Iowa), 228 N.W. 288.

In *Fayetteville v. Distributing Co., supra,* where the right to injunctive relief was upheld as authorized by G.S. 160-179, a part of the Zoning Act, G.S. Ch. 160, Art. 14 *Seawell, J.,* referring to the contention that criminal prosecution provided an adequate remedy at law, said: "It (criminal prosecution) is not intended, nor is it adequate, to protect society or the individuals or groups within it, or persons within a congested territory, from acts which expose them to special danger or which constitute a menace to the safety, health, and welfare of the community, although indeed these acts may *incidentally* become violations of law. In order to adequately deal with these evils a resort to the police power should mean more than merely setting in motion that highly specialized vehicle of its exercise—the criminal law—since in many instances this must be found inadequate to sustain the power. The fact that an act from which such injury may come, either to a private citizen or to the public at large, is denounced either in an ordinance or in the law as criminal *does not immunize its author from other appropriate remedy.* . . . Equity is invoked, not to prevent a crime, but to maintain a right." (Our italics)

It is noteworthy that Ch. 229, Session Laws of 1947, now G.S. 90-85.1, was enacted for the reasons indicated by this preamble: "WHEREAS, the illegal practice of pharmacy involving the use of many dangerous drugs and the internal use of these drugs and medicines by the public is eminently dangerous to the public health and welfare, and such illegal practice is hereby declared to be against public policy." It is quite evident that the General Assembly did not consider criminal prosecution an adequate remedy for the protection of the public health and welfare.

Whether the practice engaged in by Baldwin, the unlicensed employee, and caused or permitted by Lane, the employer-owner, of which the specific transaction of August 5, 1954, is typical, was in violation of G.S. 90-71 and G.S. 90-72, was the only question presented to and decided by the court below. Hence, the portion of the judgment reading, "or performing any thing or act in violation of the provisions of General Statutes, Chapter 90," is too broad and should be stricken therefrom. *S. v. Jewett Market Co., supra.* It is so ordered. As so modified, the judgment of the court below is affirmed.

Modified and affirmed.

McEWEN FUNERAL SERVICE, INC. v. CHARLOTTE CITY COACH LINES, INC.

(Filed 9 April, 1958)

1. Evidence § 2: Automobiles § 17—

The courts will not take judicial notice of municipal ordinances, and therefore when municipal ordinances regulating the right of way at intersections are pleaded only by code number and not introduced in evidence, the rights of the parties will be determined in accordance with applicable State statutes and the rule of the reasonably prudent man, notwithstanding the ordinances are set out in the briefs.

2. Automobiles § 7—

Fundamental to the right to operate any motor vehicle is the rule of the prudent man declared in G.S. 20-140, requiring a motorist to operate his vehicle with due care and circumspection so as not to endanger others.

3. Automobiles § 17—

G.S. 20-158(c), prescribing the right of way at intersections controlled by traffic control lights, applies only to such lights outside of towns and cities, but cities are not denied the authority to regulate the movement of traffic at street intersections. G.S. 20-158(b).

4. Automobiles § 6—

The violation of statutory rules of the road designed to provide for human safety is negligence *per se* unless the statute provides that its violation shall not constitute negligence as a matter of law.

5. Automobiles § 17—

Even though the municipal ordinance governing the use of intersections controlled by traffic control signals is not introduced in evidence, the use of traffic lights at intersections is general and the meaning of the lights well understood, and such signals will be obeyed by a reasonably prudent person; the red light gives warning of danger, and a green light or "go" signal is not a command to go, but is a qualified permission to proceed lawfully and carefully in the direction indicated.

6. Same—

The statute giving ambulances on emergency duty the right of way at intersections does not relieve the operator of a private or public ambulance of the duty to exercise due care, and does not require a motorist to yield such ambulance the right of way until the motorist hears and comprehends its siren or warning sound, or should have heard and understood its meaning in the exercise of the care of a reasonably prudent person. G.S. 20-156(b), G.S. 20-125(b).

7. Automobiles § 41g— Where evidence does not show that driver heard or should have heard warning siren, it fails to show negligence in failing to yield right of way to ambulance.

The evidence tended to show that an ambulance on emergency duty, with its siren sounding at "peak" was traveling north along a four-lane street, and entered an intersection with another, more heavily traveled,

four-lane street, against the red light, that a car traveling east and a cab traveling west along the intersecting street stopped, but that defendant's bus, traveling west in the northern lane of the intersecting street with its view obstructed by the stationary cab, etc., proceeded into the intersection with the green light and struck the right side of the ambulance in the northeastern part of the intersection. *Held:* In the absence of evidence that the operator of the bus heard or should have heard and comprehended the warning of the siren, the evidence fails to show negligence on the part of the operator of the bus. The fact that the other vehicles along the intersecting street had stopped, notwithstanding that they were facing the green light, is not evidence that the bus driver heard or should have heard the warning siren when it is not made to appear that such other vehicles stopped because of the warning siren.

PARKER, J., concurs in result.

JOHNSON, J., dissenting.

BOBBITT, J., concurs in dissent.

APPEAL by plaintiff from *Pless, J.*, November 18, 1957, Term of MECKLENBURG.

In the forenoon of 19 November 1956 there was a collision at the intersection of McDowell and Fourth Streets in Charlotte between an ambulance owned by plaintiff and a bus owned by defendant. Plaintiff seeks to recover for the damages done to its vehicle. It alleges Charlotte had adopted and there was in force at the time of the collision an ordinance designated as ch. 2, art. 11, sec. 17(a) which it pleaded by title but without stating its contents. It alleged that the collision was due to defendant's negligent failure to yield the right of way as required by GS 20-156(b), GS 20-155(b), and operation prohibited by GS 20-140.

Defendant admitted the collision and the adoption of the ordinance referred to in the complaint. It denied the asserted negligence and pleaded contributory negligence by plaintiff in entering an intersection where the view was obstructed, operation in a careless and reckless manner at a high and illegal rate of speed and in disregard of the warning given by a red traffic light at the intersection. It avers the violation of the provisions of GS 20-155(a), GS 20-156, and sec. 24(c) of the code of Charlotte. The provisions of the ordinances pleaded are not set out.

At the conclusion of plaintiff's evidence, defendant moved for nonsuit. The motion was allowed, and plaintiff appealed.

McDougle, Ervin, Horack & Snepp, for plaintiff, appellant.
Lassiter, Moore and Van Allen, for defendant, appellee.

RODMAN, J. The evidence, when viewed in the most favorable light to plaintiff, tends to establish these facts:

Fourth Street is a very heavily traveled street. It is a major traffic artery of the City of Charlotte. It is a four-lane highway, that is, two lanes move in an easterly direction and two lanes in a westerly direction. No parking is permitted on this street. At and prior to the collision, defendant's bus was traveling west on Fourth Street.

McDowell Street runs north-south. Traffic on it is likewise heavy, but not as heavy as on Fourth Street. It is also a four-lane street.

A traffic light with red and green lenses to regulate the flow of traffic across the intersection was in operation at the time of the collision. At the southeastern intersection was a grill which obstructed the vision down East Fourth Street of those traveling north on McDowell and likewise obstructed the vision of those on East Fourth Street of traffic on South McDowell Street. This building was separated from the vehicular portion of the streets only by the sidewalks of Fourth and McDowell Streets. The width of the sidewalks is not shown nor is the width of Fourth or McDowell Streets disclosed by the evidence. There was nothing on the lot at the southwest intersection to obstruct the view on West Fourth Street.

The ambulance was equipped with red flashing lights and a siren controlled by foot pedal. "The siren was mounted under the hood of the ambulance. The red lights were in the grill one on each side, one on the right and one on the left under the main headlamps. That was in front of the ambulance."

Plaintiff's vehicle, in response to an emergency call, was traveling north on McDowell Street. In the block south of Fourth Street the ambulance was traveling 35 m.p.h.—the maximum speed under the congested traffic conditions. It was in the easternmost lane of McDowell Street. The operator was familiar with the physical conditions at the intersection. One of the operators of the ambulance, the only witness testifying as to how the collision occurred, said: "As we approached the intersection of Fourth and McDowell with the siren on the very highest peak, the red lights flashing, we noticed that we had a congested intersection. We entered the intersection in the middle of McDowell Street, which is a four-lane street. We were centering the road, trying to get as close to the center of the intersection as possible. We approached the intersection, knowing that we had a red light facing us which we could see approximately a block before we got to the intersection, with the congested intersection ahead as we could see, we slowed the vehicle to approximately 20 miles an hour entering the intersection. We noticed that as we approached the intersection there was a car, a car to the left headed east on Fourth Street which stopped. We noticed on the other side of the intersection

on McDowell Street, headed South the cars were stopped facing us. As we pulled into the intersection we saw this Yellow Cab stop at the intersection of Fourth and McDowell coming west and everyone was stopped and looked as if we had clearance to go through. I told Mr. Smith, who was driving, that it looked like we had a clear road to go ahead. We proceeded to go through the intersection. About the middle of the intersection, and as we approached the intersection after our car had pulled out into the street we noticed a bus coming on the righthand lane on Fourth Street going west. As we pulled under the red light of Fourth Street on the way through the intersection, the bus struck us on the right side. . . . We were in the left center lane as we approached the intersection. When we were behind this grill, we jumped over and got in just about the center of the road. As we approached the intersection this is on the left side, I saw this taxicab come to a halt even with the intersection. He was back even with the intersection about like this. We did not notice the bus until we got in the intersection right at the red light. We could see the bus moving up from behind the cab on the righthand side lane next to the curb . . . Having a blind corner, we tried to center the intersection as much as possible . . . as we pulled to the center of McDowell Street and approximately to the end of the grill, to the back of the grill, I could see the front of the taxicab. I could see the front of the taxicab stop. Prior to that time, I was completely blind as to what traffic was going on Fourth Street. The light was green to that traffic. . . . My vision down Fourth Street was obstructed as far as seeing further than the taxicab at the point where the ambulance is now. I could not see any further than the crosswalk going across Fourth Street on the eastern side of this intersection until I got to the point that the ambulance is now I could see the cab. It stands to reason that if I could not see them, they could not see me."

What is the law applicable to the factual situation here presented?

The provisions of the ordinances referred to in the pleadings are not in the record. Plaintiff, in its brief, quotes the provisions of the ordinance referred to in the complaint. As there quoted it merely exempts vehicles of the police department and ambulances from the provisions of the city's ordinances regulating the operation and parking of motor vehicles. We are not informed as to the provisions of the ordinances which by the section quoted in the brief are made inapplicable to police vehicles and ambulances, nor are we given any information as to the provisions of the ordinance, sec. 24(c), pleaded by defendant. The rights of the parties are, therefore, to be determined by ascertaining applicable State statutes and the conduct to be expected of the reasonably prudent operator of a motor vehicle under the conditions existing at the time and place of this collision.

By 1937 the number of motor vehicles operating on our streets and highways had increased to such proportions that the Legislature felt compelled to deal with the problems arising from their use. The caption to c. 407, P. L. 1937, recites the purpose, *inter alia*, "TO REGULATE THE OPERATION OF VEHICLES ON HIGHWAYS; TO PROVIDE PENALTIES FOR THE VIOLATION OF THIS ACT, AND TO MAKE UNIFORM THE SUBJECT MATTER THEREOF." The provisions of that Act with the modifications made by subsequent Legislatures are now incorporated as art. 3 of c. 20 of the General Statutes. Part 9 deals with equipment requisite to lawful use of the highways. Part 10 prescribes the rules of the road for vehicles lawfully using the highways.

Fundamental to the right to operate any motor vehicle is the rule of the prudent man declared in G.S. 20-140, that he shall operate with due care and circumspection so as not to endanger others by his reckless driving. Subject to this broad qualification, provisions are made to determine priorities in the use of intersecting highways. G.S. 20-155 announces the rule with respect to intersections not covered by other rules. *Mallette v. Cleaners,* 245 NC 652, 97 SE 2d 245.

The Legislature took recognition of the fact that all highway intersections are not of equal importance because of the density of traffic on one highway as compared to the flow on an intersecting highway. Hence a rule was prescribed for this situation requiring operators of motor vehicles on a servient highway to stop in accordance with signs commanding them to do so. G.S. 20-158(a). This rule was supplemented in 1955 by the provisions of G.S. 20-158.1. To meet situations not adequately provided for in G.S. 20-155 and 20-158(a) traffic lights were authorized with priorities determined by the color of the light exhibited to the motorist. G.S. 20-158(c). This statutory provision with respect to traffic lights is limited to those lights outside of towns and cities, but cities are not denied the authority to regulate the movement of traffic at street intersections. G.S. 20-158(b).

The violation of statutory rules of the road designed to provide for human safety is either negligence *per se, Currin v. Williams, ante,* p. 32, *Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342, *Morgan v. Coach Co.,* 225 N.C. 668, 36 S.E. 2d 263, or the basis on which a jury can find negligence if the statute declares its violation shall not constitute negligence as a matter of law. G.S. 20-158(a) so declares.

The force and meaning of the traffic lights described in this case are not on the record declared by State statute or city ordinance. The intersection being within the corporate limits, G.S. 20-158(c) has no application. The force and effect of the traffic light, if any, as fixed by an ordinance of the City of Charlotte does not appear. We cannot

take judicial notice of the provisions of municipal ordinances. *S. v. Clyburn,* 247 N.C. 455.

The use of traffic lights is so general and the meaning of each color so well understood that one who operates his motor vehicle in disregard of these well-understood meanings cannot be said to be a prudent person; one who operates in accord with these meanings is not to be condemned for so doing. "A red light is recognized by common usage as a method of giving warning of danger. . . ." *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533. "A green or 'go' signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated." *Hyder v. Battery Co., Inc.,* 242 N.C. 553, 89 SE 2d 124.

The statute which declared the rules of the road and fixed priorities at intersections granted a conditional priority to certain vehicles used for emergency purposes. S. 118 of that Act, now G.S. 20-156, provides: "The driver of a vehicle upon a highway shall yield the right-of-way to . . . public and private ambulances when . . . operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not operate to relieve . . . a . . . public or private ambulance from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequences of any arbitrary exercise of such right-of-way."

No duty rests on the operator of a motor vehicle making normal use of a highway to yield the right of way to another vehicle on an emergency mission until an appropriate warning has been directed to him, and he has reasonable opportunity to yield his prior right. The audible sound which the statute, G.S. 20-156(b), requires is such a sound as was in fact heard and comprehended, or should have been heard and its meaning understood, by a reasonably prudent operator called upon to yield the right of way. *Balthasar v. Pacific Electric R. Co.,* 202 P 37, 19 ALR 452; *Russell v. Nadeau,* 29 A 2d 916; *Baltimore Transit Co. v. Young,* 56 A 2d 140; 60 C.J.S. 924; 5A Am. Jur. 416.

The Legislature, in prescribing practical warning devices for use on motor vehicles, drew a distinction between vehicles making normal use of the highway and those engaged in emergency uses. For normal use, a horn audible for 200 feet under normal conditions was deemed adequate, G.S. 20-125(a); but something different and manifestly with a more authoritative voice and greater volume was expected of vehicles on emergency errands. G.S. 20-125(b). A violation of this statutory provision is a crime. G.S. 20-176.

The mere statement that the ambulance approached the intersection "with the siren on the very highest peak," without further evi-

dence to show that defendant's driver heard or should have heard and, as a prudent operator, appreciated the demand to yield, is insufficient to establish the asserted negligence. There is no evidence that it was in fact heard. To the contrary such evidence as there is indicates that the siren was in fact not heard by the operator of defendant's vehicle.

Concededly, the vision of the driver of each vehicle was obstructed until he was in, or practically in, the intersection. Plaintiff argues that defendant's driver should have heard because southbound traffic on McDowell Street stopped. Two answers may be given to that: (1) that they were confronted by a red traffic light forbidding them to move; (2) that their vision of plaintiff's vehicle was not obstructed. It argues that traffic on West Fourth Street headed east, although it had a green light, did not move. But the evidence discloses that their view down McDowell Street was, unlike that of defendant's driver, unobstructed. It is a fair inference that they saw plaintiff's vehicle approach and for that reason stopped. It is argued that the cab on East Fourth Street headed west also stopped at the edge of the intersection. It does not appear that it stopped because of the sound. It may have stopped because its driver saw the ambulance approach, or for some other reason. The evidence offered failed to establish a violation of the provisions of G.S. 20-156(b).

The collision occurred in the northern portion of the intersection. It is manifest that the vehicles entered the intersection at approximately the same time, as that phrase is used in the statute. Negligence in that respect has not been established. *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Bennett v. Stephenson,* 237 N.C. 377, 75 SE 2d 147; *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532. In evaluating the action of defendant's driver and the asserted violation of G.S. 20-140, it must be borne in mind that he was in the northernmost lane of East Fourth Street. Traffic was heavy. He had a green light indicating his right to proceed through the intersection. In accepting the invitation without notice that it was dangerous to do so, defendant did not violate the provisions of the reckless driving statute.

Plaintiff, having failed to prove a violation of any of the statutory provisions alleged, has failed to establish defendant's negligence as a proximate cause of the collision. This renders unnecessary consideration and discussion of the asserted negligence of the driver of plaintiff's vehicle.

Affirmed.

PARKER, J., concurs in result.

JOHNSON, J., dissenting. As I interpret the majority opinion, it holds that the plaintiff's case fails because there was no evidence tending to show that the sound of the siren was loud enough to justify the inference that the bus driver heard, or should have heard, the signal in time for him, "as a prudent operator," to have yielded the right of way. True, no witness testified as to the approximate distance the siren was heard or should have been heard ahead of the ambulance and eastwardly along Fourth Street as it approached the intersection going north on McDowell Street. However, the evidence does disclose that the siren was "on the very highest peak" and that the traffic light in front of the ambulance was showing red. This means that traffic on the side street, Fourth Street, had the green light. Notwithstanding this, a car going east on Fourth Street pulled up at the intersection and yielded the right of way to the ambulance. Similarly, a taxi going west on Fourth Street pulled up on the other side of the intersection and yielded the right of way to the ambulance. The foregoing evidence, it seems to me, is sufficient to justify the inference that the driver of the bus should have heard and heeded the siren in time to yield the right of way, as did the other two motorists on Fourth Street. Conceding, as suggested in the majority opinion, that the other two motorists may have seen the ambulance approaching and relied on their senses of sight in yielding the right of way, even so, this is only one of two permissive inferences, the other being that the motorists approaching on Fourth Street first heard the siren and relied on their senses of hearing as they made ready to stop and yield the right of way. All things considered, I think it was a case for the jury. My vote is to reverse the nonsuit.

BOBBITT, J., concurs in dissent.

THEAON C. PERRELL, ADMINISTRATOR OF THE ESTATE OF O. R. PERRELL, DECEASED, v. BEATY SERVICE COMPANY, INC. AND L. L. LEDBETTER, TREASURER OF THE CITY OF CHARLOTTE.

(Filed 9 April, 1958)

1. Municipal Corporations § 31—

Chapter 406, Session Laws of 1951, (G.S. 20-280) does not apply to a judgment based on injuries sustained prior to the effective date of the statute.

2. Same—

Chapter 279, Public Laws of 1935, (G.S. 160-200(35)) is an enabling act which authorizes, but does not compel, municipalities to require, as

a condition precedent to the operation of taxicabs over the streets of the city, that each operator furnish a policy of insurance or surety bond conditioned upon such operator responding in damages on account of any injury to persons or damage to property resulting from the operation of such cabs.

3. Same—

A deposit of cash or securities by one person in compliance with an ordinance making such deposit a prerequisite to the right to operate taxicabs under a specified trade name over the streets of the city, imposes liability in regard to the operation of a cab under such trade name by any driver to the same extent as though the driver had made the deposit.

4. Municipal Corporations § 36—

The rules applicable to statutes apply equally to the construction and interpretation of municipal ordinances, and when the language of an ordinance is clear and unmistakable, there is no room for construction, and the plain language of the ordinance must be given effect.

5. Municipal Corporations § 39—

The municipal ordinance in question, passed under the enabling act of 1935, G.S. 160-200(35), requires each taxicab operator to deposit insurance, surety bonds, or cash or securities, conditioned upon the payment of a final judgment in favor of any person injured by the operation of a cab over the municipal streets. *Held:* Cash or securities deposited for the operation of cabs under a stipulated trade name, filed with the municipality under an agreement pursuant to the ordinance, does not cover a final judgment for injuries to a garage mechanic from the negligent operation of the cab while on private garage premises.

6. Pleadings § 20½—

Where it affirmatively appears from the facts alleged in a pleading that plaintiff has no cause of action against defendants, judgment sustaining defendants' demurrer and dismissing the action is proper.

APPEAL by plaintiff from *Dan K. Moore, J.*, September 30, 1957, Civil B Term, of MECKLENBURG.

Civil action to collect a judgment for $3,500.00 plus interest and costs obtained by plaintiff's intestate January 7, 1954, in a prior personal injury action entitled "O. R. Perrell v. James Pearl Ross," after jury trial at January 4, 1954, Extra Civil Term, Mecklenburg Superior Court.

Defendants demurred to the complaint, specifying as ground of objection that the facts alleged, including the facts disclosed by the attached appendices, by reference made a part of the complaint, are insufficient to constitute a cause of action, in that it appears therefrom that the obligation of the judgment (Appendix A) upon which this action is based is not within the condition of the agreement (Appendix

E) between Beaty Service Company, Inc., and L. L. Ledbetter, Treasurer of the City of Charlotte.

After hearing, the court entered judgment, which sustained defendants' demurrer to the complaint, dismissed the action and ordered that plaintiff be taxed with the costs.

Plaintiff excepted and appealed.

Carpenter & Webb for plaintiff, appellant.

McDougle, Ervin, Horack & Snepp for defendant Beaty Service Company, Inc., appellee.

John D. Shaw for defendant L. L. Ledbetter, Treasurer of the City of Charlotte, appellee.

BOBBITT, J. The question drawn into focus by the demurrer is whether plaintiff is entitled to require payment of said judgment (Appendix A) by L. L. Ledbetter, Treasurer, out of cash or securities deposited with him by Beaty Service Company, Inc., hereinafter called Beaty, under agreement (Appendix E) dated July 26, 1938, between Beaty and L. L. Ledbetter, Treasurer. If this question is resolved in favor of plaintiff, the complaint alleges facts sufficient to constitute a cause of action; otherwise, it does not.

The said judgment was based on a verdict which established *inter alia* that O. R. Perrell was injured by the negligence of James Pearl Ross as alleged in the complaint. O. R. Perrell alleged that he was injured May 22, 1948, in Beaty's garage, where Perrell, an employee of Beaty, was at work as an automobile mechanic; that Ross drove an automobile into said garage for the purpose of having Perrell "install a banner on the front bumper and . . . check the mechanical condition of the automobile"; and that, while Perrell was lying under said automobile, engaged in checking or repairing it, Ross got into said automobile and operated it (negligently) in such manner as to run over and injure Perrell. Issues of negligence, contributory negligence and damages, raised by the pleadings and submitted to the jury, were answered in favor of O. R. Perrell.

No question is presented as to whether O. R. Perrell, then an employee of Beaty, received or was entitled to receive an award under the Workmen's Compensation Act.

It is sufficiently alleged that the automobile operated by Ross when Perrell was injured was a "Red Top Taxi," and that Ross was permitted to operate it on the streets of Charlotte because covered by the cash or securities deposited by Beaty with L. L. Ledbetter, Treasurer, under the agreement (Appendix E) of July 26, 1938.

The crucial question is whether a judgment based on injuries to O. R. Perrell, Beaty's employee, caused by Ross' negligent operation

of the taxicab on Beaty's private garage premises, is payable out of Beaty's deposit.

It is noted that the mandatory provisions of Ch. 406, Session Laws of 1951, now G.S. 20-280, do not apply to a judgment based on injuries sustained on May 22, 1948.

The relevant statute is the enabling act, Ch. 279, Public Laws of 1935, now codified as part of G.S. 160-200, Subsection 35, which conferred upon municipal corporations the power to require "the operator of every . . . taxicab . . . engaged in the business of transporting passengers for hire over the public streets" to "furnish and keep in effect for each . . . taxicab . . . so operated a policy of insurance or surety bond . . . to be conditioned on such operator responding in damages for any liability incurred on account of any injury to persons or damage to property resulting from the operation of any such . . . taxicab . . . to be filed with the governing body . . . as a condition precedent to the operation of any . . . taxicab . . . over the streets of such city or town."

The cash and securities were deposited by Beaty and accepted by L. L. Ledbetter pursuant to an ordinance of the City of Charlotte, adopted September 2, 1936, and amended on July 13, 1938, and on January 7, 1942, identified in the complaint as Ch. 2, Art. XIII, of the Code of the City of Charlotte, 1946. The parties have stipulated that the appendix to appellant's brief is a true and correct copy of said ordinance; also, that Ch. 3, Art. I, of said Code, entitled "Taxicabs and Ambulances," contains this definition: "(k) Street: Street shall mean and include any street, alley, avenue or highway within the City Limits of the City of Charlotte and within a radius of five miles beyond such City Limits as the same may now exist or may be hereafter extended." They have stipulated further that these ordinances were in effect on May 22, 1948, and may be considered as if set forth in the complaint herein.

It is first noted that the authority of the City of Charlotte to enact said Ch. 2, Art. XIII, depended solely upon said 1935 enabling act. Prior thereto, a similar ordinance was declared invalid. *S. v. Gulledge,* 208 N.C. 204, 179 S.E. 883; also, see *S. v. Sasseen,* 206 N.C. 644, 175 S.E. 142. Thereafter, an ordinance enacted under its authority was declared valid. *Watkins v. Iseley,* 209 N.C. 256, 183 S.E. 365.

Ch. 2, Art. XIII, consists of Secs. 67, 68, 69, 70 and 71.

Sec. 67, captioned "PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE OR BONDS REQUIRED," in pertinent part, provides: "No person shall operate . . . any taxicab over the streets of the City of Charlotte without first taking out and keeping in full force and effect at all times a policy or policies of insurance. . . or providing a surety bond or bonds . . . or depositing cash or securities

with the City Treasurer . . . to be approved by the City Council to cover damages for injury . . . and for property damage . . ." in specified amounts. "Said insurance, surety bond or bonds, or the deposit of cash or securities shall be conditioned upon the payment of any final judgment rendered on account of any personal injury or property damage caused by any taxicab *while operating on any of the streets* of the City of Charlotte by or under the direction of such person." (Our italics)

Sections 68 and 69 relate, respectively, to specific requirements when an applicant undertakes to comply with the ordinance by providing (1) an insurance policy or policies, or (2) a surety bond or bonds. No provision thereof relates to coverage.

Section 70, captioned "REQUIREMENTS WITH REFERENCE TO THE DEPOSIT OF CASH OR SECURITIES," in pertinent part, provides: "Any person . . . who desires to deposit cash or securities in lieu of liability insurance or . . . a surety bond or bonds . . . as a condition precedent to the operation of any such taxicabs on the streets of the City of Charlotte shall deposit with the City Treasurer . . . cash or securities approved by the City Treasurer . . ." in specified amounts. "Such deposit shall be accompanied by a contract . . . to be approved . . . providing that such deposit has been made to guarantee the payment of any final judgment obtained by any person as a result of injury or damage resulting from the negligent operation of any . . . taxicab for which said deposit has been made *within the limits hereinafter provided.*" (Our italics) (Note: It is obvious that the word "herein" rather than "hereinafter" expresses the intended meaning; and we think it clear that *the limits* referred to are those specified in Sec. 67, namely, $5,000.00 for injury to any one person, $9,500.00 for injury to two or more persons in any one accident and $500.00 for property damage.) "Persons desiring to make the deposit herein provided for and on behalf of other persons, firms or corporations, may do so on the same basis of deposit as above set forth, provided such person desiring to make the deposit of cash or securities for other persons are (sic) to adopt a trade name for the taxicabs for which they are to deposit cash or securities," with further requirements as to identification of the taxicab(s) for which the deposit of cash or securities is made.

Sec. 71, captioned, "INSURANCE, BOND, OR DEPOSIT LIABLE REGARDLESS OF OPERATOR. (a) Any policy of insurance submitted hereunder, and every bond or deposit of cash or securities herein provided for shall be conditioned upon the payment of any final judgment recovered by any person as a result of the negligent operation of any vehicle or taxicab permitted to operate hereunder, within the limits herein provided no matter by whom operated or

driven at the time of the injury or damage. (b) . . ."

With further reference to said enabling act, Ch. 279, Public Laws of 1935, now codified as part of GS 160-200, Subsection 35, it is noted: 1. It imposed no requirement or obligation but merely conferred a power, to be exercised if the legislative body of a municipal corporation saw fit to do so. 2. It speaks only of "a policy of insurance or surety bond," containing no reference to a deposit of cash or securities on like condition.

It is clear that: (1) Except as otherwise provided by the ordinance, Ross had a legal right to operate a taxicab over the streets of the City of Charlotte without providing by insurance policy, surety bond or deposit of cash or securities for the payment of damages caused by his negligent operation thereof. (2) The deposit of cash or securities by Beaty was made to comply with the requirements prescribed by the ordinance as prerequisite to Ross' right to operate a taxicab over the streets of the City of Charlotte. (3) The cash or securities deposited by Beaty have the same status as if deposited by Ross for the purposes stated in Beaty's agreement (Appendix E) of July 26, 1938.

Appendix E, while referred to as a single agreement, consists of two instruments executed by Beaty and dated July 26, 1938.

The first of these instruments provides: "The undersigned (Beaty) having deposited money or securities under ordinance of September 2nd, 1936, relating to taxicabs, or the amendment thereto of July 13, 1938, as a cash surety bond for certain taxicabs, owners and drivers does hereby agree that such deposit is made to guarantee the payment of any final judgment secured as the result of negligence against the owner, operator, driver of (sic) lessee of any taxicab bonded by the undersigned, said judgment to be paid out of said funds under the terms of this ordinance and the undersigned adopts the Trade Name, Red Top Taxi for the purpose only of insuring and complying with the ordinance of the City of Charlotte relative to taxicabs, and hereby consents and agrees that the said City Treasurer shall pay any final judgment within the terms of said ordinance, secured against the driver, operator, lessee or owner of either one, as the result of the operation of an automobile on the streets of Charlotte bearing said trade name and the undersigned's name as bondsman as provided in said ordinance, no matter by whom the particular car was operated at the time; and further agrees that such deposit shall remain with said City Treasurer until a final determination by judgment or otherwise, of all claims arising as the result of the operation in the City of Charlotte of any such motor vehicle under said ordinance, or amendments."

The second of these instruments, captioned "ADDITIONAL AGREEMENT RELATIVE TO CASH BOND DEPOSIT OF

BEATY SERVICE COMPANY, INC., WITH THE CITY TREASURER RELATIVE TO TAXICABS," in pertinent part, provides:

"In order to eliminate any possible misinterpretation of the *foregoing* agreement, the undersigned (Beaty) specifically covenants, contracts and agrees with the City of Charlotte and L. L. Ledbetter, Treasurer . . . , that the cash deposit . . . now on hand, plus an additional sum . . . this day deposited, . . . shall be held by said Treasurer *to guarantee the payment of any final judgment hereafter secured as the result of claims or suits now outstanding which arose and exist as the result of the operation of taxicabs in the City of Charlotte under the name of Silver Streak Cab under ordinance of September 2, 1936, and up to July 1, 1938,* as well as to pay any final judgment secured as the result of the negligent operation of any taxicab by any person in the City of Charlotte hereafter under named (sic) of Red Top Cab under the provisions of the amending ordinance of July 13, 1938; said sum . . . shall be held and paid out by the said City Treasurer under the terms, provisions and conditions of the ordinance of September 2, 1936, and the amendment of July 13, 1938. (Our italics)

"The undersigned (Beaty) further contracts and agrees . . . that *this additional agreement shall be taken and considered as a part of the ordinance of July 13, 1938 as fully and completely and binding as though written in said ordinance.*" (Our italics)

It is apparent that the primary purpose of the second instrument was to make plain that Beaty agreed that his deposit was to cover the operations of *Silver Streak taxicabs* up to July 1, 1938, but not thereafter. It was specifically agreed in the first instrument as well as in the second that Beaty's deposit was to cover the operation of Red Top taxicabs.

Appellant emphasizes the words in the second instrument, "to pay any final judgment secured as the result of the negligent operation of any taxicab by any person in the City of Charlotte hereafter under named (sic) of Red Top Cab," while appellees emphasize the words in the first instrument, "as the result of the operation of an automobile on the streets of Charlotte." But when these instruments, which embody the agreement, are considered together, we think they manifest one clear intent, namely, that the deposit was made solely *to comply with the requirements* of the ordinance. It cannot be reasonably inferred that the City of Charlotte intended to require or that Beaty intended to agree that the deposit should be held for payment of any final judgment except such as was within the coverage required by the ordinance.

What did the ordinance require?

Section 67 explicitly provided: "Said insurance, surety bond or bonds, or the deposit of cash or securities shall be conditioned upon the pay-

ment of any final judgment rendered on account of any personal injury or property damage caused by any taxicab *while operating on any of the streets* of the City of Charlotte by or under the direction of such person." (Our italics)

Whether the City of Charlotte could have prescribed a broader condition under the 1935 enabling act is beside the point. Suffice to say, Beaty's deposit was made to comply with the requirements of the ordinance enacted by the legislative body of the City of Charlotte. Apparently, the City Council took the view that since the insurance, surety bond or deposit was required as a condition precedent to the operation of a taxicab on the city streets, it was appropriate that it should be conditioned for the payment of damages for injury to person or damage to property only when operated (negligently) on the city streets.

The rules applicable to statutes apply equally to the construction and interpretation of municipal ordinances. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189. The relevant rules of construction are stated by Johnson, J., in *Cab Co. v. Charlotte,* 234 N.C. 572, 576, 68 S.E. 2d 433. As stated succinctly by Walker, J.: "Where the language of a statute or ordinance is clear and its meaning unmistakable, there is no room for construction, but we merely follow the intention as thus plainly expressed." *S. v. R. R.,* 168 N.C. 103, 82 S.E. 963.

As to Sec. 70, which relates to specific requirements when an applicant undertakes to comply with the ordinance by the deposit of cash or securities, no provision thereof is sufficient to manifest an intention that the condition on which cash or securities are deposited is different from that explicitly prescribed in Sec. 67 when an applicant undertakes to comply with the ordinance by providing an insurance policy or surety bond. These words, quoted from Sec. 70, are emphasized by appellant: "Such deposit shall be accompanied by a contract . . . providing that such deposit has been made to guarantee the payment of any final judgment obtained by any person as a result of injury or damage resulting from the negligent operation of any vehicle or taxicab for which said deposit has been made within the limits hereinafter (sic) provided." The purpose of the contract was to identify the person who made the deposit, the cash or securities deposited and the taxicab(s) for which the deposit was made; and, in our opinion, the provision requiring such contract was not intended to enlarge the condition explicitly prescribed in Sec. 67.

Moreover, we do not think it can be reasonably inferred that Sec. 71(a), quoted above, was intended to enlarge the condition explicitly prescribed in Sec. 67. The purpose of Sec. 71 was to make it plain that the insurance policy, surety bond or deposit, filed or made as required by Sec. 67, was for the payment of a final judgment *regardless*

of the identity of the particular operator of the taxicab at the time injury or damage is caused by the negligent operation thereof.

On this appeal, it is unnecessary to define precisely what is meant by "operating (a taxicab) on any of the streets of the City of Charlotte." Suffice to say, the conclusion reached is that the injuries sustained by O. R. Perrell on Beaty's private garage premises, while engaged in the inspection or repair of the taxicab, under the circumstances alleged by O. R. Perrell in his complaint against Ross, cannot be considered as having been caused by the taxicab "while operating on any of the streets of the City of Charlotte" within the meaning of that phrase as used in said ordinance.

It is noted that *Mitchell v. Great Eastern Stages* (Ohio), 42 N.E. 2d 771, and *Jones v. Eppler* (Okla.), 266 P. 2d 451, cited by appellant, deal with distinguishable factual situations.

For reasons stated, we affirm Judge Moore's judgment. It is noted that the judgment sustained the demurrer *and dismissed the action.* This was correct, for it appeared affirmatively from the facts alleged that plaintiff has no cause of action against these defendants. *Adams v. College*, 247 N.C. 648, 655, 101 S.E. 2d 809, and cases cited.

Affirmed.

JOHN M. GOULDIN, III, NON COMPOS MENTIS, BY ROBERT M. WILEY, GUARDIAN, v. INTER-OCEAN INSURANCE COMPANY.

(Filed 9 April, 1958)

1. Insurance § 18c—

Insurer waives a forfeiture provision of the policy when it, with knowledge of the pertinent facts upon which insurer might declare forfeiture, engages in acts, declarations or a course of dealing inconsistent with intention to enforce the forfeiture and leads insured honestly to believe that it will not insist upon forfeiture and that the insurance is still in force.

2. Same—

While knowledge is a prerequisite to waiver, an insurer is charged with knowledge not only of the facts disclosed, but also of such other facts as would have been discovered by reasonable inquiry which an ordinarily prudent person would have made upon the facts disclosed.

3. Same—

Insurer is presumed to be cognizant of data in the official files of the company received in formal dealings with insured.

4. Same—

Ordinarily, where insurer denies liability for a loss on one ground,

with knowledge of another ground of forfeiture, insurer is estopped to assert such other ground if insured has acted upon the reasonable belief that such other ground would not be asserted.

5. Waiver § 2—

Waiver is a mixed question of law and fact, but when the facts are determined or are all one way, waiver is a question of law.

6. Insurance § 39— Evidence of insurer's waiver of forfeiture for misrepresentations in applications held sufficient for jury.

Insured obtained the policies of health and accident insurance sued on without disclosing previous hospitalization for barbiturate intoxication. After issuance of the policy insured was hospitalized for reasons which included drug intoxication, and upon his proof of claim for hospital benefits under the policies, insured, in answer to a question as to whether he had had this disease before, stated, "Yes, * * * 1952 (?). Check claim records with your company," and this claim was processed and paid. Insured had filed no claim for the 1952 hospitalization. Thereafter, insured suffered disability from a gunshot wound, and insurer denied claim therefor on the ground that the injuries resulted from attempted suicide, not covered by the policy, and filed answer denying liability solely on this ground. Later, insurer filed supplemental answer setting up the forfeiture for misrepresentations in the applications for the policies, mainly for failure to disclose the 1952 hospitalization. Insured had expressly waived provision of law regarding confidential communications between physician and patient. *Held:* The evidence is sufficient to justify, though not to require, an affirmative answer to the issue of waiver by insurer, and therefore the court properly denied plaintiff's motion for a peremptory instruction and submitted the issue of waiver to the jury.

7. Trial § 29—

Where the evidence bearing upon an issue is susceptible to diverse inferences, the court properly refuses motion for a peremptory instruction thereon.

8. Evidence § 29½: Insurance § 39— Collateral pleading containing self-serving declarations is incompetent as evidence.

Insurer, after filing answer denying liability on the ground that the injuries sued on resulted from insured's attempted suicide and were not within the coverage of the policies, made affidavit-motion to be allowed to file an amended answer on the ground that it had just discovered misrepresentations in the applications for the policies warranting forfeiture. Insured's guardian asserted waiver of the forfeiture provisions. *Held:* The affidavit-motion was a collateral pleading containing self-serving declarations of a conclusory nature on the crucial question of insurer's knowledge, based in large part on hearsay and presented in a form that deprived plaintiff of his right of cross-examination, and the collateral pleading was incompetent as evidence and its admission was prejudicial.

9. Appeal and Error § 1—

Where new trial is awarded upon one assignment of error, questions raised by other assignments of error relating to matters that may not recur on retrial, need not be decided.

APPEAL by plaintiff from *Fountain, Special Judge,* and a jury, at September-October Term, 1957, of WILSON.

Civil action on two health and accident insurance policies, tried upon the following issues, answered by the jury as indicated:

"1. Did the plaintiff suffer loss resulting directly and independently of all other causes, from accidental bodily injuries, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff make false representations of material facts in his applications for the insurance policies described in the complaint, as alleged in the answer? Answer: Yes.

"3. Did the defendant waive its right of forfeiture for false and material representations in the applications for the policies sued on as alleged in the reply? Answer: No.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: None."

The court entered judgment upon the verdict in favor of the defendant, and the plaintiff appealed.

Battle, Winslow & Merrell for plaintiff, appellant.
Robert M. Wiley, Guardian, In Propria Persona.
Gardner, Connor & Lee, for defendant, appellee.

JOHNSON, J. The two insurance policies in suit were issued in 1955, one in January, the other in June. On 31 August, 1955, the plaintiff was injured by a gunshot blast which ranged upward through the front of his forehead. As a result of the injury he has been declared *non compos mentis.* The claim filed by his guardian was denied on the ground the shooting was an attempted suicide. The policies exclude suicide or any attempt thereat. The guardian instituted this action, alleging that the injury was of accidental origin. The issue raised by the defendant's denial and plea of attempted suicide was resolved by the jury in favor of the plaintiff. As to this issue, the first one, no question is raised by the appeal.

The second issue relates to the question of false representations in the applications for the policies. The defendant by supplemental answer alleged, and at the trial evidence was offered tending to show, that the plaintiff failed to disclose in the applications that he was hospitalized in 1952 for treatment for barbiturate intoxication. The defendant set up and relied on plaintiff's failure to disclose this and other previous illnesses as misrepresentations materially affecting the insurance risk, and on the issue raised by the plaintiff's denials, the trial court gave the jury a peremptory instruction in favor of the insurance company. To this instruction no error is assigned. In fact,

no phase of the trial relating to the second issue is challenged by the appeal.

The case was fought out below over the third issue, that of waiver. All assignments of error brought forward by the plaintiff relate to that issue.

The plaintiff moved the court for a peremptory instruction in his favor on the issue of waiver. The motion was denied. This ruling is the subject of the first assignment of error.

The plaintiff contends that the evidence shows conclusively that the insurance company by its acts and conduct in dealing with the plaintiff waived its right of forfeiture. He insists that the evidence discloses that the company had knowledge of the misrepresentations before he suffered the gunshot wound now in suit; and that after receiving such knowledge the company had dealings with the plaintiff in processing a claim filed by him for a previous sickness and hospitalization and paid the claim, thus treating the policies as still being in effect and leading the plaintiff to regard himself as still insured, thereby waiving the company's right to cancel the policies. As further evidence of waiver, the plaintiff points to the fact that when the instant claim was later filed, the company denied liability on the sole ground of attempted suicide, without mention of any right it may have had to cancel the policies for previous misrepresentations.

The insurance company contends, on the other hand, that the evidence was insufficient to justify the action of the court in submitting the issue of waiver, and for that reason the company insists that any error committed by the court in the trial of the issue of waiver should be treated as harmless.

These, in summary, are the essential principles of law applicable to the issue of waiver:

"In general, any act, declaration, or course of dealing by the insurer, with knowledge of the facts constituting a cause of forfeiture . . . which recognizes and treats the policy as still in force and leads the person insured to regard himself as still protected thereby will amount to a waiver of the forfeiture . . . and will estop the insurer from insisting on the forfeiture or setting up the same as a defense when sued for a subsequent loss. Such waiver may be inferred from acts as well as from words. Acts of an insurance company in recognizing a policy as a valid and subsisting contract, and inducing the insured to act in that belief and incur trouble or expense, is a waiver of the condition under which the forfeiture arose." 29 Am. Jur., Insurance, Sec. 832.

In *Hicks v. Insurance Co.*, 226 N.C. 614, at p. 617, 39 S.E. 2d 914, it is said: "Waiver of the forfeiture provision in a policy of insurance is predicated on knowledge on the part of the insurer of the pertinent facts and conduct thereafter inconsistent with an intention to enforce

the condition. In *Coile v. Com. Travelers,* 161 N.C., 104, 76 S.E., 622, quoted in *Paul v. Ins. Co.,* 183 N.C., 159, 162, and in *Arrington v. Ins. Co.,* 193 N.C., 344, it is said: 'A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.' *Ins. Co. v. Eggleston,* 26 U.S., 577; *Ins. Co. v. Norton,* 96 U.S., 234." See also *Robinson v. Brotherhood,* 170 N.C. 545, 87 S.E. 537.

"As a general rule, in order to waive a policy provision or a forfeiture, there must be a prior knowledge of the circumstances, a waiver being the intentional relinquishment of a known right and requiring both knowledge of the existence of the right and an intention to relinquish it. Although the courts are quick to protect an insured or beneficiary, the element of knowledge is considered a fair element to impose for the protection of the insurer." 16 Appleman, Insurance Law and Practice, p. 613.

"Knowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry would have disclosed and is binding on the insurer. The rule applies to insurance companies that whatever puts a person on inquiry amounts in law to 'notice' of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed." 16 Appleman, Insurance Law and Practice, p. 817.

Ordinarily, an insurance company is presumed to be cognizant of data in the official files of the company, received in formal dealings with the insured. *Hicks v. Ins. Co., supra,* (226 N.C. 614); *Robinson v. Brotherhood, supra* (170 N.C. 545).

"An adjustment of a loss with knowledge of grounds of forfeiture has been deemed a waiver of the forfeiture, in the absence of any provision to the contrary." 29 Am. Jur., Insurance, Sec. 784, p. 670. See also *Cab Co. v. Casualty Co.,* 219 N.C. 788, 15 S.E. 2d 295.

"Thus, if the company pays certain small losses on a policy, it waives any defense of which it has knowledge and is estopped thereafter to rely upon such defense in future losses." 16 Appleman, Insurance Law and Practice, p. 945.

In 29 Am. Jur., Insurance, Sec. 871, p. 667, it is stated: "There are many cases asserting the rule that where an insurer denies liability for a loss on one ground, at the time having knowledge of another ground of forfeiture, it cannot thereafter insist on such other ground if the insured has acted on its asserted position and incurred prejudice or expense by bringing suit, or otherwise." See also *Parker v. Ins. Co.,* 143 N.C. 339, 55 S.E. 717.

Waiver is a mixed question of law and fact. When the facts are determined, and are all one way, it becomes a question of law. *Hicks v. Ins. Co., supra,* (226 N.C. 614, at bot. p. 619).

As previously pointed out, when the policies here sued on were applied for in January and May, 1955, the plaintiff failed to disclose that he had been hospitalized for barbiturate intoxication in 1952. It was this nondisclosure of facts that the insurance company relied on at the trial and urged as its chief ground for forfeiting and cancelling the policies. And it appears from the judge's charge on the issue of forfeiture that the jury's verdict in favor of the insurance company was based on the plaintiff's failure to disclose the facts in respect to his hospitalization in 1952.

The evidence on which plaintiff relies to show that the company waived its right of forfeiture may be summarized as follows:

1. After the policies were issued to the plaintiff in January and June, 1955, he was hospitalized at the Medical College of Virginia Hospital, Richmond, from 22 July until 11 August, 1955. When he was discharged at the end of this period, he filed claim with the company for hospital benefits under the policies. In the claim papers the plaintiff furnished to the defendant a statement of his physician, Dr. Foster, that the plaintiff had been treated during the stated period of hospitalization for "(1) Psychoneurosis, anxiety reaction, (2) acute brain syndrome, drug intoxication," and that his first symptoms appeared "several weeks prior to July 22, 1955." On the blank filled in and signed by the plaintiff as a part of the proof of claim, he answered questions as follows:

> "8. Have you ever had this disease before? *Yes.* Give dates. *1952 (?). Check claim records with your company.*
> "9. What medical attention have you had during the past five years? *Above.*"

It is admitted in the plaintiff's pleadings that he filed no claim for the 1952 hospitalization. The plaintiff, in explanation of the foregoing statement, "1952 (?) Check claim records with your company," offered evidence that he had previously been insured by the defendant under a similar policy, issued to him in 1949, but which lapsed in 1953 when he was called into Naval service; that while this policy was in force, he filed claims in 1950 and 1951 which were paid. The evidence discloses that the 1950 claim was for hospital expenses at Medical College of Virginia Hospital when he was treated for epididymitis, and that the 1951 claim was paid for hospital expenses during the month of August for treatment at Carolina General Hospital, Wilson, N. C. for "(1) follicular tonsilitis, (2) Vincent's pharyngitis, probably due to chloromycitis therapy."

The claim for hospital treatment from 22 July to 11 August, 1955, was processed and paid by the defendant before the plaintiff sustained the gunshot injury now in suit.

2. In his application for insurance dated 18 January, 1955, the plaintiff expressly waived all provisions of law forbidding physicians who had attended him from disclosing knowledge or information acquired by them.

3. Following the plaintiff's gunshot wound on 31 August, 1955, his guardian filed with the company claim for the hospital benefits and disability compensation from 1 September, 1955, now sued for. The claim was received by the defendant 10 October, 1955. On 1 November, 1955, the company by letter to the plaintiff's guardian denied liability "because of the manner in which the alleged accident was sustained." The guardian requested a more specific explanation of the grounds upon which liability was denied. The company replied on 8 November, 1955, stating that "The company's denial of this claim was based on information to the effect that this was an attempted suicide," a risk not covered by the policies.

The record discloses these further facts: (1) On 11 January, 1956, this action was instituted for hospital expenses and compensation allegedly due under the policies; (2) On 28 February, 1956, the defendant filed answer denying liability on the sole ground "that the injuries to the plaintiff resulted in an attempted suicide on the part of the plaintiff"; and (3) that in September, 1956, the defendant filed supplemental answer setting up its equitable defense for cancellation of the policies because of material misrepresentations, the substantial one being failure to disclose that the plaintiff was hospitalized in 1952 for barbiturate intoxication.

The plaintiff directs attention to his claim papers of 11 August, 1955, wherein he replied "Yes" to the question whether he had ever had barbiturate intoxication before, and gave the date of the former attack as "1952 (?)." This, the plaintiff contends, fixed the defendant with knowledge of the basic facts in reference to his previous hospitalization in 1952, and that the disclosure was adequate to put the defendant on inquiry which, if pursued with ordinary diligence, would have led to a discovery of all related facts; and that being charged with notice of the nature of the plaintiff's hospitalization in 1952, the company proceeded to process and pay the claim of 11 August, 1955, thus treating the policies as still being in effect and leading the plaintiff to regard himself as still insured. The plaintiff insists that this line of evidence, together with other evidence tending to show that the defendant, until long after the suit was instituted, denied the instant claim on the sole ground of attempted suicide, established his defense of waiver as a matter of law, and that therefore he was en-

titled to a peremptory instruction in his favor on the issue of waiver.

The defendant, on the other hand, takes the position that the evidence is not sufficient to support a finding of waiver, and insists that in no event does the evidence point to such finding as the only reasonable inference. In support of these contentions, the defendant points to the plaintiff's statement in his claim papers indicating that the facts in respect to his former hospitalization for barbiturate intoxication could be found by checking his "claim records with your company." Since the plaintiff's claim record with the company disclosed no former hospitalization for barbiturate intoxication, the company insists that the plaintiff's answers as given were misleading and were not reasonably calculated to put the defendant on notice as to the former hospitalization. The company takes the position it was charged with no notice beyond what its claim files disclosed, and that since the files disclosed nothing as to any former treatment of the plaintiff for barbiturate intoxication, the company in no aspect of the evidence was charged with notice in respect to the former hospitalization.

The plaintiff's counter contention is that the statement in the claim papers, "Check claim records with your company," may reasonably be interpreted as a mere inadvertence and lapse of memory in reference to claims filed by him under his first policy with the company, which was in force from 1949 to 1953, and that his amplifying statement may be treated as mere surplusage. And when so treated, he insists that his claim statement contains the unqualified answer of "Yes" to the question whether he had previously had the disease of barbiturate intoxication, with date given as "1952 (?)." These facts, appearing, in evidence, taken from documents in the possession of the defendant, the plaintiff insists were sufficient to fix the defendant with notice of his 1952 hospitalization.

Upon consideration of the foregoing arguments of the parties, we are constrained to the view that the relevant evidence, if believed, is sufficient to justify, though not to require, an affirmative answer, favorable to the plaintiff, on the issue of waiver. This being so, we conclude that the presiding Judge properly denied the plaintiff's motion for a peremptory instruction and submitted the issue of waiver as being controlled by open issues of fact to be determined by the jury. The rule is that where the evidence bearing upon an issue is susceptible of diverse inferences, it is improper for the presiding judge to give the jury a peremptory instruction. *Fertilizer Works v. Cox*, 187 N.C. 654, 122 S.E. 479; *Brooks v. Mill Co.*, 182 N.C. 258, 108 S.E. 725. *Cf. Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716.

However, the plaintiff is entitled to a new trial because of the admission of incompetent evidence offered by the defendant. Over the plaintiff's objection, the defendant was allowed to offer in evidence

and to read to the jury the defendant's motion for leave to file its supplemental answer. This motion is in form an affidavit of Wade A. Gardner, one of the defendant's attorneys. The motion alleges in gist: (1) that when the defendant filed its answer in February 1956, it denied the material allegations of the complaint and set up the defense of attempted suicide; (2) that thereafter, and on 12 June, 1956, depositions of certain witnesses were taken in Richmond, Virginia; (3) that upon the taking of the depositions "the defendant, through its attorneys, learned for the first time certain facts and information material to an adjudication of the rights and liabilities between the parties hereto, by way of testimony given by the witnesses and by way of inspection of medical records, *all of which facts and information the defendant and its attorneys were ignorant of until such time*" (Italics added.); and (4) that "additional facts and information are contained in the defendant's proposed supplemental answer, which is hereto attached."

The supplemental answer was filed, and the case was tried upon it. In it the defendant alleged for the first time its defense of forfeiture for failure of the plaintiff to disclose in his applications material facts respecting his health, including his hospitalization for barbiturate intoxication in 1952. When the Gardner affidavit-motion is considered in the light of the pleadings and the other evidence in the case, it is clear that the material facts referred to in the affidavit, of which it is asserted the defendant was ignorant until June, 1956, were the facts respecting the plaintiff's hospitalization in 1952. It thus appears that the facts asserted in the affidavit went to the very heart of the issue of waiver: The crucial question of fact presented by the issue was whether, as contended by the plaintiff, the defendant was charged with knowledge of the 1952 hospitalization when it processed and paid the small hospital claim in August, 1955, or whether, as contended by the defendant and as stated in the Gardner affidavit, the company remained ignorant of these crucial facts until the depositions were taken in Richmond in June, 1956.

The affidavit-motion was a collateral pleading, containing various self-serving declarations of a conclusory nature, based in large part on hearsay, and was presented in a form that deprived the plaintiff of his right of cross-examination. The document was inadmissible. See Stansbury, North Carolina Evidence, Sections 35 and 140. Its reception in evidence must be held prejudicial. Its harmful effect was likely accentuated, rather than removed, by the court's later instruction as follows:

"I instruct you now that that document was admitted in evidence as not substantive evidence but it is offered and admitted in evidence or admitted in the case only as evidence of the defendant in explana-

tion of the defendant's failure to allege as a defense in the action what it now contends to have been a false and material representation in the two applications, that is the applications of January and May 1955, the policies now sued on. Of course, it is for you to say from all of the evidence what the facts are in that regard, but the motion is not substantive evidence, it is not evidence of the truth of the things alleged therein, *but was only offered for the purpose of the defendant's explanation, if you find that it does constitute an explanation* why they did not raise that defense in the original answer filed but raised it only in the supplemental answer which was permitted by the Court to be filed at a later time." (Italics added.)

For the error indicated, the plaintiff is entitled to a new trial. Since the questions raised by the plaintiff's other assignments of error may not recur on retrial, we refrain from discussing them.

New Trial.

GUY M. BEATY, MRS. GUY M. BEATY, GUY M. BEATY, JR., MILDRED BEATY, ROY W. BEATY, AND J. WILLIAM BARNETTE, PATRNERS DOING BUSINESS AS GUY M. BEATY & COMPANY. v. INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, UNITED ASSOCIATION OF PLUMBERS & STEAMFITTERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL HOD CARRIERS & LABORERS UNION, G. G. RAY COMPANY, A CORPORATION, AND J. A. JONES CONSTRUCTION COMPANY, A CORPORATION.

(Filed 9 April, 1958)

1. Appeal and Error § 38: Associations § 5: Constitutional Law § 24: Process § 11—

G.S. 1-97(6), permitting service of process on unincorporated associations by service on the Secretary of State, is constitutional and meets the requirements of due process, and *held* further, assertion to the contrary was abandoned by reason of the failure to advance any argument in support thereof. Rule of Practice in the Supreme Court No. 28.

2. Appeal and Error § 49—

Findings of fact of the trial court are conclusive on appeal when supported by evidence.

3. Associations § 5: Constitutional Law § 24: Process § 11—

The constitutions and bylaws of defendant nonresident labor unions, introduced in evidence, together with affidavits of witnesses, *held* sufficient to support the court's findings that defendant unions exercised such control and supervision over their local unions operating in this State in

furtherance of the objectives of the defendant unions as to constitute doing business in this State by defendant unions in performing in this State the acts or some of the acts for which they were formed, and judgment that defendant unions were subject to service of process under G.S. 1-97(6), is affirmed.

APPEAL by defendant unions from *Moore (Dan K.), J.*, December 9, 1957 Civil Term of MECKLENBURG.

Plaintiffs seek damages for the asserted wrongful acts of defendants. The complaint alleges in substance that defendant G. G. Ray Company, subcontractor for J. A. Jones Construction Company, in July 1956 contracted with plaintiffs to install all insulation for the heating and air conditioning work on a project known as West Gate Shopping Center near Asheville, then under construction by Jones Construction Company; that defendants other than the corporate defendants, are unincorporated labor organizations or unions engaged in North Carolina in representing employees and collecting dues therefor; that plaintiffs' employees directed to perform the work contracted for with Ray Company were not members of and did not pay dues to any of the defendant unions and were unwilling to become members of the defendant unions; shortly after plaintiffs began work pursuant to the contract with Ray Company, defendant unions threatened a strike which would halt substantially all work on the entire West Gate Shopping Center project; that said strike was threatened by defendant unions to coerce and compel the corporate defendants to demand and require plaintiffs' employees against their will to join and pay dues to defendant unions and to prohibit any except members of defendant unions from working on said project; that corporate defendants succumbed to the pressure and coercion so exerted and, to avert the strike so threatened, terminated and prohibited plaintiffs from performing their contract with Ray Company.

Summons for defendant unions issued on 19 December 1956. Service was had on the Secretary of State who promptly mailed a copy of the summons and a copy of the complaint duly verified to the general headquarters of each of the defendant unions at its regular office in Washington, D. C.

Each union filed a motion dated 18 January 1957 to dismiss the action for lack of service of process. The motions recognized that service was made pursuant to the provisions of G.S. 1-97(6). Each motion avers: ". . . that the service of process on it, pursuant to the provisions of said Statute, is ineffectual for the purpose of bringing it into Court, for the reason that said International Association is not engaged in doing business in North Carolina nor engaged in the performance of any of the acts for which it is organized within the State of North Carolina." The motions also assert that G.S. 1-97(6) violates

the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Copies of the constitutions and bylaws of defendant unions and affidavits by officials of defendant unions and by former members were filed with the court. The court, after considering the evidence submitted, made findings of fact. On the facts found it concluded that defendants were amenable to process in North Carolina. Defendant unions excepted to the findings of fact made by the court, to the refusal of the court to make findings requested by them, to the order overruling their motions, and appealed.

Blakeney & Alexander and Ernest W. Machen, Jr., for plaintiff, appellees.

Robert G. Sanders and J. C. Sedberry, for defendant, appellants.

RODMAN, J. Based on the evidence which the parties submitted, the court found these facts:

"(1) That each of said defendant Unions has established and now maintains subordinate local units in this State, called Local Unions.

"(2) That the provisions of the Constitutions and By-Laws of the said defendant Unions indicating the nature and organizational structure of the defendant Unions and defining the connections between said Unions and their local units are as set forth in the affidavits filed by the plaintiffs, including the exhibits attached thereto.

"(3) That each of the defendant Unions had and exercises complete dominion and control over the activities of its local units and through such units performs in this State the purposes and objects for which each defendant Union was formed.

"(4) That each defendant Union is, and at all times material to this action, has been engaged in supervising and directing the activities of its agents, and local units in the State of North Carolina, which activities include the making of contracts with employers in North Carolina, and dealing with employers relative to wages, hours and working conditions of their employees who are members of said Unions in North Carolina.

"(5) That each of the defendant Unions is, and at all times material hereto has been, engaged in collecting money, through its local units, in the form of initiation fees, dues and assessments from its members in North Carolina, and in general, guiding, controlling, directing and supervising the activities and actions of its agents and local units in the State of North Carolina."

The motions assert that our statute, G.S. 1-97(6), permitting service of process on the Secretary of State as process agent for unincorporated associations does not accord with the constitutional requirement of

due process and is therefore void. No argument is advanced in support of this assertion, perhaps because controlling decisions so effectually dispose of the assertion. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L ed. 2d 223, 78 S Ct. 199; *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L ed. 95, 66 S Ct. 154, 161 A.L.R. 1057; *Hess v. Pawloski*, 274 US 352, 71 L ed. 1091; *Lunceford v. Association*, 190 N.C. 314, 129 S.E. 805. Under our Rule 28, this position is deemed abandoned.

This leaves for consideration two questions: (1) Is there any evidence to support the court's findings, and (2) Do the findings support the judgment?

As noted in the findings of fact, copies of the constitutions and bylaws of the various Internationals were filed with the court. It is apparent from these constitutions and bylaws that each of the Internationals seeks to accomplish the same objects. For that reason it will suffice, without unduly lengthening this opinion, to refer to some of the provisions in the constitution of the International Association of Heat and Frost Insulators and Asbestos Workers, the first named defendant. The preamble to the constitution declares the object of the International Association "shall be to assist its membership in securing employment, to defend their rights and advance their interests as working men. . . ." The constitution provides the International "shall have supreme ruling authority and supervision over all its affiliated Local Unions." It is granted legislative, executive, and judicial power. Applicants for membership shall subscribe to a form provided by the International. All persons except employers, inspectors, or foremen who work in the practical installation or erection of insulating materials are eligible for membership. Applications for membership must be made in duplicate with one copy going to the local and one to the general office of the International, "for investigation, registration, and issuance of membership book designating therein member's proper classification." An applicant cannot be accepted by the local union without the consent of the International, and must be a member of the local to be a member of the International. The president of the International "shall preside at Local Union meetings when he so decides. He shall be the official Business Representative and Chief Organizer of the International Association. He shall be an ex-officio member of all Local Union Committees and Boards. He shall have authority to audit Local Union finances and to suspend Local Union officers and appoint their successors pending hearing by General Executive Board or Convention." A bookkeeping system is furnished local unions by the International. Locals are forbidden to use any other system. Organizers appointed by the International president "shall organize unorganized Asbestos Workers into Local Unions under International

law and perform such other duties as are assigned them by the General Office." The International prescribes the minimum initiation fee for membership in a local and the percentage thereof going to the International. Members "in good standing" receive an International official receipt itemizing all the monies paid by them to the local union. Suspended members "shall not attend Local meetings *nor work with the tools.* (Emphasis supplied) Suspended members seeking reinstatement shall meet all Local Union requirements and in addition shall pay a reinstatement fee of Ten Dollars ($10.00), which fee shall be payable to the General Office." "Local Unions are *subordinate* branches of the International Association and as such can be reorganized, suspended or disbanded with charter revocation *by action of the General* Executive Board or Convention." "Local Unions as *subordinate* branches of the International Association can only exercise local autonomy in matters upon which the International Constitution and By-Laws are silent." "Local Unions must prohibit contracting, subcontracting, lump work, or piece work in our trade under penalty of charter revocation." The form of the bargaining agreement is prescribed by the International and cannot be modified or changed by the local without the assent of the International.

In addition to the constitutions the court had affidavits from former union members. A former member of the first-named defendant swore: ". . . this Union supervises and directs the activities of its agents, representatives, organizers and Local Unions in the State of North Carolina, in the making of contracts with employers in North Carolina, in dealing with employers relative to the wages, hours and working conditions of their employees who are members of this Union in North Carolina. . . ." Affidavits containing substantially similar factual statements were made with respect to the other union defendants. These affidavits may have been regarded by the court as having particular significance when examined in the light of the affidavit of Edward F. Carlough, general secretary-treasurer of the Sheet Metal Workers. His affidavit states: "The International is not a labor union in the sense that it represents members for purposes of collective bargaining with their employers for their wages, hours, and conditions of employment. The International is the policy-making, rule-making, and administrative body, but there are smaller unincorporated associations, known as local unions, which have voluntarily affiliated with the International." Prohibition of the right of nonunion artisans to labor in the construction of West Gate Shopping Center may have been regarded, by the International unions, as a matter of policy. Each of the International unions filed an affidavit by one of its principal officers. Perhaps the court took note of the fact that neither the Asbestos Workers nor the Sheet Metal Workers denied the tortious conduct charged to them

in the verified complaint. The affidavit filed on behalf of the Electrical Workers establishes that it is a party to one collective bargaining agreement touching the work of its members in North Carolina, and that it is presently appealing the results of an election held under the Federal Labor-Management Relations Act of 1947 arising with respect to employment in North Carolina.

There is, we think plenary evidence to support the findings of fact made by the court; and the facts found, supported as they are by the evidence, are conclusive on appeal. *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17; *Bangle v. Webb,* 220 N.C. 423, 17 S.E. 2d 613; *Schoenith v. Mfg. Co.,* 220 N.C. 390, 17 S.E. 2d 350.

The facts found show that defendants are performing in this State the acts or some of the acts for which they were formed. This is all the statute requires. This essential fact was not found to exist in the cases of *Youngblood v. Bright,* 243 N.C. 599, 91 S.E. 2d 559, and *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268.

The facts found would suffice in a suit against a nonresident corporation to establish that it was doing business in this State and hence amenable to service of process here. *Harrington v. Steel Products,* 244 N.C. 675, 94 S.E. 2d 803; *Harrison v. Corley,* 226 N.C. 184, 37 S.E. 2d 489; *Highway Com. v. Transportation Corp.,* 225 N.C. 198, 34 S.E. 2d 78; *Ruark v. Trust Co.,* 206 N.C. 564, 174 S.E. 441; *Lunceford v. Association, supra; Bankers' Holding Corp. v. Maybury,* 275 P 740, 75 A. L.R 1237; *Steinway v. Majestic Amusement Co.,* 179 F 2d 681, 18 A. L.R. 2d 179, and annotations 198; *American Cities Power & Light Corp. v. Williams,* 74 NYS 2d 374; *Industrial Research Corp. v. General Motors Corporation,* 29 F 2d 623; *Mas v. Orange-Crush Co.,* 99 F 2d 675.

International unions with charter provisions similar to the ones here considered have, through their control and dominance of local unions, been held, in well-considered cases in other States, to be doing business in places other than the place of their residence. *Edgar v. Southern Ry. Co.,* 49 S.E. 2d 841 (S.C.); *Spica v. International Ladies Garment Wkrs.' Union,* 130 A 2d 468 (Pa.); *International Union of Op. Eng. v. J. A. Jones Const. Co.,* 240 S.W. 2d 49 (Ky.); *Oil Workers International Union v. Superior Court,* 230 P 2d 71 (Cal.).

This case does not present the question as to who is an appropriate process agent and hence the sufficiency of service on an officer of a local union to bring the International into court. The cases cited by appellants in support of that proposition are not here pertinent.

Affirmed.

GUY M. BEATY, MRS. GUY M. BEATY, GUY M. BEATY, JR., MILDRED BEATY, ROY W. BEATY AND J. WILLIAM BARNETTE PARTNERS, DOING BUSINESS AS GUY M. BEATY & COMPANY v. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, ROSS & WITMER, INC., A CORPORATION, SOUTHEASTERN REALTY COMPANY, A CORPORATION.

(Filed 9 April, 1958)

APPEAL by defendant union from *Moore (Dan K.), J.*, December 9, 1957 Civil Term of MECKLENBURG.

Blakeney & Alexander and Ernest W. Machen, Jr., for plaintiff, appellees.

Robert G. Sanders and J. C. Sedberry, for defendant, appellant.

PER CURIAM. This is a companion suit to *Beaty et al. v. International Association of Heat & Frost Insulators & Asbestos Workers, ante,* 170. It grows out of acts of defendant touching plaintiff's contract to do certain work in Charlotte. Defendant union, as in that case, moved to quash the service of process. The court made identical findings of fact on substantially the same factual situation as there portrayed. The decision in that case is controlling here.

Affirmed.

IN THE MATTER OF THE ESTATE OF WINNIE ANN IVES, DECEASED, T. B. IVES, ADMINISTRATOR.

(Filed 9 April, 1958)

1. Executors and Administrators § 21—

Where there is dispute as to the proper distribution of funds in the hands of the administrator, he may properly petition the court, upon notice to the interested parties, for the advice and instruction of the court in the matter.

2. Death § 3—

Action for wrongful death exists in this State solely by virtue of statute. G.S. 28-173, G.S. 28-174.

3. Death § 9—

While only the personal representative may maintain an action for wrongful death, the recovery is not an asset of the estate in the usual acceptation of the term, but the personal representative holds the recovery as trustee for the distributees of the estate who are the real parties in interest. G.S. 28-173.

4. Actions § 5—

The common law maxim that a person will not be allowed to take advantage of his own wrong has been adopted as public policy in this State.

5. Same: Death § 9—

The right of a person to share in the distribution of recovery in an action for wrongful death will be denied where the death of the decedent is caused by such person's negligence.

6. Death § 10—

An administrator, provided he acts in good faith and exercises the care of an ordinarily prudent man, has the right to compromise the statutory right of action for wrongful death with the person liable, either before or after the action is brought, and the money received in settlement stands on the same basis as if it had been recovered by action.

7. Actions § 5: Death § 9— Where settlement for wrongful death is made on basis of a distributee's negligence, such distributee will not be permitted to share therein.

Intestate, while riding as a passenger in an automobile owned and driven by her son, was killed in a collision. The administrator and the son's insurer compromised claim for wrongful death in consideration of the release by the administrator from all claims and demands against the son and insurer arising out of the accident. The policy provided that insurer might make such investigation, negotiation and settlement of any claim or suit as it deemed expedient. The son's answer to the administrator's petition did not allege that he had sued the driver of the other car involved in the collision or that he had made any claim or demand against such driver for damage to his automobile. *Held:* Notwithstanding the absence of any finding that the son was negligent, and notwithstanding that the release stated that all parties released denied liability, it is manifest that the settlement was paid as compensation on the basis that the son, by his wrongful act, neglect or default, was responsible for intestate's death, and therefore the son, even though he did not know of the release, will not be permitted to share in the settlement.

APPEAL by Sam B. Ives from *Stevens, J.*, September Civil Term 1957 of LENOIR.

Petition by T. B. Ives, administrator of the estate of his mother, Winnie Ann Ives, deceased, for advice and instruction.

Winnie Ann Ives came to her death as the result of injuries received in the collision of an automobile, owned and operated at the time by her son, Sam B. Ives, and in which she was riding as a passenger, with another automobile having a housetrailer attached operated by one Jeffrey, a nonresident of this state, on U. S. Highway No. 258 about 10 miles south of Kinston.

Winnie Ann Ives died intestate on 31 January 1954, and on 29 July 1954 letters of administration were issued to her son, T. B. Ives, by

the Clerk of the Superior Court of Lenoir County.

At the time of the collision Sam B. Ives was the insured under a public liability insurance policy covering his automobile, issued to him by Farm Bureau Mutual Automobile Insurance Company of Columbus, Ohio, which was in full force and effect. The policy limited liability to $10,000.00 for each person, to $20,000.00 for each accident, and to $500.00 for funeral expenses for each person.

The policy contains these provisions:

"COVERAGE F - Bodily Injury Liability

"To pay on behalf of the Insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by the accident and arising out of the ownership, maintenance or use of the automobile.

"COVERAGE G - Medical Payments

"To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the Named Insured or with his permission."

The policy contains this further provision:

"As respects the insurance afforded by the other terms of this policy under coverages E and F the Company shall:

"(a) Defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

Following his appointment as administrator of the estate of Winnie Ann Ives, and in his capacity as such, T. B. Ives and the Farm Bureau Mutual Automobile Insurance Company entered into negotiations for a compromise settlement of all claims which he as administrator had, or might have, against Sam B. Ives for the death of his intestate resulting from injuries received by her, while a passenger in Sam B. Ives' automobile operated by him, when it had a collision with the Jeffreys' automobile. As a result of these negotiations the Insurance Company paid to T. B. Ives, as administrator, $6,500.00 under Coverage F of the policy, and $500.00 under Coverage G of the policy, and T. B. Ives, as administrator, executed and delivered to the In-

surance Company the following Release, of which we copy only the relevant parts:

"RELEASE OF ALL CLAIMS

"FOR AND IN CONSIDERATION OF the payment to me/us of the sum of ($6500.00) - - Sixty-five Hundred and No/100 - - Dollars and other good and valuable consideration, I/we, being of lawful age, have released and discharged, and by these presents do for myself/ourselves, my/our heirs, executors, administrators and assigns, release, acquit and forever discharge Sam Ives, Jr., and any and all other persons, firms and corporations of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, and all consequential damage on account of, or in any way growing out of, any and all known and unknown personal injuries and death and property damage resulting or to result from accident that occurred on or about the 31st day of January, 1954, at or near U. S. Highway 258, 10 miles south of Kinston, North Carolina.

IRRELEVANT PARAGRAPH OMITTED

"I/we understand that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons, firms and corporations hereby released by whom liability is expressly denied.

"This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital."

Winnie Ann Ives was a widow at the time of her death. She left surviving her four sons, T. B. Ives, Walter Egbert Ives, John Lewis Ives and Sam B. Ives, who are her sole heirs at law, and each of whom was more than 21 years of age at the time of her death.

No funds or property came into the hands of the administrator, except the $7,000.00 in money from the settlement with the insurance company. From this $7,000.00 the administrator has paid attorneys' fees and other small amounts, has made advancements to Walter Egbert Ives, John Lewis Ives and himself, and now has left of the $7,000.-00 the sum of $2,273.64.

The administrator by petition requested the court to advise and instruct him as to how the $7,000.00, less attorneys' fees and the costs of administration of the estate, shall be disbursed.

Sam B. Ives filed an answer to the petition of the administrator. At the hearing of the petition and answer by the Clerk of the Superior

Court of Lenoir County, the administrator and Sam B. Ives were represented by counsel. The facts found by the Clerk relevant to this appeal have been set forth above. Upon the facts as found by him the Clerk adjudged that Sam B. Ives is not entitled to share in the $7,000.00 paid by the Insurance Company, and that the net proceeds from this sum be divided equally between T. B. Ives, Walter Egbert Ives and John Lewis Ives. To which judgment Sam B. Ives excepted, and appealed to the Judge of the Superior Court.

The appeal came on to be heard before the Honorable Henry L. Stevens, Jr., Judge Presiding at the September Civil Term 1957 of the Superior Court of Lenoir County. Judge Stevens, after considering the entire record, including the evidence, the findings of fact, conclusions of law and judgment of the Clerk, and the argument of counsel on both sides, adopted as his own the findings of fact and conclusions of the Clerk, and entered judgment affirming the Clerk's judgment.

From which judgment Sam B. Ives appealed to the Supreme Court.

White & Aycock and Harvey W. Marcus for Sam B. Ives, Respondent, Appellant.

Sutton & Greene for T. B. Ives, Administrator, Petitioner, Appellee.

PARKER, J. The petitioner has adopted the proper procedure to secure judicial direction as to the method of distribution of the $7,000.00 paid to him by the Farm Bureau Mutual Automobile Insurance Company. *In re Estate of Poindexter,* 221 N.C. 246, 20 S.E. 2d 49; *In re Estate of Mizzelle,* 213 N.C. 367, 196 S.E. 364; *In re Stone,* 173 N.C. 208, 91 S.E. 852.

At common law no action would lie to recover damages for the wrongful death of a person. *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793. The first innovation upon the common law, in this respect, was brought about by the enactment of 9 and 10 Vict., Ch. 93, which authorized recoveries in such cases. This statute is commonly called Lord Campbell's Act, because he, who had the rare distinction of having been successively Lord Chief Justice and Lord Chancellor of England, was its author and mainly instrumental in its adoption. *Hartness v. Pharr,* 133 N.C. 566, 45 S.E. 901. In North Carolina a right of action to recover damages for wrongful death is given by G.S. 28-173, and 28-174, and therefore in this jurisdiction the action for wrongful death exists only by virtue of these statutes. *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49.

G.S. 28-173, "Death by wrongful act; recovery not assets; dying declarations," reads in part: "The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as

provided in this chapter for the distribution of personal property in case of intestacy."

This Court said in *Lamm v. Lorbacher, supra:* "The right of action is for the personal representative of the deceased only. 'The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term.' *Broadnax v. Broadnax,* 160 N.C. 432, 76 S.E. 216; *Hood v. Telegraph Co.,* 162 N.C. 92, 77 S.E. 1094; 28 N.C. Law Review 106."

This Court said in *Hartness v. Pharr, supra:* "It must be borne in mind that whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him, and this is so although the personal representative may be designated as the person to bring the action. *Baker v. R. R.,* 91 N.C., 308. The latter does not derive any right, title, or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration. *Baker v. R. R., supra.*"

In an action to recover damages for wrongful death the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator. *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203.

"It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and equity, and, indeed, admits of illustration from every branch of legal procedure." Broom's Legal Maxims, Tenth Ed., 191.

This maxim embodied in the common law, and constituting an essential part thereof, is stated in the text books and reported cases. It has its foundation in universal law administered in all civilized lands, for without its recognition and enforcement by the courts their judgments would rightly excite public indignation. This maxim has been adopted as public policy in this state and we have decided in many cases instituted to recover damages for wrongful death that no beneficiary under the statute for whom recovery is sought will be permitted to enrich himself by his own wrong. *Davenport v. Patrick, supra; Pearson v. Stores Corp.,* 219 N.C. 717, 14 S.E. 2d 811; *Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835; *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E.

299; *Davis v. R. R.* 136 N.C. 115, 48 S.E. 591. The right of a person otherwise entitled to receive the money paid for wrongful death, or to share in the distribution of such a sum paid, will be denied where the death of the decedent was caused by such person's negligence. *Davenport v. Patrick, supra; Goldsmith v. Samet, supra.*

An administrator *sui juris* has the power, provided he acts in entire good faith without any fraud, and exercises the care of an ordinarily prudent person, to compromise a purely statutory cause of action for wrongful death. *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438; 16 Am. Jur., Death, Sections 53 and 159; 25 C.J.S., Death, pp. 1146-7. This necessarily implies that he may compromise and settle claims arising under a statute giving a cause of action for wrongful death with the person liable, either before or after the action is brought.

In re Stone, supra, was a proceeding to determine whether the compensation for wrongful death of an employee of a railroad company killed while engaged in interstate commerce was to be apportioned according to our statute of distribution. The money received was paid by compromise to the administratrix without action. The Court said: "The net sum received by the administratrix under the compromise and settlement with the railroad company stands on the same basis as if it had been recovered by action."

G.S. 28-173 gives a cause of action, "when the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor. . . ."

A liability of the insurance company under Coverage F of the policy was to pay on behalf of Sam B. Ives, its insured, all sums which the insured shall become legally obligated to pay as damages for the death of a person arising out of the use of his insured automobile. The policy provided that under Coverage F "the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

It is manifest from the findings of fact that the insurance company paid the administrator $6,500.00 as compensation for his intestate's death in consideration of the administrator releasing, acquitting and forever discharging Sam B. Ives, its insured, and itself, from any and all actions, causes of action, claims and demands against its insured, and itself, by the administrator on account of his intestate's death, which claims and demands necessarily must have been made on the ground that Sam B. Ives, its insured, by his wrongful act, neglect or default was responsible for his intestate's death. Although there is no finding of fact that Sam B. Ives was negligent in the operation of his automobile, and although the release states that all parties released from liability deny liability, and though there is no finding of fact

that Sam B. Ives knew of the settlement, public policy and the law will not permit him to enrich himself as a beneficiary in the distribution of the very sum of money paid by his insurance company to the administrator to release, acquit and forever discharge him of any cause of action, demand or claim against him by the administrator for the wrongful death of his intestate.

These facts are significant: Sam B. Ives filed an answer to the administrator's petition alleging he was not negligent, and that his mother's death was caused by the sole proximate negligence of the driver of the other automobile. It is reasonable to infer that in the collision Sam B. Ives' automobile was damaged. However, he has no allegation in his answer that he had sued the other driver, or that he had made any claim or demand against such driver for damage to his automobile. At the hearing below the administrator testified: Sam B. Ives did not, and offered no evidence. Sam B. Ives makes no contention that the settlement should be upset, but contends that he should share in its proceeds.

Sam B. Ives in his brief quotes a dictum from the case of *Legette v. Smith,* 226 S. C. 403, 85 S.E. 2d 576, which dictum cites first *Minasian v. Aetna Life Ins. Co.,* 295 Mass. 1, 3 N.E. 2d 17. The *Minasian* case is no authority for the question presented in the instant proceeding, because in that case the plaintiff had a property right as beneficiary in a policy of life insurance on the life of his wife, and the question was how far culpability for her death deprived him of that property right. See *Arnold v. Jacobs,* 319 Mass. 130, 65 N. E. 2d 4.

The crucial findings of fact necessary to decide this appeal are amply supported by the stipulations of the parties and the evidence, and these findings of fact support the judgment.

The judgment of Judge Stevens is

Affirmed.

STEPHEN J. PHILLIPS v. PAUL GILBERT AND JACK WHALEY.

(Filed 9 April, 1958)

1. Pleadings § 28—

A motion for judgment on the pleadings is in the nature of a demurrer *ore tenus* and should be allowed if the answer admits every material averment of the complaint and fails to set up any defense or new matter sufficient to constitute a defense to plaintiff's claim.

2. Wills § 33d— Where lands are devised in passive trust for life of testator's son with remainder in fee to trustee, the remainder is not conditional.

The will devised the lands in question to be held in trust for the benefit of testator's son during the son's natural life and at the son's death to the trustee in fee simple. *Held:* No duty was imposed upon the trustee in regard to the estate, but the trustee was the holder of the bare legal title under a passive trust, and upon the death of testator's son, the remainder vested in the trustee in fee and the trustee was entitled to immediate possession, notwithstanding his failure to qualify as trustee of the son under the will and failure to manage the property for the son's benefit, the vesting of the remainder not being conditioned upon the rendering of any service by the trustee. Therefore, the guardian for the son may not claim a lien on the property for monies expended by him for the medical care and funeral expenses of the son.

3. Trusts § 13—

In a passive trust the legal and equitable titles are merged in the beneficiary and the beneficial use is converted into legal ownership, but as to an active trust, the title remains in the trustee for the purposes of the trust.

4. Estates § 9e—

Where the guardian of the life tenant executes a rental agreement for the land upon a share-crop basis, and the life tenant dies prior to the time the rent for the year accrues under the terms of the agreement, the rent due thereunder becomes the property of the remainderman.

APPEAL by defendant Paul Gilbert from *Frizzelle, J.*, January 20 Special Term 1958 of JONES.

This is a civil action instituted on 29 August 1957 by the plaintiff for the immediate possession of the 123-acre farm described in the complaint, and for the landlord's part of the proceeds arising from the sale of crops by the tenant occupying said farm during the 1957 crop year.

The facts pertinent to this appeal are as follows:

1. Edward R. Stanley died testate in Jones County, North Carolina on 18 November 1935. His last will and testament was duly probated in the office of the Clerk of the Superior Court of Jones County on 19 November 1935, and in Item 2 thereof he devised the land involved herein as follows: "I give and devise all the lands owned by me wherever it may be situated to my friend Stephen J. Phillips as Trustee to be held in trust for the benefit of my beloved son Herbert H. Stanley, during the natural life of my said son and at his death to my said friend Stephen J. Phillips in fee simple."

2. George R. Hughes who was named executor in the will declined to qualify and Ebb Noble was duly appointed administrator c.t.a., d.b.n. Stephen J. Phillips named as trustee in the will never asserted any control as trustee or otherwise with respect to the devised property during the life of the life tenant.

3. On 24 May 1937, W. N. Gilbert was appointed by the Clerk of

the Superior Court of Jones County as guardian for Herbert H. Stanley, who had been declared *non compos mentis* by the court, and W. N. Gilbert entered upon his duties as such guardian.

4. That upon the death of W. N. Gilbert on 28 January 1948, Paul Gilbert was substituted as guardian for Herbert H. Stanley and served in that capacity until the death of Herbert H. Stanley on 28 December 1956. Following the death of his ward, Paul Gilbert filed his final account and was discharged.

5. Paul Gilbert, while acting as guardian for Stanley, the incompetent, rented the lands owned by his ward to Jack Whaley for the crop year 1957, upon a share-crop basis, the tenant to pay one-third of all crops made to the guardian of Herbert H. Stanley, subject to the payment of one-third of the fertilizer bills by the guardian.

6. The defendant Paul Gilbert set up a counterclaim in his answer alleging that while he was guardian of Herbert H. Stanley he had expended the sum of $2,690.85 on his ward for hospital, doctors bills, medicines, funeral expenses, travel expenses, etc., during his ward's last illness, in excess of what he had received as guardian of his ward, and prayed that he recover said amount from the plaintiff and that said judgment be declared a lien on the property superior to any rights of the plaintiff.

7. The defendant Paul Gilbert also set up as a bar to plaintiff's right of possession the failure of the plaintiff to qualify as trustee under the provisions of the will. Therefore, he alleges, the plaintiff has forfeited his right to the title and possession of said premises and is estopped thereby from prosecuting this action.

The court below, on motion of the plaintiff, rendered judgment on the pleadings, and held that the plaintiff is the owner of and entitled to the immediate possession of the lands in controversy, and that he is likewise entitled to the sum of $1,595.15, representing the funds on deposit in the First Citizens Bank and Trust Company, realized from the sale of crops produced by Jack Whaley upon the lands described in the complaint, which sum had been placed in said bank by agreement of the parties pending the outcome of this action.

Judgment was accordingly entered and the defendant Paul Gilbert appeals, assigning error.

Jones, Reed & Griffin, for plaintiff, appellee.
Larkins & Brock, for defendant, appellants.

DENNY, J. The appellant poses three questions on this appeal:

1. Was the plaintiff entitled to judgment on the pleadings?

2. Is the plaintiff the owner of and entitled to the immediate possession of the property described in the complaint?

3. Is the defendant entitled to a lien on the property described in the complaint to the extent of $2,690.85 for moneys expended by him for doctor, medical, hospital and funeral expenses on behalf of and for Herbert H. Stanley, life tenant and only son of Edward R. Stanley?

As we construe the record before us, there is no controversy between the parties with respect to the material facts involved. The rights of the parties, therefore, must be determined, as a matter of law, in light of these undisputed facts.

A motion for judgment on the pleadings is tantamount to or in the nature of a demurrer *ore tenus*. McIntosh, North Carolina Practice & Procedure, 2nd Edition, section 1261, page 702; *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384; *Raleigh v. Fisher*, 232 N.C. 629, 61 S.E. 2d 897. Such motion should be allowed where the answer admits every material averment of the complaint and fails to set up any defense or new matter sufficient to constitute a defense to plaintiff's claim. *Raleigh v. Fisher, supra; Smith v. Smith*, 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460; *Mitchell v. Strickland*, 207 N.C. 141, 176 S.E. 468; *Pridgen v. Pridgen*, 190 N.C. 102, 129 S.E. 419.

The appellant seriously contends the plaintiff is not the holder of the title to the premises described in the complaint and is, therefore, not entitled to possession thereof. In support of this view the appellant contends that, the devise to the plaintiff was subject to the implied condition that he accept the trust and manage the trust property for the benefit of Herbert H. Stanley; that, in failing to comply with this implied condition, he is not entitled to take the property as remainderman under the provisions of the last will and testament of Edward R. Stanley, citing 57 Am. Jur., Wills, section 1523, page 1034, et seq.; *Kirkland v. Narramore*, 105 Mass. 31, 7 Am. Rep. 497.

There is nothing on the face of the will of Edward R. Stanley indicating that the testator required or expected anything of the designated trustee, except to hold the bare legal title to the property for the benefit of his son during his son's life. Moreover, at his son's death the devise of the lands to Stephen J. Phillips was not conditioned upon services rendered or any other condition, but simply to his "friend Stephen J. Phillips in fee simple."

In *Kirkland v. Narramore, supra*, the will of Abigail W. Carpenter contained bequests to her brothers and sisters. Then followed this clause: "I hereby appoint Franklin Narramore, of Goshen, as trustee, to take and keep the above legacies, the income of which he shall appropriate to their comfort so long as they live. After their decease, what remains I bequeath to the above trustee." This was followed by other bequests: a residuary legatee was named and an executor, other than the trustee. The testatrix died; the executor proved the will and settled the estate. All the legatees survived the testatrix; but before

the estate was settled Narramore died, not having given bond as trustee, nor assumed the duties of the office, and no letters of trust had been issued or applied for under the will. Kirkland was appointed trustee and acted as such during the lives of the brothers and sisters; when all of them died, the administratrix of Narramore claimed the balance of the estate in the hands of the trustee as a legacy to Narramore. The residuary legatee claimed the balance of the corpus of the trust. The Court held that there was a presumption that the legacy was given to Narramore in his character of trustee, and on the implied condition that he would accept the trust. The Court said: "Narramore must have done something under his appointment, in order to comply with the condition and entitle himself to the legacy * * *. But he died without doing anything, not making even an attempt to become trustee. Consequently his administratrix is not entitled to the legacy."

We think the above case is distinguishable from the one before us. The will clearly required the trustee to become custodian of the bequests, to keep them and the income therefrom to be appropriated by the trustee for the comfort of the brothers and sisters of the testatrix "so long as they live." Clearly this was an active trust. *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E. 2d 478; *Pilkington v. West*, 246 N.C. 575, 99 S.E. 2d 798, and cited cases.

In *Pilkington v. West, supra*, where real property had been conveyed to a trustee, for the purpose of preserving the property described therein for the use and benefit of Eva Morgan Pilkington for her natural life, we held the trust to be passive; that it was executed by the statute, G.S. 47-1, and that Eva Morgan Pilkington and her husband could convey the property in fee simple.

In a passive trust the legal and equitable titles are merged in the beneficiary and the beneficial use is converted into legal ownership, but as to an active trust, the title remains in the trustee for the purposes of the trust. *Akin v. Bank*, 227 N.C. 453, 42 S.E. 2d 518; *Deal v. Trust Co.*, 218 N.C. 483 11 S.E. 2d 464; *Fisher v. Fisher*, 218 N.C. 42, 9 S.E. 2d 493; *Bank v. Sternberger*, 207 N.C. 811, 178 S.E. 595.

In the last cited case this Court, in pointing out the distinction between "a simple, passive or dry trust," and "a special or active trust," quoted with approval from Perry On Trusts and Trustees, 7th Edition, Volume 1, section 18, page 14, the following: "Trusts are divided into simple and special trusts. A simple trust is a simple conveyance of property to one upon trust, for another, without further specifications or directions. In such case, the law regulates the trust, and the *cestui que* trust has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as may be necessary. A special trust is where the special and particular duties are pointed out to be performed by the trustee.

In such cases he is not a mere passive agent but has active duties to perform, as when an estate is given to a person to sell, and from the proceeds to pay the debts of the settler."

In our opinion, on the first question posed, the plaintiff was entitled to judgment on the pleadings and we so hold.

On the second question, we are constrained to hold that since the testator imposed no duties upon the trustee, the will created only a passive trust, and the failure of the trustee to undertake to assume and exercise duties not imposed upon him by the terms of the will, does not affect his rights as remainderman under the provisions of the will. Hence, the second question under consideration must be answered in the affirmative.

It is regrettable that Herbert H. Stanley did not leave a sufficient estate to pay the bills incurred by his guardian during the ward's last illness; however, Herbert H. Stanley never had anything more than a life estate in the premises involved in this action, and upon his death the life estate was extinguished and the title to the premises passed to the plaintiff in fee simple, free from the obligations of the life tenant, except as to the rental agreement for the 1957 crop year. It follows, therefore, that since the rent for the crop year 1957 did not accrue under the terms of the agreement until after the death of the life tenant, such rent became the property of the owner of the reversion, to wit, the plaintiff. *Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E. 2d 367; *In re Estate of Galloway*, 229 N.C. 547, 50 S.E. 2d 563. Hence, the third question posed must be answered in the negative.

In view of the conclusions we have reached, the judgment of the court below is

Affirmed.

STATE v. HERBERT DEW.

(Filed 9 April, 1958)

1. Disorderly Conduct § 1: Public Drunkenness § 1—

There is no general law in this State making public drunkenness a crime. That part of G.S. 18-51 relating to public drunkenness pertains, under the doctrine of *ejusdem generis*, to public drunkenness at athletic contests and other similar places; G.S. 14-334 relates to conduct which is both drunken and disorderly; G.S. 14-275 relates to disturbing religious congregations; and G.S. 14-335 is, in effect, seventeen different local statutes, each pertaining to a relatively small group of counties.

2. Statutes § 7—

A statute proscribing public drunkenness, followed by seventeen sub-

sections, each of which prescribes a different punishment for the county or counties named in the subsection, is not a general law, but is, in effect, a series of local acts combined into one statute for convenience. The legislative intent that the statute should be regarded as a local one is indicated by the history of the statute and the classification made by the Legislature itself.

3. Constitutional Law §§ 11, 19: Public Drunkenness § 1—

The General Assembly, in the exercise of its police power, may enact local statutes making proscribed acts, such as public drunkenness, criminal offenses in the localities stipulated, provided the local statutes apply alike to all persons within each locality specified. The distinction is noted between local statutes in derogation of the general law applicable to the entire State and exemptions of particular localities from the general law.

APPEAL by State of North Carolina from *Bundy, J.*, at October 1957 Term, of EDGECOMBE.

Criminal prosecution upon warrant charging defendant with being in intoxicated condition in a public place in town of Tarboro—the third or more times within a period of twelve months, contrary to the statutes in such cases made and provided, etc., heard in Superior Court on appeal thereto from judgment of Recorder's Court for Edgecombe County.

At January Term 1957 the jury returned verdict of Guilty. Defendant made motion to set aside the verdict, upon the ground that the punishment provided in G.S. 14-335, subsection 12, applied only to Craven, Edgecombe and Lenoir Counties, and is in contravention of the general law and the Constitution under the decision in *S. v. Fowler,* 193 N.C. 290, and under Article 1, section 7, of the Constitution.

The cause being continued from term to term came on for hearing at October 1957 Term of Superior Court, upon motion above set forth and in arrest of judgment upon the ground stated; and the judge presiding being of opinion that General Statute 14-335 is unconstitutional and void in contravention of Article 1, section 7, of the Constitution of North Carolina, and that defendant's motion is well taken, entered order that the judgment be arrested and defendant discharged.

The Solicitor for the State excepts to the foregoing judgment, and appeals to Supreme Court and assigns error.

Attorney General Patton, Assistant Attorney General T. W. Bruton for the State

Weeks & Muse for defendant, appellee.

WINBORNE, C. J.: The question involved on this appeal, as stated by the Attorney General for the State of North Carolina, is this: "Is

G.S. 14-335 (12) unconstitutional and in contravention of Article 1, Section 7, of the North Carolina Constitution, and in contravention of the General Law of the State with respect to the punishment for public drunkenness?" A review of decided cases leads to a negative answer.

In this connection the ruling of the trial court appears to have been based upon decision in the case of *S. v. Fowler,* 193 N.C. 290, 136 S.E. 709, wherein it was held that a five-county statute pertaining to illegal possession of whiskey was void for that it was contrary to the general law throughout the State in that respect. But the Attorney General takes the position, and we hold rightly so, that there is no general law making public drunkenness a crime. It therefore follows that the ruling in *S. v. Fowler, supra,* is inapplicable here.

Apparently there are four statutes in respect to public drunkenness.

The First, G.S. 14-335- the one under which the case in hand originated, provides, in pertinent part, as follows: "Local: Public Drunkenness. If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this Section * * *.

"12. In Carteret, Craven, Edgecombe, Johnston, Lenoir and Lincoln Counties, by a fine for the first offense, of not more than fifty dollars ($50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars ($100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court."

The Second, G.S. 18-51, is captioned: "Drinking or offering drinks on premises of stores and public roads or streets; Drunkenness, etc., at athletic contests or other public places." As to this, it is unnecessary to quote the text, for, as the Attorney General points out, under the doctrine of *ejusdem generis,* the latter part of the statute would apply to any place similar to an athletic contest,—hence there is a difference between the two statutes.

The Third, G.S. 14-334, relates to public drunkenness and disorderliness—making it unlawful for "any person to be drunk and disorderly in any public place * * *." To be guilty, the person must be both drunk and disorderly. See *S. v. Myrick,* 203 N.C. 8, 164 S.E. 328. Hence this statute differs from the statute violation of which defendant stands charged.

The Fourth, G.S. 14-275, relates to disturbing religious congregations.

For the reasons given there seems to be no general law in North

Carolina, other than G.S. 14-335, relating to drunkenness "on the public highway, or at any public place or meeting * * * ."

But defendant contends that G.S. 14-335 is itself a general law, and that sub-section 12 thereunder is void as being in conflict with the other sections of the statute. He bases his contention on the fact that 78 counties are included within the statute and by weight of numbers it becomes a general law. This does not follow, for there are seventeen different sub-sections of the statute, each of which prescribes a different punishment, and each includes one or more counties. Thus there is no uniformity among the several counties. This in effect divides the one statute into seventeen different statutes each pertaining to a relatively small group.

A brief history of G.S. 14-335 discloses the following: The first enactment was in 1897, Public Laws Chapter 57, which provided that the punishment be a fine of not less than ten dollars or imprisonment not exceeding thirty days. This enactment applied only to Buncombe, Transylvania, and Henderson Counties; in 1899, Public Laws Chapters 87, 208, and 638, the counties of Graham, Madison, and Dare were added and the punishment was reduced to five dollars or not more than twenty days; also in 1899, Public Laws 608, a punishment of not more than fifty dollars or not more than thirty days was enacted to apply to Rutherford, Gaston, Mecklenburg, Haywood, and Cleveland Counties; Public Laws 1901, Chapter 447, added Poplar Branch Township, Currituck County, and provided a fine of not less than ten nor more than fifty dollars, or imprisonment not to exceed thirty days; Public Laws 1903, Chapter 116, added Fruitville Township to Poplar Branch Township; Public Laws, 1903, Chapter 758, inserted Pungo, in Pantego Township, Beaufort County and provided for a fine of not less than five dollars nor more than fifty, or imprisonment not less than fifteen days; Public Laws 1903, Chapters 124 and 523, added Macon and Stanley Counties and provided for fine not to exceed fifty dollars or not more than thirty days.

These laws were codified in the Revisal of 1905 under Section 3733: "Public Drunkenness. If any person shall be found drunk or intoxicated on the public highway, or at any public place, or meeting in the counties of Dare, Graham, Buncombe, Henderson, Jackson, Wake, Warren, Ashe, Stanly, Madison, Gaston, Cleveland, Haywood, Macon, Catawba, Lincoln, Mecklenburg, or Rutherford, or in Poplar Branch and Fruitville Townships, Currituck County, or at Pungo in Beaufort County, or shall become drunk and engage in boisterous and disorderly conduct on any public highway in either Moore, Richmond or Scotland counties, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days."

Thereafter various amendments were added until the codification of

the Consolidated Statutes of 1919 wherein the statute was broken down into sections similar to the present G.S. 14-335. And thereafter more amendments were added and have been codified in the present revised volume of the General Statutes, including the Supplement. From the time of the 1919 codification of the Consolidated Statutes the Legislature has called the present G.S. 14-335 a local statute. This is strong indication of the legislative intent that this is to be a local statute rather than general. The history of the statute indicates that the Legislature intended to enact piecemeal local legislation and that these were combined into one large statute merely for convenience since they were related in subject matter.

Having resolved the question of there being no general law in conflict with G.S. 14-335, the question now arises whether the Legislature has the right to enact local legislation on public drunkenness under its police powers. There is a line of cases in North Carolina squarely in point, all of which hold that as long as the local statutes apply alike to all persons within that locality, it is a valid exercise of the police powers.

A representative case is *S. v. Moore,* 104 N.C. 714, 10 S.E. 143. It is there stated: "The police power of the State is the authority, vested in the Legislature by the Constitution, to enact all such wholesome and reasonable laws, not in conflict with the fundamental laws—the Constitution of the State and of the United States, together with laws made in pursuance of it—as they may deem conducive to public good * * * 7 Cush. 84. The question being whether the law-making branch of the State government has exceeded the limits of its power, as defined in that instrument, it is the duty of the courts to resolve every doubt in favor of the validity of the law, and to presume that it was passed in good faith to remedy * * * some evil not reached or corrected by previous legislation * * *.

"The statute then comes within the definition of a public local law. Such laws, if they operate uniformly and subject all persons who come within the defined locality and violate their provisions to indictment in the same way and to the same punishment are not repugnant to the Constitution of North Carolina. *S. v. Muse,* 20 N.C. 463; *S. v. Chambers,* 93 N.C. 600. But the objection that the prohibition is restricted to particular counties is met by a decision of our Court that is more directly in point. In *S. v. Joyner,* 81 N.C. 534, this Court held a statute constitutional that made it indictable for any person, except a manufacturer, to sell intoxicating liquors in the county of Northampton, and declared the manufacturer guilty of a misdemeanor if he sold less than a quart, because it did not discriminate in favor of or against any citizen in the State. In *S. v. Stovall,* 103 N.C. 416, a provision in the act incorporating an agricultural society, that it should be unlawful for

any person to sell, or offer for sale, any liquors, tobacco or other refreshments within one-half mile of the ground of said society during the week of their annual fair, except persons doing regular business within the prohibited territory, was held consistent with both Secs. 7 and 31, Art. 1 of the Constitution."

Other cases to the same effect are: *S. v. Joyner,* 81 N.C. 534; *S. v. Stovall, supra; S. v. Barringer,* 110 N.C. 525, 14 S.E. 781; *S. v. Barrett,* 138 N.C. 630, 50 S.E. 506.

Therefore, under the authority of these cases the statute, G.S. 14-335 (12), is valid because it pertains to all alike in the six counties mentioned. But defendant contends these cases have been modified or abandoned in later cases, naming, among others, *S. v. Fowler, supra; S. v. Felton,* 239 N.C. 575, 80 S.E. 2d 625; *Taylor v. Racing Asso.,* 241 N.C. 80, 84 S.E. 2d 390.

However, these cases sustain the earlier cases rather than overrule them. For example in the *Fowler* case, *supra,* the Court specifically said that under the police power there can be classification so long as it is not arbitrary, but that it is not a question of valid classification when the purported exercise of the police power on a local level is in derogation of the general law which was designed to act throughout the State. In making the distinction between the police powers and the privileges and immunities clause of the State Constitution (Art. 1, Sec. 7), the Court said: "The principle" (of no separate emoluments or privileges) "it should be understood, was not designed to interfere and does not interfere with the police power of the State, the object of which is to promote the health, peace, morals, and good order of the people, to increase the industries, to develop its resources, and to add to its wealth and prosperity * * * Legislation of this character is a necessity; but in the exercise of the police power classification must be natural, not arbitrary; it 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis'. * * * *."

Also, in *Taylor v. Racing Association, supra,* an action to abate the public nuisance of dog-racing which had been given legislative sanction by a special act pertaining to Morehead City, one of the parties contended that the *Barrett, Barringer, Stovall* and *Joyner* cases, *supra,* sustained the proposition that the Legislature could enact such local legislation. There *Bobbitt, J.,* speaking for the Court, discussed these cases and concluded that they were not controlling in a situation where there was a general law governing the subject matter of the special act, saying: "It is immediately apparent that the *Joyner, Stovall, Moore, Barringer,* and *Barrett* cases concerned statutes imposing prohibitions, restrictions and burdens in certain localities, *not in conflict* with any

general criminal statute dealing with the same subject matter. They do not in any sense grant the residents or any person, firm, association or corporation in such locality any *exemption or privilege* not enjoyed throughout the State. Where so understood, there is no conflict between these decisions and the decision in the *Fowler* case * * *."

In conclusion this Court holds that, since there is no general law in conflict with G.S. 14-335, relating to public drunkenness on a public highway or meeting place, the statute G.S. 14-335 (12) is not objectionable as being in violation of Article 1,. Section 7, of the Constitution of North Carolina. It does not confer any special emoluments or privileges otherwise covered by general law. Therefore, the General Assembly may enact local legislation on public drunkenness under its police power so long as there is no arbitrary or unreasonable classification.

For reasons stated the judgment from which appeal is taken is Reversed.

HELEN W. SMITH v. JOHN B. SMITH AND MINNIE M. SMITH.

(Filed 9 April, 1958)

1. Controversy without Action § 2—

Where the parties stipulate the facts upon which the court should render judgment, the stipulated facts constitute the sole basis for decision, and the court is not permitted to infer other or additional facts.

2. Tenants in Common § 10—

Where one of two tenants in common conveys his interest to a third party, such third party becomes a tenant in common with the other.

3. Partition § 1a—

The existence of tenancy in common is prerequisite to partition. G.S. 46-1, G.S. 46-3.

4. Partitions § 7—

In order for reciprocal deeds executed by each tenant in common to the other to constitute a voluntary partition of the lands, intent to partition must appear either on the face of the deeds or otherwise.

5. Same: Husband and Wife § 14—

Deeds executed by tenants in common for the purpose of effecting a voluntary partition, convey no title, and therefore, if a deed from one tenant to the other is executed pursuant to a plan for partition, the wife of the grantee tenant would take no interest by virtue of the deed, even though she is also named as grantee and even though the deed states that it creates an estate by the entirety in the grantees.

6. Partition § 1c(3)—

The existence of a life estate, even though it be in favor of one of the

tenants in common, does not preclude partition of the remainder among the tenants in common. G.S. 46-23.

7. Appeal and Error § 49—

Where the facts before the court are insufficient to sustain the judgment, the cause must be remanded.

APPEAL by plaintiff from *Crissman, J.*, October 1957 Term, GASTON Superior Court.

Special proceeding before the clerk for sale for partition of a described tract of land which the petitioner alleged she and the respondent, John B. Smith, held as tenants in common, subject to the life estate of Minnie M. Smith "in the four-room house and lot located on said property." The respondent, John B. Smith, by answer, admitted that Minnie M. Smith held a life estate in the described lands but denied the petitioner owned any interest therein. By way of further defense, John B. Smith alleged the tract of land involved came to him by inheritance from his father, and that the petitioner's name was inserted in his deed by mistake.

After determining that issues of fact were raised by the pleadings, the clerk transferred the proceeding to the civil issue docket for trial in term.

The parties stipulated:

"1. It is stipulated and agreed that Benjamin Franklin Smith purchased the lands involved in this matter from J. Sidney Smith, et al, by deed dated July 21, 1906, and recorded in Book 83, page 193, in the office of the Register of Deeds for Gaston County, North Carolina.

"2. It is stipulated and agreed that Benjamin Franklin Smith left as his heirs his widow, Minnie M. Smith, and two sons, Frank Rhyne Smith and John B. Smith.

"3. It is further stipulated and agreed that by deed dated April 23, 1933, Frank Rhyne Smith and wife, Cathryn K. Smith, conveyed all their interest in the Estate of Benjamin Franklin Smith to Minnie M. Smith.

"4. It is stipulated and agreed that by deed dated September 15, 1949, John B. Smith and wife, Helen W. Smith, conveyed a portion of the lands originally owned from Benjamin Franklin Smith to Minnie M. Smith by deed recorded in Book 546, page 467, in the aforementioned Registry. Said deed bears no revenue stamps and recites a consideration of '$1.00, Love and Affection, Deed of Gift.'

"5. It is further stipulated and agreed that by deed dated September 15, 1949, Minnie M. Smith, widow, conveyed a portion of

the lands originally owned by Benjamin Franklin Smith, being the portion involved in this controversy, to J. B. Smith and wife, Helen W. Smith, by deed recorded in Book 546, Page 468, in the aforementioned Registry. Said deed states a consideration of '$1.00, Love and Affection, Deed of Gift,' and bears no revenue stamps. Said deed further states after the names of J. B. Smith and wife, Helen W. Smith, 'creating an estate by entirety.' Said deed further states that the grantor, Minnie M. Smith, reserved a life estate in the four-room house, and the lot upon which it is situated.

"6. It is stipulated and agreed that on the date that the petition in this matter was filed, the petitioner's name was Helen W. Smith, but that on the date the petition was served, the said Helen W. Smith had remarried, and that her married name is Helen W. Schelper."

Petitioner testified that she and the respondent, John B. Smith, were married on August 6, 1949. Her further testimony related to matters not pertinent to the question determinative of this appeal.

The parties waived a jury trial and submitted the controversy to the judge for determination. The court entered the following judgment:

"The Court finds the following facts:

"That the land involved in this controversy is land which was inherited by J. B. Smith from his father, Benjamin Franklin Smith; that said deed from Minnie Smith to J. B. Smith and wife, Helen W. Smith, which states that it creates an estate by the entirety does not do so; that a portion of the land involved in said controversy is subject to the life estate of Minnie M. Smith, who is still living, and, as to that portion of said lands, said suit was brought prematurely;

"Now, therefore, it is ORDERED, ADJUDGED AND DECREED, based upon the foregoing findings of fact, that said John B. Smith is the sole owner of the lands involved in this controversy, subject to the life estate of Minnie M. Smith, as set out in said deed and that the plaintiff be taxed with the cost."

From the judgment, the petitioner appealed.

Max L. Childers for petitioner, appellant.
Ernest R. Warren, Julius T. Sanders, for defendants, appellees.

HIGGINS, J. The petitioner initiated this special proceeding for the purpose of having a described parcel of land sold for partition between her and the respondent, John B. Smith, alleged to be tenants

in common, "subject to the life estate in the four-room house and lot . . . which life estate belongs to Minnie M. Smith."

The respondents, by answer, denied the tenancy in common and alleged the petitioner had no interest in the land which descended to the respondent, John B. Smith, by inheritance from his father. The respondents alleged that the name of Helen W. Smith was inserted in the deed from Minnie M. Smith by mistake. The respondents admitted, however, that Minnie M. Smith has a life estate in the land. In the further answer and defense, the respondents pleaded other matters not material to a decision of the case.

The parties stipulated: "By deed dated September 15, 1949, Minnie M. Smith, widow, conveyed a portion of the lands originally owned by Benjamin Franklin Smith, being the portion involved in this controversy, to J. B. Smith and wife, Helen W. Smith. . . . " It is further stipulated: "Said deed states a consideration of '$1.00, Love and Affection, Deed of Gift.' . . . Said deed further states after the names of J. B. Smith and wife, Helen W. Smith, 'creating an estate by entirety.' "

The deeds referred to in the stipulations are not in the record and there is nothing to indicate they were introduced in evidence. The only evidence actually introduced was the testimony of the petitioner that she and the respondent, J. B. Smith, were married on August 6, 1949, and that she thereafter turned over to her husband certain sums of money which were used in drilling a well and making repairs on the house. "John B. Smith did not ever tell me my name had got on that deed by mistake. It was my understanding that was the way the deed was supposed to be made, otherwise I wouldn't have married him, and that is the reason I put my money in the property."

It may be noted the rights of the petitioner to an accounting for improvements put upon land under the belief she held title is not an issue raised by the pleadings in this case. The petitioner's evidence does not bear on the issue whether the petitioner and John B. Smith are tenants in common. It may be noted also that if the petitioner's contention is correct that the deed created an estate by entirety, a divorce would be necessary to convert such estate into a tenancy in common. There is no evidence and no stipulation of a divorce. The stipulation does not go beyond the fact that she remarried. Therefore, the court's judgment, which is excepted to, must stand or fall on the stipulations.

The stipulations constitute an agreed statement of facts in the cause. Decision must be based on the facts agreed. The court is not permitted to infer other, or additional facts. *Sparrow v. Casualty Co.*, 243 N.C. 60, 89 S.E. 2d 800; *Auto Co. v. Ins. Co.*, 239 N.C. 416, 80 S.E. 2d 35.

The court decided (1) the land involved was inherited by John B. Smith from his father; (2) the deed from Minnie M. Smith to J. B. Smith and wife, Helen W. Smith, which states it creates an estate by

entirety does not do so; and (3) the proceeding is prematurely instituted as to that part of the land in which Minnie M. Smith holds a life estate.

The stipulations are sufficient to show that in 1906 Benjamin Franklin Smith acquired a tract of land and at his death he left a widow, Minnie M. Smith, and two sons, Frank Rhyne Smith and the respondent, John B. Smith, as his heirs at law. Frank Rhyne Smith conveyed all his interest to his mother, Minnie M. Smith. The result was she and John B. Smith held the Benjamin Franklin Smith lands as tenants in common, subject to her dower interest. On September 15, 1949, John B. Smith and wife, Helen, by deed, conveyed a portion of the lands to Minnie M. Smith. The deed recites a consideration of "$1.00, Love and Affection, Deed of Gift." The stipulation contains no description of the land, but refers to the registry where the deed is recorded. On the same day and for the same stated consideration, *Minnie M. Smith conveyed to John B. Smith and wife, Helen W. Smith, the lands in controversy.* "Said deed further states after the names of John B. Smith and wife, Helen W. Smith 'creating an estate by entirety.' " It must be noted the stipulation says Minnie M. Smith *conveyed* the land in controversy to John B. Smith and wife, Helen W. Smith. The court held John B. Smith inherited it from his father. The court held, also, that Minnie's deed did not convey an estate by entirety to Helen. What estate, if any, it did convey is not decided. The crucial question is, did it create a tenancy in common? Such a tenancy is the foundation upon which partition is based. G.S. 46-1 and 46-3; *Lockleair v. Martin,* 245 N.C. 378, 96 S.E. 2d 24; *Murphy v. Smith,* 235 N.C. 455, 70 S.E. 2d 697; *Gregory v. Pinnix,* 158 N.C. 147, 73 S.E. 814.

We apprehend the difficulty in the case arose by reason of the attempt on the part of the court to treat the deeds of September 15, 1949, as a voluntary partition of the property held by Minnie M. Smith and John B. Smith as tenants in common. What, if anything, the deeds show beyond the stipulated facts is unknown. Neither the trial court nor this is permitted to guess. The facts stipulated are insufficient to show the deeds were intended by the parties to be a voluntary partition of their lands. It seems that in order to show the deeds were executed pursuant to a scheme or plan to divide lands held by tenancy in common, there must be evidence to that effect on the face of the deeds, or the intent must otherwise appear. *Morton v. Lumber Co.,* 154 N.C. 278, 70 S.E. 467.

If it should be determined the deeds are partition deeds, the petitioner would derive no title. "Accordingly, a deed made by one tenant in common to a cotenant and the latter's spouse in partitioning inherited land or land held as a tenancy in common, does not create

an estate by the entirety or enlarge the marital rights of the spouse as previously fixed by law." *Elledge v. Welch,* 238 N.C. 61, 76 S.E. 2d 340; *Sutton v. Sutton,* 236 N.C. 495, 73 S.E. 2d 157. Consequently, if the deed to John B. Smith and Helen W. Smith was a partition deed, it makes no difference whether the name of Helen W. Smith was inserted by design or by mistake. In neither event did she acquire any title.

The trial court erroneously held the partition proceeding was prematurely brought by reason of the outstanding life estate of Minnie M. Smith in a part of the land. G.S. 46-23 provides: "The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, . . ." *Bunting v. Cobb,* 234 N.C. 132, 66 S.E. 2d 661; *Moore v. Baker,* 222 N.C. 736, 24 S.E. 2d 749; *Baggett v. Jackson,* 160 N.C. 26, 76 S.E. 86.

The petitioner's exception to judgment is well taken. The facts before the court were insufficient to sustain the judgment for the reasons herein pointed out. The cause is remanded to the Superior Court of Gaston County for further hearing.

Remanded.

VIOLA KELLAMS, EMPLOYEE v. CAROLINA METAL PRODUCTS, INC., EMPLOYER; AND NEW YORK MUTUAL CASUALTY INSURANCE COMPANY, CARRIER.

(Filed 9 April, 1958)

1. Master and Servant § 53b(1)—

In figuring the maximum award under the Compensation Act, the award must be calculated in the ascending scale until the maximum is reached, and then the maximum controls rather than the calculation; in figuring the minimum award the rule for calculating the award is observed in the descending scale until the minimum is reached, and there the award stops and the minimum controls rather than the calculation.

2. Same—

Under the provisions of G.S. 97-31(u), awards for partial disability are subject to the minimum fixed in G.S. 97-29 in like manner as awards for total disability, and therefore the weekly payments of an award for partial disability should not be less than the $8 minimun fixed by the statute.

3. Same—

Prior to the amendment of G.S. 97-31(t) by Ch. 1396, Session Laws of 1957, an award for partial disability must be based on a percentage of the weekly wage for the entire period of 200 weeks rather than a percentage of the number of weekly payments.

4. Master and Servant § 87—

The Workmen's Compensation Act must be liberally construed to the end that its benefits shall not be denied upon technical, narrow and restricted interpretation.

APPEAL by plaintiff employee from *Craven, S. J.*, October 7, 1957, Special Civil Term, MECKLENBURG SUPERIOR COURT.

This proceeding originated before the North Carolina Industrial Commission upon a claim for compensation for injury resulting from an industrial accident on September 2, 1953. All jurisdictional facts were stipulated. Defendants admitted liability and paid compensation during temporary total disability. The controversy before the Industrial Commission involved (1) the date of maximum recovery, and (2) the amount of compensation for permanent partial disability. The hearing commissioner found the plaintiff, employee, attained maximum recovery on March 8, 1955, and that as a result of the accident she suffered a ten per cent permanent partial disability to her right leg. The commissioner, based on her weekly wages and per centum of disability, made an award to her of $2.76 per week for 200 weeks, beginning February 14, 1955. Upon her appeal and application for review before the full commission upon specific errors assigned, the full commission adopted the findings of fact, conclusions of law, and award made by the hearing commissioner. Upon her appeal, the superior court overruled all her exceptions and affirmed the award. The plaintiff excepted and appealed.

Robert L. Scott, for plaintiff, appellant.
Carpenter & Webb,
By: L. B. Carpenter, for defendants, appellees.

HIGGINS, J. The hearing commissioner determined the plaintiff's average weekly wages before the accident amounted to $46.00. Under the provisions of G.S. 97-31(p) she would have been entitled to 60 per cent of her average weekly wages, or $27.60, if the loss of the use of her leg had been total. But inasmuch as she lost only 10 per cent of the use of her leg she was entitled to weekly payments of only ten per cent of the $27.60, or $2.76. The award required the payment of that amount for a period of 200 weeks. On appeal, the commission and the superior court affirmed the award.

The real controversy in this case turns on the interpretation of the language in G.S. 97-31(t) as the subsection was written at the date of the injury: "The compensation for partial loss . . . shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss." The plaintiff contends the commission

made the correct determination as to the weekly wages, ($46.00) and of the 60 per cent thereof ($27.60), and the per cent disability (10%); and the number of weeks the disability is deemed to continue (200). However, she contends the commission fell into error by awarding her only $2.76 per week instead of $8.00 as required by G.S. 97-31(u): "Weekly compensation payments referred to in this section shall *all* be subject to the same limitations *as to maximum and minimum as set out in G.S. 97-29.*" (emphasis added) Section 97-29 fixed the minimum weekly payment at $8.00. Her contention is, the proper award should have required the payment of $8.00 per week for 200 weeks.

The defendants are satisfied with the award and they do not object to the method used by the commission in fixing it at $2.76 per week for 200 weeks. They do object to the application of the $8.00 weekly minimum rule. They contend the minimum as provided in Sec. 97-29 applies only to total disability. The contention is quite correct, but G. S. 97-31 provides for partial disability and subsection (u) provides the weekly compensation payments thereunder shall *all* be subject to the minimum fixed in Sec. 97-29; and we must look to that section for the minimum, and for nothing more. The defendants further contend the application of the $8.00 weekly minimum was never intended in a case like this for the reason that the plaintiff would receive the same award per week for her 10 per cent disability as she would receive had her disability been 29 per cent. The contention is quite correct. On the other hand, if her weekly wages had been $150.00 and her disability 33-1/3 per cent, she would receive just the same—the maximum $30.00—as if her disability were fixed at any point above 33-1/3 per cent.

The inevitable effect of any minimum is to permit the same award for minor injury as for a greater one up to the point where the award is equal to the fixed minimum. Under the maximum and minimum provisions the rule for calculating the award is observed in the ascending scale until the maximum is reached—and there the award stops and the maximum controls rather than the calculation. In precisely the same way the rule for calculating the award is observed in the descending scale until the minimum is reached—and there it stops and the minimum controls rather than the calculation. The effect of a maximum and minimum provision is to fix a ceiling above which, and a floor below which, an award may not go. The maximum and minimum provisions do not enter into the mathematical steps in making the calculation. However, when the calculation is made, the maximum and minimum provisions come into play to control the award only to the extent that it must not exceed $30.00 (as of 1953) or it must not fall below $8.00.

A stronger argument for sustaining the *amount* of the award can

be made out by giving G.S. 97-31(t) (as of 1953) a different interpretation. That is, by taking 10 per cent of the number of weekly payments rather than 10 per cent of the amount of one such payment. In other words, as contended, the award should be $27.60 per week for 20 weeks rather than $2.76 per week for 200 weeks as actually fixed by the commission. The total would be the same.

In this case the difference in the method of determining the amount of the award, whether $2.76 per week for 200 weeks or $27.60 per week for 20 weeks, becomes important to the parties only by reason of the applicability of the $8.00 minimum weekly payment provision of G.S. 97-31 and G.S. 97-29 construed together.

The method of calculating the award by applying the per cent of disability to the weekly wages rather than to the number of weekly payments during which the disability is presumed to continue has been specifically approved by this Court in the case of *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764. While the weekly award of $4.92 in that case was not disturbed, the question of the applicability of the $8.00 weekly minimum was not raised and not discussed. No case has been called to our attention where the applicability of the $8.00 minimum rule under G.S. 79-31 has been presented.

In the case of *Andrews v. Princeville*, 245 N.C. 669, 97 S.E. 2d 110, this Court, in a *per curiam* opinion, without discussing the facts, approved an award in a death case of $8.00 per week when the monthly wages of the special police officer amounted to $5.00, or a little more than $1.25 per week.

The reasoning that the minimum weekly award in this case should control is further supported by the decision of *Clark v. Portland General Electric Co.*, a decision of the Ninth Circuit Court of Appeals, reported in 111 Fed. 2d 703. There the court was considering an award under the Longshoremen's and Harbor Workers' Compensation Act (Ch. 18, 33 USCA) which provided that compensation for disability should not exceed $25.00 per week nor be less than $8.00 per week. The court upheld the contention of the appellant employee that an award to him for a partial, permanent disability could not be less than $8.00 per week for the reason that disability means total, partial, permanent, or temporary, and was not limited to total disability as contended for by the employer.

The North Carolina Workmen's Compensation Act seems to have been taken in the main from the Longshoremen's Act. *Morris v. Chevrolet Co.*, 217 N.C. 428, 8 S.E. 2d 484.

The plaintiff's injury occurred on September 2, 1953. This Court has said the per cent of the disability must be applied to the weekly payments and not to the number of payments, which must remain

constant. However, since the plaintiff's injury, the Legislature, by Ch. 1396, Session Laws of 1957, amending G.S. 97-31(t), has made the per cent of disability applicable to "periods of payment." However, as the Act was written as of the date of the plaintiff's injury, we think the wording permitted, if not required, the construction given it in *Watts v. Brewer supra.* The courts must give the Workmen's Compensation Act liberal construction "to the end that the benefits thereof shall not be denied upon technical, narrow, and restricted interpretation." *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862; *Johnson v. Hosiery Co.,* 199 N.C. 38, 153 S.E. 591.

If we adhere to the decision in *Watts v. Brewer, supra,* we must conclude the commission was correct in requiring the payments to be made for 200 weeks. It seems inevitable then that the $8.00 minimum be applied to the weekly payments. The industrial worker who earns high wages and whose injury is serious is limited by the maximum provided in G.S. 97-29, notwithstanding the fact that the award, according to the formula, would be much higher. As a means of evening the burdens resulting from industrial accidents the worker of low income is given the benefit of the minimum. After all, one of the purposes of the Workmen's Compensation Act is to relieve against hardship rather than to afford full compensation for injury. The fixing of maximum and minimum awards in industry is a compromise. In this case the plaintiff benefits by the minimum. Her assignment of error No. 3 that her weekly award should have been $8.00 instead of $2.76 is sustained. For the reasons herein stated, the judgment below is set aside. The Superior Court of Mecklenburg County will remand the case to the North Carolina Industrial Commission for an amendment to its award striking out $2.76 and substituting $8.00 therefor.

Reversed and remanded.

W. A. KANUPP AND WIFE, NELLIE KANUPP v. T. L. LAND AND WIFE, MAUDE LAND, J. P. BRADSHAW (SINGLE), MRS. ANNIE LORAIN BEACH AND HUSBAND, W. ROY BEACH, FRED GIBSON AND WIFE; JOHNSIE GIBSON, JOE MINTON AND WIFE, FLORA MINTON, LEE G. TOMLINSON AND WIFE, MRS. LEE G. TOMLINSON, A. L. PEARSON AND WIFE, MRS. A. L. PEARSON, ARTHUR KINCAID AND WIFE, RUTH KINCAID, ROBERT L. CLONTZ AND WIFE, MRS. ROBERT L. CLONTZ.

(Filed 9 April, 1958)

1. Highways § 15—

G.S. 136-69 merely gives to the owner of property who is without reasonable access to a public road the right to establish a cartway across the lands of others upon payment of compensation, but imposes no duty upon him to exercise that right, and therefore the owner of land adjacent

the public highway cannot maintain a proceeding to establish a cartway across his own lands and thus force owners of lands away from the highway to acquire such right.

2. Same—

The right to establish a cartway to a public road under the provisions of G.S. 136-69 obtains only at the instance of owners of property without reasonable access to a public road, and if reasonable access exists, there is no right to establish a cartway under the statute.

3. Same: Judgments § 32—

A judicial determination that a road to a public highway abutting the lands of all the parties should be kept open is binding on the parties and precludes subsequent proceedings among the same parties or their privies to establish a cartway under G.S. 136-69, since it establishes that a way of ingress and egress subsists.

APPEAL by plaintiffs from *Froneberger, J.*, January 1958 Term of CALDWELL.

This proceeding was begun by filing a petition with the clerk of the Superior Court. It alleges in brief: Defendants Land in 1946 purchased a tract of thirty acres from defendant Bradshaw; subsequent to their purchase they constructed a road across the remaining property of Bradshaw, connecting Lands' property with the State Highway known as the Connelly Springs Highway; this road crosses the property of plaintiff, also purchased from Bradshaw; Annie Beach is the devisee of R. B. Bush; the properties of plaintiffs and defendants abut on the road constructed by defendants Land; the road terminates at Lands' property; when plaintiffs and defendants purchased, it was contemplated and understood that a legal roadway would be established along the dividing line between J. P. Bradshaw and R. B. Bush; no such road has been established; there is no public road or way of right furnishing a means of ingress from and egress to the highway available to the parties, which fact makes necessary the establishment of a cartway as provided by G.S. 136-68 and 136-69; defendants Land have constantly "encroached" on the properties of plaintiffs and now claim an area forty feet in width across plaintiffs' property.

The prayer is that a jury of view go on the lands of plaintiffs and defendants and lay off and establish a cartway along the line dividing the properties known as the J. P. Bradshaw and R. B. Bush lands.

Defendants Clontz, Bradshaw, and Land filed answers. These answers denied the right of plaintiffs to call on the court to establish a cartway for the benefit of answering defendants. In support of their denial they allege: Defendant Bradshaw and R. B. Bush were adjoining landowners, who, desirous of selling their properties in smaller parcels, constructed a road twenty feet wide, half on the Bradshaw

land and half on the Bush property; this road extended from the Connelly Springs Highway to the thirty-acre tract thereafter purchased by defendants Land from defendant Bradshaw; subsequent to Land's purchase and the dedication and construction of the road in controversy, plaintiffs purchased from defendant Bradshaw.

The defendants Bradshaw and Land, as an additional defense, plead an estoppel by judgment rendered in the Superior Court of Caldwell County in an action entitled *Mr. and Mrs. T. L. Land v. W. A. Kanupp and Mrs. W. A. Kanupp*, wherein the dedication and right to use the road were put in issue.

No pleadings were filed by the other defendants.

When the cause was heard by the clerk, the judgment roll in the action of *Land v. Kanupp*, pleaded as an estoppel, was offered in evidence. The pleadings in that action put at issue the right of the plaintiffs therein to use a road twenty feet in width extending from the Connelly Springs Highway to the thirty-acre tract which the plaintiffs therein (defendants Land) had purchased from J. P. Bradshaw. The judgment rendered in that action provided: "That the defendants shall keep open and leave open the present road as is now located from plaintiffs' residence to the Connelly Springs Highway henceforward and not interfere with traffic thereon. . . . It is FURTHER ORDERED that plaintiffs shall not trespass upon property of the defendants herein." This judgment was consented to by the parties to the action and by their respective counsel.

The clerk concluded that plaintiffs were estopped by the prior judgment and dismissed the action. Plaintiffs then appealed to the Superior Court in term. Judge Froneberger, upon the call of the case for trial, "after reading pleadings and hearing statement from counsel," concluded that the judgment of the clerk should be affirmed. He thereupon affirmed the judgment rendered by the clerk and dismissed the action. Plaintiffs appealed.

W. H. Strickland for plaintiff appellant.
Townsend & Todd for defendant appellees.

RODMAN, J. A property owner who has no reasonable access to his property and for that reason is denied the beneficial use thereof may file his petition with the clerk of the Superior Court and, upon a showing of necessity and payment of the damages sustained, have an easement imposed on the land of his neighbor to provide the isolated property owner reasonable access to a public road. G.S. 136-69.

The statute merely accords a right to the property owner who is without reasonable access to the public road. It imposes no duty on him to exercise that right. Compensation for the servitude imposed by

establishing a cartway is a condition precedent to acquisition. *Garris v. Byrd*, 229 N.C. 343, 49 S.E. 2d 625.

Kanupps, plaintiffs, are not here seeking a cartway across the properties of Lands and the other defendants. They seek to reverse the statutory process: they seek the aid of the court to compel Lands and the other defendants to acquire a cartway across plaintiffs' property. The statute does not accord plaintiffs this right; nor can defendants be compelled to accept a cartway in substitution for an easement presently owned by them. *Andrews v. Lovejoy*, 247 N.C. 554.

Also essential to the establishment of a cartway is absence of reasonable access to the public road. If reasonable access exists, plaintiffs are not entitled to have a cartway established. G.S. 136-69; *Garris v. Byrd, supra; Waldrop v. Ferguson*, 213 N.C. 198, 195 S.E. 615; *Collins v Patterson*, 119 N.C. 602; *Plimmons v. Frisby*, 60 N.C. 200; *Burgwyn v. Lockhart*, 60 N.C. 264.

Prior to the institution of this proceeding, it had been judicially determined that the road from the property of defendants Lan to the Connelly Springs Highway shall be kept open, and the traffic thereon shall not be interfered with. Plaintiffs here allege that the properties of all defendants abut on that road. No defendant suggests that it does not provide reasonable access to a public road. To the contrary, answering defendants insist that the road so required to be kept open does provide them with reasonable access to a public road. Present plaintiffs Kanupp and present defendants Land were before the Superior Court of Caldwell County with their positions reversed when the court was called upon to determine the right to use the road providing access to the highway. The court, having jurisdiction of the parties and of the question presented, answered the question and adjudged in effect that Lands and others had the right to use the road which provided them access to the public highway. The judgment then rendered is conclusive and binds the parties. *Gaither v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909; *Cannon v. Cannon*, 223 N.C. 664, 28 S.E. 2d 240; *Current v. Webb*, 220 N.C. 425, 17 S.E. 2d 614; *Clinard v. Kernersville*, 217 N.C. 686, 9 S.E. 2d 381; *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570.

Since it had been determined that one of the essential elements requisite to the establishment of a cartway did not exist, the court correctly adjudged that plaintiffs were not entitled to maintain the action for a cartway.

Plaintiffs do not pretend to seek the aid of the court in locating the boundaries of the road declared to exist by the judgment entered in the action of *Land v. Kanupp*. The provisions of c. 38 of the General Statutes would be available to determine the location of the road de-

scribed in that judgment; but plaintiffs cannot ask for the location of something which they deny exists. *Nesbitt v. Fairview Farms,* 239 N.C. 481, 80 S.E. 2d 472; *Wood v. Hughes,* 195 N.C. 185, 141 S.E. 569; *Parker v. Taylor,* 133 N.C. 103. Plaintiffs do not seek damages for a trespass by defendants Land.

Affirmed.

THE WALTER TURNER COFFEE COMPANY, INCORPORATED, v. MAXWELL H. THOMPSON AND JAMES G. LIPE, T/D/A THOMPSON-LIPE COMPANY.

(Filed 9 April, 1958.)

1. Appeal and Error § 50—

In injunction proceedings the Supreme Court is not bound by the findings of fact of the trial court, but nevertheless the presumption is in favor of such findings, and appellant must assign and show error.

2. Injunctions § 8—

The court has the sound discretion to dissolve a temporary restraining order when plaintiff's whole equity is denied in the answer, certainly when it does not affirmatively appear that plaintiff is threatened with irreparable injury or that he does not have an adequate remedy at law.

APPEAL by plaintiff from *Nettles, J.,* November 1957 Term, CALDWELL Superior Court.

Civil action (1) for recovery of a penalty for alleged unlawful use of trade-marks; (2) for mandatory order requiring defendants to surrender "all trade-marks and designs, duplicates, or imitations" belonging to the plaintiff; (3) for temporary restraining order against the use of any product bearing "the trade-marks and designs" of the plaintiff. Upon the verified complaint, treated as an affidavit, the court issued a temporary restraining order.

By verified answer, the defendants set up the defense that under a contract they had with Walter D. Turner they obtained the legal right to the use of the trade-marks, designs, etc., and that Walter D. Turner had organized the plaintiff corporation and attempted to assign to it rights already assigned to the defendants; and that the attempted assignment was for the purpose of defeating the defendants of their rights under the contract; that the incorporators are the members of Walter D. Turner's family; that he is the owner and organizer, and the corporation is his alter ego.

By reply, the plaintiff alleged it was not a party to the contract and that the same was void for uncertainty, and for other reasons.

After hearing, the court dissolved the restraining order without finding, or a request for finding, facts. The plaintiff excepted and appealed.

W. H. Strickland, Alfred R. Crisp, for plaintiff, appellant.
Williams & Whisnant, for defendants, appellees.

HIGGINS, J. The contract set up by the defendants is discussed in the case of *Thompson v. Turner,* 245 N.C. 478, 96 S.E. 2d 263. We refrain from further discussion of the merits in order that neither party may be prejudiced at the final hearing. This Court is not bound by the findings of fact made at the trial below; it ". . . nevertheless indulges the presumption that the findings of the hearing judge are correct, and requires the appellant to assign and show error . . ." *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116.

We have a right to assume the trial court dissolved the order in the exercise of a sound discretion. ". . . 'whether the court will dissolve an injunction on hearing the answer only, or will order the bill to stand over for proofs, much must depend upon the sound discretion of the judge who is to decide the question.' . . . 'But it is also a well settled rule that when by the answer the plaintiff's whole equity is denied, and the statement in the answer is credible and exhibits no attempt to evade the material charges in the complaint, . . . an injunction . . . will be dissolved.' " *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319. (authorities cited)

In this case it is extremely doubtful whether the complaint can be so construed as to allege either the plaintiff is threatened with irreparable injury, or that it does not have an adequate remedy at law. *Arey v. Lemons,* 232 N.C. 531, 61 S.E. 2d 596; *Oil Co. v. Mecklenburg County,* 212 N.C. 642, 194 S.E. 114.

The order of the Superior Court from which this appeal is taken is Affirmed.

MAXWELL H. THOMPSON AND JAMES G. LIPE T/D/A THOMPSON-LIPE COMPANY v. D. WALTER TURNER.

(Filed 9 April, 1958)

Contempt of Court § 6—

Evidence in this case *held* to support the trial court's finding that defendant had wrongfully and knowingly disobeyed a perpetual injunction theretofore issued in the cause against defendant, and judgment sentencing defendant to jail for thirty days for contempt is affirmed.

APPEAL by defendant from *Froneberger, J.*, at January Term 1958, of CALDWELL.

Contempt proceeding in civil action wherein the court had previously entered a permanent order of injunction against the defendant.

The court in attaching the defendant for contempt entered judgment in pertinent part as follows:

". . . upon the return of an order directing the defendant to show cause why he should not be attached for contempt, the plaintiffs and the defendant being present in person and by attorney; and being heard upon affidavits filed by both plaintiffs and the defendant, and upon argument of counsel; and upon such hearing the Court finding as a fact the following:

"The defendant was 'perpetually enjoined and restrained from selling coffee, tea and other specialties and from aiding or assisting others to do so, and from violating the good will clause of his said contract in any other respects within the counties of Alexander, Ashe, Avery, Burke, Caldwell, McDowell, Mitchell, Watauga, Wilkes and Yancey,' said judgment having been signed by his Honor H. Hoyle Sink, Judge presiding at the April-May 1956 Term of the Caldwell County Superior Court. Upon appeal by the defendant to the Supreme Court of North Carolina, no error was found in the judgment of the Court below, the case being reported in 245 N.C. 478.

"The defendant willfully and knowingly disobeyed said perpetual injunction when he aided and assisted in the organization of a corporation known as THE WALTER TURNER COFFEE COMPANY, INC., said corporation having been chartered July 29, 1957, and now being engaged in selling coffee within the territory set out above in competition with the plaintiffs.

"The defendant, on or about September 16, 1957, willfully and knowingly disobeyed the perpetual injunction when he solicited orders for Million Dollar Coffee from Mrs. Carl Aldridge, Mrs. B. J. Hovis and Corbett Johnson, merchants doing business in Avery County, North Carolina, one of the counties in which the defendant was restrained from selling coffee, tea and other specialties.

"The defendant, on or about the 10th day of October, 1957, willfully and knowingly disobeyed said perpetual injunction when he personally sold and delivered one dozen bags of Million Dollar Coffee to Mrs. R. A. Harrison, a merchant doing business in Ashe County, North Carolina, one of the counties in which the defendant was restrained from selling coffee, tea and other specialties.

"The defendant, on or about the 11th day of October, 1957, willfully and knowingly disobeyed the perpetual injunction when he sold and delivered four dozen bags of Million Dollar Coffee to Mr. K. H. Goodman, a merchant doing business in Ashe County, North Carolina, one

of the counties in which the defendant was restrained from selling coffee, tea and other specialties.

"The defendant has willfully and knowingly disobeyed said perpetual injunction by aiding and assisting Hal Edminsten, President of THE WALTER TURNER COFFEE COMPANY, INC., in selling coffee within the territory set out above and by sharing the automobile expenses with agents of THE WALTER TURNER COFFEE COMPANY, INC.

"The Court finding as a fact that the defendant has willfully disobeyed the perpetual injunction of this Court in the manner above set forth, IT IS THEREFORE ORDERED AND ADJUDGED that the defendant is in contempt of Court and the defendant is hereby sentenced to be confined in the common jail of Caldwell County, North Carolina, for a period of thirty (30) days."

The defendant excepted separately to each of the foregoing findings of fact and also to the entry of the judgment, and appealed to this Court, assigning errors.

W. H. Strickland and Alfred R. Crisp, for appellant.
Williams & Whisnant, for appellees.

PER CURIAM. A study of the record discloses that crucial, essential findings of fact made by the trial Judge are supported by the evidence, and that these findings support the judgment. The record is free of reversible error. The judgment will be upheld.

Affirmed.

GRACE GOFORTH RIDDLE v. WILLIAM WILDE AND ABNER WILDE, HERBERT LUNSFORD AND HIS GUARDIAN AD LITEM, CARL LUNSFORD.

(Filed 9 April, 1958)

Appeal and Error § 8—

Upon special appearance by additional defendants joined under G.S. 1-240, and motion by them to dismiss for want of valid service, the court ordered new process to be served upon them. *Held:* The judgment did not attempt to adjudicate the validity of the previous service, nor was the efficacy of the new process then justicable, and therefore the order affected no substantial right of the additional defendants and their appeal therefrom is dismissed.

APPEAL by Herbert Lunsford and Carl Lunsford, guardian ad litem, from *Froneberger, J.*, October Term 1957, of MADISON.

This appeal is from Judge Froneberger's order of October 30, 1957,

"That *a new summons* be issued by the Clerk of the Superior Court of Madison County, and that said summons, together with a copy of the original summons, complaint, answer, cross-action, order dated November 2, 1956, making said Herbert Lunsford a party defendant in the above-entitled action, and a copy of this order, be served upon the said Herbert Lunsford and his Guardian Ad Litem, Carl Lunsford." (Our italics)

On May 23, 1956, on a public highway in Madison County, plaintiff sustained personal injuries when the car in which she was riding, then operated by Herbert Lunsford, collided with a car operated by William Wilde.

On July 26, 1956, plaintiff instituted this action against William Wilde and Abner Wilde, the father of William Wilde and the owner of the car he was operating.

The Wildes answered, alleging, *inter alia*, a cross-action against Herbert Lunsford for contribution and moving that Herbert Lunsford be joined as an additional defendant under G.S. 1-240.

On November 2, 1956, Judge Pless made Herbert Lunsford a party defendant and ordered that process be served on him.

On June 24, 1957, Judge Nettles, based on recitals that the only prior service on Herbert Lunsford, to wit, service on April 27, 1957, was defective because "not completed upon said defendant within 90 days from the date of its issuance (January 19, 1957) or from the date of the last notation on said summons (no notation)," appointed Carl Lunsford, his father, as guardian ad litem for Herbert Lunsford, and ordered that a *new* summons be issued for service upon Herbert Lunsford and upon Carl Lunsford, his guardian ad litem.

Pursuant to Judge Nettles' order, a summons issued on July 1, 1957, for Carl Lunsford, was served July 9, 1957; a separate summons issued July 1, 1957, for Herbert Lunsford, was returned unserved; another summons issued July 13, 1957, for Herbert Lunsford, bearing the notation "alias summons," was returned unserved; another summons issued August 23, 1957, for Herbert Lunsford, bearing the notation "alias summons," was served on Herbert Lunsford on August 28, 1957, together with copies of "orders, complaint and answer. . . ."

Carl Lunsford, guardian ad litem, and Herbert Lunsford, under special appearances, separately challenged the validity of the purported service. Carl Lunsford, guardian ad litem, moved that the purported service on him be quashed. Each moved "That the summons and cross-action relating to Herbert Lunsford, be abated and dismissed."

Confronted by this state of affairs, Judge Froneberger signed the order of October 30, 1957, which, in pertinent part, is quoted above.

Herbert Lunsford, and Carl Lunsford, guardian ad litem, excepted and appealed.

Williams & Williams and Bruce J. Brown for defendants Herbert Lunsford and Carl Lunsford, appellants.

Uzzell & DuMont for defendants William Wilde and Abner Wilde, appellees.

PER CURIAM. Judge Froneberger made no ruling as to whether the purported service previously made on Herbert Lunsford and on Carl Lunsford, guardian ad litem, was sufficient to confer jurisdiction. Instead, he ordered that new process be issued and served.

If the service previously made was sufficient to confer jurisdiction, the order and service pursuant thereto would not adversely affect appellants.

If, as appellants contend, the purported service previously made was void, the order for *new process,* to implement Judge Pless' order of November 2, 1956, was appropriate; for, under G.S. 1-240, the original defendants, who alleged that, if liable at all, they and Herbert Lunsford were liable as joint tort-feasors, were entitled, upon motion, "at any time before judgment is obtained," to "have the other joint tort-feasors (Herbert Lunsford) made parties defendant."

The process ordered by Judge Froneberger, being new process, will have the same status as if it were the first process issued to implement Judge Pless' order of November 2, 1956. Whether this new process, *if served,* would be subject to successful attack, either on the ground that the appointment of Carl Lunsford as guardian ad litem is defective or otherwise, would be for consideration in the light of conditions then existing, without prejudice on account of Judge Froneberger's order.

On account of appellants' failure to show that they are presently aggrieved by an order adversely affecting any substantial right, their appeal from Judge Froneberger's said order is dismissed.

Appeal dismissed.

STATE v. MAGGIE HAIRSTON.

(Filed 9 April, 1958)

Intoxicating Liquor § 9d—

Even though the quantity of intoxicating liquor found upon search of defendant's apartment was less than one gallon and therefore not sufficient to make a *prima facie* case of possession for sale, evidence that varieties of beverage were available in the apartment, that a number of different bottles had been opened and the contents of a number of them partially consumed, together with evidence that a number of persons were present at the apartment late at night, and that a number of two-ounce glasses were found in a pan of water in the sink, etc., *is held* sufficient to take the case to the jury upon the charge of possession of liquor for the purpose of sale.

APPEAL by defendant from *Preyer, J.*, January 1958 Term, DAVIDSON SUPERIOR COURT.

This criminal prosecution originated in the Davidson County Court upon a warrant charging the defendant with the unlawful possession of illicit liquors for sale. Upon a verdict of guilty and judgment thereon, the defendant appealed to the Superior Court of Davidson County.

At the trial in the superior court the defendant introduced evidence tending to show the following: At about 10:30 at night, two boys, one 15 years of age, went to Apartment No. 1 on Dixie Street in Lexington. A colored man who had been drinking came to the door and another colored man came out of the door, staggering, and left. A colored woman brought a paper bag containing two cans of beer and delivered it to the boys, for which they paid eighty cents. The police officers picked up the boys, obtained a search warrant for the first apartment, which belonged to the defendant. They made the search at about 12:30 at night. In the front room were two women and a man, and in the kitchen four men were sitting around a table. All the occupants were colored except one white man in the kitchen. One of the men had half a can of beer; another had a "shot" glass (about two ounces) containing some kind of beverage. Two pints of London Dry Gin were in a "sack" in the front room. In the apartment the officers also found two bottles of Gordon's Dry Gin, one full and the other containing about two ounces; two pints of Bourbon whisky, one full and the other about seven-eighths full; and one bottle of Vodka about three-fourths full; and seven cans of beer, six of Budweiser and one of High Life, were all found in the apartment. In a pan of water in the sink were six or seven two-ounce glasses. The unbroken bottles had unbroken stamps and the other bottles had broken stamps, indicating the tax had been paid on the contents. The amount of liquor in the house did not exceed one gallon.

One of the boys who bought the beer, the only one who testified, said the defendant was not the woman who made the delivery and took the money.

The defendant's motion for a directed verdict of not guilty was denied. The jury returned a verdict of guilty and, from the judgment imposed, the defendant appealed.

George B. Patton, Attorney General
Ralph Moody, Assistant Attorney General, for the State.
Stoner and Wilson, By: J. Lee Wilson, for defendant, appellant.

PER CURIAM. The only question raised by the appeal is the sufficiency of the evidence to make out a case for the jury. While the quantity of liquor found in the defendant's apartment was not sufficient to make out a *prima facie* case she had it for sale; nevertheless, the varieties of the beverage available in the apartment, evidence that a number of different bottles had been opened and the contents partially consumed, the time of the night and the number of persons present, the number of two-ounce glasses, together with other facts and circumstances, taken together constitute sufficient evidence to sustain the jury's finding.

No Error.

S. PEIRSON v. AMERICAN HARDWARE MUTUAL INSURANCE COMPANY.

(Filed 16 April, 1958)

1. Insurance § 43b—

There is a distinction between a garage liability policy which does not specify any particular vehicle insured and an ordinary liability policy covering loss or damage resulting from the operation of a specified vehicle, but under a group liability policy it would seem essential that insurer know the identity of insured so as to determine the nature and extent of its risks and the premiums to be charged.

2. Insurance § 18a—

Where insured declares upon the policy as written without seeking reformation, the rights of the parties must be determined in accordance with its terms, and parol evidence is incompetent to vary its terms as to the parties insured or the risks covered.

3. Evidence § 5—

It is a matter of common knowledge in the business and commercial world and among people at large that the letters "DBA" mean "doing business as."

4. Insurance § 43d—

Where a garage liability policy states that the insured is a partnership, evidence tending to show that insured in addition to the partnership was also an individual business of which one of the partners was the sole proprietor, is properly excluded, since the written policy is conclusively presumed to express the contract it purports to contain.

5. Partnership § 1a—

A partnership is an association of two or more persons to carry on as co-owners a business for profit. G.S. 59-36.

6. Insurance § 43b—

In a suit to recover medical payments under a garage liability policy naming the insured as "Peirson-Neville Co. and S. Peirson and Co.," a partnership, it is error for the court to exclude evidence that at the time of the accident in suit the vehicle was used principally in the business of "S. Peirson and Co."

7. Same—

In an action to recover medical payments under a garage liability policy insuring a partnership, submitted under agreement of the parties that the court should hear the evidence and find the facts, the failure of the court to make clear and definite findings as to whether the car was used principally in the separate individual business of one of the partners, and whether its use on the occasion in suit by such partner for a purely social purpose, during which his wife was injured in an accident, was covered by the definition of hazards in the insuring agreements of the policy, requires remand of the cause for further hearing.

8. Appeal and Error § 21—

An exception to the judgment presents the question whether the facts found support the judgment.

9. Appeal and Error § 49—

Where the facts found by the lower court are insufficient to support its judgment, the cause must be remanded.

BOBBITT, J., concurring in result.

DENNY AND RODMAN, JJ., concur in concurring opinion.

APPEAL by plaintiff from *Paul, J.*, December Term 1957 of HALIFAX.

This is an action on a garage liability policy of insurance to recover the amount of money paid by the plaintiff S. Peirson for necessary medical expenses rendered to his wife, whose injuries were allegedly caused by accident within the policy period, and the payment of which expenses is allegedly covered by the terms of the policy.

When the action came on for trial, counsel for both parties entered into a stipulation, which was written in the minutes of the court, waiving a jury trial, and agreeing that the court find the facts and render judgment thereon. The court, after finding the facts, being of the opinion that in respect of the accident necessitating the medical payments sued for, the plaintiff was not insured within the terms of the policy, and is not entitled to recover, adjudged that the plaintiff recover nothing and that the defendant go hence without day and recover its costs.

From the judgment rendered, plaintiff appeals.

Dickens & Dickens for plaintiff, appellant.

Battle, Winslow & Merrell by J. Brian Scott for defendant, appellee.

PARKER, J Prior to the trial of this case the parties stipulated and agreed as follows:

One. The defendant in this case is American Hardware Mutual Insurance Company, formerly Hardware Mutual Insurance Company of Minnesota: the American Hardware Mutual Insurance Company is the proper defendant to this action and before the court, and it has not been prejudiced or misled by reason of any improper identification.

Two. On 10 April 1953 there was outstanding a valid policy of defendant's garage liability insurance providing for the payment of medical bills up to a limit of $2,000.00, which might be incurred within one year from the date of accident. The name of the insured shown in the policy is as follows: "S. Peirson and N. G. Neville DBA: Peirson-Neville Co. and S. Peirson and Co.," and the named insured is "Partnership."

Three. On 10 April 1953 the plaintiff S. Peirson, while driving a Ford

Station Wagon, was involved in an accident in which his wife sustained injuries for the treatment of which he paid $807.90. These expenses were incurred within one year after the accident.

Four. This Ford Station Wagon was the individual property of S. Peirson, and registered in his name. The accident occurred while plaintiff, his wife, and their daughter were leaving a social gathering at Woodlawn Lake Club.

Five. If S. Peirson was an insured under the terms of the policy and within the protection afforded by the policy, in reference to the accident alleged in the complaint, then the defendant is liable to him in the amount of $807.90.

These are the material findings of fact by the Trial Judge:

One. John H. Bland was a salaried employee of defendant with authority to submit written applications of persons desiring insurance, which applications were to be approved or rejected by defendant. While so employed, and about 14 October 1952, Bland took a written application for insurance from S. Peirson for S. Peirson and N. G. Neville, doing business as Peirson-Neville Co. and S. Peirson and Co. The application was mailed to the defendant, who forwarded the policy to Bland, and by him it was delivered to the plaintiff. The policy is in evidence.

Two. At all times relevant to this action S. Peirson was a partner with N. G. Neville, doing business as Peirson-Neville Co.: S. Peirson did business under the name of S. Peirson and Co. These facts were known to Bland, who submitted the application for insurance. There was no evidence that the defendant was informed that S. Peirson individually did business as S. Peirson and Co.

Three. On 10 April 1953 plaintiff, while driving a Ford Station Wagon, was involved in an accident in which his wife sustained injuries for the treatment of which plaintiff paid $807.90 within one year after the accident.

Four. The Ford Station Wagon was the individual property of S. Peirson, and registered in his name. It did not belong to any partnership named as an insured in the policy, and was not being operated for business connected with any such partnership.

Upon these findings of fact the court being of the opinion that, in respect to the medical payments made by plaintiff, he was not insured within the terms of the policy, entered judgment that the plaintiff recover nothing.

While plaintiff has nine assignments of error in the record, he has directed his argument in the brief to only five: the first four assignments of error he discusses in his brief deal with the exclusion of evidence, and the fifth challenges the correctness of the judgment

that the plaintiff recover nothing, for the reason that in respect to the accident to his wife he was not insured within the terms of the policy.

Plaintiff contends that the court erred in excluding the testimony of S. Peirson that the Ford Station Wagon was used primarily and principally in his business known as S. Peirson and Co., and that he was the sole owner of S. Peirson and Co. The defendant objected to the questions that would have elicited this testimony, the objection was sustained, and plaintiff excepted. The answers were written into the record.

Plaintiff excepted to the exclusion of the following testimony by John H. Bland, which was placed in the record: "That at the time this policy was sold to Mr. Peirson he knew Mr. Peirson owned one 1952 Ford Station Wagon; that he knew that this automobile was used primarily and principally in the business of S. Peirson and Co.; that at that time he knew of one 2-ton truck that was used by Mr. S. Peirson in the operation of S. Peirson and Co.; that to his knowledge these automobiles were registered in the name of S. Peirson, and that he knew of no automobiles registered in the name of S. Peirson and Co.; that at the time this policy was written it was being written to cover the operation of two businesses, one business being the partnership of S. Peirson and N. G. Neville, t/a Peirson-Neville Co., and S. Peirson doing business as S. Peirson and Co., being a sole proprietorship owned by S. Peirson; that he knew the 1952 Ford Station Wagon was used primarily in the business of S. Peirson and Co.; that these were the intentions of S. Peirson and John H. Bland, but that he cannot testify that such were the intentions of the defendant company in regard to the policy issued." Plaintiff further excepted to the exclusion of testimony of Bland to the effect that, at the time he went over the provisions of the policy with Peirson, the understanding was that the vehicle registered in the name of S. Peirson was covered.

The policy in the instant case is designated by the defendant as a "National Standard Garage Liability Policy," and does not specify any particular automobile. The distinction between such a policy and an ordinary automobile liability policy is pointed out in *Hardware Mutual Casualty Co. v. Wendlinger,* (4th Cir.) 146 F. 2d 984, as follows: "The policy is called an 'automobile garage liability policy'; and it will be noted that the primary risk assumed by the policy is the liability of the assured for operations of the garage business. Automobiles are included because they are necessary features of the business; but the policy does not specify or describe any particular automobile. In this respect this form of policy is to be sharply differentiated from the ordinary automobile liability policy which covers liability for loss and damage resulting from the operation of a particu-

larly named and described automobile anywhere in the United States and Canada." By reason of the risks in a Garage Liability Insurance Policy, and its purpose, it seems essential that the insurance company know the identity of the insured so as to determine the nature and extent of its risks and the premiums to be charged.

Plaintiff contends that there is an ambiguity in the name of the insured, and that the court erred in not permitting him to show the identity of S. Peirson and Co. as being a sole proprietorship owned by him, and that S. Peirson being the sole owner was a party insured.

Plaintiff's suit is upon the policy as written. *Wright v. Ins. Co.*, 244 N.C. 361, 93 S.E. 2d 438; *Burton v. Ins. Co.*, 198 N.C. 498, 152 S.E. 396. His complaint has no allegation that the contract of insurance should be reformed because of fraud or mutual mistake, and he prays for no such relief.

This Court said in *Floars v. Ins. Co.*, 144 N.C. 232, 56 S.E. 915: "It is also accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying out, or in the effort to carry out, the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties. Like other written contracts, it may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain."

In *Graham v. Ins. Co.*, 176 N.C. 313, 97 S.E. 6, this Court said: "The written policy accepted by plaintiff stands as embodying the contract, and the rights of the parties must be determined by its terms until the contract is reformed by the Court."

This Court said in *Burton v. Ins. Co., supra:* "The question, then, is whether a contract of insurance can be reformed and enforced as reformed without appropriate allegation, issue, or prayer for relief. The identical question was considered by this Court in *Britton v. Insurance Co.*, 165 N.C. 149, 80 S.E. 1072. The Court said: 'But the reformation is subject to the same rules of law as applied to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other.' "

Plaintiff offered in evidence the policy of insurance. The policy provides that the declarations are made a part of the policy. In Item 1 of the Declarations of the Policy the "name of insured" is stated "S. Peir-

son and N. G. Neville DBA: Peirson-Neville Co. and S. Peirson and Co." In the same Item is stated "The named insured is partnership," and this the parties stipulated.

It is a matter of general knowledge in the business and commercial world and among people at large that the letters "DBA" are commonly used to mean "doing business as." Webster's New Collegiate Dictionary, (2nd Ed.), d. b. a., page 1000; *S. v. Dowling,* Mo. App., 202 S.W. 2d 580.

The policy states, as the parties stipulated, in plain and unambiguous words that "The named insured is partnership." This the plaintiff, without appropriate allegation in his complaint and prayer for relief, seeks to alter and change and add words to by reforming it to read "The named insured is partnership," and S. Peirson, or individual, or a word or words of similar import.

American Mut. Liability Ins. Co. v. Condon, 280 Mass. 517, 183 N.E. 106, was a suit in equity wherein the plaintiff, an insurance company, sought from three defendants, William F., David, and James Condon, alleged to be doing business under the firm name of W. F. Condon and Sons Company, an accounting for premiums due under a policy of automobile liability insurance. Under the heading Declarations in the policy, in Item 1 thereof the "name of insured" is stated as "W. F. Condon and Sons Company," and in Item 3 it is stated that the "insured is corporation." From a final decree adjudging William F. Condon to be indebted to the plaintiff in the sum of $329.85, with interest, and ordering execution to issue, he appealed. He contended, among other things, that there was no contract of insurance binding him because the policy referred to the insured as a corporation. In affirming the final decree the court said in part: "The statement in the policy that the insured is a corporation did not preclude a finding upon evidence that the defendant under the name in which he did business was the insured named in the policy. It was permissible for the plaintiff to show that the erroneous description of W. F. Condon and Sons Company as a corporation was inserted in the policy by mistake, that the parties were not mistaken as to the identity and character of the insured, and that the defendant as an individual doing business under that name was in fact the party making the contract of insurance and intended by both parties to be insured under the policy."

In Webster's New Collegiate Dictionary, (2nd Ed.), partnership is defined as "the relation existing between two or more competent persons who have contracted to join in business and share the proceeds." G.S. 59-36, under the Article "Uniform Partnership Act." defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."

As plaintiff's suit is upon the policy as written, which states that

"the named insured is partnership," the written policy is conclusively presumed to express the contract it purports to contain, and the court properly rejected the testimony of S. Peirson and John H. Bland tending to show that S. Peirson and Co. is not a partnership, but is S. Peirson doing business under the trade name of S. Peirson and Co.

Although the court properly rejected this evidence, it found as a fact that at all times relevant to this action S. Peirson was a partner with N. G. Neville, doing business as Peirson-Neville Co., and S. Peirson did business under the name of S. Peirson and Co., and these facts were known to Bland, who submitted the application for insurance. In other words, the court found from evidence it rejected that S. Peirson and Co. was not a partnership.

The defendant contends that under Item I of the Declarations in the policy it is stated "the named insured is partnership," and that the policy under Insuring Agreements, III. Definition of Insured, states in plain and unambiguous words "This policy does not apply: . . . (b) to any partner, employee . . . or additional insured with respect to any automobile owned by him. . . ." Therefore, as the defendant argues, since S. Peirson was a partner in the named insured in the policy, and since the Ford Station Wagon was S. Peirson's individual property, and registered in his name, the Ford Station Wagon is excluded from the coverage of the policy.

The plaintiff contends that the provision in the policy relied upon by defendant is in conflict with the provisions under Insuring Agreements, Definition of Hazards, Division I - Premises - Operations - Automobiles, reading as follows: "The ownership, maintenance or use of the premises for the purpose of an automobile dealer, repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto; and the ownership, maintenance or use of any automobile in connection with the above defined operations, and the occasional use for other business purposes and the use for non-business purposes of (1) any automobile owned by or in charge of the named insured and used principally in the above defined operations, and (2) any automobile owned by the named insured in connection with the above defined operations for the use of the named insured, a partner therein, an executive officer thereof, or a member of the household of any such person." Therefore, as the plaintiff argues, these provisions being in conflict are ambiguous, and the policy must be construed liberally in respect to the persons insured and strictly with respect to the insurance company.

This action is brought under coverage C of the policy, which provides for medical payments not to exceed $2,000.00 incurred within one year from the date of accident for bodily injury, "caused by accident, while in or upon, entering or alighting from any automobile

which is being used by the named insured. . . . if insurance for such use is afforded under coverage A." Coverage A is for bodily injury "caused by accident and arising out of the hazards hereinafter defined." Insuring Agreements, Definition of Hazards, Division I, of the policy is quoted in the paragraph above, and provides coverage for "the ownership, maintenance or use of any automobile in connection with the above defined operations, and the occasional use for other business purposes and the use for non-business purposes of (1) any automobile owned by or in charge of the named insured and used principally in the above defined operations." In respect to the use of the Ford Station Wagon there is no finding of fact by the court, except the finding that the Ford Station Wagon "was not being operated for business connected with any such partnership." Plaintiff did not except to this finding of fact. Reading the court's findings of fact contextually, this finding would seem to refer to the operation of the automobile at the time Mrs. Peirson was injured. However that may be, the court made no clear and definite finding of fact that this automobile was, or was not, used principally in the operations set forth in Insuring Agreements, Definition of Hazards, Division I of the policy. The court was in error in excluding the testimony of S. Peirson and John H. Bland tending to show that the Ford Station Wagon was used principally in the business of S. Peirson and Co.

The court has made no findings of fact sufficient to determine as to whether or not the operation of the Ford Station Wagon at the time Mrs. Peirson was injured is covered by the provisions of Insuring Agreements, Definition of Hazards, Division I - Premises - Operations - Automobiles. If the court had made findings of fact and a conclusion of law favorable to plaintiff in this respect, then would be presented for decision the question as to whether the provisions of the policy under Insuring Agreements, III. Definition of Insured, which states "This policy does not apply: . . .(b) to any partner, employee . . . or additional insured with respect to any automobile owned by him . . ." when considered in connection with the provisions of Insuring Agreements, Definition of Hazards, Division I - Premises - Operations - Automobiles, creates, or does not create, an ambiguity in the language of the policy. If the court had made findings of fact and a conclusion of law unfavorable to plaintiff in this respect, then would be presented the question as to whether or not the plaintiff had any protection under the provisions of the policy.

Plaintiff's exception to the judgment presents the question as to whether the facts found support the judgment. *Best v. Garris*, 211 N.C. 305, 190 S.E. 221. In our opinion, the facts found by the court are insuffi-

cient to support its judgment, and the action is remanded to the Superior Court of Halifax County for further hearing.

Remanded.

BOBBITT, J., concurring in result: I concur in the *immediate result* of the decision, namely, that the case be remanded for explicit findings of fact as to whether the Ford station wagon was used principally in the business operations of S. Peirson & Co. Otherwise, my views differ from those expressed in the Court's opinion.

The action is by S. Peirson, an individual. He asserts no right as partner in Peirson-Neville Co. or as partner in S. Peirson & Co. Nor does he seek to alter or reform the policy. The sole basis for his claim is that S. Peirson & Co. is not a partnership, but a business of which he is sole owner; and that the Ford station wagon was used *principally* in the business of S. Peirson & Co. but *occasionally* for non-business purposes.

My view is that the policy was intended to cover automobiles owned by and used principally in the business of S. Peirson & Co., and that this coverage is not affected by the fact that S. Peirson & Co. was erroneously described as a partnership. The *controlling intent,* as I see it, was to provide coverage for S. Peirson & Co. Whether such business was a sole proprietorship, partnership or corporation was incidental.

If S. Peirson & Co. had been described as a sole proprietorship when in fact it was a partnership, involving a greater number of persons, perhaps an argument might be made that the erroneous description was material to the risk; but when described as a partnership when in fact it was a sole proprietorship it would seem that the risk would be less, certainly no greater, than that contemplated by the insurer.

I cannot agree that a policy issued to provide coverage for both Peirson-Neville Co. and S. Peirson & Co. should be held to provide coverage only for Peirson-Neville Co. solely because S. Peirson & Co. was erroneously described as a partnership rather than as a sole proprietorship.

Denny and Rodman, JJ., concur in concurring opinion.

MARY ELIZABETH ALFORD, ADMINISTRATRIX OF THE ESTATE OF CHARLES S. ALFORD, JR., DECEASED v. TEXTILE INSURANCE COMPANY, A CORPORATION.

(Filed 16 April, 1958)

1. Constitutional Laws § 17: Contracts § 1—

Freedom to contract is both a personal and a property right within the protection of the Constitution, and although the General Assembly may impose restraints thereon for the public good, freedom of contract is the general rule and restraint the exception.

2. Insurance § 48—

Provision in a liability policy that insurer might negotiate and settle any claim or suit was not proscribed or rendered void under the 1947 statute, G.S. 20-227; further, the 1953 act, G.S. 20-279.21, does not indicate that prior to that date liability insurers were prohibited from settling claims.

3. Same—

A liability insurance carrier may settle part of multiple claims arising from the negligence of its insured, even though such settlements result in preference by exhausting the fund to which an injured party whose claim has not been settled might otherwise look for payment, provided the insurer acts in good faith and not arbitrarily, and the burden is upon a claimant whose claim is not paid in full because of prior payments made by insurer in settlements of other claims, to allege and prove bad faith on the part of insurer.

4. Same—

A liability insurance carrier is liable for interest for that amount of the recovery which is within the limits of liability of the policy from the date the judgment is rendered against insured until payment of its liability by insurer.

5. Costs § 2—

Where plaintiff recovers a part of the claim asserted in the action, the costs should be taxed against defendant.

PARKER, J., dissents.

APPEAL by plaintiff from *Stevens, J.*, November 1957 Term of LENOIR.

Plaintiff seeks to recover $5,000 with interest from 10 October 1955. Her claim has as its base a judgment obtained by plaintiff against Melvert Washington at the October 1955 Term of Lenoir Superior Court. See *Alford v. Washington,* 244 N.C. 132, 92 S.E. 2d 788, for background for the judgment. The parties waived jury trial and submitted the questions in dispute to the court upon an agreed statement of facts.

Briefly, the facts agreed upon are: On 14 June 1952 an automobile owned by Melvert Washington ran into an automobile operated by George Edward Cauley. The collision was caused by Washington's

negligence. Cauley's automobile was thrown against and broke an electric light pole and the wires suspended therefrom. There were eight people in the Cauley vehicle. Plaintiff's intestate was electrocuted in his attempt to rescue the occupants of the Cauley vehicle from the perilous position created by Washington's negligence. The policy issued by defendant on Washington's automobile obligated it, subject to the limits therein set out, to pay on behalf of its insured all sums which the insured was legally obligated to pay as damages for bodily injuries or death resulting from the operation of the insured's motor vehicle. The limits of liability set out in the policy were $5,000 for each person and $10,000 for each accident. Each of the occupants of the Cauley automobile sustained personal injuries resulting from the negligence of defendant's insured. Defendant made payments in settlement of the occupants' claims on dates and in amounts as follows: George W. Cauley, 8 July 1952, $475; J. B. Cauley, Jr., 29 July 1952, $400; Edmund Watson, 29 July 1952, $150; Allen T. Cauley, 29 July 1952, $300; J. B. Cauley, Sr., 29 July 1952, $2,500. Negotiations for settlement of the claim of another occupant, Sally B. Cauley, were begun shortly after 14 June 1952, but settlement was deferred pending receipt of complete medical reports, and was consummated 4 December 1952 by the payment of $3,000. The record does not disclose what disposition, if any, has been made of the claims of the other two occupants of the car. The total amount paid by defendant to the occupants of the Cauley automobile in settlement of their claims for personal injuries resulting from the negligence of its insured amounted to $6,825. Releases from liability in favor of Melvert Washington were obtained in consideration of said payments. On 18 September 1952 plaintiff brought her action against Washington for damages for the wrongful death of her intestate. Judgment was rendered in that action in favor of plaintiff and against defendant's insured at the October 10, 1955 Term of Lenoir Superior Court. Damages in the sum of $25,000 were assessed. Defendant appealed. The judgment was affirmed in an opinion filed 23 May 1956, *Alford v. Washington, supra.* On 21 June 1956 defendant paid the clerk of the Superior Court $3,175 to be applied as credit on that judgment. In addition it paid to the clerk the costs in the case of *Alford, Administratrix v. Washington.* The remaining portion is unsatisfied. The amount paid by defendant to the occupants of the Cauley car plus the amount paid to the clerk of the Superior Court for credit on plaintiff's judgment aggregate $10,000, the limit of liability fixed in the policy for each accident. The $3,175 paid by defendant to the clerk for credit on plaintiff's judgment was subsequently paid to her without prejudice to her right now asserted.

Upon the facts agreed, the court adjudged that plaintiff recover of defendant the sum of $3,175 with interest from 10 October 1955 to

21 June 1956 to be credited with the said sum of $3,175 paid by defendant to the clerk of the Superior Court of Lenoir County on 21 June 1956; and that said sum, when so paid, should be in full and complete discharge of defendant's liability under its policy. It taxed the costs of the action against plaintiff. She excepted and appealed.

Jones, Reed & Griffin for plaintiff appellant.
White & Aycock for defendant appellee.

RODMAN, J. Plaintiff predicates her right to recover the sum of $5,000 instead of the $3,175 paid into court on the theory that she was a beneficiary of the insurance policy issued by defendant; that the Legislature had prescribed the form of liability policies which might be issued, and the forms so prescribed did not, as she puts it, "vest in the insurance carrier the arbitrary and *ex parte* right to make settlement for personal injury with one or more of the persons injured in one accident, to the prejudice of another injured in the same accident, and that such settlements as are made by a liability carrier, are at its own risk."

The statute relating to automobile liability insurance in effect when the policy here sued on was issued is G.S. 20-227.

The policy issued by defendant to Washington provides: "Defense, Settlement, Supplementary Payments: As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall: (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; *but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.*" (Emphasis supplied.) Coverage A provides for bodily injury liability and coverage B for property damage liability.

The case therefore presents these questions: Is the policy provision which authorizes the company to make settlement void? If not, who had the burden of establishing arbitrary action by the insurance company in making settlement with others injured by the insured's negligence? Plaintiff asserts that the 1953 Act redefining "motor vehicle liability policy," (G.S. 20-279.21), which specifically authorizes insurance companies to insert in their policies a provision according them the right to settle claims with a deduction from the total of contract liability, if made in good faith, is clear indication that until 1953 insurance companies had no right to make settlements with some of numerous claimants when the effect thereof would be to reduce the amount which an injured person could recover under the policy.

We do not agree with the contention that the 1953 Act which con-

tains a provision expressly authorizing insurance companies to make settlement with claimants is any indication that prior to that date liability insurers were prohibited from settling with some of several claimants for the protection of their insured.

If the quoted policy provision is prohibited, it must be done by inference. There is no express language to that effect.

In an examination of the 1947 Act (G.S. 20-227) to ascertain if the quoted policy provision authorizing the insurer to make settlement was prohibited, we must bear in mind the fundamental rights of free men to contract. As said by *Walker, J.,* in *Stephens v. Hicks,* 156 N.C. 239, 72 S.E. 313; "Parties are entitled to contract according to their free will. They make contracts for themselves and not by legislative compulsion. The freedom of the right to contract has been universally considered as guaranteed to every citizen."

"The privilege of contracting is both a liberty and a property right. *Furniture Co. v. Armour,* 345 Ill. 160. The right to contract is recognized as being within the protection of the Fifth and Fourteenth Amendments to the Constitution of the United States (citing authorities); and protected by state constitutions. 'It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution.' . . . 'Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property.' " *Morris v. Holshouser,* 220 N.C. 293, 17 S.E. 2d 115; 11 Am. Jur. 1153. The Legislature has the power to impose reasonable restrictions on the right to contract when the restrictions imposed are conducive to public good. As said by Mr. Justice Butler in *Advance-Rumley Thresher Co. v. Jackson,* 287 U.S. 283, 77 L ed 306, 53 S Ct. 133, 87 ALR 285: "But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

With these general principles in mind we look at the 1947 statute (G.S. 20-227). It is important to recall that one was not required to have liability insurance in order to operate an automobile. That was a matter of choice with the individual; and by far the greater proportion of those who purchased liability insurance did so for their protection. True, if the owner of an automobile negligently injured another and was unable to respond in damages to the extent of $5,000, his right to operate in the future could be suspended. But such operator could have his right to operate restored by filing with the Commissioner of Motor Vehicles a policy in the form prescribed by G.S. 20-227, or by filing with the Commissioner proof that a satisfactory bond had

been given, or by making an adequate deposit of cash or securities, or by filing a self-insurance certificate, G.S. 20-252.

The statute required an explicit description of the motor vehicle covered by the policy and protection for all persons using the motor vehicle with the consent of the owner. It was mandatory that the policy "insure the insured or other person against loss from any liability imposed by law for damages . . . because of bodily injury to or death of any person . . . subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of five thousand dollars because of bodily injury to or death of one person in any one accident, and subject to the limit for one person, to the limit of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and to a limit of one thousand dollars because of injury to or destruction of property of others in any one accident."

"Every policy shall be subject to the following provisions which need not be contained therein: (a) The liability of any insurance carrier to the insured under a policy becomes absolute when loss or damage covered by the policy occurs, and the satisfaction by the insured of a judgment for the loss or damage shall not be a condition precedent to the right or duty of the carrier to make payment on account of the loss or damage. . . . (d) Upon the recovery of a judgment against any person for loss or damage if the person or the decedent he represents was at the accrual of the cause of action insured against the liability under the policy, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment."

It may be conceded that the Legislature intended to provide protection for those injured by the negligence of an operator of a motor vehicle; but certainly one cannot read the statute and say that protection was not likewise to be afforded the insured. The provisions quoted make it manifest that such protection was required.

By express language liability attaches to the insurer at the very moment the insured becomes liable. Insurer is not required to await the rendition and satisfaction of a judgment by the insured as a condition precedent to its duty to make payment on account of loss or damage. There is, we think, significance in the words loss or damage rather than payment of a judgment; and when a judgment is obtained, the creditor *shall be entitled* to have the insurance money applied to the satisfaction of the judgment. Certainly the Legislature never contemplated a race between claimants to see who should obtain the first judgment.

Here the liability to the parties with whom settlement was made is expressly stipulated. They have equality in right under the policy even if not equality in amount of claim under the policy. Suppose

instead of settling with these claimants without litigation insurer had required them to bring suit before making payment, and because of the refusal to compromise, they brought suit and obtained judgments in amounts either fixed by a jury or by consent. They would, we think, under the express language of the statute have a right to have their judgments paid even though they knew that plaintiff might subsequently bring a suit and might subsequently obtain a judgment against Washington and defendant.

Those injured by the negligence of the insured derive their right against the insurer from the insured and can assert no greater rights against the insurer than the insured could assert. *Peeler v. Casualty Co.*, 197 N.C. 286, 148 S.E. 261; *Sears v. Casualty Co.*, 220 N.C. 9, 16 S.E. 2d 419; 46 C.J.S. 112; 8 Appleman Ins. L. & P., sec. 4811; 5A Am. Jur. 117.

The law imposes on the insurer the duty of carrying out in good faith its contract of insurance. The policy provision giving the insurer the right to effectuate settlement was put in for the protection of the insured as well as the insurer. It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims. It is for this reason that courts have consistently held that an insurer owes a duty to its insured to act deligently and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy. Liability has been repeatedly imposed upon insurance companies because of their failure to act diligently and in good faith in effectuating settlements with claimants. As matters now stand, Washington has an unsatisfied judgment standing against him for something in excess of $21,000. Suppose the insurance carrier had not made settlement with the other claimants but had fought their claims to the bitter end, and as a result plaintiff had obtained the first judgment and had been paid the full amount of insurer's liability to any one person of $5,000; what assurance was there that Washington would not be confronted with judgments aggregating far more than the present amount of plaintiff's judgment against him. If the insurer had failed to make these settlements, and judgments for greater amounts had been obtained against its insured; it would, we think, be liable to Washington for such amounts as the judgments exceeded the amounts for which the insurer could have settled. *Lumber Co. v. Ins. Co.*, 173 N.C. 269, 91 S.E. 946; *State Automobile Ins. Co. v. York*, 104 F 2d 730; *Wilson v. Aetna Casualty & Surety Co.*, 76 A 2d 111; *Douglas v. United States Fidelity & G. Co.*, 127 A 708, 37 A.L.R. 1477; *Hall v. Prefered Accident Ins. Co.*, 204 F 2d 844, 40 A.L.R. 2d 162, and annotations; 45 C.J.S. 1069; 5A Am. Jur. 115. The liability so imposed on the insurer would not, we think, be affected or diminished

by the question of solvency or insolvency of its insured. *Southern Union Fire & Casualty Co. v. Norris,* 250 S.W. 2d 785; *Schwartz v. Norwich Union Indemnity Co.,* 250 N.W. 446.

It is not necessary in this case to determine whether the insurer is liable for mere negligent failure to settle or whether it is requisite to show good faith in failing to make settlement; nor is it necessary now to interpret the 1953 Act, G.S. 20-279.21, as relating to the bona fides of an insurer conducting negotiations and effecting settlements of claims made by the insurer. At the time this cause of action accrued, one who asserted arbitrary action on the part of the insurer had the burden of alleging and establishing the asserted bad faith. *Lumber Co. v. Ins. Co., supra.* Plaintiff has neither alleged nor offered proof of the assertion here made that the insurance company acted arbitrarily in making settlement.

When and how to settle claims arising under an automobile liability policy can readily become a problem with many sides. Particularly is this true when numerous persons are making claims against the insured. An article entitled "Preferential Settlement" which discusses many of these problems appears in 70 Harv. L. R. 27.

The courts which have been called upon to consider the question are in agreement that an insurer may settle part of multiple claims arising from the negligence of its insured, even though such settlements result in preference by exhausting the fund to which the injured party whose claim has not been settled might otherwise look for payment. *Bruyette v. Sandini,* 197 N.E. 29 (Mass.); *Bennett v. Conrady,* 305 P 2d 823 (Kan.); *Stolove v. Fidelity & Casualty Co.,* 282 N.Y.S. 263; *Bartlett v. Travelers' Ins. Co.,* 167 A 180 (Conn.); *Williams' Adm'x v. Lloyds of London,* 280 S.W. 2d 527 (Ky.); 46 C.J.S. 126. Nor may a court require the insurance company to pay the fund into its register for ratable distribution among claimants. *Turk v. Goldberg,* 109 A 732 (N.J.).

Since plaintiff has not alleged or offered to prove that the settlements made were not in fact made in good faith, and therefore a fraud on her rights, it follows that the payments had the effect of exhausting the fund to the extent of those payments; and the balance is the limit of defendant's liability. It is not controverted that this is $3,175. Defendant was obligated to pay that amount in October 1955 when judgment was rendered establishing the liability of its insurer. It elected not to pay the sum until June 1956. Plaintiff was therefore entitled to interest on that sum as adjudged by the court.

Plaintiff, having succeeded as to part of the claim which she asserted against the defendant, was entitled to judgment awarding her not only the interest but her costs. The judgment is erroneous to the extent that it taxes plaintiff with the costs. The cause is remanded to

the Superior Court of Lenoir County in order that the judgment may be reformed so as to tax defendant with the costs of the action.

Remanded.

PARKER, J., dissents.

C. L. MAST, M. W. SETZER, EARL ELLIS AND FRITZ LOVINS, TRUSTEES UNDER A DEED TO TRUSTEES OF THE HAPPY VALLEY GOSPEL CHURCH v. W. S. BLACKBURN, MRS. ZORA BLACKBURN, P. G. McGEE, PAUL BLACKBURN, WILLIE MILLER, R. A. MILLER, AND VERNA M. FIELDS.

(Filed 16 April, 1958)

1. Trusts § 8—

The death of trustees without provision in the instrument for the appointment of their successors does not terminate the trust, since a trust does not fail for want of a trustee.

2. Trusts §§ 9, 20—

A trustee holds the bare legal title for the purposes of the trust, and therefore the sole heir at law of the survivor trustee can at most convey the bare legal title, but cannot administer the trust or use the trust property for his own benefit, and therefore his deed to trustees designated by him to carry out the trust is ineffectual as an appointment of successor trustees.

3. Trusts § 9—

Prior to Chapter 1255, Session Laws of 1953, (G.S. 36-18.1) a clerk of the superior court had no power to appoint successor trustees of a charitable trust, such authority being vested solely in the superior court and not in the respective clerks thereof. G.S. 36-21.

4. Trusts §§ 9, 14a—

The appointment by the clerk of successor trustees of a charitable trust in *ex parte* proceeding prior to the effective date of G.S. 36-18.1, is void, and such appointees may not maintain an action to restrain others from interfering with their asserted rights as trustees, but successor trustees may be appointed by the judge of the superior court *nunc pro tunc* under G.S. 36-21 or by the clerk under G.S. 36-18.1.

APPEAL by defendants from *Froneberger, J.*, January Term 1958 of CALDWELL.

The plaintiffs instituted this action to restrain the defendants from interfering with the alleged rights of plaintiffs as trustees of the property hereinafter described.

It appears from the record that the Reverend Reuben Coffey, of

Burke County, North Carolina, on 19 October 1832, conveyed to William Davenport and Elijah Coffey (trustees), both of Wilkes County, North Carolina, a one-acre plot of land in Wilkes County (now Caldwell County), "in consideration of the Christian Love and respect which he hath and bears toward all denominations of Professed Christians who believe in the doctrine of the Protestant religion and in the articles of the Christian faith hath bargained and conveyed in (trust) the lot of land hereinafter described and the Meeting house thereon as a place of public worship for all denominations above mentioned to the said William Davenport and Elijah Coffey, Trustees." The description of the lot is given by metes and bounds.

In the habendum of the deed this language appears: "And the said Reuben Coffey doth hereby bind himself his heirs and assigns well and truly to warrant and forever defend the aforesaid lot of land with its appurtenances unto them the said William Davenport and Elijah Coffey, in trust (for the purposes above mentioned) their heirs and assigns forever free and clear from all claims and incumbrances of him the said Reuben Coffey his heirs and assigns forever."

The above deed was duly recorded in Book 0, page 152, in the office of the Register of Deeds of Wilkes County, North Carolina.

William Davenport and Elijah Coffey, trustees, having died, and no successor trustees having been appointed, Edmund W. Jones of Caldwell County, on 16 April 1873, executed a deed, as the sole heir of one of the trustees, William Davenport, to William B. Coffey, the Clerk of the Baptist Church using the property at the time, and to his successors in office, "all the right, title, claim and interest which he the said Edmund W. Jones possesses in the said lot of ground * * *" This deed contained a recital of the purposes for which the original trust was created and was duly recorded on 12 March 1879 in the office of the Register of Deeds of Caldwell County.

The plaintiffs in this action filed an *ex parte* proceeding in the Superior Court of Caldwell County, before the Clerk, in 1946, in which, after reciting the contents of the Reuben Coffey deed, they alleged, among other things, that about six years prior thereto, certain persons, being the petitioners and others, finding that the former church buildings had passed into disuse by reason of their age, raised funds to build a church on the lot involved herein, such church to be used by all denominations in accordance with the express terms of Reuben Coffey, as defined in his deed to William Davenport and Elijah Coffey, trustees.

The petitioners prayed that they be named as trustees of the Happy Valley Gospel Church, for the purposes of carrying out the trust created and set up in the deed from the Reverend Reuben Coffey to William Davenport and Elijah Coffey in 1832.

On 23 October 1946, the Clerk of the Superior Court of Caldwell County purported to appoint these petitioners as trustees for the purposes set forth in the petition.

When the present cause came on for hearing, it was agreed that his Honor might hear the matter without a jury and render judgment on the verdict. No evidence was introduced other than the pleadings and the exhibits. The defendants moved for judgment as of nonsuit; motion denied; exception. The plaintiffs moved for judgment on the pleadings; motion allowed; exception.

The court below held that "the deed by Rev. Reuben Coffey to the grantees named as trustees creates a charitable or religious trust, and that the original grantee trustees having died, without the appointment of successors, it was the office of the Clerk of the Superior Court under the provisions of General Statutes of N. C. 36- to appoint the trustees to succeed the original trustees who had died." Whereupon, the court further held that, the judgment approving the petitioners as trustees "is valid, and must be so considered, unless and until a motion shall be made in the original special proceeding in which the judgment of appointment was made, to set the judgment aside"; that such order cannot be attacked collaterally.

From the judgment entered, the defendants appeal, assigning error.

Hal B. Adams, for plaintiff, appellees.
L. H. Wall, for defendant, appellants.

DENNY, J. It would seem that this appeal requires the determination of two questions: (1) Did the use of the words, "unto them the said William Davenport and Elijah Coffey, in trust (for the purposes above mentioned), their heirs and assigns forever," appearing in the habendum of the deed, clothe Edmund W. Jones, the sole heir of William Davenport, one of the trustees in the Reuben Coffey deed, with power to convey a good title to the premises involved? (2) Did the Clerk of the Superior Court of Caldwell County have the authority on 23 October 1946 to appoint the plaintiffs as trustees, pursuant to the request in the *ex parte* proceeding brought before him?

In our opinion, the use of the words, "their heirs and assigns," in the habendum of the deed executed by the Reverend Reuben Coffey on 19 October 1832, to William Davenport and Elijah Coffey, trustees, for the purposes therein expressed, did not make Edmund W. Jones a trustee of the property or give him the right to administer the trust, or to transfer the property to anyone else with power to carry out the purposes of the trust, unless directed to do so by a court of competent jurisdiction.

The death of original trustees, without any provision in the instrument creating the trust for the appointment of their successors, will not terminate or destroy a trust. *Lassiter v. Jones,* 215 N.C. 298, 1 S.E. 2d 845.

The general rule with respect to such trusts is succinctly stated in Scott on Trusts, Volume 1, section 101, page 752: "The principle that equity will not allow a trust to fail for want of a trustee is clearly established. Where a trust has once been created and the trustee dies, become insane or subject to some other legal incapacity, or resigns or is removed, the trust does not fail, but a new trustee will be appointed." *Benevolent Society v. Orrell,* 195 N.C. 405, 142 S.E. 493; *Lassiter v. Jones, supra; Cheshire v. First Presbyterian Church,* 221 N.C. 205, 19 S.E. 2d 855; 90 C.J.S., Trusts, Section 217 (a), page 151; 54 Am. Jur., Trusts, Section 122, page 106.

We hold that Edmund W. Jones, at most, held only the bare legal title impressed with the trust, but that he never possessed the right to administer the trust or to use the property for his own benefit. If indeed Edmund W. Jones was the sole heir of William Davenport, and Willian Davenport survived his co-trustee, then title vested in him pending appointment by civil action in the nature of a bill in equity in the superior court of a successor trustee or trustees. *Cameron v. Hicks,* 141 N.C. 21, 53 S.E. 728, 7 L.R.A. (NS) 407; Scott on Trusts, Volume 1, section 101.1, page 753.

It follows, therefore, that the deed from Edmund W. Jones, as sole heir of William Davenport, to William B. Coffey, Clerk of the Baptist Church, and his successors in office, which Baptist Church was using the property at the time, conveyed to Coffey no greater interest in the trust property than Jones held. Furthermore, nothing appears on this record to indicate that William B. Coffey or any of his successors asserted or have undertaken to assert any right, title or interest in the property that has ripened into a good title by adverse possession or otherwise. Hence, we hold that neither Coffey nor any of his successors in office had the legal or equitable right to administer the trust created by the Reuben Coffey deed.

As to the second question posed, it appears that on 23 October 1946, the clerk of the superior court had no power to appoint a successor trustee or trustees, except in cases where the former trustee or trustees had resigned. G.S. 36-9.

The provisions of G.S. 45-9 are not applicable to the facts involved herein. *Cheshire v. First Presbyterian Church, supra.* The powers granted in G.S. 36-21 are vested in the superior court and not in the respective clerks thereof.

Not until our General Assembly enacted Chapter 1255 of the Session Laws of 1953, was the clerk of the superior court given the power

to appoint a successor trustee or trustees in a situation like that under consideration. If follows, therefore, that the order of the Clerk of the Superior Court of Caldwell County, purporting to appoint these plaintiffs as trustees to carry out the purposes of the trust created in the Reuben Coffey deed of 1832, was a nullity.

Even so, the superior court, in a civil action, in the nature of a bill in equity, may appoint new trustees or appoint the plaintiffs as trustees, *nunc pro tunc (Cheshire v. First Presbyterian Church, supra)*, if the necessary parties are before the court, or trustees may be appointed by the Clerk of the Superior Court of Caldwell County, pursuant to the provisions of Chapter 1255 of the Session Laws of 1953, now codified as G.S. 36-18.1.

The controversy involved in this litigation should be terminated without further delay. Representative trustees should be appointed and should not come from any one particular group or denomination. The purposes of the trust and the limited value of the property involved would not seem to justify controversial litigation or any serious difficulty in procuring the appointment of trustees satisfactory to all interested parties.

In light of the conclusions we have reached, the motion for judgment as of nonsuit should have been sustained, and the ruling to the contrary is

Reversed.

CALDLAW, INC., A NORTH CAROLINA CORPORATION, BY S. W. HINSON, T/A CHARLOTTE HEATING & AIR CONDITIONING COMPANY v. HAROLD J. CALDWELL.

(Filed 16 April, 1958)

1. Actions § 8—

An action for breach of duty imposed by law arising upon a given state of facts is *ex delicto* and in tort and not *ex contractu* for a debt.

2. Corporations § 12—

A judgment creditor of a corporation whose judgment is unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation, G.S. 55-143, and an unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises *ex delicto* and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer.

3. Appeal and Error § 2—

Where it appears on the face of the record proper that the complaint fails to state a cause of action, the Supreme Court will take cognizance of such defect *ex mero motu* and dismiss the action.

APPEAL by plaintiff from *Pless, J.*, October 21, 1957 A Civil Term, MECKLENBURG SUPERIOR COURT.

Civil action instituted on January 26, 1956, in the name of Caldlaw, Inc., (a corporation) by Charlotte Heating & Air Conditioning Company, (a proprietorship) under the provisions of G.S. 55-143. At the time the action was brought the proprietorship had an unsatisfied judgment against the corporation whose charter had been suspended for failure to file reports with the Commissioner of Revenue. The sheriff was unable to find assets of the corporation sufficient to satisfy an execution on the judgment.

As a basis for the action, the judgment creditor alleged the defendant was vice president and one of the directors of the corporation and that he had dealt with the corporation and had used its credit and assets in completing the purchase of an airplane, having title thereto transferred from himself to the corporation, and upon completion of the sale, had the corporation transfer title to the ultimate purchaser to whom he sold at a profit. The corporation sustained no loss but the appellant contends it should have had all, or at least a part of the profits on the transaction. Paragraph 14 of the complaint alleged:

> "14. The defendant Harold J. Caldwell, by the acts hereinbefore alleged, violated his duty to the plaintiff corporation as its Vice President in that he effected a profit of $14,448.40 through the use of the corporation and its assets, and caused no part of the same to accrue to the benefit of the corporation, but instead caused all of said profit to accrue to his own use and benefit."

The plaintiff asked for judgment against the defendant for the amount of profit realized in the purchase and sale of the airplane; that the judgment in favor of the proprietorship be satisfied and a receiver be appointed for the corporation to administer the excess of such recovery.

The defendant, by answer, admitted that he was vice president and director of the corporation at the time of the purchase and sale of the airplane; that he transferred title to the corporation for its benefit with the consent and approval of all directors for the purpose of enhancing the corporation's credit, and that in doing so he acted in good faith. He especially denied any breach of trust or the use of the corporation's name or any of its funds for his own benefit. The defendant

moved for nonsuit at the close of the plaintiff's evidence, and renewed the motion at the close of all the evidence. The motion was denied.

Among the issues submitted to and answered by the jury was the following:

> "4. Did the defendant, in violation of his fiduciary duty as an officer of Caldlaw, Inc., take and appropriate to his own use a profit realized from the purchase and resale of said aircraft? "Answer: No."

The jury having answered Issue No. 4 in favor of the defendant, the judgment was entered therein that the plaintiff recover nothing. From the judgment comes this appeal.

Robinson, Jones & Hewson, for plaintiff, appellant
Porter B. Byrum, for defendant, appellee.

HIGGINS, J. At the threshold of this case we are confronted with the question whether a judgment creditor can maintain an action in the name of the judgment debtor corporation against one of its officers upon the ground that he committed a breach of trust in the use of corporate credit and assets for his own private gain. The plaintiff states in his brief: "This is not a creditor's bill but is brought under G.S. 55-143 in effect at the time of the transaction . . . to collect debts owed the corporation by a third person."

Assuming the appellant's allegations are true, and that the evidence is sufficient to establish them, the defendant's obligation to the corporation is *ex delicto,* in tort. It arises, if at all, by operation of law because of the fiduciary relationship of the parties. Is an undetermined, unlitigated cause of action for breach of trust a debt within the meaning of G.S. 55-143? " . . . he (sheriff) or the judgment creditor may elect to satisfy such execution . . . *out of any debts due the corporation;* and it is the duty of any agent or person having custody *of any evidence of such debt* to deliver it to the officer, . . . *with a transfer to the officer in writing,* . . . and notice to the debtor, shall be *a valid assignment thereof,* . . ." (emphasis added)

"Ordinarily, the term 'debt' does not include the obligation arising on account of a tort committed, although the term has been construed in certain connections as including a claim based on tort; and it has been held that when a claim in tort is reduced to, or liquidated by, a judgment it becomes fixed and certain, and is as much a debt as if it had been recovered on a promise. On the other hand, in some jurisdictions, the courts have made a distinction between liability *ex contractu* and liability *ex delicto,* or in tort, and have held that a claim arising from a wrong, or *ex delicto,* is not a debt even when it

has been reduced to judgment, the question depending largely upon the context in which the word is used." 26 C.J.S. 6.

An action based on a claim for unliquidated damages, until reduced to judgment liquidating the amount of the claim, is not a debt under this section (G.S. 28-61). *Suskin v. Maryland Trust Co.*, 214 N.C. 347, 199 S.E. 276.

In a stockholder's derivative suit to recover from the directors and officers the damages which they caused a corporation to suffer by unlawfully distributing a portion of the corporation's profits under a by-law alleged to be illegal, the action for unliquidated damages was not a debt within this section. *Healey v. Reynolds Tobacco Co.*, 48 F. Supp. 207.

"A debt is something due from one person, the debtor, to another called the creditor, and may be created by simple contract or evidenced by specialty or judgment according to the nature of the obligation giving rise to it." *Silk Co. v. Spinning Co.*, 154 N.C. 422, 70 S.E. 820.

"While breach of a duty imposed by statute or by express contract is *ex contractu*, the breach of duty imposed by law arising upon a given state of facts is a tort. *Hodges v. R.R.*, 105 N.C. 170. An action for damages for breach of duty in the latter case is an action for tort. *Bond v. Hilton*, 44 N.C. 308; *Williamson v. Dickens*, 27 N.C. 259." *Solomon v. Bates*, 118 N.C. 311, 24 S.E. 478.

Careful examination of G.S. 55-143 discloses the term "debts" is used in a restricted sense. Any agent or person *having custody* must deliver *any evidence of such debt* to the officer with a transfer to the officer in writing and notice to the creditor shall be *a valid assignment thereof*. Nothing in the statute gives authority to a creditor to maintain an action in the name of the corporation for the recovery of damages for tortious breach of trust by officers in their dealings with the corporation. If one creditor can maintain such an action, so can another, and one suit would not terminate or settle the full liability. A single creditor's interest would extend no further than the recovery of a sufficient amount to satisfy his judgment. The law provides a different method of settling the corporation's differences with its officers resulting from a breach of trust. Hence the complaint shows on its face that in no view of the case can the plaintiff maintain this action.

"When . . . the complaint fails to state a cause of action, that is a defect upon the face of the record proper, of which the Supreme Court on appeal will take notice, and when such defects appear the court will *ex mero motu* dismiss the action." *Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E. 2d 774; *Aiken v. Sanderford*, 236 N.C. 760, 73 S.E. 2d 911; *Dare County v. Mater*, 235 N.C. 179, 69 S.E. 2d 244; *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E. 2d 644.

"We have repeatedly held that where a complaint states no cause

of action such a defect is not waived by answering. The defendant may demur *ore tenus,* and, furthermore, this Court may take notice *ex mero motu* of the insufficiency of the complaint in this respect. If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action. *Garrison v. Williams,* 150 N.C. 674, 64 S.E. 783; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911, where the cases are cited." *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910.

This disposition makes it unnecessary to consider any other questions raised by the appeal. S. W. Hinson, t/a Charlotte Heating & Air Conditioning Co., will pay the costs of this appeal.

Action **Dismissed.**

FRANK W. DIXON, H. KEITH DIXON, AND MARGARET D. TUTTEROW, ADMINISTRATRIX OF THE ESTATE OF D. V. DIXON, DECEASED, V. VIRGINIA L. DIXON, INDIVIDUALLY, VIRGINIA L. DIXON, EXECUTRIX OF ERROL P. DIXON, DECEASED, AND FRANK GRIGGS.

(Filed 16 April, 1958)

1. Pleadings § 2—

As a general rule, if the causes of action alleged in the complaint are not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole, they may be joined in order to determine the whole controversy in one action. G.S. 1-123.

2. Same—

The complaint alleged that the heirs of an estate agreed that one of them should manage the estate for the benefit of all, that the trustee heir mishandled the properties, and in a purported sale of one of the pieces of realty, conveyed the property to a third person who reconveyed to the wife of the trustee heir. Plaintiff prayed for an accounting of the entire estate and that the deed in question be set aside or for a full accounting of the increases, rents and profits from such property. *Held:* The complaint is not demurrable for misjoinder of causes of action, since the complaint alleges a series of transactions forming one course of dealings tending to a single end.

APPEAL by plaintiffs from *Stevens, J.,* at September 1957 Term, of LENOIR.

Civil action for an accounting, heard upon demurrer to the complaint for that there is a misjoinder of causes of actions.

Plaintiffs alleged in their complaint substantially the following: That plaintiffs and defendants are devisees, or personal representatives of devisees as alleged, under the will of Mamie T. Dixon, who died testate in 1936; that plaintiff Frank W. Dixon and defendant Errol P. Dixon were the duly qualified executors of said estate; that following the closing of the administration of Mamie T. Dixon estate the heirs and devisees mutually agreed that Errol P. Dixon would continue to handle the funds and properties and other interests of said heirs in and to the said Mamie T. Dixon estate for and on behalf of all the said heirs or representatives; that defendant Errol P. Dixon lived in the town of Kinston where most of the properties were located, and the plaintiffs were non-residents; that thereafter and for a period of years the said Errol P. Dixon undertook to handle the properties as agent or trustee for the benefit of the heirs; and that it has come to the attention of the plaintiffs that Errol P. Dixon is mishandling the said properties and is not allotting to the plaintiffs their proportionate shares in the estate.

And it is further alleged in paragraph 6 of the complaint:

"6. That during the month of July 1948, and prior thereto, the heirs named aforesaid had agreed among themselves to a sale of certain properties lying and being in the City of Kinston, known as the 'Busy Bee Cafe Building' and known and more particularly described as follows: * * *.

"That these plaintiffs, and as they are advised, informed and believe and upon such information and belief allege, the other heirs of Mamie T. Dixon, authorized the said Errol P. Dixon as their representative and agent to negotiate for the sale of said properties on their behalf. That the said Errol P. Dixon reported to these plaintiffs and the others that he had a sale for said building for approximately $18,000, and the plaintiffs, together with the other heirs, agreed to sell at said figure and were later informed by the said Errol P. Dixon that he was unable to complete said sale, but could sell the properties to Speros Maroules. That the said heirs agreed to a sale to the said Speros Maroules at the original figure and executed a deed which was forwarded to them by the said Errol P. Dixon and returned the same to the possession of the said Errol P. Dixon as their agent and representative. That said deed to Speros Maroules was dated August 10, 1948 and was ultimately delivered and placed on record in Book 246, page 47 in the office of Register of Deeds of Lenoir County, but that the said instrument was not filed for record until October 9, 1948. That subsequently these plaintiffs were informed by the said Errol P. Dixon that he could only get $15,000 for said properties, and had sold the same, and it was not until years later that these plaintiffs discovered that said deed was not filed until October 9, 1948; and that they also then discovered that

the said Speros Maroules and wife had, by deed also dated August 10, 1948, re-conveyed the same Busy Bee Cafe properties to Virginia Lee Dixon, the wife of Errol P. Dixon, and one of the defendants herein. That the said Virginia Lee Dixon was at all times aware of the transactions aforesaid and of the circumstances and conditions under which the same was to be sold, and knew of the relationship between these parties. That the sale of said properties by said Errol P. Dixon to Speros Maroules and the reconveyance of the properties to the said Virginia Lee Dixon was contrary to the understanding and intention of these plaintiffs, and the others having an interest therein. That shortly prior to, or at the time of the purchase of said properties by the said Virginia Lee Dixon, the said Errol P. Dixon withdrew or used from the funds of the said Mamie T. Dixon estate, the sum of $6,000 which formed and constituted a part of the purchase price of said properties, when conveyed to the said Virginia Lee Dixon. That the said Errol P. Dixon was without authcrization or right to so utilize said funds, and that the same were used without the consent or permission of the other heirs and were, in fact, the funds and moneys of these plaintiffs and others for which they are entitled to of all of the proceeds, rents, profits, and increase resulting from said transactions. That these plaintiffs, and as the plaintiffs are advised, informed and believe and upon such information and belief allege, they and the other heirs of Mamie T. Dixon are in fact and in equity the owners of a proportionate interest in said Busy Bee Cafe to the extent of the amount of their funds which were utilized in the purchase thereof, all as represented in said $6,000 so withdrawn from the estate funds and used for such purposes. That these plaintiffs and the other heirs are entitled to an accounting on said properties for all rents and profits therefrom and if said plaintiffs and the other heirs are not in fact and in law entitled to an interest in said properties as aforesaid, that they are entitled to have said $6,000 repaid into the funds of said estate with interest thereon from the date of its removal, and are entitled to have determined and paid into said estate the amount of any increase in valuation of said properties from the date of its purchase until said amount is repaid in proporation to the amount which said $6,000 represents as part of the purchase price therefor."

The plaintiffs further allege that they have repeatedly asked for an accounting by defendant Errol P. Dixon and that all the necessary books and information are in his hands.

"Wherefore, plaintiffs pray:

"(1) For an order issued by this court to the said Errol P. Dixon to produce at the trial of this cause all records, accounts, and inventories of said estate;

"(2) For a complete and full accounting to be made of said Mamie T. Dixon Estate;

"(3) For a judgment against the defendant Errol P. Dixon for such money as may be shown to be due by him to the plaintiffs, and for judgment declaring such interest as the plaintiffs may show themselves to have in the Busy Bee Cafe Building properties, and transferring to them the legal record title thereto as their interest may appear, or for a full accounting of the increases, rents and profits on said properties since the date of its purchase, and for the reimbursement in payment to these plaintiffs by the defendants of such share thereof as they may show themselves entitled to; and

"(4) For such other and further relief as the plaintiffs may show themselves entitled to upon the whole cause."

Defendant Errol P. Dixon, having died testate naming Virginia L. Dixon as executrix of his will, and she, having qualified as such, was made defendant in this action to the end that a complete determination of the controversy can be made.

Thereupon Virginia L. Dixon, Executrix of Errol P. Dixon, deceased, demurred to the complaint for that: "1. There is a misjoinder of causes of action in that the complaint attempts to join (a) an action for setting aside a deed with (b) an action for an accounting for rents and profits due by an agent in the handling of real property. 2. The two said causes of action are separable and severable."

The cause being heard upon the demurrer, it was sustained by the court. Plaintiffs excepted thereto, and appeal to Supreme Court and assign error.

Wallace & Wallace, White & Aycock, D. L. Ward, for plaintiffs, appellants.

Dawson & Cowper, Marion A. Parrott, for defendants, appellees.

WINBORNE, C. J.: This is the determinative question on this appeal: Does the complaint in this action contain a misjoinder of causes of action?

In the light of applicable statute, G.S. 1-123, as interpreted and applied by this Court, the answer is "No." *Bedsole v. Monroe,* 40 N.C. 313; *Fisher v. Trust Co.,* 138 N.C. 224, 50 S.E. 659; *Chemical Co. v. Floyd,* 158 N.C. 455, 74 S.E. 465; *Bundy v. Marsh,* 205 N.C. 768, 172 S.E. 353; *Barkley v. Realty Co.,* 211 N.C. 540, 191 S.E. 3; *Bellman v. Bissette,* 222 N.C. 72, 21 S.E. 2d 896; *Owen v. Hines,* 227 N.C. 236, 41 S.E. 2d 739; *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832.

The general rule, deducible from these decisions of this Court pertaining to the statute, G.S. 1-123, is that, if the causes be not entirely distinct and unconnected, if they arise out of one and the same trans-

action, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole, they may be joined in order to determine the whole controversy in one action. See *Owen v. Hines, supra.*

Testing the allegations of the complaint in the instant case by this rule, the series of transactions alleged form one dealing, and a connected story of the whole is told—all tending to one end—an accounting by Errol P. Dixon as agent or trustee for the heirs in the handling of the properties entrusted to him for their and his benefit.

Hence the judgment sustaining the demurrer must be, and it is hereby

Reversed.

LOLA STEELMAN BATTS v. JOHN NATHANIEL BATTS.

(Filed 16 April, 1958)

1. Pleadings § 30—

A motion to strike irrelevant or redundant matter from a pleading is made as a matter of right when made in apt time.

2. Pleadings § 31—

The test upon motion to strike allegations from a pleading on the ground of irrelevancy or redundancy is whether the pleader has the right to introduce in evidence the facts to which the allegations relate.

3. Appeal and Error § 47—

The denial of a motion to strike, even though the motion is made in apt time, will not be disturbed on appeal unless the matter objected to is irrelevant or redundant and unless its retention in the pleading will cause harm or injustice to the moving party.

4. Divorce and Alimony § 12—

Where, in an action for alimony without divorce under G.S. 50-16, the complaint contains allegations of indignities, cruelty or abandonment sufficient to sustain an order for subsistence *pendente lite*, demurrer entered upon the hearing of plaintiff's application for reasonable subsistence and counsel fees pending the trial, is properly overruled.

5. Divorce and Alimony § 5c—

Where, in an action for alimony without divorce, there are allegations of indignities and cruel treatment in a chain of connected events for a period of some eleven years subsequent to the marriage and again from the period beginning some thirty-five years subsequent to the marriage and lasting for the three years prior to the institution of the action, motion to strike the allegations relating to the prior period should be allowed as being too remote in point of time to be material or relevant to the controversy, and further the cause is remanded with direction that plaintiff be granted reasonable time to redraft the complaint to state the cause of action in a plain and concise manner. G.S. 1-122.

BATTS *v.* BATTS.

APPEAL by defendant from *Burgwyn, Emergency J.*, at December 1957 Term, of NASH.

Civil action instituted 4 September, 1957, for alimony without divorce under G.S. 50-16, heard upon application of plaintiff before Judge holding a term of Superior Court, for allowance for reasonable subsistence and counsel fees pending the trial and final determination of the issues involved in the action.

Plaintiff, in her "petition and affidavit," containing forty-five paragraphs, and covering twenty mimeographed pages of typewriting, alleges acts of cruelty and indignities inflicted upon her by defendant, her husband, dating back as far as 1918, the year she and he were married. In addition she alleged coercion and fraud imposed upon her by defendant compelling her to transfer to him her interest in certain property owned jointly by them— all of which she alleges and contends rendered her condition intolerable and life burdensome. In her prayer for relief she prays only for subsistence *pendente lite* and counsel fees.

Defendant in apt time moved to strike every material allegation of the petition on the ground of irrelevancy, redundancy, and immateriality, in that they were either too remote in point of time, or they concerned alleged irrelevant property dispute between the parties.

Defendant, in addition, demurred to the petition on the ground that the allegations of it failed to state a cause of action, and on ground of misjoinder of causes of action.

Upon hearing, the court overruled the demurrer, sustained a portion of the matters sought to be stricken, and overruled other parts. And, the court, "finding for the purpose of this application, after hearing the proof offered by both sides, that the material facts alleged in the petition and affidavit are true, and being of opinion that in law plaintiff is entitled to such allotment," ordered "that pending the trial and final determination of the issues involved in this action, defendant shall pay into the office of the Clerk of Superior Court of Nash County for the use and subsistence of the plaintiff the sum of $300.00 per month, and the further sum of $400.00" attorney's fee, "which sums are found by the court to be a reasonable allotment for such subsistence and counsel fees."

Defendant excepted (1) to judgment overruling defendant's demurrer, (2) to ruling of the court to strike in each and every case in which the court overruled the motion to strike, and (3) to order allowing plaintiff alimony *pendente lite*, and attorney's fees.

Defendant also gave notice that he would apply to Supreme Court for *certiorari* within the time and in manner prescribed by the Rules of Court as to rulings on motions to strike.

And defendant also appeals to Supreme Court, and assigns error.

Cooley & May, for plaintiff, appellee.

L. L. Davenport, John M. King, I. T. Valentine, Jr., for defendant, appellant.

WINBORNE, C. J.: The motion to strike for irrelevancy and redundancy is governed by G.S. 1-153. It provides, in pertinent part, that "if irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby" and "when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment * * *." Here the defendant, having made motion to strike in apt time, it is made as a matter of right. See *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333, and cases cited.

"The test is, does the pleader have a right to introduce in evidence the facts to which the allegation relates? If so, the motion should be denied; if not, it should be allowed." *Lutz Industries v. Dixie Home Stores, supra,* citing *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. However, "the denial of the motion to strike, made in apt time, 'is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm, or injustice to the moving party.' " *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185.

In the light of these principles, a perusal of the complaint in instant case discloses that acts complained of began shortly after the marriage of plaintiff and defendant in 1919, and culminated in this action in 1957. The first allegation of cruel treatment and rendering of indignities in point of time was in 1919; then in 1930s; then 1954; then 1955; and finally 1957. There is, thus, a connected chain of events from 1919 to 1957 with the exception of a period of years between the 1930s and 1954 when there are no allegations of specific acts. However there are allegations of general abuse with no dates specified scattered throughout the complaint.

So there seems to be sufficient allegation of indignities, cruelty, or abandonment from 1954 to 1957 upon which the judge could base his judgment of subsistence *pendente lite.* Hence the demurrer was properly overruled.

We are of opinion, however, that the allegations as to acts from 1919 to 1930s are too remote to be material and relevant to this controversy. And, hence, they should be stricken from the complaint. Indeed, this Court feels constrained to reverse the rulings of the judge by which such allegations are retained in the pleading for the final hearing, and "to remand the cause with direction that plaintiff be granted a reasonable time in which to reform and redraft her com-

plaint," so as to contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition" as required by G.S. 1-122. See *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615. *Daniel v. Gardner, supra.*

Nevertheless, as the hearing was before the judge on application for allowance of subsistence and counsel fees pending final hearing, the pleading is sufficient to support the allowance of subsistence and counsel fees *pendente lite.* See *Cameron v. Cameron,* 232 N.C. 686, 61 S.E. 2d 913.

Modified and Affirmed.

STATE v. ROBERT (BOB) KEY.

(Filed 16 April, 1958)

1. Bastards § 6—

The evidence in this prosecution of defendant for willful failure to provide support for his illegitimate child *is held* sufficient to take the case to the jury, and testimony of the mother of the prosecutrix was admissible for the purpose of corroboration.

2. Bastards § 7—

In this prosecution of defendant for willful failure to support his illegitimate child, an instruction that the jury might take judicial notice that the normal period of gestation is seven, eight, nine, nine and one-half, or ten months, *is held* not prejudicial in view of the evidence in this case.

APPEAL by defendant from *Craven, S. J.,* December 1957 Term, WILKES SUPERIOR COURT.

Criminal prosecution upon a bill of indictment charging the defendant with the unlawful and willful failure to provide support for his illegitimate child.

The prosecuting witness testified the defendant came to the school where she was a pupil, called for her about one o'clock in the afternoon. She left with him in his pickup truck. During the hour she was out he had intercourse with her, as a result of which she became pregnant; and that she never had intercourse with any other person. She first stated the act took place November 1, 1956, then changed to November 1, 1955. She later stated the act took place *in November, 1955.* The child was born August 22, 1956. On the date of the trial, 1957, the prosecutrix was 18 years of age—the defendant a married man with two children. There was evidence that demand had been made of the defendant to support the child and that the demand had been refused.

The defendant testified in his own behalf. He denied having inter-

course with the prosecutrix. However, he admitted that he gave her a wrist watch for Christmas, 1955, and that he furnished some provisions for the family at that time. A boy 15 years of age testified that in November, 1955, he saw the driver of the school bus in the act of intercourse with the prosecutrix. Corroborating evidence was offered both by the State and the defendant. From a verdict of guilty and judgment thereon, the defendant appealed.

George B. Patton, Attorney General, Claude L. Love, Assistant Attorney General, for the State.

Julius A. Rousseau, Jr., H. J. Whicker, Sr., for defendant, appellant.

HIGGINS, J. The evidence made out a case for the jury. Motions for a directed verdict were properly denied. The evidence of the mother of the prosecuting witness was admissible for purpose of corroboration.

The defendant's assignment of error No. 10 involves the following part of the court's charge:

> "If you find from the evidence and beyond a reasonable doubt that Robert Key had sexual intercourse with this girl, . . . about the first of November, or thereabouts, and within a reasonable period of gestation, that is, within approximately seven, eight, or nine months and nine and a half or ten months prior to the birth of the baby (which period of time the members of the jury and the court can judicially notice is the normal period of gestation), . . . find that he was the father of the child and that no other person was, (it, of course, being impossible for two men to be the father of the same child) and if you further find that being the father of the child that he subsequently, . . . failed and refused to provide adequate support and gave only $5.00 or some such amount, then I charge you it would be your duty, if you find all of those to be the facts, to return a verdict of guilty as charged.
>
> "If, however, you find that he was not the father of the child, or if upon considering all the evidence you have a reasonable doubt as to whether he was the father of the child, it would be your duty to give him the benefit of that doubt; and . . . return a verdict of acquittal or not guilty; or . . . if you find that he is the father of the child, but . . . did not willfully, intentionally, refuse to support the child, then, likewise, it would be your duty, giving him the benefit of the doubt, to return a verdict of acquittal or not guilty."

The defendant especially objects to that part of the charge which states in substance that the court and jury may judicially notice that the normal period of gestation is seven, eight, nine, nine and one-half,

or ten months. In support of the objection, the defendant cites the case of *State v. Forte*, 222 N.C. 537, 23 S.E. 2d 842; "And it is a matter of common knowledge that the term of pregnancy is ten lunar months, or 280 days."

The evidence is to the effect the defendant had intercourse with the prosecutrix one time. She fixed the date of this act as November 1, 1956, immediately changed to November 1, 1955, and, another time in her testimony said the act occurred in November, 1955. She testified that was her only act of intercourse with any person. The defendant testified that he never, at any time, had intercourse with the prosecuting witness.

The jury resolved the sharply conflicting evidence against the defendant. No doubt, his admission on cross-examination weighed heavily against him and induced the jury to find for the State. So unusual it is for a married man to go to the home of a 16-year-old girl whom he had seen only twice before to present her a wrist watch as a Christmas present that the jury failed to believe his story.

In view of the evidence in the case, the court's charge is not deemed prejudicial. The record fails to disclose any valid reason why the verdict and judgment should be disturbed.

No Error.

NAN MATTOX HERNDON v. JACK DENNIS HERNDON.

(Filed 16 April, 1958)

Divorce and Alimony § 12: Judges § 2a—

The resident judge of the district has the jurisdiction to hear and determine motion for reasonable subsistence and counsel fees *pendente lite* in an action for alimony without divorce. G.S. 50-16.

APPEAL by defendant from *Bickett, J.*, in Chambers, October 22, 1957, at Raleigh, County of WAKE.

Civil action for allotment of subsistence and support without divorce, and for reasonable subsistence and counsel fees *pendente lite*.

Upon a hearing the resident judge of the Superior Court, Tenth Judicial District, at Raleigh, N. C., finding from the pleadings and affidavits that plaintiff and defendant were married on 28 December, 1956; that defendant separated himself from plaintiff on 22 July, 1957, and that he has since failed to provide plaintiff with necessary subsistence according to his means and station in life, entered an order for subsistence and counsel fees, and retained the cause subject to further orders of the court.

Defendant excepted thereto, and appeals to Supreme Court and assigns error.

Charles M. Griwn, J. Harold Griffin, for plaintiff, appellee.
Emanuel & Emanuel, for defendant, appellant.

PER CURIAM: The only assignment of error presented on this appeal is based upon exception to the order entered, and to the signing thereof.

The record discloses that this action was instituted, and has been prosecuted thus far, in accordance with provisions of G.S. 50-16. Hence the resident judge of Superior Court was empowered to make the order from which appeal is taken. See *Olham v. Oldham,* 225 N.C. 476 35 S.E. 2d 332. Therefore, the order is

Affirmed.

R. T. CAUDLE v. HERBERT E. SWANSON AND WIFE, ELIZABETH L. SWANSON.

(Filed 30 April, 1958)

1. Evidence § 46d—

Witnesses with special practical knowledge of the cost of materials and labor in the construction of houses of like value and who had seen and are familiar with the house constructed for defendants by plaintiff, may testify, upon the court's finding that they are experts, as to their opinion of the reasonable cost of the construction of defendants' house, their testimony being based on facts known and observed by them and not upon hypothetical questions.

2. Evidence § 49—

Testimony of experts will not be admitted except in case of necessity where the proper understanding of the facts in issue requires scientific or specialized knowledge or experience, but when such testimony is necessary and is properly admitted, objection thereto on the ground that it invades the province of the jury is untenable. The distinction is noted in cases of opinion evidence by nonexpert witnesses.

3. Trial § 49½—

Where the jury answers the issues upon sharply conflicting evidence and the verdict is supported by competent evidence and there is nothing to show that the amount awarded was the result of bias or prejudice, the trial court may refuse motions to set aside the verdict for inadequate award and on the ground that the verdict was not supported by sufficient evidence, and, upon its opinion that the award is inadequate, increase the amount of the award with consent of defendants, the motions being

addressed to the discretion of the court and there being nothing in the record tending to show abuse of discretion.

4. Judgments § 17b: Appeal and Error § 20—

Ordinarily, the judgment must follow the verdict. Nevertheless, the trial court has the power, with the consent of defendants, to increase the amount of the verdict, and such additur is not prejudicial to plaintiff when plaintiff thus receives more than awarded by the jury and an amount not less than a reasonable jury might award him on the sharply conflicting evidence. The additur does not infringe plaintiff's right to trial by jury as guaranteed to him by Art. I, Sec. 19, of the North Carolina Constitution.

5. Constitutional Law § 4—

A party may waive his right to trial by jury.

6. Constitutional Law § 23—

The provision of the 7th Amendment to the Constitution of the United States guaranteeing the right of trial by jury applies only to the federal courts and not to the state courts.

APPEAL by plaintiff from *Preyer, J.*, 23 September Term 1957 of FORSYTH.

Civil action to recover upon an alleged oral contract to construct a dwelling house upon a cost plus basis.

Plaintiff's evidence in support of the allegations of his complaint shows the following facts: Plaintiff, a resident of Forsyth County, has been constructing residential and commercial buildings for 15 years. In March 1956 the defendants, who are husband and wife and residents of Forsyth County, had plans for the construction of a home, and contacted plaintiff as to building it. After preliminary conversations plaintiff and the defendants entered into an oral agreement, whereby plaintiff was to furnish the materials and labor, and build the home according to the defendants' plans, excluding the digging of a well, and the furnishing and installing of plumbing fixtures, heating and bathroom tile, for the sum of $800.00, plus the actual cost of the construction of the home in materials and labor, and plus $1.75 an hour for plaintiff's labor on the home, which was to be added to its cost. During the course of construction the defendants ordered a number of changes made in their plans, which plaintiff obeyed. The building of the home was completed about 15 September 1956. On 20 December 1956 plaintiff furnished the defendants a written itemized statement of account showing that the cost of materials and labor for the construction of their home, plus $800.00 for his services, was $15,091.99, and that the defendants had paid on the account $4,700.00. This account did not include any charge for plumbing fixtures, heating and bathroom tile. The defendants refused to pay the account, and plaintiff filed notices and claims for materialmen's and laborers' liens.

The defendants' evidence in support of the allegations of their answer shows these facts: Plaintiff and the defendants entered into an oral agreement that plaintiff would furnish the materials and labor and build a home for them according to their plans at a cost not to exceed $13,000.00, plus $800.00 for supervising the construction. Nothing was said by the parties when the contract was entered into in respect to who would arrange for the purchase of plumbing fixtures, a furnace for the home and bathroom tile. The defendants paid for the plumbing fixtures in their home $1,289.41, for the tile work $855.00, and for heating and guttering $955.00, and paid plaintiff on account $4,700.00, and they contend that they were indebted to plaintiff at the most in the sum of $13,800.00, less these amounts.

The defendants further alleged in their answer that if it should be found that the contract between them and the plaintiff had no definite limitation as to the cost of the construction of their home, that the parties contracted in contemplation of law that the cost of the home would be only those costs reasonably necessary to be incurred in its construction. The defendants offered evidence to show that during the construction of their home they made no change in their plans, and that the fair cost of its construction as it stood when completed was from $13,000.00 to $14,500.00, exclusive of any fee to the builder.

The defendants in their answer admitted "that as much as $5,991.33 may be due the plaintiff herein, which sum the defendants are prepared and have heretofore offered to pay and now offer to pay."

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

> "1. Did the plaintiff enter into an oral agreement with the defendants Swanson to construct a house on a cost plus basis, as alleged in the Complaint? Answer: NO.
> "2. What amount, if any, is the plaintiff entitled to recover of the defendants Swanson? Answer: $6,192.00."

After the verdict had been accepted by the court, the judge, with the consent of the defendants, added to the recovery $500.00, and signed a judgment that the plaintiff have and recover from the defendants the sum of $6,692.00, together with the costs of this action, and the cost of filing plaintiff's liens for labor and materials.

From the judgment entered plaintiff appeals to this Court.

Clyde C. Randolph, Jr., for plaintiff, appellant.
Eugene H. Phillips for defendants, appellees.

PARKER, J. There is no exception to the issues submitted to the

jury. The jury found by their answer to the first issue that the plaintiff had no contract as contended for by him to build the defendants' home. The trial court in its charge to the jury on the second issue, which is what amount, if any, is the plaintiff entitled to recover of the defendants, declared and explained the law arising on the evidence if the jury found that the contract between the parties was as contended for by the plaintiff, did likewise if the jury found that the contract between the parties was as contended for by the defendants, and then instructed the jury that if they found "by the greater weight of the evidence that there was no meeting of the minds on either of the two types of contract alleged, why then Mr. Caudle would be entitled to an amount which you find it was reasonably worth to build such a house as this one about which this suit was brought." To this part of the charge plaintiff has no exception.

Edward Shelton, a witness for the defendants, testified in substance as follows: For ten years he has been continuously engaged in Forsyth County in constructing homes of a value between $12,000.00 and $18,000.00. During this time it has been necessary for him to keep informed as to the costs of materials and labor in building various types of homes, and he is familiar with the costs of such construction for the year 1956. He saw the defendants' home while it was being built, and did some masonry work on it. He saw and went through their home after it was completed. At this point in his testimony the trial court held that he was an expert in the construction of homes of a value less than $20,000.00. He was then asked if he had an opinion satisfactory to himself, based upon his examination of the defendants' home, and upon his knowledge and experience in building matters, as to the fair and reasonable cost of constructing the defendants' home, including everything that is in it, exclusive of the fee to the builder, during the year 1956. Over the objection and exception of the plaintiff, he was permitted to answer that he had such an opinion. He was then asked what his opinion was, and over the objection and exception of the plaintiff he was permitted to answer he thought it could be built for $13,000.00 to $14,000.00 construction costs. Plaintiff assigns as error the admission of this evidence over his objection and exception.

Paul Flynt, another witness for the defendants, testified that he had been a building contractor for 8½ years, that in 1956 he was primarily engaged in building homes in Forsyth County, was acquainted with the costs of labor and materials going into home construction during that year, and had examined the defendants' home and had looked at the plans. The court held that he was an expert in the construction of residential dwellings. He was then asked if he had an opinion satisfactory to himself, based upon his examination of the defendants' home, and upon his knowledge and experience as a builder, as to the fair

and reasonable cost of constructing the home in its entirety in the year 1956, exclusive of any fee to the builder. Over the objection and exception of the plaintiff he was permitted to answer that he had such an opinion. He was then asked what his opinion was, and over the objection and exception of plaintiff he was permitted to answer $14,000.00 to $14,500.00, exclusive of any fees or profits to the builder. Plaintiff assigns as error the admission of this evidence over his objection and exception.

Plaintiff excepted to the ruling of the court holding that Edward Shelton is an expert in the construction of homes of a value less than $20,000.00. However, he states in his brief that he has abandoned his assignment of error based on the exception to such ruling. Plaintiff did not except to the court's ruling holding that Paul Flynt is an expert in the construction of residential dwellings.

"A witness experienced in a building trade, and who is shown to have had sufficient opportunity for observation, and to be adequately qualified to form a judgment as to the matter of which he undertakes to speak, may testify as to his inferences or judgment as to matters in his particular department. The statement may relate to various matters connected with the construction, condition, or repair of buildings, such as the cost of a house or other building. . . ." 32 C.J.S., Evidence, pp. 326-327. See *Ibid*, p. 129.

This is said in 20 Am. Jur., Evidence, Sec. 833: "The determination of the cost of certain repairs or construction is necessarily a matter of estimate by a person qualified in the class of work in question and is consequently a proper subject of opinion testimony, when given by properly qualified witnesses. Builders, contractors, or architects are competent witnesses on questions of the cost of construction or repair of buildings."

In *Younce v. Lumber Co.*, 155 N.C. 239, 71 S.E. 329, plaintiff's alleged damages were measured by him between the contract price of sawing the timber into lumber, and what he contended was the cost of doing so. The defendant offered, as a witness on the cost of doing the work, a man who had 18 or 20 years of experience in the sawmill business, and was so engaged in 1906 and 1907, the year in which the breach of agreement is alleged to have occurred, and had manufactured lumber in some smooth and some rough land in Rutherford County. The trial court excluded this evidence. In awarding a new trial this Court said: "We think his Honor erred in excluding the evidence. It is true the witness had never been on this particular land, but he had expert knowledge of the cost of sawing and manufacturing lumber upon both smooth and mountainous lands in Rutherford County. It was proper for him to state the average cost of sawing and manufactur-

ing lumber as a fact in his experience to be considered by the jury and given such weight as in their opinion it was entitled to."

In *Sikes v. Paine,* 32 N.C. 280, the Court said: "On questions of science, or trade, and others of a similar character, persons of skill are permitted to give their opinions in evidence. . . . In all these cases of science and skill the opinion of the witness is admitted as evidence, upon the ground that he is conversant with the business to which he is called to testify, and has, therefore, peculiar knowledge concerning it."

In *Denson v. Acker,* 201 Ala. 300, 78 So. 76, plaintiff sued the defendant for the price or value of repairs done upon defendant's house. Defendant denied that there had been any agreement as to the price of the work to be done, and contended that he had paid in part and in other part tendered to plaintiff the full value of the repairs. From a judgment for plaintiff, the defendant appealed. In its opinion the Court said: "In view of defendant's contention that he had no express contract with plaintiff in regard to the work done, the witness Mann, a contractor of long experience and acquainted with values in his line in the neighborhood where the work was done, was competent to give his opinion as to the reasonable value of the work and material contributed by plaintiff to the repair of defendant's house, and this, in substance, is what the witness was allowed to testify."

In *Borough of Atglen v. Pennsylvania Public U. Com'n.,* 174 Pa. Super. 149, 100 A. 2d 138, it is said: "The testimony of properly qualified experts as to the probable cost of construction is competent evidence and, if believed, may afford substantial basis for a judgment."

The evidence shows that Edward Shelton and Paul Flynt had special knowledge of the cost of materials and labor for the construction of a home of the value of defendants' home in Forsyth County during the year 1956. Their knowledge of the cost of labor in constructing a home must necessarily be based upon the number of hours of labor that would be required to build such a home. This was a subject outside the ordinary realm of human experience. The only practical method of showing the cost of construction of defendants' home was by means of opinion evidence by persons of specialized knowledge or experience in that particular business. Both witnesses had seen and were familiar with defendants' home after it was completed. Their opinion as to the cost of its construction was based on facts known and observed by them. They were not answering hypothetical questions. The court properly allowed them to express their opinion as to the cost of construction of defendants' home to aid the jury in weighing and considering the evidence in the final determination of the case, because they possessed on this subject a superior knowledge and experience to co-ordinate and weigh the facts within their own

knowledge so as to draw the correct and proper opinion therefrom as to the cost of construction, as one without such special knowledge could not.

Plaintiff contends this evidence should have been rejected because it invades the province of the jury. This Court in *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818, quotes this language from 20 Am. Jur., p. 653: " 'Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of facts in issue requires some explanation of those facts or some deduction therefrom by persons who have scientific or specialized knowledge or experience. Such testimony does, in a broad general sense, encroach upon the province of the jury; and when it relates to matters directly in issue, it should not be admitted unless its admission is demanded by the necessities of the individual case.' "

In Stansbury's North Carolina Evidence, p. 238, it is said: "Exceptions to the rule are recognized where the question is one of mental capacity or condition, habits of temperance or the reverse, solvency or insolvency, identity, handwriting or value. Here opinion evidence is admitted or excluded without regard to whether it touches the very issue for the jury." *Wood v. Ins. Co.*, 243 N.C. 158, 90 S.E. 2d 310, relied on by the plaintiff, is distinguishable. The opinion evidence held there to be inadmissible was that of non-expert witnesses. The assignments of error as to the admission in evidence of the opinion of Edward Shelton and Paul Flynt as to the cost of construction of the defendants' home are overruled.

Plaintiff's sole assignment of error to the charge is that the court instructed the jury that defendants offered the evidence of Paul Flynt and Edward Shelton "in support of their contention, that the amount claimed by the plaintiff was too high." This assignment of error is overruled.

The trial court denied plaintiff's motions to set aside the verdict as being contrary to the greater weight of the evidence, and as a matter of law for the reason that there is insufficient competent evidence to support the verdict, and plaintiff excepted. The judgment then recites "and the court being of the opinion that the amount of the damages as awarded by the jury are inadequate, and that judgment should be rendered in the plaintiff's favor in the additional sum of $500.00, and the defendants having consented thereto, . . . it is ordered . . . that the plaintiff recover of the defendants . . . the sum of $6,692.00, together with the costs . . . ."

The evidence offered by plaintiff and the defendants was in sharp conflict. There is sufficient competent evidence to support the verdict. Plaintiff's motions to set aside the verdict for the reasons assigned were addressed to the sound discretion of the trial judge, and in the

absence of a showing of abuse of discretion by the trial judge his refusal of such motions will not be disturbed on appeal. G.S. 1-207; *Frye & Sons, Inc. v. Francis,* 242 N.C. 107, 86 S.E. 2d 790; *Walston v. Greene,* 246 N.C. 617, 99 S.E. 2d 805. There is a vital distinction between mere inadequacy in a verdict when the evidence is in sharp conflict, and such inadequacy as would indicate a verdict was the result of bias and prejudice. And we must bear in mind that the trial judge participated in the trial, saw and heard the witnesses, and knew what took place, much of which cannot be preserved in any record. While the judgment recites the trial court was of opinion that the amount of damages awarded was inadequate, he did not exercise the power of discretion vested in him to set the verdict aside on that ground, and, in our opinion, it cannot be said that his refusal was an abuse of his discretion.

Plaintiff excepted to the judgment, and contends that the trial judge in signing a judgment, that he recover from the defendants, with their consent, $500.00 more than the jury awarded him in answer to the second issue, deprived him of his right to a jury trial as guaranteed to him by Article I, Sec. 19, of the North Carolina Constitution.

This Court said in *Cohoon v. Cooper,* 186 N.C. 26, 118 S.E. 834: "Indeed, the court had the power to reduce the verdict of its own motion so long as the plaintiff, the party in whose favor it was rendered, did not object." This Court held in *Hyatt v. McCoy,* 194 N.C. 760, 140 S.E. 807, that the judge could not reduce a verdict in favor of plaintiff from $10,000.00 to $8,000.00 without his consent. See *Isley v. Bridge Co.,* 143 N.C. 51, 55 S.E. 416. Such remittitur practice with the plaintiff's consent has been followed for many years by the courts in this State. It would seem that such procedure does not deprive a defendant of his constitutional right to have a jury assess the damages he must pay, because he will pay less under such procedure than the amount which a jury awarded by its verdict against him, and he will pay no more than a reasonable jury might award against him.

In the instant case the trial judge in his discretion refused to set the verdict aside. By the additur procedure adopted, the plaintiff, by consent of the defendants, receives no less, but in fact more, than the jury awarded him by its verdict, and he receives no less than a reasonable jury might award him on the sharply conflicting evidence in the case.

Under the remittitur procedure, part of what the jury awarded the plaintiff is taken away from him with his consent. Under the additur practice, the whole of what the jury awarded is upheld, and something in addition is given to the plaintiff, with the defendants' consent, and the departure from what the jury actually did is consented to by the party prejudiced by such departure.

If the arguments used to uphold the remittitur practice, as not depriving a defendant of his constitutional right to a jury trial are sound, then corresponding arguments used to sustain the additur procedure would also seem to be sound. To say that the arguments upholding the remittitur practice are sound, while the corresponding arguments advanced to sustain the additur procedure are not sound, necessarily leads to the absurd conclusion that a plaintiff has a greater right to a jury verdict, determining the amount of his recovery, than a defendant. It may be suggested that the additur practice deprives a defendant of his constitutional right to a jury trial. The obvious answer to that contention is that the defendant can waive that right, which he does when he consents to pay the additur, just as a plaintiff waives his constitutional right, when he consents, to a remittitur. In this State the parties to a civil action have a right to waive a jury trial. North Carolina Constitution, Art. IV, Sec. 13; G.S. 1-184; *Bartlett v. Hopkins*, 235 N.C. 165, 69 S.E. 2d 236; *Keith v. Silvia*, 233 N.C. 328, 64 S.E. 2d 178. See 11 Am. Jur., Cons. Law, Sec. 119.

The cases seem to be in conflict on the question of the power of the trial court to increase the amount of the verdict over either party's refusal to consent to the additur. In an annotation in 56 A.L.R. 2d, pp. 221-226, are set forth cases from many jurisdictions holding that under the particular facts involved that the trial court did not have the power to increase the verdict over either party's refusal to consent to the additur. In the same annotation, pp. 226-231, are set forth many cases from many jurisdictions holding that under the circumstances involved the trial court could increase the amount of the verdict.

In *Winn v. Finch*, 171 N.C. 272, 88 S.E. 332, it was held that in a buyer's action for damages for breach of warranty in the sale of a horse, where the jury, on an issue submitted, returned a verdict for the buyer for $125.00, a judgment that the seller surrender the buyer's unpaid note for the horse, and that such surrender should satisfy the damages, and that the buyer surrender the horse to the seller, was held, on plaintiff's appeal, erroneous, in that it was not germane to and did not follow the verdict. The Court said: "It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum in an action for damages, the Court cannot increase or decrease the amount, nor can it change the substance of the verdict; the remedy for any error committed by the jury being a new trial." The sole authority cited to support the statement is Black on Judgments (2 Ed.), Sec. 142. The Court closes its opinion with this language: "Since this opinion was prepared, the parties have agreed that the amount of the recovery may be credited on the note, and this will be done in the court below and provided for in the judg-

ment, the costs to be paid by the defendant." It nowhere appears in this case that either party consented to the judgment, and the section cited from Black on Judgments is entitled "Judgment must follow the verdict," and the section does not refer to a case where one of the parties consents to the change. In the opinion the Court said the trial court cannot decrease the amount of the verdict, but this is in conflict with what this Court has said, as set forth above, when the plaintiff consents to the decrease. Obviously, *Winn v. Finch* is not authority for the question before us, where the defendants consented to the additur.

Genzel v. Halvorson, 248 Minn. 527, 80 N.W. 2d 854, was decided by the Supreme Court of Minnesota on 25 January 1957. Plaintiff was a passenger in a car driven by defendant Roemer, which collided with another car driven by defendant Halvorson. Plaintiff brought suit for $56,000.00 for personal injuries sustained in the collision. The jury returned a verdict for plaintiff in the sum of $3,000.00, after which he moved in the alternative for a new trial on the issue of damages, and in the event of a denial, for a new trial on all the issues. The trial court ordered that the motion be denied on condition that each defendant consent to an entry of judgment in the sum of $9,830.92 against them jointly, and otherwise the motion for a new trial on all the issues was to be granted. Both defendants consented to the entry of judgment in the increased amount. Plaintiff appealed on the ground that the use of additur constituted an infringement upon his constitutional guarantee of a jury trial. Judge Murphy speaking for a unanimous court, after stating that remittitur has been established state practice for a long time, and after stating that even if *Dimick v. Schiedt,* 293 U.S. 474, 79 L. Ed. 603, which was a 5 to 4 decision, with Mr. Justice Stone dissenting, and Chief Justice Hughes, and Mr. Justice Brandeis and Mr. Justice Cardozo concurring in the dissent, is the law in the Federal Courts, they were not required to follow it, because Amend. VII to the U.S. Constitution guaranteeing trial by jury in suits at common law in the U.S. Courts is not binding upon the states, has this to say about additur in a scholarly and exhaustive opinion: "An examination of authorities from other jurisdictions indicates varying views as to the validity of additur. New Jersey and Washington have held additur to be within the power of the trial court. *Gaffney v. Illingsworth,* 90 N.J. L. 490, 101 A. 243; *Clausing v. Kershaw,* 129 Wash. 67, 224 P. 573. Additur is now provided for by statute in Washington. Rev. Code of Washington, Sec. 4.76.030. Rhode Island has a statute which requires the trial court to permit the losing party to consent to an additur before it can grant a new trial for inadequacy of damages. Public Laws of Rhode Island 1939-40, c. 946, Sec. 1. New York has held additur to be constitutional, at least when

the damages are increased to the highest amount awardable as a matter of law. *O'Connor v. Papertsian,* 309 N.Y. 465, 131 N.E. 2d 883. Massachusetts, Illinois, and Delaware hold that additur is within the power of the trial court when liquidated damages are involved. *Clark v. Henshaw Motor Co.,* 246 Mass. 386, 140 N.E. 593; *Yep Hong v. Williams,* 6 Ill. App. 2d 456, 128 N.E. 2d 655; *Rudnick v. Jacobs,* 9 W. W. Harr. 169, 39 Del. 169, 197 A. 381. California and Pennsylvania hold additur to be beyond the power of the trial court. *Dorsey v. Barba,* 38 Cal. 2d 350, 240 P. 2d 604; see, *Raymond L. J. Riling, Inc. v. Schuck,* 346 Pa. 169, 171, 29 A 2d 693, 694. Wisconsin permits the trial court to give the plaintiff the option of accepting the lowest amount of damages a fair-minded jury would probably allow or to have a new trial, *Risch v. Lawhead,* 211 Wis. 270, 248 N.W. 127, or it can give the defendant the option to be assessed the highest amount of damages a fair-minded jury would probably allow or to have a new trial. See, *McCauley v. International Trading Co.,* 268 Wis. 62, 71, 66 N.W. 2d 633, 638. While it is apparent there is a wide area of disagreement among the authorities as to this issue, we think that the better authority, as expressed by Mr. Justice Stone's dissent in *Dimick v. Schiedt, supra,* as well as a reasonable appraisal of Minn. Const. art. I, Sec. 4, in the light of recognized practice in this state, compels the conclusion that the practice of using additur is in the interest of the sound administration of justice and that in the case before us the trial court was within its constitutional power in raising the amount of damages with the consent of the defendant. This practice avoids the necessity of a new trial with its accompanying expense and delay. 23 Calif. L. Rev. 536, 537. It does not prejudice the plaintiff's interests any more than the use of remittitur prejudices those of defendant. 44 Yale L. J. 318, 324. Under the practice the plaintiff receives more than the jury did award him, and if the damages as increased are still inadequate, the plaintiff may appeal on that ground, Rule 59.01(5) of Rules of Civil Procedure, at which time the appellate court will have the benefit of the trial court's judgment as to what may constitute an adequate verdict. To the extent that *Mohr v. Williams,* 95 Minn. 261, 104 N.W. 12, 1 L.R.A., N.S., 439, holds to the contrary, it is hereby overruled."

As plaintiff points out in his brief the Supreme Court of the United States held in *Dimick v. Schiedt, supra,* a 5 to 4 decision, that additur practice was contrary to the 7th Amend. to the U. S. Constitution guaranteeing jury trials in the courts of the United States. It is well settled that the 7th Amend. to the U. S. Constitution applies only to the federal courts and not to the state courts. *Furniture Co. v. Baron,* 243 N.C. 502, 91 S.E. 2d 236; *St. Louis & S. F. R. Co. v. Brown,* 241 U.S. 223, 60 L. Ed. 966; *Pearson v. Yewdall,* 95 U.S. 294, 24 L. Ed.

436; 31 Am. Jur., Jury, p. 554; new 31 Am. Jur., Jury, p. 15. The dissenting opinion of Mr. Justice Stone in the *Dimick* case—a convincing and closely reasoned opinion supported by ample authority, and concurred in by three eminent jurists—clearly points out that the reasons, for denying the power of a federal court to follow the additur practice, would require a holding denying the power of a federal court to follow the remittitur practice. The majority opinion evades this issue by pointing out that the power of a federal court, with regard to the remittitur practice, was not involved in the *Dimick* case, though recognizing that the Supreme Court had previously approved the exercise of such power. Later in *U. S. v. Kennesaw Mountain Battlefield Ass'n.*, 5 Cir., 99 F. 2d 830, certiorari denied, 306 U.S. 646, 83 L. Ed. 1045, a condemnation suit where a judgment was entered on a verdict increased from $9,000.00 to $16,000.00 by an additur, required by the District Judge and consented to by the United States, a unanimous court upheld the judgment. The Circuit Court held that the guarantees of the 7th Amendment did not apply to a condemnation proceeding. It is also held that the *Dimick* case was not controlling. The Court said: "That case, decided as it was by a closely divided court, is authority only for its own facts, and those facts are not present here. Those facts as shown by the opinions of the Circuit Court of Appeals, and of the Supreme Court, were that the trial was attended with serious error for which a new trial ought to have been granted at common law. . . ."

In *Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 97 N.E. 2d 13, (14 Feb. 1951), the Supreme Court of Ohio, in a well reasoned and learned opinion for a unanimous court by Judge Taft, which declined to follow the reasoning of the majority opinion in the Dimick case, holding that it was not binding upon them, with regard to the question as to whether the additur practice is in conflict with Section 5, Article I, of the Ohio Constitution, providing that "The right of trial by jury shall be inviolate," said: "The practice of ordering an additur, with the assent of a defendant, to increase an inadequate verdict not influenced by passion or prejudice or otherwise tainted by prejudicial error, is supported by judicial precedent. *United States v. Kennesaw Mountain Battlefield Ass'n.*, 5 Cir., 99 F. 2d 830, certiorari denied, 306 U.S. 646, 59 S. Ct. 587, 83 L. Ed. 1045. See *Krass v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565; *Rudnick v. Jacobs*, 9 W. W. Harr. 169, 39 Del. 169, 197 A. 381; *Gaffney v. Illingsworth*, 90 N.J. L. 490, 101 A. 243; *Clausing v. Kershaw*, 129 Wash. 67, 224 P. 573; *Clark v. Henshaw Motor Co.*, 246 Mass. 386, 140 N.E. 593; *Secreto v. Carlander*, 35 Cal. App. 2d 361, 95 P. 2d 476; *Blackmore v. Brennan*, 43 Cal. App. 2d 280, 110 P. 2d 723, 728; note, 13 North Carolina Law Review, 514; note, 44 Yale Law Journal, 318, 323 et seq.; 66 Corpus

Juris Secundum, New Trial, Sec. 207, page 512; Scott's Fundamentals of Procedure in Actions at Law, 126 *et seq.* . . . My conclusion is that where the amount of a verdict is inadequate but not so inadequate as to indicate passion or prejudice and such verdict is not otherwise tainted with error, a new trial may be denied on condition that the defendant assents to an increase in the amount of the verdict to an amount which is more than the least that a reasonable jury would have awarded. I believe that this rule, just as does the practice with respect to remittitur, will frequently enable the trial court or a reviewing court to accomplish substantial justice, without awarding a new trial where a new trial might otherwise be required."

All plaintiff's assignments of error as to the admission of evidence, and as to the charge, are without merit. A study of the whole conflicting evidence offered by the parties shows that the trial judge did not commit an abuse of discretion in refusing, on plaintiff's motions, to set the verdict aside. The verdict that the plaintiff is entitled to recover of the defendants $6,192.00 stands without change. If we should hold that the court lacked the power, without plaintiff's consent, to sign the judgment that plaintiff, with the defendants' consent, should recover from the defendants $500.00 more than the jury awarded him, we would be required to remand the case for a judgment upon the verdict in the sum of $6,192.00, which would mean a loss to the plaintiff of $500.00. Plaintiff has had one jury trial free from error. He has no right to two jury trials. The additur procedure followed here, with the defendants' consent, in no way infringed upon plaintiff's right to a trial by jury as guaranteed to him by Article I, Sec. 19, of the North Carolina Constitution.

No Error.

IN THE MATTER OF THE WILL OF JOSEPH E. STIMPSON, DECEASED.

(Filed 30 April, 1958)

1. Executors and Administrators § 24: Judgments § 3½—

A family agreement for the settlement and distribution of an estate, approved and confirmed by the court, becomes a contract between the parties and is to be interpreted, in accordance with rules governing contracts generally, to ascertain the intent of the parties as gathered from the entire instrument with regard to the situation of the parties at the time the consent judgment was entered and the motives and the results sought to be accomplished.

2. Same— Family agreement for distribution of estate held not to deprive widow of her share in the personalty under her dissent from will.

The widow filed her dissent to the probated will. Thereafter, caveat proceedings were instituted, and though the widow was a party by citation, she disclaimed any interest in the litigation, since it could not in any way impair her rights. Later, the parties entered into a consent judgment for the distribution of the estate in accordance with a family agreement. *Held:* Provision in the agreement that the widow assented to the payment of the value of her dower as contemplated by the agreement and accepted said settlement in relinquishment of all further claim in and to the estate referred solely to her right of dower and did not relinquish her right to share in the personalty, it being apparent that the widow signed the agreement solely for the purpose of permitting the lands to be sold, and that there was no intent that she should surrender the rights accruing to her under her dissent from the will.

3. Dower § 8c—

At common law a widow had no right to possession of the land of her husband until her dower was assigned, and courts of law did not permit her to recover the rental value of the land assigned as dower prior to assignment, although in equity when the property was rented, she was allowed a proportionate part of the rents received.

4. Same—

Where the widow and heirs enter into a family agreement for the sale of the realty and the payment to the widow of the cash value of her dower, the widow is obligated to pay her proportionate part of the cost of subdividing and selling the land, and is not entitled to rents or interest in the absence of any evidence to show that sale was delayed in order that rents might accrue or that rents collected were retained by the heirs.

APPEAL by Minnie Murray Stimpson from *Bone, J.*, January 1958 Assigned Civil Term of WAKE.

Joseph E. Stimpson died testate 11 Semptember 1955. He left surviving him his widow, Minnie Murray Stimpson, the appellant, and six children, viz., Euphia Stimpson Norwood, Ronda Stimpson Echols, Reba Stimpson Dull, Elizabeth Fay Stimpson, Joann Stimpson, and Joseph E. Stimpson, Jr. The last three named are minors.

The will of Joseph E. Stimpson was filed for probate in Wake County by Reba Stimpson Dull, therein named as executrix and trustee. She qualified as executrix. Appellant in apt time filed her dissent to the will. Thereafter, on 30 December 1955, Euphia Stimpson Norwood and Ronda Stimpson Echols filed a caveat to the will. Citation thereupon issued to the widow as well as to the heirs. Appellant, in response to the citation, filed an answer "not denying" the allegations of the caveat. She prayed that the court render such judgment as it found proper.

The caveat was heard at the February Term 1957. The jury answered the issue submitted to them in favor of the propounders. Judgment was entered on the verdict. The judgment taxed the cost of the probate proceeding including attorneys' fees for propounders and caveators against the estate. Mrs. Norwood and Mrs. Echols, the caveators, excepted to the judgment probating the will and gave notice of appeal. Immediately thereafter an agreement was submitted to the presiding judge by the terms of which caveators would withdraw their appeal, caveators would participate in the distribution of the estate, the land would be sold, and the widow's dower paid in cash rather than by allotment in kind, Mrs. Dull would file a final account, make settlement as executrix and would resign as trustee. This agreement was signed by the three adult children, by the widow, the executrix, the guardian ad litem for the three minors, and the attorneys for the respective parties. Judge Carr, the presiding judge, approved and confirmed the proposed family settlement, finding that it was fair and equitable to the minors.

Acting in conformity with the approved agreement, petitioners proceeded to subdivide and sell the realty. On 26 October 1957 they filed a report showing sales aggregating $33,350. On 25 November 1957 an order was entered confirming the sales as reported. On the same day the trustees filed a report of receipts and disbursements. The only receipts shown on the report are from the sales of realty. The report shows disbursements to the widow and children aggregating $27,203.47 and other disbursements of $6,146.53. The latter sum includes $2,795.54 incident to the subdivision and sale of the realty. The remainder of the $6,146.53 is composed of inheritance taxes amounting to $34.50, and $3,116.80, costs incident to the probate of the will. Petitioners deducted from the sale price of the land $2,795.54, the costs incident to subdividing and selling the property, and computed the value of appellant's dower in the balance. The value of her dower so computed amounts to $8,384.13. This amount was tendered appellant in settlement of all of her rights in the estate of her deceased husband. She refused to accept it as full settlement, asserting (1) her right to one-seventh of the net proceeds of the personal estate of her deceased hus-

band, (2) dower computed on the gross sale price of the realty without deduction of the expenses of subdividing and selling, and (3) the rental value of her dower or interest on the value thereof from the date of her husband's death until paid.

The trustees thereupon filed a petition in the Superior Court asserting their interpretation of the family settlement agreement approved and made an order of the court in February 1957. They asked the court to advise them. Attached to and made a part of the petition is the judgment establishing the will, the family settlement agreement, the report of sales, order confirming the sales, and account of the trustees. Notice was served upon the heirs and the widow. She answered and admitted the factual allegations of the petition. She reiterated the position taken when the tender was made by the trustees as her statement of her legal right by virtue of her dissent and the family settlement agreement. She further alleged that after the judgment was entered establishing the will, counsel representing the caveators and propounders presented her with the family settlement agreement with the request that she sign the same as evidence of her consent, informing her that she would, by signing, waive none of the rights accruing to her by her dissent from the will; and "that the only purpose for which she was asked to sign the family settlement and agreement was to secure to her the allotment of her dower in cash rather than the laying off of a part of the land . . ."; that she signed the agreement based on the representations and assurances so made and given. She does not in her answer pray for reformation. No other answers have been filed. The matter was heard by Judge Bone who made findings of fact. He found that the judgment and family settlement agreement were consented to by all parties. He recited the sixth section of the judgment in his findings of fact, found that appellant has received no share in the distribution of the personalty of her deceased husband; "that, except for the signing of the said family settlement and agreement, the dissent of Minnie Murray Stimpson to the will of Joseph E. Stimpson has at no time been withdrawn or set aside." He made no findings with respect to the occupancy of the land from the date of Mr. Stimpson's death to the day of sale. He made no findings with respect to rent of said land. He concluded that appellant, by signing the agreement and consenting to the judgment dismissing caveators' appeal, waived her right to any part of the personal estate of her deceased husband; that the method of computing her dower employed by petitioners was correct; the amount tendered was in fact the correct amount owing to her, and adjudged that the payment of said sum would be a full and complete discharge of any claim which she might have against the estate of her husband or the trustees.

G. Earl Weaver and W. Gale Parker appellee-trustees in propria persona.

Allen Langston for respondent, appellant.

RODMAN, J. Appellant does not assign as error the failure of the court to make findings of fact with respect to her allegations which might form the basis for reformation or avoidance of the provisions of the family settlement. Her assignments of error are all predicated on the thesis that the agreement and consent judgment are valid but that the court has misinterpreted and misconstrued that agreement. A determination of appellant's rights rests upon the assignments of error which she has preserved.

The judgment dismissing caveators' appeal and establishing the rights of the parties was entered by consent. It thereby became a contract between the parties. *Houghton v. Harris,* 243 N.C. 92, 89 S.E. 2d 860; *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *Lee v. Rhodes,* 227 N.C. 240, 41 S.E. 2d 747.

Courts do not presume to make contracts for parties. They only interpret when controversy arises as to the meaning of the language chosen by the parties to express their agreement. The rules which courts have evolved for the interpretation of contracts are applicable to consent judgments. *Rand v. Wilson County,* 243 N.C. 43, 89 S.E. 2d 781; *Carpenter v. Carpenter,* 213 N.C. 36, 195 S.E. 5.

A contract results when there is a meeting of the minds for the settlement or adjustment of asserted or disputed rights and obligations. The words chosen by the draftsman selected to reduce the agreement to writing are merely vehicles to make visible the mutual intention of the parties. Interpretation is, therefore, the ascertainment of that intent. To do so, the entire agreement must be examined with an understanding of the result to be accomplished and the situation of the parties at the moment the contract is made. *DeBruhl v. Highway Com.,* 245 N.C. 139, 95 S.E. 2d 553; *Bowles v. Bowles,* 237 N.C. 462, 75 S.E. 2d 413; *R.R. v. R.R.,* 236 N.C. 247, 72 S.E. 2d 604; *Hill v. Freight Carriers,* 235 N.C. 705, 71 S.E. 2d 133; *McCorkle v. Beatty,* 226 N.C. 338, 38 S.E. 2d 102; *McAden v. Craig,* 222 N.C. 497, 24 S.E. 2d 1; *Lumberton v. Hood, Comr.,* 204 N.C. 171, 167 S.E. 641.

Section 6 of the agreement quoted in the findings of Judge Bone is the portion of the contract expressly binding on the widow. It provides: "That Minnie Murray Stimpson, widow of the late Joseph E. Stimpson, has signified to the Court her willingness to accept her dower interest in the estate of Joseph E. Stimpson as contemplated by the proposed family agreement and settlement, and does hereby accept said settlement; relinquishing all further claim in and to the estate of said Joseph E. Stimpson."

The last clause of the quoted section is asserted to bar her right in the distribution of the personal estate. It may be conceded that this phrase, standing alone, is susceptible of the construction which appellees put on it; but when the entire contract is read with an appreciation of the rights and relationship of the respective parties to the action, such an interpretation would, in our opinion, do violence to the real intent of the parties.

We point to some of the factors which lead us to that conclusion. First, we must bear in mind that the prime object of the contract was to settle a lawsuit which could not in any way impair the rights of the widow. True, she was, by the service of the citation, a party, but a mere nominal party. Her answer had disclaimed any interest in the litigation. Her rights accrued when she dissented from the will, which was prior to the filing of the caveat. Her rights fixed by statute could only be taken from her by her act. Judge Bone expressly finds that she has not withdrawn her dissent or waived her rights, unless she did so by her signature to the agreement.

As a basis for Judge Carr's findings to bind the parties by the consent judgment, the opening paragraph reads: "That all legatees, devisees and heirs at law of the late Joseph E. Stimpson, together with the Executrix and Trustee named in the will of said Joseph E. Stimpson, are before the Court and are parties to this proceeding, either as propounders or caveators of the will of said Joseph E. Stimpson." Appellant, the dissenting widow, did not fit either of these categories. The omission of her name or status was natural and apparently deliberate, because her consent was not material to a settlement of the pending litigation. As to that she was a mere observer.

The agreement recites that the real estate on which the dwelling was situate represented the greater portion of the total value of the estate, the personalty making "a small fraction of the total value of the estate"; that the widow had dissented and was not bound by the will; that the will as probated made two bequests of $10, devised the dwelling house to Mrs. Stimpson during widowhood and the residue of the estate to a trustee for the benefit of testator's three minor children, and "that irrespective of the terms of said will relating to said testamentary trust for the benefit of said minor children, when the dower rights of the said widow are allotted and assigned to her, which rights must include the dwelling house and other outbuildings situated on the aforementioned land, the residue of said land and other items comprising the estate of said testator will be greatly diminished in value, and made impractical for farming purposes or other business operations for the purpose of providing income as contemplated by the terms of testator's will, thereby compelling the Trustee, as appointed by said will, to invade and sell or otherwise dispose of such residue,

after allotment and assignment of dower, at a depressed value in order to effectuate the purposes of said trust as set forth in testator's will." Then follows the statement that the best interests of the minors will be served by a sale of the real estate and the allotment of the widow's dower in cash. Nowhere is there a suggestion that the widow will benefit by sale of the land and allotment of her dower in cash.

No fair interpretation of a contract can be made without taking recognition of the motives which ordinarily prompt people to surrender valuable rights. They do not normally do so unless they expect some benefit to accrue to them. *Clement v. Clement,* 230 N.C. 636, 55 S.E. 2d 459.

The contract further stipulated that Mrs. Dull, the executrix, should, as soon as practicable, file with the clerk of the Superior Court of Wake County a final account as executrix indicating the completion of the administration of the estate of Joseph E. Stimpson, and that she should immediately resign as trustee under the will. Successor trustees were named.

The executrix could not complete the administration of the estate without paying to the widow her share in the personal property after the debts and costs of administration had been paid. The record does not disclose what personal property came into the hands of executrix. Her final account, if one has been filed, is not included as a part of the record. We have no information as to the costs and expenses of administering the estate. On the oral argument it was indicated that the personalty might amount to a substantial sum. Appellant's "child's share" would of course be chargeable with debts of the estate and the costs and expenses of administering the estate but not including any cost incident to the probate and caveat proceedings. When the executrix filed her final account, it was her duty to then pay to the parties entitled thereto their respective shares in the surplus. No provision was made to exclude the widow upon an accounting by the executrix. That would have been a logical place for such a provision.

When we examine the entire agreement in the light of the purpose to be accomplished, with recognition of the position of the parties, we reach the conclusion that the agreement, so far as it related to Mrs. Stimpson, dealt only with the method of alloting her dower, and did not constitute a sale, transfer, or forfeiture of her right to participate in the distribution of the personal estate.

The agreement provides for the allotment of the widow's dower by payment of the cash value rather than by allotment of specific real estate.

At common law a widow had no right to the possession of the land of her husband until her dower was assigned. *Williamson v. Cox,* 3 N.C.

4; *Webb v. Boyle,* 63 N.C. 271; *Fishel v. Browning,* 145 N.C. 71; *Taylor v. Meadows,* 169 N.C. 124, 85 S.E. 1.

Courts of law therefore held that a widow was not entitled to damages or the rental value of the land assigned as dower prior to assignment. *Sutton v. Burrows,* 6 N.C. 79; *Spencer v. Weston,* 18 N.C. 213; *Vannoy v. Green,* 206 N.C. 77, 173 S.E. 277. In equity when the property was rented, the widow was entitled to have allotted to her a proportionate part of the rents received. *Campbell v. Murphy,* 55 N.C. 357. The heir is not, however, chargeable as a trustee with a duty of renting for the benefit of the widow. He is chargeable only with the rents received while dealing with the property in good faith or the reasonable value of the premises occupied by him. *In re Gorham,* 177 N.C. 271, 98 S.E. 717; *Gay v. Exum & Co.,* 234 N.C. 378, 67 S.E. 2d 290; 17 A Am. Jur. 429, 430.

The record in this case is barren of any evidence that the heirs have received any rents or that they occupied the real estate to the exclusion of the widow. There is no suggestion that there was any bad faith in delaying sale of the real estate from February 1957 until October 1957. In the absence of any evidence to show that the sale was delayed in order that rents might accrue and that the rents collected were retained by the heirs, the widow would not be entitled to charge the heirs with the payment of rent or have interest computed on the value of her dower.

We think it a fair and necessary inference from the family settlement agreement providing for a sale of the real estate and the allotment of dower in cash that the widow is obligated to pay her proportionate part of the costs of subdividing and selling the property.

As we understand the record, the only items deducted from the gross sale price are the actual expenses incident to the sale. Since appellant is not entitled to rents or interest or damages and is only entitled to have dower allotted in the net proceeds of the sale, it follows that the method of computing her dower is the correct method and the amount tendered is the amount which she is entitled to receive for dower, but payment of that sum cannot defeat her right to participate in the distribution of the personalty, and if settlement has been made with the trustees by the executrix, she is entitled to call upon them to pay over to her her proportionate part of the personal estate.

Error and remanded.

EDWARD DUFF THOMAS, MICHAEL A. THOMAS, GEORGE W. THOMAS, III, BY THEIR NEXT FRIEND, ELEANOR D. THOMAS v. GEORGE W. THOMAS, JR.

(Filed 30 April, 1958)

1. Actions § 2—

Nonresidents have the right to bring an action in our courts as one of the privileges guaranteed to citizens of the several states. Article IV, Section 2, of the Constitution of the United States.

2. Parent and Child § 5—

Where parents of minor children have been divorced and custody of the children has been awarded to the mother, the minor children by a next friend may sue the father for support.

3. Divorce and Alimony § 20½—

Where the statute of the state rendering a divorce decree provides that order for the support of the minor children of the marriage might thereafter be modified for change of conditions, such court has power to modify the order on such ground regardless of whether the decree itself so provides.

4. Constitutional Law § 26—

While a valid decree of divorce entered in another state must be given full faith and credit and is conclusive as to all matters therein adjudicated, including its provisions for the custody and support of minor children of the marriage, the full faith and credit clause does not require that it be more conclusive in the state of the forum than in the jurisdiction where rendered, and therefore where the state rendering the decree has power to modify its provisions for support for change of condition, such modification by the state of the forum is not precluded. Article IV, Section 1, of the Constitution of the United States.

5. Divorce and Alimony §§ 20½, 21—

Where the laws of the state rendering decree of divorce with provision for support of the minor children of the marriage permit modification of the provision for support for change of condition, a petition filed for the minor nonresident children by the divorced wife, as their next friend, against the resident father for increase in the amount of allowance upon allegations of change of condition, states a cause of action, and our courts have jurisdiction of the action upon personal service of the resident father.

6. Divorce and Alimony § 17—

No agreement or contract between husband and wife will serve to deprive the court of its inherent and statutory authority to protect the interests and provide for the welfare of the minor children of the marriage.

APPEAL by plaintiffs from *Bone, J.*, January Civil Term 1958 in WAKE.

This is a civil action instituted by Edward Duff Thomas, Michael A. Thomas, and George W. Thomas, III, residents of the State of Vir-

ginia, through their next friend, Eleanor D. Thomas, their mother. Eleanor D. Thomas and their father, the defendant, George W. Thomas, Jr., were divorced by a decree entered in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, on 15 December 1947. The defendant is now a resident of Wake County, North Carolina.

The Nevada decree awarded custody of the three minor children born of the marriage to their mother, Eleanor D. Thomas, and ordered the defendant, George W. Thomas, Jr., to pay to the plaintiff for the support and maintenance of said children the sum of $150.00 per month until said children reach their majority, in accordance with a separation agreement theretofore entered into by and between the parties, which agreement was approved and incorporated in the decree. The Nevada court reserved the right to modify its decree.

The complaint in this action alleges that at the time the Nevada decree was entered, the plaintiffs herein were respectively nine, seven, and five years of age; that they are now nineteen, seventeen, and fifteen years of age; that because of the increased age of said plaintiffs, the increase in the cost of food, clothing, rent, and other necessary expenses incident to the support and education of the plaintiffs, the sum of $150.00 per month allowed in the decree of the Eighth Judicial District Court of the State of Nevada is insufficient to provide for the education, support and maintenance of the plaintiffs.

It is further alleged in the complaint that the defendant has an annual income of $30,000, and the plaintiffs pray that the defendant be required to pay to Eleanor D. Thomas, for the support and maintenance of the plaintiffs and for the purpose of defraying the cost of their education, the sum of $450.00 per month, to be continued until the plaintiffs have completed their education or until the further orders of the court.

The defendant demurred to the complaint on the ground: (1) that the Superior Court of Wake County does not have jurisdiction of the parties or of the subject matter, for that, among other things, the plaintiffs are residents of Virginia and the action is an attempt to modify the Nevada decree; and (2) that there is no allegation in the complaint that defendant has defaulted or failed to comply with the Nevada decree, etc.

The court below sustained the demurrer, and the plaintiffs appeal, assigning error.

A. L. Purrington, Jr., for plaintiffs.
Emanuel & Emanuel for defendant.

DENNY, J. We concur in the view expressed by the appellants in

their brief that the questions involved in this appeal are as follows: "1. Does the Superior Court of Wake County have jurisdiction of this action? 2. Is this action barred by Article IV, Section 1 (full faith and credit clause) of the Constitution of the United States? 3. Does a complaint by nonresident children of divorced parents, acting through a next friend, against the father, a resident of Wake County, North Carolina, for an increase in support and maintenance heretofore decreed in an action between the father and mother by a Nevada court, which reserves the right to amend the decree, state a cause of action?"

Nonresidents have the right to bring an action in our courts as one of the privileges guaranteed to citizens of the several States by the Constitution of the United States, Article IV, Section 2. *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732; *Bank v. Appleyard*, 238 N.C. 145, 77 S.E. 2d 783.

Where parents of minor children have been divorced and custody of the children has been awarded to the mother, the minor children by a next friend may sue the father for support. *Green v. Green*, 210 N.C. 147, 185 S.E. 651; *Pickelsimer v. Critcher*, 210 N.C. 779, 188 S.E. 313; *Bryant v. Bryant*, 212 N.C. 6, 192 S.E. 864; *Mahan v. Read*, 240 N.C. 641, 83 S.E. 2d 706.

It follows, therefore, that unless the relief sought must be obtained in the forum where the original order for the support and maintenance of these plaintiffs was entered, our courts do have the right to adjudicate the question of adequate support for these plaintiffs.

We think it is immaterial on this appeal whether these plaintiffs were or were not present in the Nevada court when their custody was awarded to their mother, Eleanor D. Thomas, and the order was entered requiring their father, the defendant herein, to contribute $150.00 per month for their support. The question of custody is not involved in this action. Moreover, the statutory law in Nevada provides: " * * *; provided, that in actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance, and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." Statutes of Nevada, 1947, Chapter 70, Section 1.

In 27 C.J.S., Divorce, section 322 (a), page 1237, it is said: "A statute authorizing the modification of a decree as to the support of minor children becomes a part of the decree, whether mentioned therein or not."

Is the Superior Court of Wake County barred by the full faith and credit clause of the Constitution of the United States, Article IV, Section 1, from granting the relief sought by these plaintiffs?

In 17A Am. Jur., Divorce and Separation, section 861, page 48, we find this statement: "Statutes often provide that the allowance for the maintenance of children may, at any time after the decree, be annulled, varied, or modified on application by either of the parties. Moreover, the power to modify such an award has been recognized in cases which do not refer to the statutes as the basis of the power. Even though circumstances are such that an award of alimony could not be modified, the court may modify an award of child support."

Likewise, in 17A Am. Jur., Divorce and Separation, section 982, page 165, it is said: "A court, when adopting as its own a decree of another State for alimony or child support, has the power to modify the foreign decree indirectly by ordering that the husband pay more or less than was required by the foreign decree, where both States have the power to modify decrees. * * *

"It is true that one State cannot directly modify the provisions of a divorce decree of a sister State relating to child support. However, the State, upon gaining jurisdiction of the husband in personam, may enter a new order for child support which increases the amount that would have been payable prospectively under the divorce decree where the divorce court has the power to do so; and the State may declare that in this respect the decree of the divorce court shall be superseded by the new order. The full faith and credit clause does not forbid this result; the foreign decree has no constitutional claim to a greater effect outside the State than it has within the State." *Lopez v. Avery* (Fla.), 66 So. 2d 689; *Goodman v. Goodman*, 15 N.J. Misc. 716, 194 A 866.

Both Nevada and North Carolina have statutory authority for the modification of decrees for the support of a minor child or children. Statutes of Nevada, 1947, Chapter 70, section 1; General Statutes of North Carolina, 50-13.

In *Lopez v. Avery, supra*, Dorothy Avery Lopez, the plaintiff, and the defendant were married in Florida in 1943. In 1945 the parties separated and in December 1945 the husband instituted an action for divorce in the State of Missouri. The wife, who was still a resident of Florida, personally defended the suit. A property settlement was entered into and executed in Florida. Under the terms of the agreement the wife was granted complete care and custody of the minor son born of the marriage, and the husband agreed to pay to the wife the sum of $100.00 monthly solely as support money for the child. In March 1946 the Missouri court approved the separation agreement in its final decree of divorce.

In April 1952 the plaintiff filed a complaint in the Circuit Court of Duval County, Florida, the county in which she was then residing with her minor child, for the entry of an order modifying the terms

and conditions of the settlement agreement, and the final decree of the Missouri court confirming the same, as far as they pertained to support money for the child. In the petition the wife alleged the above facts and alleged further that due to the increase in the cost of living, the increased age of the minor son, and the fact that the father's annual income had increased appreciably since the execution of the agreement, the sum of $100.00 a month for the support of the child was grossly inadequate; that the Missouri decree had not been amended and prayed that the court establish the Missouri decree as a Florida decree.

The defendant husband, while temporarily in Florida on vacation, was personally served with process. Subsequently, he filed a motion to dismiss the complaint upon the grounds that the Florida court was without jurisdiction over the subject matter and the defendant, and that the petition failed to state a claim upon which relief could be granted. The trial court granted the motion. On appeal, the Supreme Court of Florida reversed the ruling, and said: "Broadly stated, the rule in respect to foreign judgments and decrees is that one State may not modify or alter the judgment or decree of a sister State, because under the provisions of Section 1, Article IV, of the United States Constitution, full faith and credit must be given to it as it stands. However, from a study of the decisions it will be seen that upon one theory or another the courts of many of the States have permitted suits to readjudicate the extent of parental liability for support of minor children domiciled within the State, even when a provision for child support has been incorporated in a prior sister State's decree. While recognizing the general rule that foreign decrees as a class are *res judicata* of the matters involved for all time in the future, the courts make a distinction in respect to orders or decrees for child support when by the law of the State of rendition such orders are subject to change. Decrees for child support and custody are usually regarded, in fact, as being impermanent in character, and hence, by their very nature, are *res judicata* of the issues only so long as the facts and circumstances of the parties remain the same as when the decree was rendered. *Goodman v. Goodman,* 194 A 866, 15 N.J. Misc. 716; *Setzer v. Setzer,* 251 Wis. 234, 29 N.W. 2d 62; *Turnage v. Tyler,* 183 Miss. 318, 184 So. 52, and authorities hereinafter cited. Compare *Minick v. Minick,* 111 Fla. 469, 149 So. 483. * * *

"The law of Missouri is that the terms and conditions of a decree for child support rendered in that State are subject to revision in that jurisdiction upon proof of a change in circumstances of the parties. *Landau v. Landau,* Mo.App., 71 S.W. 2d 49; *Kelly v. Kelly,* 329 Mo. 992, 47 S.W. 2d 762, 81 A.L.R. 875; sec. 452.070, Mo.Rev.Stat. of 1949.

"Hence, the full faith and credit clause does not stand as a consti-

tutional bar to this suit. What Missouri could do by way of making new provisions for support payments, Florida may also do; for the decree has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the jurisdiction where rendered. People of State of New York ex rel. *Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133. See also *Setzer v. Setzer, supra; Turnage v. Tyler, supra; Geary v. Geary*, 102 Neb. 511, 167 N.W. 778, 20 A.L.R. 809; *Goodman v. Goodman, supra.*"

In the case of *Goodman v. Goodman, supra*, the decree of separation had been entered in New York State, where the plaintiff and her minor child still resided. The defendant husband was living in New Jersey when the action for an increase in the allowance for support was instituted in that State. The defendant had fully complied with the New York decree with respect to the support of his minor child. Personal service on the defendant was obtained in New Jersey. A motion was made to strike the petition on the ground that the court was without jurisdiction to grant the relief sought. On the identical question before us, the Court of Chancery of New Jersey said: "So far as jurisdiction over the defendant is concerned, the cause of action differs in no respect from a creditor's cause of action for collection of an ordinary debt. * * *

"The common-law obligation of a man to support his wife follows him wherever he goes, and if he comes to New Jersey he is liable also for the support of his children under our statutory provisions. If this court secures jurisdiction over his person, or seizes his property located in this State, it may enforce both of these obligations against his person or his property as the case may be, whether wife or children be domiciled in New Jersey or elsewhere. 'State boundaries do not make court barriers.' *Gasteiger v. Gasteiger*, 136 A 497, 498, 5 N.J. Misc. 315, 317. * * *

"If the decree has any *res judicata* effect with respect to the amount of the award, such effect did not survive a substantial change in the circumstances of the parties after its entry, so that the petitioner is not foreclosed in her action under the doctrine of *res judicata* or election of remedies."

This action does not involve an attempt to procure a judgment for accrued and unpaid sums due under a foreign decree, or for a judgment directing the defendant to pay the future installments as they become due under such decree, as was the case in *Willard v. Rodman*, 233 N.C. 198, 63 S.E. 2d 106 and *Lockman v. Lockman*, 220 N.C. 95, 16 S.E. 2d 670.

Moreover, in the case of *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136, this Court said: "No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory

authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; * * * but they cannot thus withdraw children of the marriage from the protective custody of the court. * * * In such case the welfare of the child is the paramount consideration to which even parental love must yield and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties." *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721.

In light of the authorities cited herein, we hold that the Superior Court of Wake County does have jurisdiction to consider and adjudicate the question of adequate support for the plaintiffs. However, the Nevada decree is binding on our courts under the full faith and credit clause of the Constitution of the United States unless the plaintiffs show such changed conditions and circumstances as to justify an increase in the allowance made by the Nevada court.

Therefore, the first question must be answered in the affirmative; the second in the negative; and the third in the affirmative.

The ruling of the court below is

Reversed.

HARRIET LAWSON, ADMINISTRATRIX OF THE ESTATE OF CLEO LAWSON, DECEASED, v. THE NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 30 April, 1958.)

1. State § 3a—

The State may be sued in tort only in those instances in which it has waived its sovereign immunity by statute.

2. Same: Master and Servant § 39a—

Action to recover for the wrongful death of a prisoner assigned to work under the supervision of the State Highway and Public Works Commission may be maintained under the State Tort Claims Act, G.S. 143-291, the sole remedy not being under the Workmen's Compensation Act, G.S. 97-10, G.S. 97-13(c). As to the effect of the amendment to G.S. 97-13(c) by Session Laws of 1957, *quaere?*

3. State § 3b— Cause of action held based upon negligent act within purview of State Tort Claims Act.

This action for wrongful death was instituted to recover for the electrocution of a prisoner while working under the supervision of a State prison guard. The stipulations and findings were to the effect that the crew was working in removing trees and brush blown along the highway by a hurricane, that the guard should have reasonably foreseen that members of the crew might come into contact with a live wire in the performance of the work, and that the guard failed to ascertain whether the prisoners could work in safety in the area to which he assigned them. *Held:* The cause was based upon a negligent act within the purview of G.S. 143-291 prior to the 1955 amendments, rather than negligent omission, the guard's omissions in respect to failing to ascertain whether the prisoners could work in safety in the area being but the circumstance of the negligent act in putting them to work in the area of hidden danger.

APPEAL by plaintiff from *Fountain, J.*, October Term, 1957, of GREENE.

Proceeding before the North Carolina Industrial Commission to recover under Tort Claims Act (G.S. Ch. 143, Art. 31) for the death of Cleo Lawson, allegedly caused by the negligence of L. R. Barefoot, defendant's employee.

The stipulations, and the findings of fact made by Commissioner Ransdell, quoted below, disclose the factual situation.

STIPULATIONS

"1. That the accident giving rise to this claim occurred on the east side of Highway No. 258, two miles north of Snow Hill on October 18, 1954, at about 9:15 a.m.

"2. That on said date L. R. Barefoot was an employee of the State Highway & Public Works Commission, which is an agency of the State of North Carolina, and that said employee at the times complained

of in this proceeding was acting within the scope of his employment.

"3. That Harriet Lawson is the duly qualified, appointed and acting administratrix of the estate of Cleo Lawson, deceased, whose death gives rise to this claim.

"4. That plaintiff's claim was filed with the Industrial Commission on March 2, 1955.

"5. That at the time of his death, Cleo Lawson was a prisoner assigned to work under the supervision of the State Highway & Public Works Commission; that L. R. Barefoot was in charge of the work crew to which Cleo Lawson was assigned on October 18, 1954.

"6. That Cleo Lawson died on October 18th 1954, and that his death was caused by his electrocution."

FINDINGS OF FACT

"1. That October 18, 1954 was on a Tuesday following Hurricane Hazel on the preceding Friday; that L. R. Barefoot was a guard at Prison Camp #204, where Cleo Lawson was a prisoner; that on the day in question L. R. Barefoot left the prison camp with the prisoners assigned to work under his supervision; that their work that day was to consist of removing trees, brush, and other debris from the highways which had been placed thereon by Hurricane Hazel.

"2. That Cleo Lawson was the water boy for the crew working under the supervision of L. R. Barefoot; that sometimes he performed other tasks and it was not unusual for him to assist the other prisoners in the work they were all trying to accomplish and which had been assigned them; that a few minutes prior to his death Cleo Lawson had been and secured water for the crew to which he was assigned and had finished giving the other prisoners a drink of water; that he then went to the east side of Highway #258 and started to helping Lovelace Pearson, a fellow prisoner, to clear a tree limb from the side of the road; that while engaged in these duties he came in contact with an energized power line, resulting in immediate death by electrocution.

"3. That L. R. Barefoot was aware of the fact that electric wires were down on or near the highway as a result of the winds from Hurricane Hazel prior to the time work was begun on October 18, 1954; that notwithstanding this fact he did not contact the power companies to ascertain that the electricity was shut off from these wires during the period the highway was being cleared; that he instructed the prisoners under his supervision to be on the alert for electric wires; that Cleo Lawson was working under the instruction, direction, and supervision of the said L. R. Barefoot at the time of his death.

"4. That L. R. Barefoot was negligent in not ascertaining that the prisoners under his supervision could work in safety, he having knowledge that electric wires were down in the vicinity in which they were

working; that his negligence in not calling the power companies and requesting them to switch the electricity from the wires which were down was the proximate cause of the death of Cleo Lawson, without contributory negligence on the part of the plaintiff or the person in whose behalf the claim is asserted.

"5. (Facts relating solely to amount of award.)"

Upon these facts and his conclusions of law, Commissioner Ransdell, the hearing Commissioner, "ORDERED that defendant pay plaintiff the sum of $6,000 in full settlement of all her rights by reason of the death of Cleo Lawson."

Upon review, the full Commission, overruling defendant's exceptions thereto, adopted as its own the said findings of fact and the conclusions of law and affirmed said award.

Upon appeal to the superior court, defendant brought forward its exceptions to said findings of fact and to the conclusions of law. After hearing, the court entered judgment, which after recital of the prior proceedings, concluded in these words:

"And the Court being of the opinion that the North Carolina Workmen's Compensation Act, Chapter 97, Article 1, of the General Statutes of North Carolina, provides an exclusive remedy against the State for accidental injury or death of a prisoner arising out of and in the course of the employment to which he had been assigned.

"And the Court being further of the opinion that there can be no recovery against the State under the Tort Claims Act for a negligent omission; that the negligence of L. R. Barefoot, if any, was a negligent omission rather than a negligent act as required by the Tort Claims Act;

"And the Court further being of the opinion that the exceptions of the defendant relative to these two issues should be sustained; and it appearing to the Court that the defendant has abandoned all other exceptions;

"IT IS NOW, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that defendant's exceptions relative to these two issues be and they are hereby sustained; it is FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that this cause be and the same is hereby remanded to the North Carolina Industrial Commission to be dismissed by it."

Plaintiff excepted and appealed.

Harvey E. Beech and White & Aycock for plaintiff, appellant.

Attorney-General Patton, Assistant Attorney-General Wooten and Parks H. Icenhour, Member of Staff, for defendant, appellee.

BOBBITT, J. The court below did not rule on defendant's exceptions to findings of fact. It appears that, at the hearing in the superior court, defendant abandoned all exceptions except those directed to the two questions of law upon which the court based its judgment. Hence, as the case comes to us, we must consider the facts to be as set out in the stipulations and findings of fact.

Defendant's contention that plaintiff's sole remedy is under the Workmen's Compensation Act, G.S. Ch. 97, Art. 1, requires consideration of G.S. 97-13(c) and G.S. 97-10, the specific provisions on which defendant relies.

The Workmen's Compensation Act "contains elements of a mutual concession between the employer and employee by which the question of negligence is eliminated." *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266. Its provisions relate explicitly to employees, employers and employment. G.S. 97-10, in pertinent part, provides: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, . . . shall exclude all other rights and remedies of such employee, his personal representative, . . . as against his employer at common law, or otherwise, on account of . . . injury, loss of service, or death."

"Negligence cannot be imputed to the sovereign, and for this reason, *in the absence of statute*, no private action for tort can be maintained against the State." (Our italics) *Scales v. Winston-Salem*, 189 N.C. 469, 127 S.E. 543. Thus, in the absence of statute, it was held that a prisoner, injured by the negligence of the overseer under whom he was placed, had no cause of action against the State, his sole remedy being against the overseer as an individual. *Clodfelter v. State*, 86 N.C. 51; *Moody v. State Prison*, 128 N.C. 12, 38 S.E. 131. It is noted that G.S. 28-173, which created the statutory cause of action for wrongful death, applies only to causes of action where the injured person, if he had lived, could have recovered. Thus, plaintiff's right to recover on account of the death of her intestate rests solely upon statutes whereby the State has waived its sovereign immunity.

A prisoner is not an employee as defined by G.S. 97-2(b). He is not a person "engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." *Baker v. State*, 200 N.C. 232, 156 S.E. 917; *Moore v. State*, 200 N.C. 300, 156 S.E. 806; also, see *Alliance Co. v. State Hospital*, 241 N.C. 329, 85 S.E. 2d 386. Indeed, when the word "employee" was defined by Ch. 120, Sec. 2(b), Public Laws of 1929, Sec. 14(c) of said 1929 Act explicitly provided: "This act shall not apply to State prisoners nor to County convicts." Sec. 14(c) of the 1929 Act was stricken out by Ch. 295, Public Laws of 1941, which substituted therefor the provisions now codified as G.S. 97-13(c).

G.S. 97-13(c) conferred limited rights upon prisoners *in a special classification*, to wit, those assigned to work under the supervision of the State Highway and Public Works Commission, in the event they suffered "accidental injury arising out of and in the course of the employment to which . . . assigned." No provision was made for other prisoners.

While G.S. 97-13(c) is not free from ambiguity, we assume, for present purposes, that its provisions permitted the establishment of a claim for the *burial expenses* of a prisoner whose death occurred while a prisoner.

With knowledge, actual or presumed, of the limited rights theretofore conferred upon prisoners in this special classification, the General Assembly of 1951 enacted the Tort Claims Act. Ch. 1059, Session Laws of 1951. It did not except any prisoners from its provisions. In *Gould v. Highway Com.*, 245 N.C. 350, 95 S.E. 2d 910, this Court held that a prisoner not in said special classification was entitled to recover under the Tort Claims Act.

Defendant's contention that, because of G.S. 97-10, prisoners in the favored classification have only such rights as are conferred by G.S. 97-13(c) while other prisoners, unimpeded by G.S. 97-10, have the full benefit of the Tort Claims Act is not, in our opinion, in reasonable accord with the intent of the 1951 General Assembly. Moreover, if it be conceded that the word "employee" as used in G.S. 97-10 could be enlarged by interpretation to include a prisoner, this construction would bring about a conflict between G.S. 97-10 and the statutory rights expressly conferred by the Tort Claims Act. In such case, the Tort Claims Act would prevail. It provides: "All laws and clauses of laws in conflict with this Act are hereby repealed."

Defendant directs our attention to Ch. 809, Session Laws of 1957, which amends G.S. 97-13(c) by adding thereto the following: "The provisions of G.S. 97-10 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said Section applies to employees and employers."

The 1957 Act reflects the intention of the General Assembly of 1957. Apparently, although the reason therefor is obscure, the 1957 General Assembly concluded that prisoners at work on an assigned task should be denied rights conferred by the Tort Claims Act on other prisoners. Be that as it may, we are concerned with the intent of the 1957 General Assembly at the time it enacted the Tort Claims Act, and on that question the 1957 Act casts no light.

Defendant's further contention is that plaintiff cannot recover un-

der the Tort Claims Act because Barefoot's negligence, if any, consisted of omissions, not acts.

Plaintiff's right to recover depends upon the provisions of G.S. 143-291 prior to the 1955 amendments. She was entitled to recover if the death of her intestate was caused by the negligent act(s) of a designated State employee while acting within the scope of his employment and there was no contributory negligence on the part of her intestate. *Flynn v. Highway Com.*, 244 N.C. 617, 94 S.E. 2d 571; also, see *Tucker v. Highway Com.*, 247 N.C. 171, 100 S.E. 2d 514.

In the *Flynn* case, the alleged negligence was the failure to repair a hole in the highway caused by ordinary public travel. Recovery was denied. In the *Tucker* case, "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.

Plaintiff's intestate "was working under the instruction, direction and supervision of . . . Barefoot (the designated State employee) at the time of his death." True, his special job was that of water boy; but when not so engaged he performed other tasks and gave assistance to the other prisoners.

While the findings of fact established Barefoot's negligent failure to ascertain whether the prisoners under his supervision could work in safety in the area to which he assigned them, his omissions in this respect constituted the circumstances under which he acted, not the cause of Lawson's death. The basis of plaintiff's claim is Barefoot's act, in the light of such circumstances, in putting the prisoners, including Lawson, to work in an area of hidden danger when he should have reasonably foreseen that they might and probably would unwittingly come in contact with a live wire. In our view, the findings support the Commission's composite conclusion of fact and law, set forth in its Conclusions of Law, that the negligence of Barefoot was the proximate cause of Lawson's death.

Greene v. Board of Education, 237 N.C. 336, 75 S.E. 2d 129, and *Lyon & Sons v. Board of Education*, 238 N.C. 24, 76 S.E. 2d 553, involved proceedings under G.S. 143-291 et seq., where injury was inflicted by the negligent operation of a school bus. In each, plaintiff recovered. The driver's failure to exercise due care to observe the child in front of the bus (*Greene* case) or the the automobile behind the bus (*Lyon* case) did not proximately cause the injury or damage. The fact that the driver operated the bus under such circumstances was the negligent act that proximately caused the injury or damage.

For the reasons stated, plaintiff's assignments of error to the court's rulings are sustained. The judgment of the court below is reversed and

the cause remanded for the entry of judgment implementing the Commission's said award.

Reversed and remanded.

STATE v. DOROTHY ROBINSON

(Filed 30 April, 1958.)

1. Criminal Law § 136—

A defendant has the right to appeal from a domestic relations court to the superior court from a judgment putting a suspended sentence into effect, and upon such appeal the matter should be heard *de novo*, but solely upon the question of whether there has been a violation of the terms of suspension. G.S. 15-200.1.

2. Bastards § 9: Criminal Law § 135—

A domestic relations court has authority, upon conviction of a defendant for wilful refusal to support her illegitimate child to suspend sentence upon condition that defendant pay a stipulated sum per week into court for the support of the child. G.S. 49-7, G.S. 49-8.

3. Criminal Law § 136—

Whether defendant has violated conditions of suspension of sentence is not an issue of fact for the jury but is a question of fact for the judge to be determined in the exercise of his sound discretion.

4. Same—

In order for the judge to put into effect a suspended sentence, it is not required that violation of the terms of suspension be proven beyond a reasonable doubt but only that the evidence be such as to reasonably satisfy the judge, in the exercise of his sound discretion, that defendant had violated a condition of suspension without lawful excuse, the credibility of the witnesses and the evaluation and the weight of their testimony being for the judge.

5. Appeal and Error § 46: Criminal Law § 167—

While the findings of fact and judgment upon the hearing of whether a suspended sentence should be put into effect are to be determined in the sound discretion of the court, and the exercise of such discretion is not reviewable in the absence of gross abuse, the exercise of such discretion implies conscientious judgment and not arbitrary action.

6. Criminal Law § 136—

The court need not find that defendant's violation of a condition of suspension of execution was wilful, all that is required being that the court find that defendant had violated a valid condition of suspension and that such violation was without lawful excuse, but when the court fails to find specific facts supporting the conclusion that the violation was without lawful excuse, there is insufficient predicate for the order putting the suspended sentence into effect.

7. Criminal Law § 169—

When the findings of fact of the court are insufficient to support its order putting into effect a suspended sentence, the cause must be remanded for specific findings.

APPEAL by defendant from *Johnston, J.*, 23 September 1957 Criminal Term of GUILFORD, High Point Division.

From a judgment putting into effect a suspended sentence the defendant appeals.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Morgan, Byerly & Post for Defendant, Appellant.

PARKER, J. On 17 August 1954 the defendant, Dorothy Robinson, pleaded Guilty in the Domestic Relations Court to a warrant charging her on 9 August 1953 with wilfully neglecting and refusing to support and maintain her bastard child, Juanita Robinson, age 10 years, a violation of G.S. 49-2. The judgment of the court was that the defendant be committed to the common jail of Guilford County for a term of six months, and the jail sentence was ordered suspended for a period of five years upon the condition, among others, that the defendant pay into court the sum of six dollars per week, beginning on 23 August 1954, for the support and maintenance of her bastard child, Juanita Robinson.

On 22 February 1955, on 23 August 1955, on 20 September 1955, on 6 December 1955 and on 10 January 1956 the defendant was brought before the Domestic Relations Court for failure to make the payments of six dollars a week for the support of her daughter, Juanita Robinson, and each time she was in arrears in such payments, but the jail sentence was not put into effect.

On 23 July 1957 the defendant was again brought before the Domestic Relations Court on a *capias*. After hearing the evidence the court found that the defendant had paid into court only $95.00 since 10 January 1956 for the support of her daughter, Juanita Robinson, and was now $379.00 in arrears, and that such failure to make the weekly payments was wilful and intentional. Upon such findings of fact the court put into effect the six months jail sentence. The defendant appealed to the Superior Court.

At the hearing in the Superior Court the State offered evidence to this effect: On 23 July 1957 the defendant was in arrears in her weekly payments for the support of her daughter, Juanita Robinson, in the amount of $379.00. Juanita Robinson has lived for years with her ma-

ternal grandmother, Susie Robinson. Dorothy Robinson does not stay with her mother, but lives in a home of her own. The money paid by the defendant into the Domestic Relations Court was given to Susie Robinson for the support of Juanita Robinson. Susie Robinson had to support Juanita Robinson out of her own money. Susie Robinson testified: "I do not know whether she (Dorothy Robinson) has been working regularly since January 1956. I think she has been paying me about what she could . . . I lost my husband May 17, and he was supporting me and her."

At the close of the State's evidence, the trial judge stated the failure of the defendant to comply with the condition of the suspended sentence to make the weekly payments for the support of Juanita Robinson constituted a violation of the condition to make such weekly payments, whether such failure was wilful or not wilful. Whereupon, the defendant offered no evidence. The defendant then requested the court to find as a fact that the failure of defendant to make the weekly payments of six dollars per week was not wilful. The court refused the request, stating that it would make no finding as to whether the failure to make the weekly payments was wilful or not wilful. The defendant excepted.

Judge Johnston's judgment, after finding the facts as to the defendant's plea of guilty to the warrant, and the judgment entered upon such plea, and that thereafter she was before the Domestic Relations Court on several occasions, and that on 23 July 1957 the Domestic Relations Court made the findings and activated the jail sentence, which are set forth above, contains this recital: "This Court further finds as a fact that the defendant has violated the terms of this suspended sentence, and has not made the weekly payments as provided, and on July 23, 1957 was in arrears in the sum of $379.00 under the terms of said judgment." Whereupon, Judge Johnston put the six months jail sentence into effect.

Defendant has two assignments of error. One, the court erred in refusing defendant's requested finding of fact that defendant's failure to make the weekly payments of six dollars was not wilful, and in stating that her failure to make such payments constituted a violation of the condition upon which the jail sentence was suspended, whether wilful or not wilful. Two, an exception to the judgment.

G.S. 15-200.1 gave the defendant the right to appeal to the Superior Court from the judgment of the Domestic Relations Court putting the six months jail sentence into effect, and provides that upon such appeal the matter shall be heard *de novo*, but only upon the question of whether or not there has been a violation of the terms of the suspended sentence. *S. v. Davis*, 243 N.C. 754, 92 S.E. 2d 177.

Defendant states in her brief she "does not challenge the original

Judgment entered by the Domestic Relations Court of Guilford County suspending sentence upon the conditions specified." The Domestic Relations Court had express statutory authority to suspend the jail sentence upon the express condition that the defendant pay six dollars a week into court for the support of her bastard child, Juanita Robinson. G.S. 49-7 and G.S. 49-8; *S. v. Bowser,* 232 N.C. 414, 61 S.E. 2d 98.

Whether the defendant has violated the condition to make weekly payments for the support of her child, Juanita Robinson, upon which the sentence of imprisonment was suspended, presents a question of fact for the judge, and not an issue of fact for a jury. *S. v. Barrett,* 243 N.C. 686, 91 S.E. 2d 917; *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274.

In the instant case the burden of proof is on the State to show by evidence that the defendant has violated the condition of the judgment to make weekly payments of six dollars for the support of her daughter, Juanita Robinson. *S. v. Sullivan,* 227 N.C. 680, 44 S.E. 2d 81. Where a judgment was suspended, and the defendant was required to appear at each criminal term for the next two years, and show that he has demeaned himself as a good law-abiding citizen, this Court has said the defendant "assumed the obligation of showing, to the satisfaction of the court, from time to time," a compliance with the judgment. *S. v. Everitt, supra.*

Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the sentence imposed, the prisoner has a right to rely upon such conditions, and so long as he complies therewith the suspension should stand. In such a case he carries the keys to his freedom in his willingness to comply with the court's sentence.

When a judgment is suspended in a criminal action on certain valid conditions, the proceeding to determine whether a condition has been violated, ordinarily, is a matter to be determined by the sound discretion of the judge. *S. v. Everitt, supra; S. v. Greer,* 173 N.C. 759, 92 S.E. 147; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S v. Love,* 236 N.C. 344, 72 S.E. 2d 737; *S. v. Davis, supra.*

The alleged violation by the defendant of a valid condition upon which a sentence in a criminal case was suspended need not be proven beyond a reasonable doubt. *Manning v. U. S.,* 5 Cir., 161 F. 2d 827; *Slayton v. Com.,* 185 Va. 357, 38 S.E. 2d 479; *Murphy v. Lawhon, Sheriff,* 213 Miss. 513, 57 So. 2d 154; *Blaylock v. State,* 88 Ga. App. 880, 78 S.E. 2d 537; *Bryant v. State,* 89 Ga. App. 891, 81 S.E. 2d 556; *People v. Kuduk,* 320 Ill. App. 610, 51 N.E. 2d 997, 1000; *People v. London,* 28 Cal. App. 2d 395, 82 P. 2d 619, 620; *People v. Sweeden,* 116 Cal. App. 2d 891, 254 P. 2d 899; *McLemore v. State,* 170 Miss. 641, 155 So. 415, 416.

All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant

has violated a valid condition upon which the sentence was suspended. *S. v. Everitt, supra; S. v. Pelley, supra; S. v. Marsh,* 225 N.C. 648, 36 S.E. 2d 244; *S. v. Davis, supra; Manning v. U. S., supra; Slayton v. Com., supra; Murphy v. Lawhon, Sheriff, supra; Pritchett v. U. S.,* 4 Cir., 67 F. 2d 244; *Neeley v. U. S.,* 5 Cir., 151 F. 2d 533; *Spears v. State,* 194 Ark. 836, 109 S.W. 2d 926.

In determining whether the evidence warrants the revocation of a suspended sentence, the credibility of the witnesses and the evaluation and weight of their testimony, are for the judge. *S. v. Johnson,* 230 N.C. 743, 55 S.E. 2d 690; *S. v. Marsh, supra; Slayton v. Com., supra; Pritchett v. U. S., supra; Calloway v. State,* 201 Ark. 542, 145 S.W. 2d 353.

This Court said in *S. v. Davis, supra,* speaking of a hearing as to whether a suspended sentence should be put into effect: "Ordinarily, in hearings of this character, the findings of fact and the judgment entered thereupon are matters to be determined in the sound discretion of the court, and the exercise of that discretion in the absence of gross abuse cannot be reviewed here."

In *Burns v. U. S.,* 287 U. S. 216, 77 L. ed. 266, in affirming an order revoking probation, Chief Justice Hughes said for the Court: "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria v. Morgan,* 186 U. S. 1, 9, 46 L. ed. 1027, 1033, 22 S. Ct. 731. It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' *Langnes v. Green,* 282 U. S. 531, 541, 75 L. ed. 520, 526, 51 S. Ct. 243. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

In the case of *Ex parte Alvarez,* 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102, 7 Ann. Cas. 88, the Court held that if the violation of, or non compliance with the condition or conditions of the pardon be shown to the satisfaction of the court without any legal reason or excuse therefor, the convict shall be remanded to custody and ordered to have the original sentence imposed upon him duly executed, or so much thereof as has not been already served by him. A like opinion was expressed in *Ex parte Ridley,* 3 Okl. Cr. 350, 106 P. 549, 26 L.R.A., N.S., 110. See *S. v. Wolfer,* 53 Minn. 135, 54 N.W. 1065.

In *Rex v. Aickles,* 1 Leach C. C. 390, 168 English Reports, Full Reprint, 297, the defendant was convicted of simple grand larceny, and received judgment of transportation to America for seven years. He afterwards received his Majesty's pardon "on condition of transporting himself beyond the seas for the same term of years, within fourteen

days from the date of his discharge." The case states: "But on farther evidence, it appeared that the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but that he had been prevented from carrying it into execution by the distress of poverty and ill health; and the Court being of opinion, That these impediments, if true, amounted to a lawful excuse, the Jury found a verdict, Not Guilty."

In *S. v. Johnson, supra,* which was an appeal from a judgment revoking a suspension or stay of execution and enforcing the original sentence, the Court stated it was unnecessary for the Court to express an opinion as to whether when a court pronounces a sentence in a criminal action and suspends or stays its execution on a specified condition, it cannot subsequently revoke the suspension or stay and enforce the sentence for a breach of the condition on the part of the defendant unless such breach be wilful, because the evidence produced by the State at the hearing was sufficient to show that the defendant possessed complete capacity to support his child according to the terms prescribed by the court from the time of the entry of the original order in November 1947, down to the summer of 1948, and sustained the finding that the defendant's violation of the specified condition was wilful in character.

After a diligent search we have found no case, and counsel in the case have referred us to none, which holds that a court cannot revoke a suspension of sentence in a criminal case, and enforce the sentence for a breach of the condition on the part of the defendant unless such breach is wilful. Based upon the reasoning and language of the cases we have cited above, it is our opinion that all that is required to revoke a suspension of a sentence in a criminal case, and to put the sentence into effect is that the evidence shall satisfy the judge in the exercise of his sound discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended and that the judge's findings of fact in the exercise of his sound discretion are to that effect.

The exception to the judgment challenges the sufficiency of the findings of fact by the judge to support his judgment putting the six months jail sentence into effect. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53.

The mere finding of fact by the judge "that the defendant has violated the terms of this suspended sentence, and has not made the weekly payments as provided, and on July 23, 1957 was in arrears in the sum of $379.00 under the terms of said judgment" is insufficient to support the judgment putting the six months jail sentence into effect.

It is ordered that the judgment putting the six months jail sentence into effect be vacated, and this proceeding is remanded for further hear-

ing for the judge, in the exercise of his sound discretion, to determine as to whether or not the failure of the defendant to make the weekly payments for the support of her daughter, Juanita Robinson, was without lawful excuse. The judge's findings of fact should be definite, and not mere conclusions. *S. v. Davis, supra.*

Remanded.

AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK; GREAT AMERICAN INSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; THE CONTINENTAL INSURANCE COMPANY; AND VIRGINIA FIRE & MARINE INSURANCE COMPANY, ORIGINAL PLAINTIFFS, (AND CHARLES D. ARTHUR, INTERVENOR), v. CHARLES F. GOLD, COMMISSIONER OF INSURANCE, HENRY L. BRIDGES, I. MILLER WARREN, CHARLES F. GOLD, BERRY C. GIBSON AND CURTIS H. FLANAGAN, CONSTITUTING THE BOARD OF TRUSTEES OF THE NORTH CAROLINA FIREMEN'S PENSION FUND; THE NORTH CAROLINA FIREMEN'S ASSOCIATION; C. R. PURYEAR AND RAY E. SCOTT, DEFENDANTS.

(Filed 30 April, 1958.)

1. Declaratory Judgment Act § 2—

Insurance companies collecting and transmitting to the Commissioner of Insurance funds under the provisions of the Firemen's Pension Fund Act (Chapter 1420, Session Laws of 1957), and alleging irreparable injury in that no procedure is provided for the recovery of funds paid under the Act in the event it should be determined that the Act is unconstitutional and in that some of their competitors were refusing to collect and account for such additional premiums, thus putting plaintiffs at a competitive disadvantage, etc., are authorized to maintain an action under the Declaratory Judgment Act to test the constitutionality of the statute. G.S. 1-253, G.S. 1-254, G.S. 1-264, G.S. 1-265.

2. Same: State § 3a—

The Board of Trustees of the North Carolina Firemen's Pension Fund is not an agency of the State, and an action attacking the constitutionality of the statute creating the Pension Fund (Chapter 1420, Session Laws of 1957) is not an action against the State, since, although the Commissioner of Insurance and the State Treasurer receive and transmit funds under the Act, their duties are solely custodial and ministerial, and the State has no interest in or control over such funds.

3. Constitutional Law § 4—

Parties who collect from their customers and transmit certain funds to a specified agency in compliance with statutory requirement rather than risk the heavy penalties prescribed by the statute for failure to do so, and who allege irreparable injury in that the statute contains no provision for the recovery of such funds in the event the statute should

be declared unconstitutional, and in that some of their competitors were refusing to comply with the statute, thus putting plaintiffs at a competitive disadvantage, etc., may maintain an action attacking the constitutionality of the statute.

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

APPEAL by plaintiffs from *Bickett, J.*, November, 1957 Civil Term, WAKE SUPERIOR COURT.

This action was instituted under G.S. 1-253,-257 for the purpose of having the court pass on the constitutionality of Chapter 1420, Session Laws of 1957 - the North Carolina Firemen's Pension Fund Act. The plaintiffs are five insurance companies authorized to do business in North Carolina and now engaged in writing all types of fire and lightning insurance coverage in this State. The defendant Charles F. Gold is Commissioner of Insurance of North Carolina. The defendants Henry L. Bridges, I. Miller Warren, Charles F. Gold, Berry C. Gibson and Curtis H. Flanagan constitute the Board of Trustees of the North Carolina Firemen's Pension Fund. The defendant North Carolina Firemen's Association is a private voluntary group composed of firemen, both regular and volunteer. The defendant C. R. Puryear is a regular full time paid fireman of the City of Raleigh. The defendant Ray E. Scott is a volunteer fireman of the Town of Apex, rated Rural Class A by the Southeastern Underwriters Association. The defendants Puryear and Scott are designated representatives of all firemen in their respective classes.

The plaintiffs, in crucial substance, allege the Firemen's Pension Fund Act requires that: (1) All purchasers of fire and lightning insurance in protected areas must pay an additional one per cent of the premium to the insurer to be transmitted to the Commissioner of Insurance, who, in turn must pass it on to the State Treasurer who shall be the custodian of the fund and shall disburse it to eligible firemen on the vouchers signed by two trustees of the fund. Purchasers of fire and lightning insurance from "farmers mutual fire associations" are not required to make the payments. (2) A number of insurance companies in competition with the plaintiffs are treating the Pension Fund Act as invalid and unconstitutional, and are refusing and will continue to refuse to collect and account for the additional premiums to the great financial disadvantage and irreparable injury of the plaintiffs. Insurance agents writing policies for a number of different companies are necessarily giving preference to the companies that refuse to require the payment of the additional charge. This practice results in a daily loss of business and is placing the plaintiffs at a competitive disadvantage, thereby causing them irreparable injury for which the law does not provide a remedy. (3) The Pension Fund Act gives

special privileges and emoluments to certain firemen only, to the exclusion of other firemen and other employees, and delegates to Southeastern Underwriters Association, a private organization, the right to classify towns and rural fire districts and determine eligibility for participating in the fund without fixing standards for the classification. The Act discriminates against the plaintiffs in favor of farmers mutual fire insurance companies—plaintiffs' competitors—in that they are exempt from the provisions of the Act. (4) The Act is in violation of Article I, Sections 7 and 31, Article II, Section 14, and Article V, Section 3, of the Constitution of North Carolina, and of the 13th and 14th Amendments to the Constitution of the United States. (5) The duties assigned to the Commissioner of Insurance and to the Treasurer of North Carolina are ministerial only and require them to transmit and disburse the fund to private persons of a special class, and that this action is, therefore, not against the State. (6) The Pension Fund Act does not provide any method for the recovery of money paid by the plaintiffs under the provisions of the Act. (7) The plaintiffs have complied and are complying with the provisions of the Act for the reason that they prefer not to incur the danger of the heavy penalties provided for noncompliance. By this action they seek to settle the uncertainty and turbulence in the business of providing fire and lightning insurance in protected areas brought about by the attempt of the plaintiffs to comply with the Act and a refusal on the part of other companies so to do, to the great competitive disadvantage and loss of business to the plaintiffs.

The complaint contains other material allegations as well as amplification of those here summarized. The plaintiffs invoke the equitable power of the court to determine by declaratory judgment the constitutionality and validity of Chapter 1420, Session Laws of 1957, and allege that a speedy hearing to that end is in the public interest.

The defendants filed a demurrer asking the "complaint" be dismissed on five grounds: (1) The plaintiffs are not the real parties in interest and do not have the legal capacity to maintain this action. (2) There is a defect of parties defendant in that Puryear and Scott and the North Carolina Firemen's Association have no interest in the subject-matter of this action. (3) That the complaint fails to state facts sufficient to constitute a cause of action in that no tax has been assessed or collected, or liability fixed against the plaintiffs. (4) The court has no jurisdiction to entertain this action against the State which has not consented to be sued. (5) The court is without jurisdiction to determine by declaratory judgment the matters set out in the complaint.

Upon the hearing, the court sustained the demurrer and entered a judgment dismissing the action. The plaintiffs excepted and appealed.

Joyner & Howison, By: W. T. Joyner, Jr.,
Allen & Hipp, By: Arch T. Allen for plaintiffs, appellants.
George B. Patton, Attorney General, T. W. Bruton, Assistant Attorney General, Ehringhaus & Ellis for defendants, appellees.

HIGGINS, J. The defendants challenge (1) the right of the plaintiffs to maintain this action; (2) the jurisdiction of the court to hear it; and (3) the sufficiency of the complaint to state a cause of action.

The Uniform Declaratory Judgment Act, Article 26, Chapter 1, provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." (G.S. 1-253). "Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question or construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." (G.S. 1-254). "This Article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights . . . and it is to be liberally construed and administered." (G.S. 1-264). The plaintiffs' allegations (taken as true for the purpose of testing the demurrer), therefore, qualify them as "persons" authorized to bring this action. (G.S. 1-265).

Under the broad terms of the Declaratory Judgment Act the plaintiffs have the right to challenge the constitutionality of the Pension Fund Act in the superior court unless jurisdiction is withdrawn by some contrary provision of law. The defendants contend the plaintiffs cannot maintain this action for that it is in fact against the State and the State has not consented to be sued. At this stage of the proceeding it does not appear that the Board of Trustees of the North Carolina Firemen's Pension Fund is such an agency as rendered this an action against the State. While the Governor and the Insurance Commissioner are ex officio members of the board, the majority of its members are not selected by any State agency. The Secretary of the North Carolina Firemen's Association is an ex officio member of the board. The remaining two members are elected by the Firemen's Association. The two officials of the State constitute a minority of the board members. The secretary and the two members selected by the Firemen's Association control. The duties assigned to the commissioner of Insurance and to the Treasurer appear to be ministrant in character. These officers have no discretion with respect to disbursements. They receive and transmit funds that do not belong to the State and in which the State has no interest, and over which it has no control. The interest or rights of the State must be involved here in order to constitute this an action against the State. "An action against a commission or board

created by statute as an agency of the State *where the interest or rights of the State are directly affected* is in fact an action against the State." (emphasis added) *Prudential Ins. Co. v. Unemployment Compensation Commission*, 217 N.C. 495, 8 S.E. 2d 619. It does not now appear that this is an action against the State. The allegations are sufficient to show the court has jurisdiction of the cause.

The Firemen's Pension Fund Act does not provide machinery by which the payments required under it may be recovered in the event it is determined they are exacted in violation of constitutional guaranties. The plaintiffs' allegations of irreparable injury are sufficient to present that question as one for decision by the court. The Attorney General's brief on behalf of the appellees contains the following frank statement: "Most all taxpayers find themselves in something of the dilemma which is suggested by the plaintiffs here. It is virtually impossible to secure a determination of a sales tax liability, for instance, without going to the same type of trouble and without subjecting one's self to untold complications just as is argued by the plaintiffs now."

We think the Uniform Declaratory Judgment Act provides a means of testing the validity of the statute here called in question. The plaintiffs have appealed to the equitable power of the court to grant relief where a legal remedy does not exist, or is inadequate. "When public officials act in accordance with and under color of an Act of the General Assembly, the constitutionality of such statute may not be tested in an action to enjoin enforcement thereof *unless* it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury. *Newman v. Comrs. of Vance, supra*, and cases cited; *Hood, Comr. of Banks, v. Realty, Inc., supra:* also, see *Amick v. Lancaster*, 228 N.C. 157, 44 S.E. 2d 733. The rule as stated was fully recognized, not impaired, in *Summrell v. Racing Asso.*, 239 N.C. 591, 80 S.E. 2d 638, and in *Taylor v. Racing Asso.*, 241 N.C. 80, 84 S.E. 2d 390. It has been frequently pointed out that 'the courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution.' *Turner v. Reidsville*, 224 N.C. 42, 46, 29 S.E. 2d 211; *S. v. Lueders*, 214 N.C. 558, 200 S.E. 22." *Fox v. Comrs. of Durham*, 244 N.C. 497, 500, 94 S.E. 2d 482. While the principles of law in the foregoing cases are stated conversely to the propositions here involved, however they are no less authoritative.

We conclude the plaintiffs' allegations are sufficient to require they should be answered to the end the issues thus presented may be heard and passed on by the superior court. In order that neither party may be prejudiced when the case is heard on the merits, we have discussed the facts alleged and the law involved only to the extent deemed neces-

sary for decision on the present appeal. The petition of Charles D. Arthur does not allege facts sufficient to entitle him to intervene as a party plaintiff in this cause and his application to do so was properly denied. The judgment of the Superior Court of Wake County sustaining the demurrer, however, is

Reversed.

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

HARDWARE MUTUAL INSURANCE COMPANY OF THE CAROLINAS, INC., (AND GEORGE R. BATCHELOR, INTERVENOR) v. CHARLES F. GOLD, COMMISSIONER OF INSURANCE; HENRY L. BRIDGES, I. MILLER WARREN, CHARLES F. GOLD, BERRY C. GIBSON AND CURTIS H. FLANAGAN, CONSTITUTING THE BOARD OF TRUSTEES OF THE NORTH CAROLINA FIREMEN'S PENSION FUND; THE NORTH CAROLINA FIREMEN'S ASSOCIATION; C. R. PURYEAR AND RAY E. SCOTT.

(Filed 30 April, 1958.)

APPEAL by plaintiffs from *Bickett, J.*, November, 1957 Civil Term, WAKE Superior Court.

The plaintiff is a North Carolina corporation authorized to write all types of fire and lightning insurance coverage in North Carolina. The defendants and the questions involved in this case are identical with those involved in *Assurance Co. v. Gold, ante* 288. Only the plaintiff and the intervenor are different.

Allen & Hipp, By: Arch T. Allen,
Joyner & Howison, By: W. T. Joyner, Jr., for plaintiffs, appellants.
George B. Patton, Attorney General,
T. W. Bruton, Assistant Attorney General,
Ehringhaus & Ellis for defendants, appellees.

PER CURIAM: Decision in this case is governed by the decision of *American Equitable Assurance Company of New York, et als., v. Charles F. Gold, Commissioner of Insurance, et als., ante,* 288. Upon the authority of that case, the order denying the petition to intervene is affirmed, and the judgment sustaining the demurrer is

Reversed.

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

WILLIAM S. BIZZELL v. GREAT AMERICAN INSURANCE COMPANY.

(Filed 30 April, 1958.)

1. Appeal and Error § 6: Constitutional Law § 4—

Ordinarily, the courts will not pass upon the constitutionality of a statute in an action in which there is no actual antagonistic interest between the parties, or where it appears that the parties are as one in interest, and desire the same relief.

2. Actions § 3: Courts § 2—

Whenever in the course of litigation it becomes apparent that there is an absence of a genuine adversary issue between the parties, the court should withhold the exercise of jurisdiction and dismiss the action.

3. Appeal and Error § 2—

The Supreme Court will take judicial notice that a party defendant in the case under consideration is a party plaintiff in another case heard on appeal the same week.

4. Appeal and Error § 6: Constitutional Law § 4—

In this action attacking the constitutionality of a statute, demurrer of certain defendants was allowed, and it appeared that the remaining defendant was a party plaintiff in another action in which such party attacked the constitutionality of the statute for like reasons asserted by plaintiff in the instant case. *Held:* It appearing that no actual antagonistic interest exists between the parties and that both parties desire the same relief, the action is dismissed.

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

APPEAL by defendant from *Sharp,* Special Judge, at 10 February, 1958, Civil Term of WAKE.

Civil action to test the constitutionality of the Firemen's Pension Fund Act, Chapter 1420, Session Laws of 1957, codified as G.S. 118-18 through 118-37, heard below on motion for judgment on the pleadings.

The Act creates a pension plan for certain eligible firemen in North Carolina. The plan is to be financed in part by a charge of 1% of the premiums on fire and lightning insurance on property "in areas where fire protection is available." The Act requires the charge to be passed on to the purchasers of insurance in the form of an additional charge for insurance.

The plaintiff, William S. Bizzell, obtained a policy of fire insurance from the defendant, Great American Insurance Company. The policy insured the plaintiff's home located in the City of Raleigh. The Insurance Company required the plaintiff to pay, pursuant to the Firemen's Pension Fund Act, a charge of 1% of the fire and lightning insurance premium in addition to the regular premium. The additional charge amounted to fifty cents.

Thereafter, the plaintiff instituted this action, alleging that the Firemen's Pension Fund Act is unconstitutional on five specific grounds, and demanding refund of the additional premium charge of fifty cents.

In addition to the Great American Insurance Company, the following were made parties defendant: Charles F. Gold, Commissioner of Insurance, who is charged by the Act with the duty of collecting from the insurance companies the additional charges made for the benefit of the Pension Fund; the five individuals who constitute the Board of Trustees of the Pension Fund, namely: Henry L. Bridges, I. Miller Warren, Charles F. Gold, Berry C. Gibson and Curtis H. Flanagan; C. R. Puryear, a paid fireman from the City of Raleigh, as class representative of all paid firemen in North Carolina; and Ray E. Scott, as class representative of all volunteer firemen in the State.

All the defendants except the Great American Insurance Company filed a demurrer to the complaint. The demurrer was directed to procedural and jurisdictional aspects of the case rather than to the merits of the constitutional attack made upon the Act in the complaint.

On 18 December, 1957, by order of Judge Bickett, Resident Judge of the Tenth Judicial District, the demurrer was sustained, and the action was dismissed as to the demurring defendants. There was no appeal from the order.

Thereafter the Great American Insurance Company, which had originally answered the complaint, filed an amendment amplifying the allegations of the answer and setting forth additional facts respecting some of the allegations of the complaint previously admitted. The answer as amended makes only technical denial of the plaintiff's allegations wherein it is averred that the Act is unconstitutional.

Next, the plaintiff moved for judgment on the pleadings. At the conclusion of the hearing on the motion, the presiding Judge, being of the opinion that no issue of fact is raised by the pleadings and that the challenged statute is unconstitutional for the reasons set out in the complaint, entered judgment declaring the Act unconstitutional and void. From the judgment entered, the defendant appeals.

Bailey & Bason for plaintiff.

Joyner & Howison and Allen & Hipp for defendant.

Attorney General George B. Patton, Assistant Attorney General T. W. Bruton, and Ehringhaus & Ellis, Amici Curiae.

JOHNSON, J. Ordinarily, the courts will not pass upon the constitutionality of a statute in an action in which there is no actual antagonistic interest between the parties, or where it appears that the parties are as one in interest and desire the same relief. *U. S. v. John-*

son, (1943) 319 U. S. 302, 87 L. ed. 1413; *Chicago & Grand Trunk Railway Co. v. Wellman,* (1892) 143 U. S. 339, 36 L. ed. 176; *C. I. O. v. McAdory,* (1945) 325 U.S. 472, 89 L. ed. 1741; *Moritz v. United Brethrens Church,* 244 App. Div. 121, 278 N.Y.S. 342.

In *C. I. O. v. McAdory, supra,* it is said: "The court will not pass upon the constitutionality of legislation in a suit which is not adversary, *Bartemeyer v. Iowa,* 18 Wall. 129, 134-5; *Chicago & Grand Trunk R. Co. v. Wellman,* 143 U. S. 339; *Atherton Mills v. Johnston,* 259 U. S. 13, 15; *Coffman v. Breeze Corps.,* 323 U. S. 316, 324, or in which there is no actual antagonistic assertion of rights."

Whenever in the course of litigation it becomes apparent that there is an absence of a genuine adversary issue between the parties, the court should withhold the exercise of jurisdiction and dismiss the action. *U. S. v. Johnson, supra; Burton v. Realty Co.,* 188 N.C. 473, 125 S.E. 3. See also *Tryon v. Power Co.,* 222 N.C. 200, 22 S.E. 2d 450; *Parker v. Bank,* 152 N.C. 253, 67 S.E. 492; *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413 1 C.J.S., Actions, Sec. 1 f. (7), p. 944; 14 Am. Jur., Courts, Sec. 49; *Ibid,* Sec. 173.

This record impels the conclusion that the instant action, as one to test the constitutional validity of the Firemen's Pension Fund Act, lost its adversary character when the original defendants who demurred were let out.

In support of this conclusion it suffices to point to these crucial facts: The defendant Great American Insurance Company is one of the plaintiffs in an action instituted in the Superior Court of Wake County on 26 August, 1957, by five insurance companies for the purpose of testing the constitutionality of the Firemen's Pension Fund Act. The case is now before this Court on appeal, and is being decided by opinion filed simultaneously with this opinion. The companion case, entitled *"American Equitable Assurance Company of New York, and others v. Charles F. Gold, Commissioner of Insurance, and others,"* joins as defendants the same persons who as original parties defendant in the instant action were let out when their demurrer was sustained. The allegations of the complaint attacking the constitutionality of the Act are substantially the same in the companion case as in the instant case. Also, it is noted that in the case at bar, in answering the plaintiff's allegations of unconstitutionality, the defendant makes what it terms only "technical and formal denial thereof." And this "technical and formal" denial is prefaced by the averment that the defendant is of the opinion that the statute "is probably unconstitutional . . . and will be so declared by the courts for the reasons set forth in the complaint, . . ." Moreover, the defendant appellant in its answer alleges that it "is in the position of a stakeholder" and offers, if requested to do so, to pay the amount of the additional charge claimed by the plaintiff

into court, to be paid out as directed by the court upon final determination of the cause. And in its prayer for relief, the defendant prays, not that the statute be upheld, but only that "the court take jurisdiction of this matter and determine the validity and constitutionality of the Firemen's Pension Fund Act."

It is further noted that the attorneys who appeared *amici curiae* in this Court also appeared in a similar capacity in the court below. The record indicates that these attorneys, who had previously represented the demurring defendants, were invited by both the plaintiff and the defendant to appear *amici curiae*, subject to the permission of the court, and participate in the hearing on the motion for judgment on the pleadings. In response to the invitation, and with the permission of the court, the attorneys appeared at the hearing, but, as was their right, they took the position that the court was without jurisdiction to pass on the constitutional questions, and limited their arguments to procedural and jurisdictional phases of the case. Similarly, in this Court the *amici curiae* brief and the amplifying oral argument were limited in scope to the same procedural and jurisdictional matters, and did not go to the merits of the constitutional questions attempted to be presented. These fringe *amici curiae* appearances have contributed nothing of substance toward giving the case a genuine antagonistic character.

We deem it proper to state that the record here discloses no suggestion of collusion on the part of any of the parties or attorneys. On the contrary, the case appears to have been instituted in the utmost good faith for the purpose of obtaining a speedy decision of a question vitally affecting both private and public rights. And the case as instituted against all the original parties presented a genuine justiciable question for the court. It was only when the case was dismissed as to the demurring defendants by order of Judge Bickett, with no appeal being noted by the plaintiff, that the case lost its adversary character. The record on appeal does not disclose whether the presiding Judge was apprised of the fact that the defendant Great American Insurance Company was a party plaintiff in the companion case heretofore mentioned. The record in that case discloses that it was previously heard by Judge Bickett on demurrer and had been on appeal to this Court more than a month before Judge Sharp heard the instant case. However, both cases were heard in this Court the same day, on call of cases from the Tenth District. Thus we are charged with judicial notice that the Great American Insurance Company, defendant in the instant case, is a plaintiff in the other case, and being charged with such notice, we take cognizance of all the natural and reasonable inferences deducible therefrom; and when these facts and inferences are considered with the facts disclosed by the record in the instant case, it is manifest that

as between the plaintiff and the defendant there is no actual antagonistic interest and that both parties desire the same relief, namely, that the Act be declared unconstitutional.

Since no real controversy is presented by the case, the action will be dismissed. This will be done notwithstanding the plaintiff is suing for refund of the fifty cents additional premium collected by the defendant pursuant to the Firemen's Pension Fund Act. In this connection it is worthy of note that the companion case which is being decided simultaneously herewith is now set to provide the means necessary for a prompt testing of the validity of the Firemen's Pension Fund Act.

The judgment rendered below will be treated as erroneous and set aside; and the action will be dismissed. Let each side pay its own costs.

Action Dismissed.

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

JOHN O. SMITH v. MYRTLE IRENE KINNEY SMITH

(Filed 30 April, 1958.)

1. Contempt of Court § 3: Divorce and Alimony § 20—

Where the husband introduces evidence that his failure to pay sums for the support of his minor child in accordance with decree of court was due to his financial inability, judgment confining the husband for wilful failure to comply with the order without any finding in respect to his ability to pay during the time of his alleged delinquency, must be set aside and the cause remanded, since in such instance the finding that the husband's failure to make the payments was wilful and deliberate is not supported by the record.

2. Contempt of Court § 7—

Wilful failure and refusal of a party to make payments for the support of his child in accordance with decree of court is civil contempt, and the court may order him into custody until he shows compliance or is otherwise discharged according to law, G.S. 5-8. G.S. 5-4, limiting sentence of confinement for a period not exceeding thirty days, is not applicable.

BOBBITT, J., concurring in result.

JOHNSON, J., joins in concurring opinion.

APPEAL by plaintiff from *Olive, J.*, at February 3, 1958 Term, of RANDOLPH.

Contempt proceedings in civil action for absolute divorce heard on

order to plaintiff to show cause why contempt order should not issue for willful refusal to pay support for his minor child pursuant to consent judgment.

The case was here on former appeal reported in 247 N.C. 223, 100 S.E. 2d, 370, where the factual situation is described. On that appeal the Court found that the order attaching plaintiff in contempt is fatally defective in that it was not supported by a finding of fact that the conduct of plaintiff in failing or refusing to make the payments required by the former order of the Court was willful. And the case was remanded for further proceedings.

On rehearing before Olive, J., pursuant thereto, plaintiff and defendant were present and represented by counsel, and each offered written evidence.

Plaintiff, in affidavit filed 13 February, 1958, reiterated statement made by him in his affidavit of 30 September, 1957, that he is unable to pay more than $44.22 per month out of his total earnings for the support of his child, and again moved that the amount for the support of his child be reduced to the sum of $44.22 per month, and also prayed that he be not adjudged in contempt of court.

And the record (1) shows that the judge failed to take note of the motion to reduce the amount of payments, and (2) fails to show any finding of fact one way or the other in respect to plaintiff's ability to pay during the time of his alleged delinquency.

However, the judge found as a fact that plaintiff arbitrarily and intentionally failed and refused to pay the amount he had agreed to pay, and concluded that his failure so to do was willful, and thereupon it was adjudged that plaintiff is in contempt of court therefor. Pursuant thereto the judge ordered plaintiff into the custody of the sheriff and that he be confined in the county jail of Randolph County until he shall have shown compliance with the orders of the court for the payment of arrears, and not be otherwise released.

To judgment in accordance therewith plaintiff excepts, and appeals to Supreme Court and assigns error.

Ottway Burton, Don Davis for plaintiff, appellant.
Ferree & Anderson for defendant, appellee.

WINBORNE, C. J.: Plaintiff appellant challenges the judgment from which appeal is taken upon the grounds that the trial judge erred, first in failing to make finding of fact in respect to his, plaintiff's, inability to pay more than he has paid, and second, in ordering imprisonment of plaintiff as specified.

The first point on which the challenge is made, as above stated, is, in the light of established principles set forth in decisions of this Court,

well taken. See *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867, in which in opinion by Parker, J., it is said: "The lower court has not found as a fact that the defendant possessed the means to comply with the orders for payment of subsistence *pendente lite* at any time during the period when he was in default in such payments. Therefore, the finding that the defendant's failure to make the payments of subsistence was deliberate and willful is not supported by the record, and the decree committing him to imprisonment for contempt must be set aside," citing *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403; *Smithwick v. Smithwick,* 218 N.C. 503, 11 S.E. 2d 455; *Berry v. Berry,* 215 N.C. 339, 1 S.E. 2d 871; *Vaughan v. Vaughan,* 213 N.C. 189, 195 S.E. 351; *West v. West,* 199 N.C. 12, 153 S.E. 600.

These cases sustain the same proposition that if the husband gives evidence on his inability to pay, there must be finding of fact by the court in respect thereto. And in the instant case there is such evidence.

Now we turn to the second ground upon which plaintiff appellant challenges the judgment below as above set forth.

In this connection we find it said in 12 Am. Jur. 392, Contempt, Sec. 6, that "Proceedings for contempt are of two classes— namely, Criminal and Civil. Criminal contempt proceedings are those brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders. Civil contempt proceedings are those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are those individuals for the enforcement of whose private rights and remedies the suits were instituted * * * It is, however, a civil, and not a criminal, contempt for a person to fail to comply with an order of a court requiring him to pay money for his wife's support * * *."

We find that in *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157, this Court had before it the point now considered. There this Court held that the defendant's "contention that the court was without power to make an order, the effect of which might be to confine him in jail for more than thirty days, is without merit," citing *Green v. Green,* 130 N.C. 578, 41 S.E. 784, and *Cromartie v. Comrs.,* 85 N.C. 211.

And then the Court went on to say: "Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. C.S. 978" (now G.S. 5-1), "Civil contempt is a term applied where the proceeding is had 'to preserve and enforce the rights of private parties

to suits and to compel obedience to orders and decrees made for the benefit of such parties.' 12 Am. Jur., Contempt, Sec. 6. Resort to this proceeding is common to enforce orders in the equity jurisdiction of the Court, orders for the payment of alimony, and in like matters. In North Carolina, such proceeding is authorized by statute, C.S. 985," (now G.S. 5-8).

And the Court continued by saying: "The contempt with which we are dealing in the present case falls within the latter category and is unaffected by C.S. 981," (now G.S. 5-4), "prescribing a thirty day limit to imprisonment for contempts falling within the provisions of preceding sections," citing *Green v. Green, supra; Cromartie v. Comrs., supra; Thompson v. Onley*, 96 N.C. 9, 5 S.E. 120.

Moreover, the Court added that "one who is imprisoned for contempt in an alimony case need not serve indefinitely. There are other proceedings under which he might obtain his discharge upon a proper showing. Under this proceeding, however, such relief may not be given."

The language used in *Dyer v. Dyer, supra,* seems clear and understandable. However confusion arises by reason of what is said in the short *Per Curiam* opinion in *Basnight v. Basnight,* 242 N.C. 645, 89 S.E. 2d, 259. This was a contempt proceeding in a civil action for subsistence under G.S. 50-16. The trial court, "on facts found, concluded and adjudged that the defendant is in contempt of court for willful and contumacious failure and refusal to make payments to his wife in compliance with a former order of the court. The judgment decrees that the defendant be confined in jail 'until he shall have complied' with the order, 'or until he is otherwise discharged according to law.' " Defendant appealed. And the opinion in Supreme Court is as follows: "Two members of the Court, Winborne and Higgins, JJ., not sitting, but with Devin, Emergency Justice, participating in lieu of Winborne, J., and the Court being of the unanimous opinion that the judgment entered below is erroneous in directing that the defendant be committed to jail for an indefinite period rather than for thirty days, as prescribed by statute, G.S. 5-4, but with the six sitting members of the Court being evenly divided in opinion whether prejudicial or reversible error otherwise has been shown, the judgment below will be modified so as to limit the defendant's confinement in jail to thirty days. Subject to this modification the judgment is affirmed in accordance with the precedents which require a majority vote to overthrow a judgment of the Superior Court."

Reference to the original record in the *Dyer* case reveals the fact that the question involved on appeal was whether the refusal to pay alimony was civil or criminal contempt. And in the Basnight case the question involved was whether the lower court had found sufficient facts to hold defendant in contempt. It did not present the question as

to the nature of the contempt, whether civil or criminal. However, the proceeding was brought under G.S. 5-1 (4), thereby limiting the scope of remedy to find and thirty day imprisonment.

In the instant case on former appeal decision turned upon the conclusion that the order attaching plaintiff in contempt was fatally defective in that it was 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. Therefore the holding there is not interpreted as undertaking to rule on the kind of contempt involved.

The facts in *Dyer* and *Basnight* cases, as in case in hand, make for civil contempts. And the *Dyer* case is not referred to in the *Basnight* case, nor is it differentiated or overruled.

Therefore, this Court is now constrained to follow the decision in the *Dyer* case, and to hold that the judgment in case in hand in respect to confinement in jail is correct. Error in this respect is not made to appear.

The case will be remanded for further proceeding, however, for error pointed out.

Error and Remanded.

BOBBITT, J., concurring in result: I agree that the cause should be remanded for necessary findings of fact relating to the alleged contempt and also to defendant's motion first made in his affidavit of September 30, 1957, that the amount of the payments previously ordered should be reduced.

Moreover, I accept as correct the broad distinction between civil contempt and criminal contempt set forth in the *per curiam* opinion in *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157, and cases cited; but I deem it appropriate to indicate what I consider a further distinction of importance in this and similar cases.

In my opinion, to the extent the defendant is *presently able to pay,* but wilfully fails or refuses to pay, the amount now overdue, imprisonment would be for civil contempt. In such case, the limitations of G.S. 5-4 would not apply; but the defendant could be lawfully confined for such length of time as such wilful contempt continued. To the extent the defendant is *not presently able to pay* the amount now overdue, a different question is presented. In such case, the question is whether he *was able to pay* at the time the payments became due and then wilfully failed or refused to make such payments. In the latter case, the punishment would be for "an act already accomplished," that is, a past rather than a present and continuing contempt. His wilful disobedience in the past to the order of the court, as distinguished from his present wilful disobedience to the order of the court, would, in

my opinion, constitute a criminal contempt for which the permissible punishment would be that prescribed by G.S. 5-4.

It is noted that in *Dyer v. Dyer, supra,* the court found as a fact that defendant's "continued refusal to pay alimony was wilful."

Johnson, J., joins in concurring opinion.

L. J. PEOPLES, PLAINTIFF, AND NEW PARTY PLAINTIFF: MRS. RAFAELA D. PEOPLES, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF L. J. PEOPLES, v. UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION, AND R. O. PEARCE.

(Filed 30 April, 1958.)

1. Appeal and Error § 1—

Where appellant is given notice of a motion and appears at the time and place designated for the hearing of the case in its regular order at a regular term of court, and participates in the hearing and agrees that the judge might sign judgment after term, all without raising the question whether the motion was required to be in writing, he will not be heard on appeal to raise this question.

2. Trial § 20—

Where the facts are not controverted, the rights of the parties upon such facts are questions of law, and the court may enter judgment thereon in accordance with the rights of the parties without the intervention of the jury.

3. Agriculture § 2—

Where a tenant procures and pays for a policy of hail storm insurance, nothing else appearing, the landlord's statutory crop lien for advancements, G.S. 42-15, does not extend to the fund paid by insurer under the policy after damage to the crop by the risk covered.

4. Judgments § 17a—

Where the tenant, upon the uncontroverted facts, is entitled, as a matter of law, to the proceeds of a crop insurance policy paid into court by insurer, free from the landlord's crop lien for advancements, the court has authority to order that such fund be delivered to the tenant. G.S. 1-508.

APPEAL by plaintiff from *Hobgood, J.,* at November-December 1957 Term, of FRANKLIN.

Order signed 17 January, 1958.

Civil action begun 3 September, 1957, to recover for advances made by plaintiff L. J. Peoples to his tenant, the defendant R. O. Pearce, heard upon motion of said defendant for an order directing the Clerk of Superior Court of Franklin County to pay to him the balance of

funds in hands of said Clerk derived from hail insurance policy No. C-1305, issued by United States Fire Insurance Company.

From the pleadings and agreed statement of case on appeal, substantially the following appears in the record on appeal:

For the year 1957 the relationship of landlord and tenant existed between plaintiff, L. J. Peoples, and defendant, R. O. Pearce, in respect to certain land of plaintiff— on which said defendant was to grow tobacco and other crops, on crop sharing basis— and plaintiff Peoples to make, and did make advancements in money and in kind to Pearce to enable him to plant, cultivate and harvest the crops.

Plaintiff alleges the amount of advancements to be approximately $3,000.

Defendant Pearce secured, and corporate defendant issued its policy insuring the crop of tobacco upon the lands above described, against loss from certain hazards, including hail storm, while the crop was in the field and before harvesting— which policy stated upon its face that said Pearce was a tenant of said plaintiff.

On 26 August, 1957, the said crop of tobacco on the lands of plaintiff, so insured by corporate defendant was damaged by hail to the extent of approximately $4,000. The corporate defendant admitted liability therefor.

Plaintiff in complaint filed herein seeks to establish landlord's lien on the proceeds of the hail insurance so effectuated by defendant Pearce for advancements made, and obtained temporary restraining order against defendants enjoining them, pending hearing on the cause, from issuing, paying or receiving proceeds from said insurance policy in respect to hail loss. And plaintiff prays that he recover of defendants or either of them for advancements made with respect to said tenancy, as above related, and for his interest therein, for cost, and such other and further relief to which he may be entitled.

The corporate defendant, in answer filed, admitting liability, requested permission to deposit the proceeds from said policy in office of Clerk of Superior Court of Franklin County; and defendant Pearce demurred to the complaint.

Plaintiff Peoples died before hearing on the order granting temporary injunction and his executrix was made party plaintiff.

The resident judge heard the motions herein and the demurrer. The demurrer was overruled. The temporary injunction was dissolved, and the corporate defendant was permitted to deposit the proceeds from the insurance policy as requested, and the Clerk was directed to pay defendant Pearce all the proceeds from the insurance policy except $3,000, the amount of alleged advancements, without prejudice to him to apply at any time for payment of the residue of said fund. In apt time defendant Pearce filed answer raising issues of fact.

On 5 November, 1957, defendant Pearce gave notice that he would apply to resident judge in Chambers on 16 November, 1957, for an order that he be paid the balance of the funds so deposited in the Clerk's office. The hearing on this matter was postponed from time to time until heard on 4 December, 1957. At the hearing on this motion defendant Pearce put in evidence, apparently without objection, the note given by him for the premium due on said insurance policy and the policy. By consent the court took the matter under advisement, it being agreed in open court that judgment might be signed and entered by the court at any time thereafter.

And on 17 January, 1958, the judge entered order in which after further reciting: (1) That the cause was heard in its regular order on the calendar at the November-December Term of Franklin County Superior Court, before Honorable Hamilton H. Hobgood, Judge of the Superior Court assigned to and holding the courts of the Ninth Judicial District, and presiding at said regular term, upon the motion of defendant R. O. Pearce for release to him of the funds held by the Clerk of Superior Court under order entered in this cause; and (2) that the court having carefully considered the pleadings, the argument of counsel regarding said motion, and the hail insurance policy issued to R. O. Pearce and his note for the premium therefor, which were offered as exhibits by R. O. Pearce, and being of opinion that the defendant R. O. Pearce is entitled to have the balance of funds in the hands of the Clerk of Superior Court paid to him without further delay, it was ordered that the balance of said funds be paid to defendant R. O. Pearce, to which order plaintiff excepted, and appealed to Supreme Court, and was "allowed twenty days in which to file specific exceptions" to the order, and to make up and serve case on appeal.

And the record shows that plaintiff specifically excepts to the order entered 17 January, 1958, for that:

"1. The court was without authority to sign the Order * * *

"2. The court failed to find facts * * *

"3. The order as signed was not based upon proper findings of fact as required by law * * *

"4. The order was entered contrary to law * * * ," and assigns same as error, and appeals to Supreme Court.

Gaither M. Beam, Ehringhaus & Ellis for plaintiff, appellant.
John F. Matthews for defendant, appellee.

WINBORNE, C. J.: Plaintiff, appellant, in brief filed, without specifying the exception to which any particular question is related, presents argument in respect to four questions:

First: "Should the defendant Pearce's motion upon which the final

order herein was based have been denied for the reason that it was not in writing?" In this connection the record discloses (1) that defendant Pearce gave notice to plaintiff that he would at certain time and place apply to judge of Superior Court for an order to pay to him the balance of the fund arising from the hail insurance, and (2) that plaintiff appeared at the time and place for the hearing of the case in its regular order on the calendar at a regular term of court, and participated in the hearing, and agreed that the judge might take the case under advisement and sign judgment at any time thereafter. And the record is silent as to whether the motion was or was not in writing. And it does not appear that any point was made by plaintiff in respect thereto. Under these circumstances the point will be deemed waived and may not now be successfully presented.

Second and Third are these: "Should issues of fact be tried by the judge when trial by jury has not been waived? Does the order herein from which plaintiff appealed find sufficient facts in compliance with provisions of G.S. 1-185?" In this connection the issues of fact raised by the pleading in this cause relate to matters far afield from the matter affected by the order.

On this record it is not controverted that defendant Pearce secured hail insurance on the tobacco crop grown by him on plaintiff's land, and paid the premium therefor, that the fund ordered paid into the clerk's hands was proceeds for damage to the tobacco crop by reason of hail. It is not contended that plaintiff had anything to do with taking out the insurance or paying for it, or that it was intended to cover plaintiff's interest in the crop. In fact it is made to appear in the record on appeal that plaintiff opposed the idea of insuring the crop when it was suggested by Pearce.

Hence the determinative question on this appeal is one of law, that is: Where tenant procures and pays for policy of insurance against damage to tobacco crop by hail storm, and the crop is so damaged, nothing else appearing, does the landlord on whose land the crop is growing have statutory crop lien for advancements, G.S. 42-15, on the fund paid under the policy to cover the hail damage? Decisions of this Court provide negative answer. See *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511, where these headnotes reflect the decision of this Court:

"1. The possession and title to all crops raised by a tenant or cropper in the absence of a contrary agreement, are deemed vested in the landlord until the rent and advancements have been paid.

"2. The interest of the tenant in the undivided crops, and housed in the landlord's barn, is insurable.

"3. Where the undivided crop of the landlord and tenant has been housed in the latter's barn, and while insured by the tenant for his sole benefit has been destroyed by fire, and the insurance company has

paid the loss, in the landlord's action the tenant is entitled to the full amount of the loss so paid; and the question as to the validity of the policy and the extent of the landlord's interest in the crop does not arise."

Fourth: "Whether the court erred in signing and entering of the order herein from which plaintiff appealed." In this connection it is provided by statute in this State that "When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to further direction of the judge." G.S. 1-508.

Testing the factual situation in case in hand by this statute, it is apparent that Judge Hobgood had the authority to make the orders in question in respect to the fund derived from the hail insurance on the tobacco crop.

After careful consideration of the matters presented on this appeal error in them is not made to appear.

Affirmed.

PRESLEY E. BROWN LUMBER COMPANY, INC. v. TEXTILE BANKING COMPANY.

(Filed 30 April, 1958.)

1. Chattel Mortgages and Conditional Sales § 1: Partnership § 1—

A contract under which the vendor retains title to raw materials to be used by the purchaser in the manufacture of articles, with provision that the purchaser should sell the articles manufactured and that upon sale the vendor should own the proportionate part of the accounts receivable or cash realized from the sale, is a conditional sale and does not create a partnership.

2. Assignment §§ 1, 2—

A conditional sale of raw materials to be used by the manufacturer in its business, with provision that the manufacturer might sell the manufactured goods, in which event the seller should be entitled to a proportionate part of the accounts receivable, or in the event of a cash sale, to the cash paid, constitutes an equitable assignment of accounts receivable and cash realized by the manufacturer pursuant to the contract.

3. Assignment § 2: Chattel Mortgages and Conditional Sales § 11: Registration § 1— Registration is not notice as to instruments not authorized to be registered.

Where a registered contract for the sale of raw materials to be used in the manufacture of articles provides for retention of title in the seller, but that the manufacturer might sell the finished goods, in which event the seller should be entitled to a proportionate part of the accounts receivable or cash realized from such sale, *held*, upon sale by the manufacturer the seller's lien on the specific goods is immediately terminated, and the equitable assignment of the accounts receivable is not within the protective provisions of G.S. 47-20 nor 47-23, and the contract being registered prior to the enactment of Ch. 504, Session Laws of 1957, its provisions are not applicable, and therefore the registration of the contract does not constitute notice of the equitable assignment.

4. Brokers and Factors § 1—

By statutory definition a factor advances money to manufacturers or processors. G.S. 44-70.

5. Assignment § 3—

A factor taking an assignment of accounts receivable from the manufacturer has priority over an equitable assignee of such accounts in a registered instrument when at the time of the registration of the equitable assignment there was no statutory provision authorizing its registration.

APPEAL by plaintiff from *Crissman, J.*, January 1958 Civil Term of WILKES.

W. H. McElwee, W. L. Osteen, and Max F. Ferree for plaintiff, appellant.

McLennan & Surratt for defendant, appellee.

RODMAN, J. This appeal is from a judgment sustaining a demurrer to the complaint for failure to state a cause of action.

The facts alleged may be summarized as follows: Plaintiff, a domestic corporation, is engaged in the manufacture of "dimension stock, including core stock." (Core stock is the base to which veneer is applied to make furniture.)

Lucas National is a domestic corporation with its principal office in Randolph County. It manufactures bedroom furniture.

Defendant is a New York banking corporation domesticated here and operates under the supervision of the Commissioner of Banks. Defendant engages here in "the banking and factoring business, factoring accounts throughout the State." Its factoring business in this State is extensive amounting to several million dollars each year.

On 28 June 1955 Lucas National entered into an agreement with plaintiff, a copy of which is attached to and incorporated by reference as a part of the complaint. This agreement recites the business in which each of the parties was engaged, the impoverished financial condition of Lucas National, and because of that condition plaintiff's unwillingness to sell core stock to Lucas National on credit, but a willingness to consign core stock to the value of $12,000 to be used by Lucas National in the manufacture of bedroom furniture. The agreement then provides:

"It is further stipulated that when and if said finished produce is sold, that the party of the first part shall be the owner of a portion of the Accounts Receivable for said finished product which is represented by the value of the Core Stock sold in said product and notice is given to all persons, firms and corporations, that the accounts receivable represented by the sale of said finished product is owned in part by the party of the first part, the said proportion of said accounts receivable which is owned by the party of the first part being determined by the value of the Core Stock contained in the finished product for which said accounts receivable is owned. It is further stipulated that when said accounts receivable is paid or in the event said finished product is sold for cash, that the funds derived from said accounts receivable or said cash sale, shall belong to the party of the first part and be its property until the amount represented by the Core Stock is paid to the party of the first part from said moneys received from said accounts receivable or cash sale, it being distinctly understood that the party of the second part is not the owner of said funds but that the party of the second part is collecting said funds as the agent of and on behalf of the party of the first part and is retaining said funds in trust as the agent of and for the party of the first part, the said party of the second part having no interest in said funds which are represented by the sale of the Core Stock which formed an integral part of the furni-

ture but is holding said funds for transmittal to the party of the first part."

Based on the agreement plaintiff alleges: ". . . that the title to the Core Stock was to remain in the plaintiff throughout the entire manufacture of the furniture and the title to the accounts receivable from the sale of the furniture the plaintiff's Core Stock was to remain in the plaintiff until the amount due for the Core Stock had been paid . . ."; the agreement between plaintiff and Lucas National was properly recorded in Randolph County, and defendant had, by reason of such recordation, constructive notice of said agreement, and with this constructive notice procured an assignment from Lucas National of accounts receivable, the property of plaintiff, arising from the contractual rights between it and Lucas National; that defendant had collected these accounts, refused to pay the same to plaintiff, and was indebted to it in the sum of $6,081.66, the balance owing by Lucas National to plaintiff under the agreement of June 1955.

The agreement does not contemplate a partnership between the parties by which each should contribute to the production of a completed article. It is an agreement to sell the raw materials, the title to remain in vendor until paid for. It is a conditional sales contract subject to the provisions of G.S. 47-23.

The agreement provides that Lucas National is to sell the furniture made with the core stock. Lucas National has the right to determine the time and place of sale, to fix the sale price, and how it should be paid—either in cash or on credit. When so sold, plaintiff's lien or claim to the core stock immediately terminated. *Discount Corp. v. Young,* 224 N.C. 89, 29 S.E. 2d 29; *R.R. v. Simpkins,* 178 N.C. 273, 100 S.E. 418; *Etheridge v. Hilliard,* 100 N.C. 250; *Bynum v. Miller,* 89 N.C. 393.

When the furniture was sold, a contractual obligation arose requiring the purchaser to pay the purchase price—a mere chose in action. The most that plaintiff could claim under the agreement of 28 June 1955 with respect to accounts accruing from subsequent sales was a right to seek the aid of a court to compel Lucas National to comply with its contractual obligation and pay for the core wood or assign to plaintiff the proportion owing to him from the sales made of the furniture. His was a right to an equitable assignment. In Restatement of the Law of Contracts it is said in sec. 154 (2): "An assignment of a right expected to arise under a contract or employment not then existing is operative only as a promise by the assignor to assign the right and an authorization to the assignee to enforce it, but neither imposes a duty upon the obligor nor precludes garnishment by the obligee's creditors."

The summary there made accords with judicial decision. *Wike v. Guaranty Co.,* 229 N.C. 370, 49 S.E. 2d 740; *Taylor v. Barton-Child*

Co., 117 N.E. 43; *Re Nelson*, 72 ALR 850; *Maier v. Freeman*, 53 Am. St. Rep. 151; 6 C.J.S. 1067.

An equitable assignment is not within the protective provisions of G.S. 47-20 nor 47-23. As noted by Pearson, C. J.: "There is a marked difference between what may be the subject of a grant and the subject of an executory contract." *Mastin v. Marlow*, 65 N.C. 695. Not until 1945 did the Legislature deem it proper to provide for constructive notice of the assignment of an account receivable, c. 196, S.L. 1945, now incorporated as Art. 14 of c. 44 of the General Statutes. That statute was by express language limited to "a presently subsisting right to the present or future payment of money—(a) Under an existing contract." Not until 1957 was it possible in this State to give constructive notice of the assignment of an account to accrue under a contract to be subsequently made, c. 504, S.L. 1957. The amendment to the 1945 statute became effective 1 May 1957. This action was instituted in March 1957. Defendant was not by the recording in Randolph County of the agreement of 28 June 1955 between plaintiff and Lucas National notified of plaintiff's claim to accounts payable to Lucas National. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E. 2d 528, with annotations appearing 3 ALR 2d 577 et seq.

The complaint alleges defendant's business is banking and "factoring accounts." By statutory definition a factor advances money to manufacturers or processors, G.S. 44-70. Defendant's factoring business in this State, according to plaintiff, amounts to several million dollars a year. Fairly interpreted, the complaint says defendant purchased and took an assignment of the accounts, but it acquired title thereto subject to plaintiff's claim because of the constructive notice imposed by recording the agreement between it and Lucas National. Since the recordation was not notice and did not affect defendant's right to purchase, it follows that the judgment sustaining the demurrer is

Affirmed.

STATE v. LIVINGSTON BROWN

(Filed 30 April, 1958.)

Criminal Law § 118: Intoxicating Liquor § 9g—

In a prosecution under an indictment charging unlawful possession of intoxicating liquors contrary to the form of the statute, a verdict of "guilty of possession" without reference to the indictment is not sufficient to support judgment, and upon defendant's appeal from judgment imposed, a *venire de novo* must be ordered.

APPEAL by defendant from *Hall, J.*, at December 2, 1957, Term, of RANDOLPH.

Criminal prosecution upon two bills of indictment:

No. 2434, a true bill found at June Term 1957 of Randolph County, charging that "Livingston Brown, late of the County of Randolph, on the 23rd day of April, A.D. 1957, with force and arms, at and in the county aforesaid, did unlawfully and willfully purchase, have on hand and possess intoxicating liquors," contrary to the form of the statute.

And No. 2547, a true bill found at December 2 Term 1957, of Randolph County, charging: "That Livingston Brown, late of said county of Randolph, on the 21st day of September, A.D. 1957, with force and arms, at and in said county, did unlawfully and willfully purchase, have on hand and possess intoxicating liquors," etc., contrary to the form of the statute.

And the record on appeal contains two warrants issued out of and returnable to Recorder's Court of Randolph Court, one on 23 April, 1957, charging that "at and in said county on or about the 23rd day of April, 1957, Livingston Brown did unlawfully and willfully possess, possess for the purpose of sale, one pint of non-taxpaid liquor against the form of the statute * * *" and the other on 21 September, 1957, charging "that at and in said county, on or about the 21st day of September, 1957, Livingston Brown did unlawfully and willfully transport and possess for purpose of sale 8¾ gallons of non-taxpaid liquor against the form of the statute" etc.

And the record shows (1) that in the Recorder's Court defendant requested a jury trial and the case was sent over to the Superior Court for trial on the bills of indictment above recited.

(2) That "defendant Livingston Brown, through his attorney, Ottway Burton, enters a plea of not guilty to the specified indictments in these two cases."

(3) "Jury and Verdict No. 2547— The properly impanelled jury of 12 freeholders of Randolph County returned a verdict in No. 2547 as follows: Guilty of possession; not guilty of possession for sale."

(4) "Jury and Verdict No. 2434— At the close of the State's evidence the court orders a verdict of not guilty."

(5) "Judgment No. 2547— Thereupon judgment was pronounced upon the defendant as follows: The defendant is to be confined in the common jail of Randolph County for the term of 7 months and assigned to work the roads under the direction of the State Highway and State Prison Department, to commence at the termination of sentence in No. 2448."

And in statement of case on appeal served by defendant, to which the Solicitor for the State agrees, referring to the charges in cases No.

2434 and 2547, it is stated: "In the Recorder's Court of Randolph County, the defendant demanded a jury trial as to these charges and the cases were bound over for the December 2, 1957 Criminal Term of Randolph County Superior Court, when the bills of indictment for the two charges were returned as true bills and the defendant tried by consolidating of the two cases."

The defendant, through his attorney, entered a plea of not guilty to both cases. At the close of the State's evidence No. 2434 was dismissed on motion of nonsuit, and in No. 2547 the trial court dismissed the count of transportation, (not charged in the bill of indictment). From a jury verdict of guilty of possession (No. 2547) and the sentence imposed, the defendant appeals to the Supreme Court and assigns error.

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

Ottway Burton, Don Davis for defendant, appellant.

WINBORNE, C. J.:It appears upon the face of the record proper that the verdict is insufficient to support a judgment. *S. v. Lassiter,* 208 N.C. 251, 179 S.E. 891. See also *S. v. Shew,* 194 N.C. 690, 140 S.E. 621; *S. v. Barbee,* 197 N.C. 248, 148 S.E. 249.

In the *Lassiter* case, *supra,* the defendant was charged in the second count "with having and possessing a quantity of intoxicating liquor against the form of the statute," and the jury returned a verdict of "Guilty of possession." This Court, in opinion by Stacy, C. J., had this to say: "The verdict is not sufficient to support a judgment * * * It neither alludes to the warrant nor uses language to show a conviction of the offense charged therein."

Moreover, in the *Lassiter* case the Court further declared: "Had the verdict been 'guilty of possession as charged in the second count,' or simply 'Guilty as charged in the second count,' the situation would have been different, but when the jury undertakes to spell out its verdict without specific reference to the charge, as in the instant case, it is essential that the spelling be correct," citing *S. v. Parker,* 152 N.C. 790, 67 S.E. 35. See also *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9.

And in the *Shew* case, *supra,* the verdict was "Guilty of receiving stolen goods," and the Court called attention to a similar verdict, in almost exact language, in the case of *S. v. Whitaker,* 89 N.C. 472, where, speaking to the insufficiency of the verdict as a basis for judgment, in opinion by Ashe, J., the Court said: "It is not sufficiently responsive to the issue: and whenever a verdict is imperfect, informal, insensible, or one that is not responsive to the indictment, the jury may

be directed to reconsider it with proper instructions as to the form in which it should be rendered * * * But if such verdict is received by the court and recorded, it would be error to pronounce judgment upon it. The most regular course would be to set aside the verdict and order a *venire de novo.*" See also *S. v. Parker, supra.*

Moreover, in the *Barbee* case, *supra,* the verdict, after naming defendants, was "guilty of having car in their possession knowing it to have been stolen." Speaking thereto, this Court said: "Viewed in the light of the evidence, and the charge of the court, the verdict would seem to be defective or insufficient to support a judgment, as it is not responsive to the indictment * * * It is not found that the defendants received the car in question knowing at the time that the same had been feloniously stolen or taken * * * ." And the Court held that "on the record as it now appears, the appealing defendant is entitled to a *venire de novo.*"

In the instant case the verdict "Guilty of possession" is without specific reference to the charge, and is insufficient to support a judgment; and defendant is entitled to a *venire de novo. S v. Lassiter, supra.*

Venire de novo.

STATE v. LIVINGSTON BROWN.

(Filed 30 April, 1958.)

1. Criminal Law § 118: Intoxicating Liquor § 9g—

A verdict of "guilty of transporting and illegal possession," without reference to the bill of indictment, is insufficient to support judgment for illegal possession of intoxicating liquor.

2. Indictment and Warrant § 20: Intoxicating Liquor § 9g—

Defendant cannot be convicted of illegal transportation of intoxicating liquor unless such charge is contained in the bill of indictment under which he is tried.

APPEAL by defendant from *Hall, J.,* December Term 1957 of RANDOLPH.

Criminal actions consolidated for trial.

The defendant was charged in a warrant dated 31 May 1957, returnable to the Recorder's Court of Randolph County, with transporting, possessing, and possessing for the purpose of sale, six gallons of nontax-paid liquor. In the second warrant, dated the same day and returnable to the same court, the defendant was charged with having in his possession for the purpose of sale one and one-half gallons of nontax-paid liquor.

When these cases came on for hearing in the Recorder's Court, the defendant demanded a jury trial and the cases were transferred to the Superior Court for trial.

At the December Term 1957, two identical bills of indictment were found, charging that the defendant on the 31st day of May 1957 did unlawfully and wilfully purchase, have on hand and possess intoxicating liquors, contrary to the form of the statute in such cases, made and provided, etc. One of these cases was numbered 2448, the other 2449; the cases were consolidated for trial.

The record discloses that, "The defendant Livingston Brown, through his attorney Ottway Burton, enters a plea of Not Guilty to the specified indictments in these two cases."

The State offered ample evidence to support the charge of transporting and illegal possession of intoxicating liquors, although neither bill of indictment charged the defendant with transporting or with the possession of intoxicating liquors for the purpose of sale as did one of the original warrants.

The record further discloses that at the close of the State's evidence the court ordered a verdict of not guilty in case No. 2449.

In case No. 2448 the jury returned a verdict as follows: "Guilty of transporting and illegal possession. Not guilty: possession for sale."

The court pronounced judgment as follows: That, "the defendant be confined in the common jail of Randolph County for the term of 12 months and assigned to work the roads under the direction of the State Highway and Prison Department."

The defendant appeals, assigning error.

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

Ottway Burton, Don Davis for defendant, appellant.

PER CURIAM. The assignments of error brought forward on this appeal are without merit and are overruled. Even so, the Court, *ex mero motu,* takes cognizance of the fact that the verdict is not sufficient to support the judgment. It neither alludes to the bill of indictment nor uses language to show the conviction of the offense charged therein. Therefore, on authority of *S. v. Brown, ante,* 311, and for the reasons stated therein, a *venire de novo* is ordered.

Moreover, if the Solicitor desires to try the defendant for transporting, as well as for the unlawful possession of intoxicating liquors, he must obtain an indictment charging the defendant with the unlawful and wilful transportation of intoxicating liquors, contrary to law. No such charge is contained in the bill of indictment under which the jury

purported to convict him of illegally transporting intoxicating liquors.

Venire de Novo.

STATE v. MARION LEE IVEY.

(Filed 30 April, 1958.)

Bills and Notes § 19—

The signing of a blank check form does not constitute the instrument a check, and where, in a prosecution under G.S. 14-107, defendant testifies that he signed a blank check, that he did not authorize anyone to fill it out in any amount, and that he did not know by whom or when it was filled out, an instruction to the effect that it was immaterial whether there was any writing on the check other than the signature at the time of delivery, must be held for prejudicial error as depriving defendant of the defense that what he signed was not a check.

APPEAL by defendant from *Sink, E. J.*, November Term 1957 of HARNETT.

Criminal prosecution upon a warrant charging the defendant with drawing, making, uttering, issuing and delivering to Coats Grocery a worthless check, in violation of G.S. 14-107.

Plea: Not Guilty. Verdict: Guilty in the manner and form charged in the warrant.

From the judgment pronounced against him defendant appeals.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Young Taylor & Lamm for defendant, appellant.

PARKER, J. The State's evidence tends to show these facts: Defendant was in the store known as Coats Grocery, and told Joseph S. Coats to fill out a check for what he owed him, and he would sign it. Joseph S. Coats filled out a blank check so that it read:

"No.....

Dunn, N. C. June 27, 1956.

THE COMMERCIAL BANK

Pay to the Order of Coats Grocery - - - - $1399.00

Thirteen Hundred Ninety-Nine and no/100 Dollars."

When the check was filled out, the defendant signed it, and gave it back to Coats. Upon presentation at the bank, the check was not paid, for the reason that the defendant on 27 June 1956, and thereafter, had neither sufficient funds on deposit in or credit with the bank to pay the check upon presentation.

The defendant's evidence tends to show these facts: When he signed the blank check there was nothing written on it except his name. He does not know who filled out the amount payable on the check, or when it was filled out. He did not authorize anyone to fill the check out in the amount of $1,399.00, or any other amount.

The defendant assigns as error this part of the charge: "Gentlemen, that it is immaterial if he signed it, whether there was any writing on it or not, if he signed a blank check and gave it to the Coats Grocery for the payment of a debt or for the payment of money for any purchase whatsoever, knowing at the time that he did not have money in there to meet that check and you so find beyond a reasonable doubt, that he would nevertheless be guilty."

The offense condemned by G.S. 14-107 is "the giving of a worthless check and its consequent disturbance of business integrity." *S v. White,* 230 N.C. 513, 53 S.E. 2d 436.

G.S. 25-192 defines a check as "a bill of exchange drawn on a bank payable on demand."

G.S. 25-133 defines a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

"A check is a bill of exchange, and may more particularly be defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment, at all events, of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand." *Trust Co. v. Bank,* 166 N.C. 112, 81 S.E. 1074.

In *People v. Nichols,* 391 Ill. 565, 63 N.E. 2d 759, the defendant pleaded guilty to a bill of indictment charging him with forgery of a check, which instrument the indictment set out in *haec verba:*

"No.....

Second National Bank of Monmouth, Ill.
70-625

Monmouth, Ill., Oct. 1, 1940

Pay to the
Order of $3.93/100
Three and 93/100 .....Dollars
For..... J. B. Clark
7
Member
Federal Reserve
System."

The Court said: "A check is defined as a draft or an order upon a bank purporting to be drawn upon a deposit of funds, for the payment of a certain sum of money to a certain person named therein, or to his order or to bearer. *Economy Fuse & Mfg. Co. v. Standard Electric Mfg. Co.*, 359 Ill. 504, 194 N.E. 922. An instrument is not a check if it does not appear from the face of the paper to whom it is payable. *Equitable Trust Co. v. Harger*, 258 Ill. 615, 102 N.E. 209; *Geske v. State Bank of Heyworth*, 273 Ill. App. 294. . . . Since an accusation charging a crime is the foundation of the proceeding in a criminal case, without which no conviction can be sustained, the court will not, when the insufficiency of the charge is brought to its attention before final judgment, affirm the conviction. *People v. Wallace*, 316 Ill. 120, 146 N.E. 486. . . . The indictment being wholly insufficient to sustain the conviction, the judgment and sentence based thereon are erroneous, and cannot be sustained. The judgment of the circuit court of Mercer County is reversed."

According to the defendant's testimony, the instrument he signed did not contain a promise or order to pay any sum in any amount, nor did it state to whom it was payable. He did not authorize anyone to fill it out in any amount. He did not know by whom or when it was filled out. If his evidence is accepted as true by the jury, what he signed was not a check, and he is not guilty of the offense charged against him in the warrant.

The charge of the court assigned as error, to the effect, that if defendant signed an instrument, it is immaterial whether there was any writing on it or not, and if he delivered it to Coats Grocery knowing at the time that he did not have money in the bank to meet it, and the jury so find beyond a reasonable doubt, defendant would be guilty, is erroneous as a matter of law, destroyed the defendant's defense that what he signed was not a check, and entitles him to a

New Trial.

STATE v. ISAAC DAVIS

(Filed 30 April, 1958.)

1. Constitutional Law § 32—

There is no statutory requirement that indigent defendants charged with a crime less than a capital felony must have court appointed counsel, and in the absence of a request for counsel and in the absence of any showing that counsel is essential to a fair trial, the appointment of counsel rests in the sound discretion of the trial judge. G.S. 15-4.1.

2. Criminal Law § 147: Habeas Corpus § 2—

Where defendant does not request appointment of counsel and does not

serve case on appeal or cause his appeal to be docketed in order that it might be heard on the record proper, or apply for a writ of *certiorari* to preserve the right of review at the next succeeding term of the Supreme Court, a judge of the Superior Court is thereafter without power to enlarge the time for service of case on appeal, and an order doing so upon a petition for *habeas corpus* is ineffective.

3. Habeas Corpus § 2—

An order entered in a *habeas corpus* proceeding appointing counsel for defendant and allowing him time therefrom to perfect his appeal after time for perfecting appeal had expired, and purporting to arrest the judgment, will be reversed upon review by *certiorari*, no prejudicial error appearing upon the face of the record proper, and the original sentence remains in effect, although defendant should be given credit for time spent in confinement since the entry of the order purporting to arrest the judgment.

4. Criminal Law §§ 149, 173: Habeas Corpus § 8—

The strict enforcement of the rules governing appeals does not preclude rights under the Post Conviction Hearing Act, G.S. 15-217, nor the right to petition for a writ of *certiorari* to review orders entered in a *habeas corpus* proceeding.

CERTIORARI allowed upon petition of Solicitor for the State to review the order of *Burgwyn*, Emergency Judge, entered on 13 November 1957.

The defendant was tried and convicted at the March Term 1956 of the Superior Court of WAKE COUNTY on a bill of indictment charging him with breaking and entering. The bill of indictment had been returned at the February Term 1956 of said court. The defendant was sentenced to a prison term of not less than five nor more than seven years in Central Prison and assigned to work under the supervision of the State Highway and Public Works Commission. He gave notice of appeal to the Supreme Court and was authorized to appeal as a pauper. He was allowed fifteen days in which to serve his case on appeal and the State was allowed ten days thereafter to file exceptions or serve countercase.

No case on appeal having been served on the Solicitor within the fifteen days allowed, and the time for serving such case not having been extended, his Honor Hamilton Hobgood, Judge Presiding at the May Criminal Term 1956 of the Superior Court of Wake County, ordered that the defendant be committed to prison in accordance with the original judgment. Committment was issued on 7 May 1956.

At the November Term 1957 of Wake Superior Court, Judge Burgwyn in a *habeas corpus* proceeding entered an order appointing counsel for the defendant, allowing him twenty days from the signing of the order to perfect his appeal, and purporting to arrest the judgment theretofore entered.

No case on appeal was served on the Solicitor during the time allowed by said order. Hence, on 30 January 1958, the Solicitor for the State filed a petition for a writ of *certiorari* and docketed the record proper in this Court in order that the Court might review Judge Burgwyn's order. We allowed the petition on 11 February 1958.

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

Carl E. Gaddy, Jr., for defendant.

DENNY, J. It appears that the defendant was without counsel when he was convicted and sentenced on the charge of breaking and entering at the March Term 1956 of the Superior Court of Wake County. There is no showing that the appointment of defense counsel was essential to a fair trial in the Superior Court, or that the appointment of counsel was requested. *S. v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778.

There is no statutory requirement in this jurisdiction that indigent defendants not accused of capital felonies must have court appointed counsel. *S v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563; *S. v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320. Cf. *S. v. Simpson,* 243 N.C. 436, 90 S.E. 2d 708, and see G.S. 15-4.1.

A defendant has the constitutional right to be represented by counsel and to have counsel assigned, if requested, when the circumstances are such as to show apparent necessity for counsel to protect his rights. But in the absence of a request therefor, the propriety of providing counsel for a person accused of an offense less than a capital felony, rests in the sound discretion of the trial judge. *S. v. Hedgebeth, supra; In re Taylor,* 230 N.C. 566, 53 S.E. 2d 857; *S. v. Hackney, supra.* See *People v. Logan,* 137 C.A. 2d 331, 290 P 2d 11, where numerous authorities from many jurisdictions are cited.

The fact that Judge Hobgood ordered the sentence imposed at the March Term 1956 into effect at the May Term 1956, after finding as a fact that the defendant had not served his case on appeal within the time allowed by the court, did not prevent the defendant from having his appeal docketed in the Supreme Court for review of the record proper. But since the defendant did not request the appointment of counsel, and did not cause his appeal to be docketed in order that it might be heard on the record proper, nor apply for a writ of *certiorari* at the Fall Term 1956, a judge of the superior court was thereafter without power to enlarge the time for serving case on appeal. *S. v. Walker,* 245 N.C. 658, 97 S.E. 2d 219, and cited cases.

The present case demonstrates the necessity for the strict enforcement of our rules relating to appeals. For example, the defendant in this case waited approximately twenty months before raising any

objection to his trial and conviction or to the judgment imposed. Then when judgment was purportedly arrested on 13 November 1957, and counsel was appointed for him and he was given twenty days in which to serve his case on appeal, there is nothing before us to indicate that he made any effort to prepare or serve such case. Hence, it would seem clear that if the State had not applied to this Court for a writ of *certiorari* to have the order of Judge Burgwyn reviewed, the matter would not now be before us.

A careful review of the record proper reveals no prejudicial error on its face. Therefore, the order of Judge Burgwyn is held to be ineffective to arrest the original judgment. It will, therefore, remain in full force and effect as entered at the March Term 1956. However, the defendant should be given credit on his sentence for any time spent in the Wake County jail since the entry of the order purporting to arrest the judgment.

The necessity for the enforcement of our rules governing appeals in no way constitutes an encroachment on the rights of a defendant which come within the purview of our Post Conviction statute, Chapter 1083, Session Laws of 1951, codified as G.S. 15-217 through and including G.S. 15-222, or the right to petition this Court for a writ of *certiorari* to review orders entered in a *habeas corpus* proceeding.

The order of Judge Burgwyn is

Reversed.

MRS. RAY S. ALLEN v. THOMAS W. SEAY, JR, ADMINISTRATOR C.T.A. OF MARY CROSS COX, DECEDENT.

(Filed 30 April, 1958.)

1. Executors and Administrators § 15d: Quasi Contracts § 2—

Where plaintiff declares on a special contract to pay for personal services rendered and also alleges in detail the services which were accepted and that they were reasonably worth a stipulated amount, the allegations are sufficient, upon failure to establish the special contract alleged, to go to the jury on *quantum meruit*.

2. Executors and Administrators § 15d—

The presumption that personal services rendered one kinsman by another are gratuitous does not extend to personal services rendered a first cousin once removed when the persons are not of the same household so that the person rendering the services has to move to the recipient's residence for the purpose of ministering to her.

3. Limitation of Actions § 15—

A plea of the statute of limitations is ineffectual in the absence of fac-

tual allegation showing the lapse of time between the date the cause of action accrued and the date on which it was instituted.

APPEAL by plaintiff from *Rousseau, J.* October, 1957 Term, ROWAN Superior Court.

Civil action to recover $40.00 per week for services and accommodations the plaintiff alleged she agreed to, and did, provide for the defendant's testatrix under a special contract - the payment to be made out of the latter's estate. The plaintiff also alleged in detail the services which the testatrix accepted, and that they were reasonably worth more than $40.00 per week.

The defendant denied the contract and all other material allegations of the complaint, and as a plea in bar alleged, "That any claim existing in favor of the plaintiff for services rendered the deceased was barred by the three-year and six-year statutes of limitations, and same are pleaded by this defendant as a bar to any recovery by the plaintiff."

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

"In what amount, if any, is the defendant indebted to the plaintiff?
Answer: None."

From the judgment in favor of the defendant, the plaintiff appealed.

Graham M. Carlton for plaintiff appellant.
John C. Kesley for defendant appellee.

HIGGINS, J. The plaintiff based her cause of action on a special contract. However, upon failure to establish the special contract her complaint contained sufficient allegations to permit her to go to the jury on *quantum meruit. Thormer v. Mail Order Co.,* 241 N.C. 249, 85 S.E. 2d 140; *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561; *Wright v. Ins. Co.,* 138 N.C. 488, 51 S.E. 55; *Stokes v. Taylor,* 104 N.C. 394, 10 S.E. 566.

The court submitted only the issue based on the value of the services, evidently upon the ground the evidence was insufficient to show the special contract. On this issue the judge charged:

> "Now, as I stated a moment ago, where one kinsman moves into the home of another kinsman there is a presumption of fact that the services rendered by the kinsman to another kinsman were given gratis, that is, free, but that is not a conclusive presumption; that can be rebutted, and if . . . you find by the greater weight of the evidence that Mrs. Cox received services under certain circumstances and conditions, and find that she expected

to pay Mrs. Allen for the services and Mrs. Allen expected her to pay, then it is a case of arriving at whatever her services were reasonably worth; . . .

"You cannot go back now and award any sum of money to Mrs. Allen beyond three years from the time Mrs. Cox died."

The plaintiff's assignment of error No. 17 challenges the quoted portion of the charge insofar as it relates to the presumption that services rendered to a kinsman by a kinsman are gratuitous. "The general rule that the performance of valuable services for one who knowingly and voluntarily accepts the benefit thereof raises the implication of a promise to pay, is subject to the modification that, when certain family relationships exist, services performed by one member of the family for another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation." *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907 (citing numerous cases). See also, *Twiford v. Waterfield,* 240 N.C. 582, 83 S.E. 2d 548; *Dills v. Cornwell,* 238 N.C. 435, 78 S.E. 2d 167; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Landreth v. Morris,* 214 N.C. 619, 200 S.E. 378; *Winkler v. Killian,* 141 N.C. 575, 54 S.E. 540; *Callahan v. Wood,* 118 N.C. 752, 24 S.E. 542; *Williams v. Barnes,* 14 N.C. 348; Mordecai's Law Lectures, 2d ed., 119.

In the case at bar the plaintiff and the testatrix were first cousins once removed. Prior to 1947 the former lived in New Jersey and the latter in South Carolina. In that year the testatrix moved to the plaintiff's apartment in New Jersey where she remained until her death in 1956. Prior to 1947, insofar as the evidence discloses, the two had never been members of the same household. The court's charge, therefore, that services by a kinsman to a kinsman are presumed to be gratuitous was entirely too broad and all-inclusive. Kinship in this case, according to the authorities cited, and many others, was insufficient to raise a presumption that services rendered were gratuitous. In the charge the court committed error prejudicial to the plaintiff.

The plaintiff's assignment No. 18 challenges the applicability of the plea of the statutes of limitations quoted in full in the statement of facts. The form and sufficiency of the plea were not debated either in the briefs or on the argument. However, we call attention thereto in view of the assignment of error. The essence of such a plea is a factual allegation showing the lapse of time between the date the cause of action accrued and the date on which it was actually instituted. When the facts showing the lapse of time are pleaded, the pleader becomes entitled to the benefit of the plea as a matter of law.

" . . . the plea is not good if it merely states that the party pleads the statute of limitations . . . he must go further and state the facts constituting the defense." *Bank v. Warehouse,* 172 N.C. 602; *Jackson v. Thomas,* 211 N.C. 634, 191 S.E. 327; *Pipes v. Lumber Co.,* 132 N.C. 612, 44 S.E. 114; *Lassiter v. Roper,* 114 N.C. 17, 18 S.E. 946; *Turner v. Shuffler,* 108 N.C. 642, 13 S.E. 243; *Pope v. Andrews,* 90 N.C. 401; McIntosh on Practice and Procedure, 2d ed., Vol. 1, sec. 372, p. 211.

The plaintiff alleges that errors were committed in the exclusion of certain testimony and documents tending to show a special contract. Some of these assignments are not without merit, but since they may not arise on another trial we refrain from discussing them. For the error in the charge, the plaintiff is awarded a

New Trial.

IN THE MATTER OF JOAN BEATRICE McWHIRTER.

(Filed 30 April, 1958.)

1. Appeal and Error § 19—

Exceptions which appear nowhere in the record except under the assignments of error are ineffectual, since an exception must be duly noted at the proper time.

2. Appeal and Error § 22—

Where no exceptions are taken to the admission of evidence or to the findings of fact, or, if taken, are not preserved, it will be presumed that the findings are supported by competent evidence and they are binding on appeal, and the appeal presents only whether the facts found and conclusions of law support the judgment and whether error appears on the face of the record.

3. Infants § 22— Court may properly award custody of child to respondent as against child's father when the best interests of the child so require.

Upon petition of the father for the custody of his daughter, findings of fact to the effect that petitioner had made no concrete attempt to visit his daughter for a period of approximately six years and that his only attention to her during this period was the payment of the monthly sums stipulated by order of court upon conviction of abandonment, that respondent had been given custody of the child by its mother after the separation of petitioner and the child's mother, that the child's mother had named respondent guardian of the child and willed her property in trust for the child, and that the best interests of the child clearly required that she be allowed to remain in the home of respondent, support judgment of the court awarding custody of the child to respondent.

IN RE McWHIRTER.

APPEAL by petitioner from *Preyer, J.*, September Term 1957 of WAKE.

The petitioner, J. H. D. McWhirter, instituted this proceeding in the Domestic Relations Court for Raleigh and Wake County for the custody of his daughter, Joan Beatrice McWhirter, frequently called "Diane."

The petitioner, a widower with two children, and Christine Barker (now deceased) were married on 17 August 1944. They lived together as husband and wife until 9 December 1948, at which time they separated. Joan Beatrice McWhirter was born of this marriage on 19 August 1948. When the petitioner and his wife separated, his wife took the infant daughter.

From the judgment of the Domestic Relations Court awarding custody of Joan Beatrice McWhirter to the respondent, Hattie Mae Williams, the petitioner appealed to the Superior Court of Wake County.

At the hearing in the Superior Court, his Honor heard the matter, without objection of the petitioner or respondent, without a jury, both on oral testimony and affidavits filed by the respective parties, and found the facts and made his conclusions of law, the pertinent parts thereof being as follows:

"That when Joan B. McWhirter was an infant of approximately three months of age, J. H. D. McWhirter and Christine McWhirter were separated, at which time Christine McWhirter and the respondent, Hattie Mae Williams, commenced keeping house together.

"That Joan B. McWhirter since her infancy lived continuously in the house with her mother and Hattie Mae Williams until her mother's death in September of 1956, and since that time she lived with Hattie Mae Williams, who she regards as and calls her mother.

"That upon the death of Christine McWhirter, she named Hattie Mae Williams guardian of Joan B. McWhirter, and willed her property to Hattie Mae Williams in trust for Joan B. McWhirter.

"That J. H. D. McWhirter made no concrete attempt to visit or see his daughter, Joan B. McWhirter, for a period of approximately six years ending shortly after the death of Christine McWhirter in September of 1956; that during this six year period, the only support made by J. H. D. McWhirter was $25.00 per month paid under order of the Domestic Relations Court following a conviction of abandonment and inadequate support; that the said J. H. D. McWhirter sent neither presents nor anything else whatsoever to his child during this six year period.

"That the respondent, Hattie Mae Williams, is a person of excellent character, and that she is a fit, suitable and proper person to have the care, custody and control of Joan Beatrice McWhirter; that Hattie Mae Williams has a proper, suitable and comfortable home, that she

is giving Joan Beatrice McWhirter such care as to promote her best welfare, interest and development.

"That Joan Beatrice McWhirter does not want to leave her present home, and has shown anxiety and turmoil over the possible dissolution of her present family relationship; that her best interest and welfare clearly require that she be allowed to remain in the home of the respondent, Hattie Mae Williams.

"That J. H. D. McWhirter and his present wife are people of excellent character and have a suitable and proper home; that it would be proper for Joan Beatrice McWhirter to visit in their home.

"Upon the foregoing facts, the court concludes as a matter of law:

"1. That Hattie Mae Williams is a fit, suitable and proper person to have the care, custody and control of the said Joan Beatrice McWhirter.

"2. That by his conduct during the six year period ending shortly after September of 1956, the petitioner neglected the welfare and interest of his daughter, Joan Beatrice McWhirter, and by so doing waived his usual right to her custody."

Based on the foregoing findings of fact and conclusions of law, judgment was entered awarding the custody of Joan Beatrice McWhirter to Hattie Mae Williams, and making provision for the infant to visit in the home of her father at certain fixed times.

The petitioner appealed to the Supreme Court.

Sam J. Morris for petitioner.

Manning & Fulton for respondent.

PER CURIAM. The petitioner sets out nine assignments of error purportedly based on a like number of exceptions. However, these exceptions appear nowhere in the record except under the assignments of error. Such exceptions are ineffectual since an assignment of error must be supported by an exception duly noted at the proper time. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223.

Even so, where no exceptions have been taken to the admission of evidence or to the findings of fact, or if taken but not preserved, such findings will be presumed to be supported by competent evidence and will be binding on appeal. *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759.

Therefore, this appeal presents only these questions: (1) Are the facts found and the conclusions of law made in the court below sufficient to support the judgment, and (2) does any error appear on the face of the record? *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486.

We hold that the findings of fact are sufficient to support the conclusions of law and the judgment entered pursuant thereto. Further-

more, an examination of the record discloses ample evidence to support his Honor's findings of fact. Therefore, the judgment of the court below is

Affirmed.

STATE v. DR. P. H. LEE.

(Filed 30 April, 1958.)

1. Abortion § 3—

Conflicting evidence in this prosecution for violation of G.S. 14-45 *held* sufficient to be submitted to the jury.

2. Criminal Law § 107—

Where corroborative evidence is properly restricted upon its admission, the failure of the court in its charge to explain the difference between substantive evidence and corroborative evidence will not be held for error in the absence of special request.

3. Criminal Law § 106—

Failure of the court to define "reasonable doubt" will not be held for error in the absence of special request.

APPEAL by defendant from *Rousseau, J.*, October 1957 Term of CABARRUS.

Attorney General Patton, Assistant Attorney General Love, and R. T. Sanders of staff for the State.

Llewellyn and McKenzie for defendant, appellant.

PER CURIAM. Defendant was indicted on a charge of attempting to produce an abortion by Joan Porter in violation of G.S. 14-45. Mrs. Porter testified that she employed defendant and paid him $35 to cause her to abort. She was then four or five months pregnant. Her description of what defendant did is sufficient to constitute the crime of which defendant was charged.

Defendant admitted he was employed and treated Mrs. Porter. He denied the employment was for the purpose charged, testifying he did not discover his patient was pregnant, and that the treatment given was to correct the position of her womb and not to produce an abortion.

The conflict in testimony between patient and physician was for the jury. The motion to nonsuit was properly overruled. It is not argued in the brief and is abandoned. Rule 28, 221 N.C. 563.

A police officer testified to statements made to him by Mrs. Porter which detailed her employment of defendant, the purpose of the employment and the treatment given. The court admitted this evidence, telling the jury at the time the evidence was admitted that it was offered for the purpose of corroboration and was not substantive evidence. The court did not, in its charge, explain the difference between substantive evidence and corroborative evidence. Defendant made no request for such an instruction. The failure to make reference in the charge to the difference between substantive evidence and corroborative evidence and to define each of these terms is not ground for exception. Rule 21, 221 N.C. 558; *S .v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278.

No request was made to define the term "reasonable doubt." The failure to define the words "reasonable" and "doubt" does no violence to G.S. 1-180. *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133; *S. v. Ammons,* 204 N.C. 753, 169 S.E. 631; *S. v. Steadman,* 200 N.C. 768, 158 S.E. 478.

The charge of the court fairly presented the question at issue to the jury. Our examination of the record and the assignments of error fails to disclose any error in the trial prejudicial to defendant.

Affirmed.

ELIAHOU LEVY v. EZRA MEIR.

(Filed 30 April, 1958.)

Pleadings § 4—

Whether the complaint should be verified is optional with plaintiff unless some statute requires verification as a condition to the maintenance of the action, G.S. 1-144, and in an action on a promissory note verification is not required, and therefore an attempted verification, which is a nullity, cannot defeat the action, although in such instance defendant is not required to verify his answer. G.S. 1-146.

APPEAL by plaintiff from *Sink, E. J.,* October 1957 Civil Term (Second) of WAKE.

Plaintiff seeks to recover the dollar equivalent of 450 dinars, the sum specified in a promissory note given by defendant to plaintiff in Bagdad in August 1947. Attached to the complaint is an affidavit by Kenneth M. Stark as attorney in fact for plaintiff. This affidavit is in the form prescribed for a party to the action who desires to verify the same, G.S. 1-145; but does not meet the requirements of a verification by an agent or attorney, G.S. 1-146.

Defendant moved to dismiss the action for lack of proper verification. The original complaint alleged that plaintiff was a resident of New York County, State of New York. Plaintiff was allowed to amend to allege that he was a resident of Israel. The court, after hearing the parties on the motion to dismiss, adjudged that the complaint had been improperly verified and thereupon dismissed the action at plaintiff's cost. Plaintiff appealed.

Everett Everett & Everett for plaintiff, appellant.
Emanuel & Emanuel for defendant, appellee.

PER CURIAM. A pleading must be subscribed by a party or his attorney. The complaint filed in this case meets this statutory requirement. Whether plaintiff verifies his complaint is optional with him unless some statute requires verification as a condition to the maintenance of the action. G.S. 1-144. No statute requires verification to maintain an action on a promissory note. Since plaintiff can maintain his action without verifying the complaint, an attempted verification. which is a nullity, cannot defeat that right. *Reynolds v. Smathers,* 87 N.C. 24; *McNair v. Yarboro,* 186 N.C. 111. As the verification does not meet the requirement of the statute, G.S. 1-146, defendant is not required to verify his answer.

Reversed.

MENER LEE MOODY, BY HER NEXT FRIEND, WALTER CLYDE MOODY, v. RUDELL W. MASSEY AND JAMES REVELL.

(Filed 30 April, 1958.)

Automobiles § 43—

In this action by a passenger in one car against the drivers of both cars involved in a collision at an intersection, the evidence *is held* sufficient to be submitted to the jury on the theory of the concurrent negligence of both drivers, and motion to nonsuit made by one of them on the ground that any negligence on his part was insulated by the negligence of the other, was properly refused.

APPEAL by defendant Massey from *Sharp, J.,* and a jury, at 18 November Civil Term, 1957, of WAKE.

Civil action by plaintiff to recover damages for personal injuries resulting from an intersection collision.

The collision occurred about 12 miles west of Rocky Mount where Highway #95 is intersected by a county road. The defendant Massey

was going east on Highway #95; the defendant Revell north on the county road. Both roads are paved. Stop signs at the intersection made Highway #95 the dominant, through highway, and the county road the servient road. Therefore, as the two vehicles approached the intersection, the car driven by the defendant Massey was on the favored highway as designated by the stop signs. The plaintiff was a passenger in the Massey car. The case was tried upon the following issues, answered by the jury as indicated:

"1. Was the plaintiff injured and damaged by the negligence of defendant Rudell W. Massey, as alleged in the Complaint?

Answer: Yes.

"2. Was the plaintiff injured and damaged by the negligence of defendant James Revell, as alleged in the Complaint?

Answer: Yes.

"3. What amount, if any, is the plaintiff entitled to recover?

Answer: $3,844.00."

From judgment upon the verdict against both defendants, the defendant Massey appeals.

Bunn & Bunn for the plaintiff.

Clem B. Holding for the defendant Massey.

PER CURIAM. The single question presented by the appeal is whether the trial court erred in denying the defendant Massey's motion for judgment as of nonsuit. His chief contention is that the evidence discloses that any negligence chargeable to him was insulated as a matter of law by the intervening negligence of the defendant Revell. However, our study of the record leaves the impression the evidence was susceptible of diverse inferences and that there was plenary evidence of actionable negligence as to both defendants. We conclude that the trial court properly submitted the case to the jury on the theory of concurrent negligence of both drivers. The verdict and judgment will be upheld. See *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373; *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17.

No Error.

F. L. TAYLOR AND LUMBERMEN'S MUTUAL CASUALTY COMPANY v. E. M. HUNT.

(Filed 30 April, 1958.)

APPEAL by plaintiffs and by defendant from *Craven, S. J.*, at September 1957 Term, of MOORE.

Civil action originally instituted by plaintiff F. L. Taylor to recover for personal injuries, and property damage allegedly sustained by him in a collision about 10 A.M., on 10 November, 1955, between a motor vehicle operated by him, and one operated by defendant, as result of negligence of defendant.

Defendant answering denies material allegations of the complaint and pleads contributory negligence of plaintiff, and interposes a counterclaim for personal injuries, and property damage allegedly sustained by him in said collision, as result of negligence of plaintiff Taylor. Plaintiff in reply denies material allegations of the counterclaim, and sets up plea of contributory negligence.

On an appeal from the refusal of the lower court to allow motion to strike, this Court in opinion reported as *Taylor v. Hunt,* 245 N.C. 212, 95 S.E. 2d 589, ruled that, since plaintiff F. L. Taylor had accepted compensation under the Workmen's Compensation Act, the action, which had been instituted within six months of the injury, could not be maintained in the name of plaintiff F. L. Taylor unless the complaint disclosed that the action was instituted in the name of the employee by either the employer or insurance carrier.

Thereafter, Lumbermen's Mutual Casualty Company, insurance carrier of the employer of F. L. Taylor, was, by its consent, made a party plaintiff to the action to prosecute same in name of F. L. Taylor by it as insurance carrier under provisions of G.S. 97-10, and to that end it adopted the complaint filed by F. L. Taylor.

And defendant Hunt answering the complaint so adopted, adopts and reasserts all the allegations of his answer theretofore filed to the original complaint, to which plaintiffs replied, denying in material aspects the averments of the answer and plead contributory negligence of defendant.

The case coming on for hearing, and being heard, at September Term 1957, of Superior Court, in accordance with stipulation of attorneys for the parties, was submitted to the jury on evidence adduced. Of the six issues so submitted, the first was as to whether plaintiff Taylor was injured and damaged by the negligence of defendant Hunt as alleged in the complaint, and the fifth was as to whether defendant Hunt was injured and damaged by the negligence of plaintiff Taylor as alleged in the answer and counterclaim.

The jury answered each of these two issues "No". And the jury did not answer the issues as to contributory negligence of plaintiff as alleged in the answer, or as to any of the three issues as to damages.

Thereupon the court entered judgment that plaintiffs recover nothing against defendant by reason of matters and things alleged in the complaint; and that defendant recover nothing of plaintiff F. L. Taylor on the counterclaim set up in the answer of defendant.

To judgment so entered, and to the signing thereof, both plaintiffs and defendant except and appeal to Supreme Court, and assign error.

H. F. Seawell Jr., David H. Armstrong for plaintiffs, appellants.
W. D. Sabiston, Jr., for defendant.

PER CURIAM. The record of case on appeal discloses that there were only two eye-witnesses to the collision of motor vehicles here involved—the plaintiff F. L. Taylor, and defendant E. M. Hunt. And careful consideration of their testimony reveals conflicting accounts of the accident and events immediately preceding.

Thus the evidence is in conflict as to speed of the cars or motor vehicles, as to their position on the highway at the moment of impact, as to the skidding of defendant's car, and as to whether defendant ran off the highway and on to the shoulder on his side just prior to the collision.

Now as to *Plaintiff's Appeal*: These appellants group and present for consideration forty-five assignments of error, based upon exceptions of like number. Of these ten are abandoned by reason of failure of supporting argument in brief. Rule 28 of Rules of Practice in Supreme Court. And all other assignments of error have been carefully considered, and prejudicial error is not made to appear. Indeed, there is evidence to support the issues submitted to and answered by the jury. No new principle is involved.

And as to *Defendant's Appeal*: While defendant assigns as error alleged failure of trial judge to charge the jury, as required by G.S. 1-180, in respect to the fifth issue, it is stated in his brief that he was content to settle with the "draw verdict" of the jury; but if plaintiffs are entitled to a new trial, so is he. Therefore, the Court finding no error on plaintiffs' appeal, takes defendant at his word, and makes like decision on his appeal.

Each party will pay cost of his statement of case on appeal, and of briefs filed, and each will pay one-half remaining cost of the appeal.

On Plaintiffs' Appeal: No Error.

On Defendant's Appeal: No Error.

NEWBY CLARENCE COCKMAN v. CURTIS E. POWERS.

(Filed 30 April, 1958.)

APPEAL by defendant from *Olive, J.*, February, 1958 Term, RANDOLPH Superior Court.

Civil action for alienation of affections and criminal conversation. The complaint and answer raise issues of fact as to which each party introduced evidence. The wife of the plaintiff testified as a witness for the defendant.

The jury answered all issues in favor of the plaintiff and from the judgment on the verdict the defendant appealed.

Ottoway Burton, Don Davis for plaintiff, appellee.

Ferree & Anderson, Seawell & Seawell, By: H. F. Seawell, Jr., for defendant, appellant.

PER CURIAM: Separate issues as to alienation of affections and as to criminal conversation, as well as actual and punitive damages, were submitted to the jury. The evidence was sufficient to sustain the verdict. The assignments of error in the admission and exclusion of testimony are lacking in merit.

While the charge to some extent fails to draw a distinct line between damages that may be awarded for alienation of affections and damages that may be awarded for criminal conversation, nevertheless the jury answered both issues for the plaintiff; and inasmuch as only one issue of actual damages was submitted, the slight deviation in the charge as to what damages may be awarded under the one or the other is deemed harmless. No reason appears why the result of the trial should be disturbed.

No error.

STATE v. ERNEST ROOSEVELT ST. CLAIR

(Filed 30 April, 1958.)

APPEAL by defendant from *Olive, J.*, January Term, 1958, of CABARRUS.

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

Llewellyn & McKenzie for defendant, appellant.

PER CURIAM. Appellant, charged with the operation of a motor vehicle upon a public highway while under the influence of intoxicants in violation of G.S. 20-138, was tried and found guilty at August Term, 1956; and the prayer for judgment was continued until October Term, 1956.

In *S. v. St. Clair,* 246 N.C. 183, 97 S.E. 2d 840, no error was found in defendant's trial and conviction at August Term, 1956. In *S. v. St. Clair,* 247 N.C. 228, 100 S.E. 2d 493, an error in the prior opinion, *relating solely to the judgment,* was corrected; and the judgment pronounced in superior court at October Term, 1956, to wit, that the defendant pay a fine of $100.00 and costs, was upheld as *the final judgment* in the cause.

The present purported appeal is based solely on defendant's exception to Judge Olive's order that the judgment pronounced at October Term, 1956, be "docketed against the defendant Ernest Roosevelt St. Clair." Obviously, no appeal lies from an order which merely recognizes and orders docketed a judgment theretofore declared final by this Court.

Appeal dismissed.

STATE v. A. E. PERRY.

(Filed 7 May, 1958.)

1. Constitutional Law § 29: Grand Jury § 1—

The systematic exclusion of persons of defendant's race from the grand jury returning the indictment against defendant is a denial of defendant's right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution and also "the law of the land" clause of the State Constitution, Art. I, Sec. 17.

2. Constitutional Law § 24—

Due process of law is secured against state action by the Fourteenth Amendment to the United States Constitution.

3. Indictment and Warrant § 12—

An objection to an indictment based on defects and irregularities in the drawing or organization of the grand jury must be taken by motion to quash the indictment made before the jury is sworn and impaneled to try the issue, and if not so taken, is deemed waived. G.S. 9-26.

4. Same: Constitutional Law §29: Grand Jury §1—

The burden of proof is upon the defendant to establish the racial discrimination alleged in his motion to quash the indictment.

5. Same—

Upon motion to quash the indictment on the ground of racial discrimination in selecting the grand jury, the defendant must be given reasonable time and opportunity to investigate the matter of racial discrimination, since due process of law requires that he be given his day in court, the next morning the defendants took the woman to the house of a friend, the facts in each particular case.

6. Same— Upon facts of this case defendant was deprived of opportunity to procure evidence in support of alleged racial discrimination in selection of grand jury.

Defendant was represented by counsel from another county, and on the day the indictment was returned counsel moved, before pleading, to quash the indictment on the ground that members of defendant's race had been systematically excluded from the grand jury and prayed for inquiry in the matter. Two days later, upon the call of the case, defendant renewed his motion, upon affidavit of one of the attorneys upon information and belief that members of defendant's race had been excluded from the jury panel, and requested time and opportunity to investigate the matter. The trial court found as a fact that no evidence had been offered in support of the motion to quash except the affidavit of counsel, and denied the motion, and the trial proceeded. *Held:* Upon the facts in this case, defendant was denied a reasonable opportunity and time to investigate and produce evidence, if any existed, in respect to racial discrimination, and the judgment and verdict are reversed and the cause remanded.

7. Indictment and Warrant § 14—

If the court, upon supporting evidence and proper finding, should quash the indictment on the ground of racial discrimination in the grand jury panel, defendant would not be entitled to his discharge, but should be held until an indictment against him can be found by a properly constituted grand jury.

APPEAL by defendant from *Clarkson, J.*, October 1957, Mixed Term, of UNION.

Criminal prosecution on a bill of indictment charging the defendant A. E. Perry on 4 October 1957 in Union County with using drugs and instruments with intent thereby to procure the miscarriage of Lillie Mae Rape, a pregnant woman.

Prior to pleading to the bill of indictment, the defendant moved to quash it, for reasons which will be set forth in the opinion. The trial court denied the motion to quash. Whereupon, the defendant pleaded Not Guilty. The jury returned a verdict of Guilty.

From a judgment of imprisonment the defendent appeals.

George B. Patton, Attorney General, T. W. Bruton, Assistant Attorney General, and Ralph Moody, Assistant Attorney General for the State.

Taylor & Mitchell for defendant, appellant.

PARKER, J. The defendant is a negro doctor. The bill of indictment, which charges that the offense was committed in Union County on 4 October 1957, was found on 28 October 1957 by the grand jury of Union County at the October 1957, Mixed Term, Union County Superior Court, which convened on the day the indictment was found.

The defendant on 28 October 1957, in due season, before pleading

to the bill of indictment, (*S. v. Linney*, 212 N.C. 739, 194 S.E. 470; *S. v. Speller*, 229 N.C. 67, 47 S.E. 2d 537), filed a written motion to quash the bill of indictment, for the reason that negroes because of their race have been systematically excluded from serving upon grand juries of Union County for a long period of time, and that negroes because of their race were excluded from serving upon the grand jury of Union County at the term of court when the bill of indictment was found, and that such systematic exclusion of members of the defendant's race from the grand juries of Union County, and particularly from the grand jury that found the bill of indictment against him, is a violation of his rights guaranteed to him by the due process and equal protection clauses of the Federal Constitution, and by Art. I, Sec. 17, of the State Constitution. The motion to quash prayed that an inquiry be had in order that the defendant's rights may be adequately protected and that the court cause process to be issued as necessary to permit the defendant to investigate the alleged violation of his constitutional rights.

On 28 October 1957, the day the bill of indictment was found, the trial court ordered a special venire of 50 persons from Anson County to appear in court on 30 October 1957, from which a trial jury was to be selected in the case.

On 30 October 1957 the State announced it was ready to proceed with the trial. Whereupon, counsel for the defendant stated to the court, that before entering a plea to the indictment, they renewed the motion made on 28 October 1957 to quash the indictment for the reasons set forth in the motion, and requested that they be given time and opportunity to inquire into the alleged systematic exclusion of negroes from grand jury service in Union County. In support of the motion to quash, counsel for the defendant presented to the court an affidavit made by Samuel S. Mitchell, a negro lawyer of counsel for the defendant. This is a summary of the material parts of the affidavit: The defendant is a negro. He has made inquiry, and is informed, and believes upon such information, that the grand jury which indicted the defendant was unlawfully constituted for that negroes solely because of their race have been systematically excluded from serving on grand juries of Union County for many years. All of counsel for the defendant are nonresidents of Union County, and need opportunity to inquire into the matter of such exclusion, and to gather evidence to present to the court on the matter. Counsel for the defendant then stated to the court that in order to substantiate their motion to quash it was necessary for the defendant to adduce evidence of such systematic exclusion of negroes from grand jury service in Union County, and they requested they be given an opportunity to present such evidence. The trial court inquired: "Is that all?" Counsel for defendant replied:

"That's all, yes, your Honor." The trial court then found as a fact that no evidence had been offered on the motion to quash, except the affidavit of Samuel S. Mitchell, and denied the motion to quash. To such denial the defendant excepted. The court then asked the defendant how did he plead to the indictment. Counsel for defendant replied Not Guilty. The trial then proceeded. A jury was selected, sworn and empaneled from the special venire of Anson County. The trial jury found the defendant guilty, and from a sentence of imprisonment he appeals to this Court.

For over 50 years the United States Supreme Court has adhered to the view that valid grand jury selection is a constitutionally protected right. *Reece v. Georgia,* 350 U.S. 85, 100 L. Ed. 77.

The indictment of a negro defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution. *Reece v. Georgia, supra; Shepherd v. Florida,* 341 U.S. 50, 95 L. Ed. 740; *Cassell v. Texas,* 339 U.S. 282, 94 L. Ed. 839: *Patton v. Mississippi,* 332 U.S. 463, 92 L. Ed. 76, 1 A.L.R. 2d 1286; *Norris v. Alabama,* 294 U.S. 587, 79 L. Ed. 1074; *Rogers v. Alabama,* 192 U.S. 226, 48 L. Ed. 417; *Carter v. Texas,* 177 U.S. 442, 44 L. Ed. 839; *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664. See *Hernandez v. Texas,* 347 U.S. 475, 98 L. Ed. 866—persons of Mexican descent.

A like conclusion is reached in North Carolina by virtue of our decisions on "the law of the land" clause embodied in the Declaration of Rights, Art. I, Sec. 17, of the North Carolina Constitution. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *S. v. Speller, supra; S. v. Peoples,* 131 N.C. 784, 42 S.E. 814.

This Court held in *S. v. Peoples, supra,* which was decided in 1902, that the exclusion of all negroes from a grand jury solely by reason of their race, which finds an indictment against a negro, denies him the equal protection of the laws in violation of his constitutional rights, and that a motion to quash the indictment would properly lie in such a case.

Art. I, Sec. 17, of the North Carolina Constitution states, "no person ought to be . . . in any manner deprived of his . . . liberty . . . , 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.

"The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions." *Powell v. Alabama,* 287 U.S. 45, 77 L. Ed. 158, 84 A.L.R. 527.

Due process of law is secured against state action by the words of the Fourteenth Amendment to the United States Constitution. *Betts v. Brady*, 316 U.S. 455, 86 L. Ed. 1595.

The Court said in *Holden v. Hardy*, 169 U.S. 366, 389, 42 L. Ed. 780, 790: "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

An objection to an indictment based on defects and irregularities in the drawing or organization of the grand jury must be taken "before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." G.S. 9-26; *S. v. Gales*, 240 N.C. 319, 82 S.E. 2d 80; *Miller v. State, supra.*

The question presented for decision by defendant's assignment of error to the denial by the court of his motion to quash the indictment is whether or not the court denied the defendant and his counsel a reasonable opportunity and time to investigate, prepare and present to the court evidence, if such existed, in support of the allegations of the motion to quash the indictment.

The burden of proof is upon the defendant here to establish the racial discrimination alleged in his motion to quash the indictment. *Akins v. Texas*, 325 U.S. 398, 89 L. Ed. 1692; *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043; *Miller v. State, supra.*

On 13 October 1957 the defendant was arrested on a warrant charging him with the same offense for which he was indicted by the grand jury. At a preliminary hearing on the warrant 18 October 1957 he was bound over to the Superior Court, which convened on 28 October 1957 for a two weeks term for the trial of criminal and civil cases. G.S. 7-70.

Lillie Mae Rape is a white woman. The defendant is a negro doctor. On 28 October 1957 the defendant filed a written motion for removal of his case from Union County for a fair trial. G.S. 1-84. On the same day the judge, acting under the authority vested in him by G.S. 1-86, instead of removing the case to another county ordered a special venire of 50 jurors from Anson County to appear in court on 30 October 1957 from which the trial jury was to be selected. On 29 October 1957 defendant's counsel filed a written motion requesting a continuance of the trial to a later term to enable them adequately to investigate and prepare the defendant's defense. On 30 October 1957 the special venire was in court, the court denied the motion for a continuance, and the

motion to quash the indictment, and the trial began.

All of defendant's counsel are nonresidents of Union County. The State did not controvert the allegations of racial discrimination contained in the motion to quash and in the affidavit of Samuel S. Mitchell. We recognize that the allegations of racial discrimination in the motion to quash the indictment and in Mitchell's affidavit are in general terms, and state no specific facts. However, if defendant and his counsel were denied by the court a reasonable opportunity and time to investigate the matter of racial discrimination, it would seem that they would not be able to state in the motion to quash and in Mitchell's affidavit specific facts of racial discrimination, nor offer evidence to that effect, if such facts existed. The trial judge made no findings of fact as to the alleged racial discrimination in the composition of the grand jury.

Allegations in a motion to quash an indictment, because of racial discrimination practices in selecting a grand jury panel, challenge an essential element of proper judicial procedure — the requirement of fairness on the part of courts in trying persons accused of crime. However, "it cannot lightly be concluded that officers of the courts disregard this accepted standard of justice." *Akins v. Texas, supra.*

Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. After a careful examination of all the facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination as to the grand jury set forth in the motion to quash and in the supporting affidavit of Samuel S. Mitchell. Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any.

The judgment and verdict below are reversed, and the case is remanded for further proceedings. In the Superior Court the defendant will have the opportunity to present the evidence, if any, that he may have as to the alleged racial discrimination in the grand jury panel. If the trial court at such hearing then finds there was no racial discrimination, the trial will proceed on the present indictment. If the trial judge then finds there was racial discrimination in the grand jury panel, and quashes the indictment, the defendant is not to be discharged. He will be held until an indictment against him can be found by an unexceptionable grand jury. *S. v. Speller, supra.*

Reversed.

STATE v. GEORGE H. WILKINS

(Filed 7 May, 1958.)

Automobiles § 75: Criminal Law §§ 18, 134—

Where defendant is tried on appeal to the Superior Court upon the original warrant, and it is not clear from the record whether the warrant was amended before or after trial in the inferior court so as to charge that the prosecution was for a second offense, the Supreme Court, *ex mero motu*, will set aside the judgment and remand the cause.

APPEAL by defendant from *Johnston, J.*, at September 9, 1957, Criminal Term of GUILFORD- Greensboro Division.

Criminal prosecution upon a warrant issued out of the Municipal County Court, Criminal Division, Guilford County, charging that defendant "did unlawfully and wilfully drive a vehicle upon the highway while under the influence of intoxicating liquor, narcotic drugs, 200 block of West Wendover Avenue, Greensboro, North Carolina."

The record shows: (1) That upon trial in said Municipal-County Court, the court found as its verdict the defendant to be guilty. And from judgment imposed by said court defendant appealed to Superior Court of Guilford County, Greensboro Division, for a trial *de novo* therein as provided by law.

(2) That in Superior Court, prior to plea and selection of jury, the State, upon motion of Assistant Solicitor, was permitted to amend the warrant to charge this as a second offense of the crime charged.

(3) That there appears in the record not only what purports to be original warrant charging the offense for which the criminal prosecution is begun, but what purports to be an original warrant charging the crime as a second offense.

(4) That the jury returned a verdict of "Guilty as charged."

(5) That it is stipulated (a) that when the original warrant was docketed in Superior Court there appeared upon the face of it, and in the handwriting of the Solicitor of the Municipal-County Court in the City of Greensboro, the following words: "This being a second offense of driving a vehicle under the influence of intoxicating liquor upon a public highway"; (b) that there is an entry in the minutes of Superior Court, relating to this case, and signed by the presiding judge which recites the verdict of the jury as being "guilty of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor."

(6) Judgment pronounced.

(7) Defendant appeals to Supreme Court, and assigns error.

Attorney General Malcolm B. Seawell, Assistant Attorney General Love for the State.

Robert S. Cahoon, George W. Gordon for defendant, appellant.

PER CURIAM. On account of conflict in the record as to the charge for which defendant was tried, and as to verdict of the jury, this Court *ex mero motu* sets aside the verdict returned and judgment rendered, and remands the case for further proceeding on the warrant as it appeared before the amendment, unless it shall be determined by the court that the warrant was amended before trial in Municipal-County Court, and, if so amended, then to be tried upon warrant as amended.

In respect to subsequent proceeding, attention is called to the case of *S. v. White,* 246 N.C. 587, 99 S.E. 2d 772, and cases cited.

Remanded.

STATE v. HUDSON GRANT.

(Filed 7 May, 1958.)

Arrest and Bail § 3: Criminal Law § 79: Narcotics § 2: Searches and Seizures § 1—

Where the victim of an assault and robbery points out defendant to an officer as being one of his assailants, the officer has the duty to arrest defendant, G.S. 15-40, G.S. 15-41, and to search his person, and upon a separate prosecution of defendant for possession of a narcotic drug, G.S. 90-88, based upon marijuana cigarettes discovered on the person of defendant upon the search, the evidence thus obtained is competent upon the court's finding that the officer had reasonable ground to believe that a felony had been committed, notwithstanding defendant's conviction of the lesser offense in the prior prosecution for assault and robbery.

APPEAL by defendant from *Seawell, J.,* August Criminal Term 1957 of CUMBERLAND.

This is a criminal proceeding tried upon an indictment charging that the defendant did unlawfully, wilfully, and feloniously have in his possession and under his control a narcotic drug, to wit, marijuana, in violation of G.S. 90-88.

The State's evidence discloses that about 3:30 a.m. on 28 July 1957, Police Officer C. B. Morrison, of the City of Fayetteville, was investigating a case of assault and robbery. He was accompanied at the time by the victim of the assault. As they were proceeding along Washington Avenue in the City of Fayetteville, they observed the defendant walking along the street. The victim of the assault identified the defendant as being one of the participants in the assault on him. The defendant was immediately arrested and as a result of a search then made of his person, it was found that he had in his possession a number of marijuana cigarettes.

The jury returned a verdict of guilty as charged, and the defendant appeals, assigning error.

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

Seavy A. Carroll for defendant, appellant.

PER CURIAM. The defendant argues that the officer had no right to search him because the arrest was made without a warrant and was, therefore, illegal and void. This constitutes the defendant's assignment of error No. 1.

When the defendant challenged the legality of his arrest in the trial below, the court, in the absence of the jury, heard the evidence relating to the circumstances under which the arrest was made, and found as a fact that the officer had reasonable grounds to believe that a felony had been committed.

If the officer had the right to arrest the defendant, the defendant concedes he had the right to search his person, and items found in the search would be admissible in evidence against him.

We hold that, upon the evidence adduced in the trial below, the officer not only had the right but the duty to arrest the defendant on the occasion in question, when the victim in the assault and robbery charge pointed out the defendant to the officer as being one of his assailants. G.S. 15-40 and G.S.15-41. The defendant was thereafter indicted for assault and robbery, tried and convicted of the lesser offense.

A careful examination of the remaining exceptions and assignments of error leads us to the conclusion that no error prejudicial to the defendant was committed in the trial below.

No Error.

STATE v. JAMES MADISON HORNER AND WILLIAM GORDY.

(Filed 21 May, 1958.)

1. Criminal Law § 99—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving it every reasonable inference fairly to be drawn therefrom.

2. Criminal Law § 101—

If there is more than a scintilla of competent evidence to support the

allegations in the warrant or indictment, it is the court's duty to submit the case to the jury.

3. Same—

When the State's evidence is conflicting, some tending to incriminate and some tending to exculpate the defendant, it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury.

4. Same—

The fact that a confession introduced in evidence by the State contains exculpatory statements does not justify nonsuit, since the jury is not compelled to believe the whole of the confession, but may, in their sound discretion, believe a part and reject a part.

5. Homicide § 3—

A person is legally accountable if the direct cause of a person's death is the natural result of his criminal act.

6. Criminal Law § 9—

When two or more persons aid and abet each other in the commission of a crime, all are principles and equally guilty irrespective of any previous confederation or design.

7. Same—

Mere presence, even with the intention of assisting, cannot be said to be aiding and abetting, unless the intention to assist, if necessary, is in some way communicated to the actual perpetrator of the crime.

8. Criminal Law § 101—

Circumstantial evidence is an accepted instrumentality in the ascertainment of truth and is sufficient to take the issue of guilt to the jury if it tends to prove the fact in issue or reasonably conduces to that conclusion as a fairly logical and legitimate deduction, and thus raises more than a mere suspicion or conjecture.

9. Criminal Law § 72—

In the absence of a charge of conspiracy, incriminating statements made by each defendant not in the presence of the other are competent, respectively, only against the defendant making the statements.

10. Homicide § 8a—

Manslaughter is generally divided into voluntary and involuntary manslaughter; involuntary manslaughter is 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, the killing being without malice.

11. Homicide § 25— Circumstantial evidence of defendants' guilt of homicide held sufficient to be submitted to the jury.

The State's evidence tended to show that both defendants and a woman, all highly intoxicated, went to the home of one of the defendants about midnight, where the woman was put to bed, that about 5:00 o'clock the next morning the defendants took the woman to the house of a friend, where more drinks were taken, that while at this house the woman fell

off a cot and groaned, but also that a woman was heard to yell twice for help, with evidence tending to show that the yells came from this house, that about 8:30 in the morning defendants took the woman from the house to a car in the yard, supporting her under her arms, drove about a mile, and put her out on a country road and left her, that the woman was discovered lying in a rut in the road shortly after 2:00 in the afternoon, and that she was taken to the hospital where she died between 3:50 and 4:00 the same afternoon. There was medical expert testimony that deceased had numerous bruises on her body, that death resulted from laceration of her liver and intestine, that the laceration of the liver occurred two to twelve hours prior to death, and that such injury could not likely have resulted from her falling off a cot. There was in evidence, also, a statement by one of defendants, referring to the time they were at the house of the friend, that "that is where it happened." *Held:* The evidence was sufficient to permit, but not to compel, reasonable and legitimate inferences that the death of deceased was the result of a terrible beating, and that if only one defendant beat her, the other was present aiding and abetting in the beating, and therefore was sufficient to be submitted to the jury as to both defendants upon an indictment charging manslaughter. G.S. 15-144.

HIGGINS, J., dissenting.

APPEAL by defendants from *Seawell,* J., November Criminal Term 1957 of CUMBERLAND.

Prosecution upon a bill of indictment charging the defendants James Madison Horner and William Gordy on 28 September 1957 with feloniously slaying and killing Sarah Moultrie Lindsay.

Both defendants pleaded Not Guilty. The jury returned a verdict that both defendants were guilty as charged.

From judgments of imprisonment of both defendants, both defendants appeal.

George B. Patton, Attorney General, Claude L. Love, Assistant Attorney General, and R. T. Sanders, Staff Attorney for the State.

Nance, Barrington & Collier by: Carl A. Barrington and Rudolph G. Singleton, Jr., for James Madison Horner defendant, appellant.

Seavy A. Carroll for William Gordy defendant, appellant.

PARKER, J. The State offered evidence. The defendants offered none. Each defendant assigns as error the denial by the court of his motion for judgment of nonsuit made at the close of the State's evidence.

These motions challenge the sufficiency of the State's evidence, considered in the light most favorable to the State, and giving to the State the benefit of every reasonable inference fairly to be drawn therefrom, to carry the case to the jury. *S. v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

If there is more than a scintilla of competent evidence to support the

allegations in the warrant or indictment, it is the court's duty to submit the case to the jury. *S. v. Kelly, supra; S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686.

When the State's evidence is conflicting—some tending to incriminate and some to exculpate the defendant—it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury. *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740; *S. v. Edwards,* 211 N.C. 555, 191 S.E. 1.

A jury is not compelled to believe the whole of a confession. The twelve are the triers of fact, and may, in their sound discretion, believe a part and reject a part. *S. v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39; *S. v. Henderson,* 180 N.C. 735, 105 S.E. 339; *S. v. Ellis,* 97 N.C. 447, 2 S.E. 525; *S. v. Overton,* 75 N.C. 200.

The State's evidence tends to show the following facts: Between 2:00 and 3:00 o'clock on the afternoon of Saturday, 28 September 1957, Mrs. Margaret Faircloth saw Sarah Moultrie Lindsay, a white woman, lying in a wheel rut in a little sand road some three miles west of the corporate limits of the City of Fayetteville. This road is not maintained by the State. It is a remote woods area. The weather was cold, and it was raining. Mrs. Faircloth stopped her car, got out, walked to where Sarah Moultrie Lindsay was lying in the wheel rut, and asked her who left her there. She raised her head a second or two, and asked for water. Mrs. Faircloth got in her car, drove away, and called the Sheriff's Office in Fayetteville.

About 2:55 p.m. two Deputy Sheriffs from Fayetteville, with Mrs. Faircloth, arrived at the scene. Upon arrival they saw Sarah Moultrie Lindsay lying in a wheel rut in this little sand road. She was alive. The ground around the body was torn up with footmarks and handmarks, and on the ground were three blood spots about 10 feet apart. She had on a dark dress which was up around her waist. She was nude from her waist down. One shoe was off her foot, and about 1½ to 2 feet from a blood spot. The other shoe was on her foot. A woman's purse was lying about 10 feet from her body. She shook her head, and tried to talk, but the officers could not understand her. Her entire chin was bruised black, one eye was swollen and almost closed with a little blood in its corner, her arms were bruised, and she was bloody between her legs. The officers called an ambulance, and sent her to the Cape Fear Hospital, where she died between 3:50 and 4:00 o'clock the same afternoon.

The body of Sarah Moultrie Lindsay, shortly after her death, was sent to the morgue of the North Carolina Memorial Hospital in Chapel Hill, where some 17 to 18 hours after her death Dr. William W. Forrest, held by the court to be a medical expert in the field of pathology, conducted an examination and autopsy of her body. After the clothes were removed from her body, the examination disclosed the following

bruises on her body: a bruise in the front part of the scalp measuring 2½ inches in greatest diameter, a bruise on the left upper eyelid measuring about an inch and extending over the nose with a hemorrhage in the white of the eye, a bruise on the lower lip, a bruise on the chin measuring 2 inches in diameter, 33 bruises on the right arm, 36 bruises on the left arm, a bruise on the left breast 6 inches in diameter, 9 small bruises on the abdomen, 23 bruises on the right leg—the largest of which was 4 inches in greatest diameter, 21 bruises on the left leg —the largest of which was 4 inches. Clotted blood was on her thighs. When the body was opened, about a quart of blood was found in the abdominal cavity that came from a tear in the liver on its bottom front surface measuring 2 inches in length and 2 inches in depth, and from a tear in the large intestine next to the liver. Dr. Forrest testified the liver is the largest organ in the body sitting in the right upper abdomen, and is normally protected by the lower ribs. This woman's liver was a little larger than usual, and it stuck down a little below the ribs. The examination disclosed she had aspirated her stomach contents into her lungs. No fractures of any bones were found. An examination of the liver microscopically showed around the edges of the laceration a considerable amount of inflammation, indicating that the laceration of the liver was several hours old from the time the laceration occurred until she died, maybe 2 or 3, or maybe 10 or 12 hours. An analysis of the body's blood for its alcoholic content showed she had enough alcohol to be intoxicated. Dr. Forrest's opinion was that the laceration of the liver and the laceration of the intestine were the real causes of Sarah Moultrie Lindsay's death, with the other factors being contributory. On cross-examination Dr. Forrest testified: "I stated in my autopsy report that it was apparent this woman had received numerous blunt force injuries, the most serious of which was the laceration of the liver with hemorrhage into the peritoneal cavity and that the blood on the thighs and the perineum apparently came from the colon." He also testified on redirect examination: "I think it would be very unlikely for a person to have her liver lacerated upon rolling off an ordinary cot or bed. I have plus that my experience of nine years in pathology; having seen many lacerations of the liver, I have never seen one result from a person falling out of bed."

The State introduced in evidence, without any objection, a statement made by the defendant Horner on the afternoon of 1 October 1957 in the office of the Sheriff of Cumberland County in the presence of three deputy sheriffs, the substance of which follows: Shortly after dark on 27 September 1957 he was at the Crystal Drive-In on 301 South Street, Fayetteville, when a car drove up. Clyde Taylor was driving the car, and in it were the defendant Gordy and Sarah Moultrie Lindsay, who "was over in the car on the seat or on the floor." Gordy

told him they had a woman in the back seat of the car, he could not tell him who she was. He (Horner) went and looked at the woman, and told them they had better get her somewhere, and get her to bed. About 11:00 or 12:00 o'clock that night they carried her to his (Horner's) house, and put her to bed. Clyde Taylor went back to town. He and the defendant Gordy stayed with the woman in his apartment until 5:00 o'clock a. m. He was very high. He and Gordy were in a double bed in his apartment, and the woman was in a cot in his apartment. At 5:00 o'clock a. m. on 28 September 1957 they carried the woman to the home of Eunice Hall. (Other evidence in the record shows that the home of Eunice Hall is about a mile, or a little less, from the place in the road where Mrs. Faircloth and the two deputy sheriffs saw Sarah Moultrie Lindsay lying between 2:00 and 3:00 o'clock that afternoon). All three went in the Hall home. He identified himself to Eunice Hall, who was cooking breakfast. Gordy and the woman took some drinks of whiskey out of a bottle they had left, and he took one drink. While the Hall woman was still cooking, the woman went over, laid down on a cot, and soon rolled off the cot onto the floor. She moaned and groaned. He then noticed she had on no breeches, and that she had started bleeding, blood trickling down her legs. He and Eunice cleaned her up, and placed her on the cot. He and Gordy took her out of the house, placed her in the car and carried her down "the side road where she was later found." When they got there, "they started to put her out of the car . . . , she started raising cain and said he couldn't leave her." He gave her a shove, ran and got in his car, and they drove off. It was 8:15 to 8:30 in the morning. He and Gordy went to the White House on Robeson Street, where they got beer. They stayed there some 30 or 40 minutes, and went back to the home of Eunice Hall.

The defendant Horner had a 1951 Plymouth automobile. On the Monday following the date of the death of Sarah Moultrie Lindsay, Deputy Sheriff Baxley examined this car. It had a new seat cover on the front seat. Next day, Tuesday, Baxley went to where Horner worked, and told him they wanted to talk with him at the office. Horner got in his car, and as they drove in the driveway at the courthouse, Baxley said: "I imagine you know why we picked you up?" Horner replied, "Yes, I have been expecting it; I saw you out at the car yesterday." Horner said he had the seat cover changed Saturday. The Lindsay woman died that Saturday. In the Sheriff's office Baxley told Horner that they knew he and Gordy had been with Sarah Moultrie Lindsay on Friday night and Saturday morning, the date of her death. Horner replied: "Yes, told me that he and his brother Billy Horner, a Taylor boy and Billy Gordy carried her to his house about 11:00 o'clock, put her to bed there; that they all came back to town, other than Taylor. They messed around the drive-in a while on Gillespie

Street, Crystal Drive-In, and that he and Billy Gordy went back to the house and they stayed there until 3:00 or 3:30 in the morning, and that they then taken her and went to the home of Eunice Hall. And he says, 'That is where it happened.' I imagine it is two miles from the house of Horner to the house of Eunice Hall."

On the same afternoon that the defendant Horner made a statement, the defendant Gordy made a statement to Deputy Sheriff, Mrs. L. L. Guy, which was admitted without objection, and the substance of which is as follows: On Friday night 27 September 1957, about 8:00 p. m., he and Clyde Taylor were at the Crystal Drive-In. They had been drinking vodka, and bought whiskey. There they got up with Dink Horner and the defendant Horner in another car. They then went to the Flamingo Bar on Gillespie Street, where they had several beers. He and Dink Horner left in his car, drove around town, and went back to the Crystal Drive-In. The defendant Horner came back to the Crystal Drive-In. He bought more whiskey. Clyde Taylor came back to the Crystal Drive-In "pretty well drunk." He said he spent the night riding around either with the defendant Horner or Clyde Taylor, and then added he and the defendant Horner spent the night at the home of Eunice Hall.

On the following day the defendant Gordy made another statement to Mrs. L. L. Guy, which was admitted without objection. The substance of it follows: After telling about considerable drinking on this Friday night by Clyde Taylor, the defendant Horner, himself, and others at various places, using 3 cars, he said Clyde Taylor got him at the Crystal Drive-In, and said: "Let's go." Here it became confusing to him. They got into Clyde Taylor's car, and Taylor drove off. He does not know whether they left the Crystal Drive-In, or how far they went. Anyway, they stopped, and put the woman in the car. They rode around, and he must have passed out, because they reached Eunice Hall's house about 3:00 o'clock a. m. He remembers their shaking him. He took a couple of drinks, went out of the house, and got in the back of the defendant Horner's car. The woman was in the car. This was about 8:00 o'clock a. m. They left Eunice Hall's house, and the next thing he remembered the defendant Horner was telling him to lets go and get the beer. This was at the White House. The defendant Gordy was shown the pocketbook found at the place Sarah Moultrie Lindsay was lying in the road, and identified it as belonging to her. On cross-examination Mrs. Guy testified that Gordy said when he made his first statement to her, he had been drinking the night before and things were very hazy in his mind as to what had occurred, and he was not absolutely sure of what he was saying. When he made his second statement, he said he had been drinking.

On 27 and 28 September 1957 James Huggins was living almost

straight across the road from the home of Eunice Hall. The distance between their houses is about 350 feet. On Saturday morning, 28 September 1957, he got up to go to work at 6:30 o'clock. Not too long before this time he heard a noise, got up, and went out on his front porch. It was dark. He heard a woman holloing, and it came from straight across the road, and that house is Eunice Hall's. This woman was holloing, "Help, somebody help me." He heard the woman's voice calling three times. There was a light on in the back of Eunice Hall's house, and it looked like an automobile was sitting in the yard. He stayed on his front porch not over a couple of minutes. On cross-examination he testified there are three houses close to Eunice Hall's house, and he couldn't be sure from which house the noise was coming.

On Saturday morning C. C. Chapman, who lives about 35 yards from Eunice Hall's house, got up about 8:00 o'clock to prepare breakfast. At this time he saw two men drag a woman out of Eunice Hall's house. She looked to him like she was drunk. The two men were holding her up under the arms, and he saw the two men drag her from the door to the edge of the porch. He did not then see Eunice Hall. The men and the woman were white. The men's backs were to him, and he did not recognize either of the men. His coffee was percolating, he turned from the kitchen window, and did not see them any more. He moved into the house where he was living on the third of March. He saw Eunice Hall later that morning. On cross-examination C. C. Chapman said he saw two men take hold of the woman's arms, and drag her to a parked car. On redirect examination he testified, "on the morning of the 28th of September, 1957, before 6:30 a.m., there was no one screaming or holloing at my house at all." On recross-examination he said he got up about 8:00 o'clock a.m.; he slept soundly all night, and did not know what was happening before that time.

William Allen and his wife live in a house about 50 or 60 feet from the house of Eunice Hall. They were at home on 27 and 28 September 1957. On Saturday morning, 28 September 1957, they got up between 7:30 a. m. and 8:30 a. m. That morning Mrs. Allen saw the defendant Horner's car in Eunice Hall's yard. She does not know when his car left that morning. She saw his car there in the yard later when the ambulance went after Sarah Moultrie Lindsay about 2:00 o'clock p. m. When the ambulance passed, Eunice Hall went to the Allen home. William Allen said before he got up this Saturday morning he heard cars going in and out and doors slamming. No one did any screaming or holloing for help in the Allen house that night or morning.

The State did not call Eunice Hall as a witness.

A person is legally accountable if the direct cause of a person's death is the natural result of his criminal act. *S. v. Knight*, 247 N.C. 754, 102 S.E. 2d 259; *S. v. Minton*, 234 N.C. 716, 68 S.E. 2d 844.

It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty. *S. v. Kelly, supra; S. v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *S. v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *S. v. Donnell,* 202 N.C. 782, 164 S.E. 352; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127.

Mere presence, even with the intention of assisting, cannot be said to be aiding and abetting, unless the intention to assist, if necessary, was in some way communicated to the actual perpetrator of the crime. *S. v. Kelly, supra; S. v. Ham,* 238 N.C. 94, 76 S.E. 2d 346; *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272; *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358.

The State's evidence is circumstantial. This Court in *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277, quoted Merrimon, C. J., in *S. v. Brackville,* 106 N.C. 701, 11 S.E. 284, as follows: "Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment."

The rule in respect to the sufficiency of circumstantial evidence to carry the case to the jury is stated in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, as follows: "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730; 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' "

The statements made by the defendants were not made in the presence of each other, and, therefore, what each one said is to be considered against the one making the statements, and not against the other. Horner said Gordy and himself were with Sarah Moultrie Lindsay in his apartment from 11:00 or 12:00 o'clock at night until about 5:00 a. m. on 28 September 1957, when they carried her to the home of Eunice Hall. Gordy said they reached Eunice Hall's house with the woman about 3:00 o'clock that morning. Both said they drove away from Eunice Hall's house in a car with the woman in it about 8:00 o'clock that morning. C. C. Chapman testified that he lived about 35 yards from Eunice Hall's house, and that about 8:00 o'clock this morning he saw two men drag a woman out of Eunice Hall's house to

a parked car. James Huggins testified that he lived straight across the road from the house of Eunice Hall, about 350 feet away, and that not too long before 6:30 this morning he was out on his front porch, and heard a woman holloing from straight across the road, "Help, somebody help me." He heard the woman's voice calling three times. On Tuesday following the woman's death Horner told Deputy Sheriff Baxley that Gordy and he carried the Lindsay woman to Eunice Hall's house about 3:00 or 3:30 a. m. after their staying in his apartment with her some 4 hours, and "that is where it happened." Horner said he and Gordy took the Lindsay woman out of the house, placed her in the car and carried her down "the side road where she was later found." Horner also said, when they got there "they started to put her out of the car . . . , she started raising cain and said he couldn't leave her." He further said he gave her a shove, ran and got in the car, and they drove off. The officers found a woman's purse lying about 10 feet from the Lindsay woman, when they found her in the road. Gordy identified this purse as belonging to her. Horner said that after putting the woman out in the road, they went to the White House, got beer, stayed there some 30 or 40 minutes, and went back to the Eunice Hall house. Mrs. William Allen, who lived about 50 or 60 feet from Eunice Hall, testified she saw Horner's car in Eunice Hall's yard, when the ambulance went after the Lindsay woman about 2:00 p. m.

Between 2:00 and 3:00 o'clock on the afternoon of this day the Lindsay woman was found lying in the road in a dying condition. She was dead at or before 4:00 o'clock on the same afternoon. An examination and autopsy of her body the next day showed numerous bruises on her body, including 9 small bruises on the abdomen, and a tear in her liver and a tear in the large intestine next to the liver. Dr. Forrest, a medical expert in the field of pathology, who conducted an examination and autopsy of the body, gave it as his opinion that the real cause of her death was the laceration of the liver and the laceration of the intestine. He also said he thought it was very unlikely for a person to have her liver lacerated upon rolling off an ordinary cot or bed. The body had no bone fractures. Dr. Forrest also testified that a microscopic examination of the edges of the laceration of the liver indicated that it was several hours old from the time the laceration occurred until she died.

In our opinion, the evidence, considered in the light most favorable to the State, permits, but does not compel, the reasonable and legitimate inferences that from at least about 5:00 a.m to about 8:00 a. m. on Saturday, 28 September 1957, Eunice Hall, the two defendants and Sarah Moultrie Lindsay were the only ones in the house of Eunice Hall, that the Lindsay woman was drunk, that thede while both de-

fendants were present, one or both gave her a terrible beating, causing her to cry out "Help, somebody help me," and that if only one defendant beat her, the other defendant was present aiding and abetting in the beating, that among the blows struck were blows to her abdomen causing lacerations of her liver and intestine next to the liver, and that these lacerations were the direct cause of her death about 4:00 p.m. that afternoon.

Manslaughter is generally divided into voluntary and involuntary manslaughter. *S. v. Durham*, 201 N.C. 724, 161 S.E. 398; 40 C.J.S., Homicide, Sec. 37. 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.'" The unlawful killing of a human being without malice is manslaughter. *S. v. Street*, 241 N.C. 689, 86 S.E. 2d 277. The indictment charges manslaughter. G.S. 15-144. We conclude that the State, considering its evidence in the light most favorable to it, offered sufficient evidence of all the essential elements of manslaughter against both defendants to withstand each defendant's motion for judgment of nonsuit.

There are no assignments of error as to the admission or exclusion of evidence. The other assignments of error are formal, and are overruled.

No Error.

HIGGINS, J., dissenting: This is one of the few, occasions in which I find it impossible to agree with my brethren. The evidence in the case discloses that on Friday night, September 27, 1957, just after dark, the defendant Horner was at a drive-in theater in Fayetteville. At that time one Clyde Taylor drove up. In the car with him were the defendant Gordy and a woman who was lying in the seat or on the floor of the car. Gordy said he could not tell Horner who she was. The defendant Horner looked at her and said they had better get her somewhere and get her to bed. Thereafter, they took her to Horner's house and put her to bed. Taylor left. About five next morning the defendants took her to Eunice Hall's house. Eunice was up, getting breakfast. The three did more drinking. What took place thereafter is stated fully in the Court's opinion.

It seems to be the theory of the State that somewhere, probably at Eunice Hall's house, the defendants administered to Sarah Lindsay a terrible beating which finally caused her death; that the call, "Help, someone help me," heard in the vicinity, not only came from the Hall house but it came from the deceased because of a beating she was

then receiving; and, further, that the beating was being administered by the defendants. The State successfully asked the jury to find the above without calling the one person apparently in a position to know firsthand what happened—Eunice Hall. The State says its theory is supported by Horner's statement: "There (the Hall house) is where it happened." Where what happened? Horner didn't say. The officer didn't ask him. According to the State's evidence one thing certainly did happen at the Hall house—an obese woman with an enlarged liver fell off a cot and after the fall, "she groaned and groaned."

One of the State's witnesses testified that about eight o'clock on Saturday morning two men dragged a woman from the Hall house towards a car. However, further questioning elicited the following: "What I saw the men doing was helping the woman off the porch." Thereafter, the defendants—Horner driving—took the woman to the place where she was found about six hours later and put her out of the car. After they put her out, "she started to raise cain and said they couldn't leave her, and she tried to get back in the car." Horner shoved her back, got in the car and drove off. Such is the State's evidence, gained in part by interrogation of the defendants, but none the less the State's evidence. That a woman should "raise cain" and should try to get back in the car with two men who had terribly beaten her presents a picture that is a little too much out of focus for my mental gallery.

The first time Horner saw the woman she was either lying on the back seat or on the floor of Taylor's car, "passed out." Taylor and Gordy were also in the car. What injuries she had received, if any, or how she had received them prior to the time Horner first saw her does not appear. Gordy could not tell Horner who she was; and Taylor, the owner of the car, was not called to testify. There is not a particle of evidence that either defendant laid a violent hand on Sarah Lindsay, except Horner. The evidence indicates all he did was to shove her away when she tried to get back in the car.

The most suspicious thing in the case, however, was Horner's removal of the seat covers of his car to get rid of the bloodstains. This occurred after it became known that Sarah Lindsay had died. When asked about it, he told the officers and showed them the old seat covers. It is understandable, that after such a night, he would want to remove the bloodstains. But, after all, the important and the unanswered question is how the injury occurred that caused the blood. Where, when, how the fatal injuries were received, the evidence does not disclose. The answers are in the realm of speculation and guess. Had she been injured when Taylor and Gordy appeared with her at the drive-in? Was she injured by the fall from the cot? What happened to her during

the six hours between the time the defendants left her and the time she was discovered still alive, are unanswered questions. "True it is, the evidence seems to point an accusing finger at the defendant as the perpetrator of the crime, and to excite suspicion, somewhat strongly perhaps, of his guilt, but it apparently leaves too much to surmise or assumption to support a conviction." The foregoing are the words of the late Chief Justice Stacy in the case of *State v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472. They fit this case.

I can agree the defendants' conduct in putting this woman out in the rain was shabby indeed, but to say the evidence supports manslaughter is too much for me. I vote to reverse.

W. J. BLACKWELL v. HOWARD RAY LEE and BOBBY GLOVER

AND

WARREN G TART v. HOWARD RAY LEE AND BOBBY GLOVER.

(Filed 21 May, 1958.)

1. Automobiles § 37: Evidence § 46—

Testimony that there were no obstructions on the highway at the scene of the accident except a sign post at the south shoulder is competent when it refers solely to the presence or absence of any physical object or condition that might have a tendency to obstruct the driver's view, and is, therefore, a statement of fact by the witness. Principles of law relating to the competency of opinion evidence as whether an identified object was sufficient to obstruct the driver's view are inapposite.

2. Automobiles § 40: Evidence § 42c—

Testimony of a statement made by one plaintiff tending to substantiate one defendant's version of the accident is competent as substantive evidence in favor of such defendant, but is properly excluded as to the other plaintiff and the other defendant.

3. Evidence § 17—

On cross-examination of plaintiffs' witness, he testified as to a statement made by one plaintiff, and on redirect examination plaintiffs' counsel were permitted to ask leading questions for the purpose of eliciting testimony that the witness had told plaintiffs' counsel a somewhat different version of the admission. *Held:* It was within the discretion of the trial court to permit the leading questions on redirect examination of their adverse witness for the purpose of refreshing the recollection of the witness without offending the rule that a party may not impeach his own witness, and further in the instant case the witness's response to the leading questions did not impair his prior testimony on that particular subject.

4. Evidence §§ 22, 30a—

The use of photographs in cross-examining a witness in regard to his testimony as to the width of the shoulders of the road *held* not objectionable as in effect admitting the photographs as substantive evidence, and under the circumstances of this case was not prejudicial.

5. Automobiles § 15—

An instruction on the right of a motorist to assume that an approaching vehicle would yield one-half the highway in passing *held* not objectionable in limiting such right to a motorist himself observing the requirements of the statute, when such instruction, considered in context, is to the effect that a motorist is not entitled to rely on such assumption if such motorist was himself then driving on his left side of the highway and was thereby contributing to the hazard and emergency that existed immediately prior to the collision. G.S. 20-148.

APPEAL by defendant Lee from *Fountain, Special Judge,* September Civil Term, 1957, of HARNETT.

Two civil actions, consolidated (by consent) for trial, growing out of a head-on collision that occurred October 30, 1956, about 7:15 a. m. on the Bunnlevel-Erwin Highway, between a 1953 Mercury, owned and operated by defendant Lee, and a 1950 Mercury, owned and operated by defendant Glover.

Plaintiffs, passengers in Lee's car, instituted separate actions to recover damages for personal injuries, alleging that the collision and their injuries were caused by the joint and concurrent negligence of Lee and Glover.

In each complaint, the allegations relating to negligence are identical. Each plaintiff alleged, *inter alia,* that each defendant "did operate his . . . automobile to the left of the center lane *(sic)* of said highway and in fact was operating said . . . automobile on the wrong side of said highway."

The evidence, to the extent necessary to understand the legal questions presented, is set forth in the opinion.

In each case, three issues, (1) as to the alleged negligence of Lee, (2) as to the alleged negligence of Glover, and (3) as to damages, were submitted. All negligence issues were answered in favor of plaintiffs. The jury awarded damages of $6,000.00 in the *Blackwell* case and of $25,000.00 in the *Tart* case.

Judgments against defendants, jointly and severally, were entered. These judgments were based on the verdicts and were in accordance therewith with this exception: In the *Tart* case, "by and with the consent of counsel for the plaintiff in open court given, the court in its discretion reduced the amount of recovery to $15,000.00."

Defendants excepted and appealed. Later, Glover abandoned his

appeal. Lee, now sole appellant, assigns error in respect of (1) rulings on evidence, and (2) the court's instructions to the jury.

Doffermyre & Stewart for plaintiffs, appellees.
Dupree & Weaver and Walter Lee Horton, Jr., for defendant Lee, appellant.

BOBBITT, J. The Bunnlevel-Erwin Highway runs east-west. Lee was going west towards Bunnlevel. Glover was going east towards Erwin.

There was evidence tending to show these physical facts: The paved portion of said highway was 21 feet wide. The center was marked by a broken white line. There was a shoulder of approximately 11½ feet on each side of the paved portion. The collision occurred "about the center line," approximately opposite a sign post located on the south shoulder some 6 to 8 feet from the south edge of the pavement. It was raining. The road was wet and slick. Approximately 100 yards east of the sign post, the highway curved; and this curve, when proceeding west, was to the driver's left. Approximately 200 yards west of the sign post, the highway curved; and this curve, when proceeding east, was to the driver's left. Between these two curves there was a straight-away of approximately 300 yards. A driver, coming out of either curve, could see straight down the road for this distance. After the collision, the front of each car was on the south side of the paved portion of the highway, the Glover car headed southeast and the Lee car headed southwest.

Only two witnesses testified as to what occurred on the occasion of the collision, namely, defendant Glover, called by plaintiffs as an adverse witness, and defendant Lee. Plaintiff Blackwell did not testify. Plaintiff Tart's testimony related wholly to injuries and damages, he having been asleep when the collision occurred.

Glover testified, in substance, as follows: His car, traveling east, was wholly in his right (south) lane at all times until, immediately before the impact, he applied his brakes; and this caused a portion of his car to skid into the north lane. He was approximately 50 yards from the sign post when he observed the Lee car coming around the curve in its left (south) lane. Thereafter, the Lee car "veered" to its right (north) lane and then cut back to its left and into the south lane immediately before the collision.

Lee testified, in substance, as follows: His car, traveling west, was wholly in his right (north) lane of the highway until he reached the scene of collision. The Glover car "was coming out of this other (west) curve," in its left (north) lane, when he first saw it. He (Lee) was

then in the straightaway. The Glover car was on Lee's right (north) side of the highway. Immediately, he took his foot off the gas to give the operator of the Glover car time to cross back to his (right) side of the highway. "It did not cross back but continued on my side of the road going further over to the north side." When the cars were 150-200 feet apart, Lee sounded his horn and applied his brakes; but Glover continued to approach in the north lane. When the cars were some 15 feet apart, Lee "put on full brakes and veered to the left to try to get out of his way to the south side of the road." At the same time, Glover "put on brakes and veered hard to the south"—towards Glover's right side of the highway. Lee testified: ". . . at the point of impact I was across the center line. I intentionally operated my automobile to the left of the center line." Lee cut to his left because "to cut to the right (he) would have been almost certain that (he) would have a ditch job and possibly a collision so (he) took to the left. (He) veered to the left sharply, turned to the left so as to get (him) by this oncoming (Glover) car. At the time (he) cut to (his) left the other car had not started to get back on its right."

Glover estimated Lee's speed at 60 to 70 miles per hour, his own at 30-35 miles per hour. Lee estimated Glover's speed at 50-55 miles per hour, his own at 40-45 miles per hour. Lee testified that he had slowed down to approximately 20-25 miles per hour "at the time the cars came together."

We consider *seriatim* the assignments of error *brought forward* by appellant in his brief.

Assignments of error 3, 7 and 11, based on Exceptions 3, 7 and 12, relate to testimony, admitted over objection, to the effect that there were *no obstructions* on the highway or on either shoulder except the sign post on the south shoulder. Appellant contends that this testimony, referred to as the opinion or conclusion of the witness, was incompetent as an invasion of the province of the jury, citing, *inter alia*, *Bevan v. Carter*, 210 N.C. 291, 186 S.E. 321, and *Wood v. Insurance Co.*, 243 N.C. 158, 90 S.E. 2d 310. In addition, appellant cites cases to the effect that the opinion rule does not preclude "a shorthand statement of the facts," and then argues that the challenged testimony does not fall within this excepion to the general rule.

The cases cited are readily distinguishable when the evidence now challenged is considered in the context of the entire factual situation. All the evidence discloses that the Glover and Lee cars constituted the only traffic on the straightaway prior to and at the time of the collision. It was not a situation where, for example, there was evidence relating to a sign, a barricade, a tree, or other physical object, and the testimony was directed to whether the described object was or was not sufficient to obstruct the driver's view or travel. The gist of

the testimony here challenged is simply that *no physical object* was involved. The word "obstruction," in the context used, simply referred to the presence or absence of any physical object or condition that might have a tendency to obstruct, not to whether *an identified* object or condition was sufficient to obstruct the driver's view or travel. Moreover, there is no evidence that any object or physical condition having a tendency to obstruct the driver's view or travel was involved. Hence, these assignments of error lack merit and are overruled.

Assignments of error 4, 5 and 6, based on exceptions of like number, relate to testimony of Grady, admitted, over appellant's objection, on *redirect* examination by plaintiffs' counsel.

Grady, the investigating State Highway Patrolman, was offered as a witness by plaintiffs. When cross-examined by appellant's counsel, he testified that he had heard (plaintiff) Blackwell make a statement to the effect that the Lee car was on its right side of the road, traveling approximately 45 miles per hour, then slowing down to 25 or 30 miles per hour; and that Lee, after blowing his horn, "slowed down and cut to his left to avoid a head-on collision with the Glover car." There was no contention that Blackwell's declarations were a part of the *res gestae.*

This testimony was properly admitted against plaintiff Blackwell and in favor of defendant Lee as substantive evidence, the admission of a party. *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; Stansbury, North Carolina Evidence, Sec. 167. The court correctly instructed the jury that this testimony was not to be considered against plaintiff Tart or against defendant Glover.

The court, in its discretion, permitted plaintiff's counsel, on redirect examination of Grady, to refer to a conversation between plaintiffs' counsel and Grady the previous night and to ask leading questions for the purpose of eliciting testimony to the effect that Blackwell's declarations, as related by Grady to plaintiffs' counsel, were somewhat different, less damaging to Blackwell, than Blackwell's declarations as related by Grady in his testimony.

Careful consideration of Grady's answers to these leading questions leaves the impression that plaintiffs' counsel failed to achieve the desired result; for we find nothing in Grady's answers that appreciably impairs the testimony Grady had previously given when cross-examined by appellant's counsel.

The following excerpt from the opinion by Ervin, J., in *S. v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473, sums up the legal principles applicable here: "The trial judge has the discretionary power to permit a party to cross-examine his own witness for a legitimate purpose. (Citations) Accordingly, the trial judge may let a party cross-examine his own

witness, who is hostile or who surprises him by his testimony, for the purpose of refreshing the recollection of the witness and enabling him to testify correctly. (Citations) In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. (Citations) But the trial judge offends the rule that a witness may not be impeached by the party calling him and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief. (Citations)"

It is quite clear that plaintiffs' counsel, by the leading questions now considered, was not attacking the general character of Grady solely for the purpose of proving him to be unworthy of belief. Rather, it would seem that he was undertaking to refresh his recollection by inquiry as to prior statements made by Grady on the particular subject of Blackwell's declarations. Indeed, plaintiffs relied in substantial measure on Grady's testimony in respect of other phases of the case.

Aside from the fact that Grady's answers in response to these leading questions did not impair his prior testimony on the particular subject of Blackwell's declarations, we think it was permissible for the court, in its discretion, to permit the leading questions and the answers elicited thereby.

Assignments of error 12, 13 and 14, based on Exceptions 13, 14 and 15, relate to the use of a photograph or photographs by plaintiffs' counsel when cross-examining appellant.

On cross-examination, appellant testified that he "would say the shoulders are about five or six feet in width." This was in conflict with Grady's testimony that each shoulder was 11½ feet in width. Later, also on cross-examination, appellant testified: "I don't know if it is at least 11½ feet from here to that little ditch. Eleven feet is a pretty good distance. I didn't measure it, but I don't think that it was 11 feet, but I didn't measure it. I would think it was a smaller distance than ten feet. I would not say that the whole road, including the two shoulders, was not 43 feet wide."

Preceding the questions and answers to which these assignments relate, appellant had testified that he had enough shoulder so that two cars could pass and be clear of each other on this highway, "if the shoulder had been flat." The challenged questions and answers concerned further inquiry as to whether the north shoulder was "flat across like the surface of the highway." "Q. Do you see anything that is a hollow or rough on that shoulder? Come out here and show it to the jury." Objection by appellant; overruled; Exception No. 13. (No answer) "Q. Point out on that photograph what kept you from that. Let

the jury see it, please sir." Objection by appellant; overruled; Exception No. 14. "A. There is nothing on that shoulder or roadbed." Later, in further cross-examination: "Q. What does that photograph show; does that indicate a ditch which you referred to?" Objection by appellant; overruled; Exception No. 15. "A. Yes sir, that indicates the ditch."

The record on appeal contains no photographs. Moreover, the record does not show that the photograph to which plaintiffs' counsel referred was identified, offered in evidence or exhibited to the jury.

Appellant's contention is that the cross-examiner's use of a photograph "to contradict or impeach the spoken testimony of a witness" is in effect the use thereof as substantive evidence. The flaw in appellant's contention is that, except for the implication arising from appellant's prior answer, "if the shoulder had been flat," there is nothing in appellant's testimony, or in the testimony of any other witness, to the effect that the north shoulder was otherwise than flat from the pavement to the ditch that constituted the north edge thereof. Appellant testified: "I say that I would have run into a ditch on the right even though the shoulder was 11 feet wide and level." Under these circumstances, error, if any, in the cross-examiner's use of the photograph(s) may not be considered prejudicial.

Assignments of error 28 and 29, based on Exceptions 29 and 30, relate to the following excerpts from the charge:

"Now, if the defendant Lee was observing *the rule of the road* and if he acted upon the assumption that Glover would yield to him one-half of the main-traveled portion of the roadway and if relying upon that assumption and in the absence of notice to the contrary, he proceeded as he did, and if after notice to the contrary, that is, if the conduct and driving of the defendant Glover was such as to put him on notice, that is, to put Lee on notice that Glover would not yield, or was not likely to yield Lee's side of the road to Lee, then Lee was charged only with the duty, but with that duty, of doing what a person of ordinary prudence when similarly situated, charged with a like duty, would have done. And if under those circumstances it reasonably appeared to a person of ordinary prudence that the safest thing to do was to turn left, then that act of turning left would not constitute negligence on his part." (Our italics) Exception 29.

"On the other hand, if the defendant Lee was not himself observing *the requirements of the statute, and if he himself was partly at fault,* then, of course, he was not entitled to rely on any such assumption; and furthermore if he, that is the defendant Lee, was driving to the left side of the road and then drove back to his right and then cut across in front of Glover while Glover's conduct was such as not

to give notice to Lee that Glover would not yield to Lee his half of the road, then, of course, under those circumstances the defendant Lee would not have been justified or permitted *by the terms of the statute* to turn to the left of the road." (Our italics) Exception 30.

Appellant contends that this portion of the second instruction, "If the defendant Lee was not himself observing the requirements of the statute, and if he himself was partly at fault," erroneously deprived him of his legal right to assume, unless and until he had notice to the contrary, that Glover would yield to him his one-half of the main-traveled portion of the highway.

In support of this contention, appellant relies on *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25, wherein this Court disapproved the unqualified statements in the opinions in *Groome v. Davis*, 215 N.C. 510, 2 S.E. 2d 771, and *Swinson v. Nance*, 219 N.C. 772, 15 S.E. 2d 284, to the effect "that the right to rely on a right of way created by positive legislation and to assume that other users of the highway will obey the law and exercise ordinary care is restricted to those motorists who are themselves absolutely free from negligence."

The three cited cases involved intersection collisions. In the *Groome* and *Swinson* cases, this Court had held that a motorist on a dominant highway by traveling at an unlawful speed forfeited his right to assume that a motorist on the servient highway would stop in obedience to the stop sign. In the *Cox* case, where an automatic signal device at a street intersection was involved, this Court held that, if defendant approached and entered the intersection on the green light, the fact that he was traveling at unlawful speed did not, as a matter of law, work a forfeiture of his right to assume that the motorist on the intersecting street would stop in obedience to the red light, but that defendant's negligence was to be determined on the basis of whether he exercised due care under all the circumstances. To hold otherwise, as expressed by Ervin, J., would require "that a motorist be penalized for his negligence, even though it bears no causal relation whatever to the occurrence under judicial investigation," and "that the negligence of a motorist, however inconsequential it may be, can nullify positive legislation aptly designed to protect human life and limb at highway intersections." Nothing stated herein should be construed as impairing or modifying the principles of law declared in the *Cox* case.

Preceding the quoted instructions, the court read G.S. 20-148, which provides: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible." Then the court discussed *this statutory rule*, explaining in considerable detail the circumstances under which a driver who was himself observ-

ing *the rule* had the right to assume and act upon the assumption that the driver of the other vehicle would also observe *the rule* and turn to his right, if necessary, so that the two vehicles could pass each other in safety in the manner prescribed by statute. To these instructions appellant did not except. Then followed the quoted instructions.

The true meaning of the instruction, "if the defendant Lee was not himself observing the requirements of the statute, and if he himself was partly at fault," must be considered as relating solely to the particular rule that was then the subject of the court's instructions. The gist of the instruction, in the context of the charge and of the evidential facts, is that plaintiff was not entitled to rely on the assumption that Glover would turn to the right and get on his one-half of the main-traveled portion of the highway if at that time appellant was driving on his left side of the highway and thereby contributed to the hazard and emergency that existed immediately prior to the collision. When so understood, there was no error in the instruction; for if appellant was negligent *in this respect,* such negligence did bear a causal relation to the collision.

The court's instructions, as related to the particular statutory rule under consideration, are supported by decisions dealing with analogous factual situations. *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387, and cases cited. Indeed, the court's instructions are substantially in accord with the rule as stated by Winborne, J. (now C.J.), in *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593.

Assignments of error 15, 26, 27, 28, 29 and 30, based on Exceptions 16, 27, 28, 29, 30 and 31, may be disposed of without elaboration.

These assignments are listed in appellant's brief under the caption, "The Court erred in failing to charge the jury on essential features of the evidence and the applicable law." While appellant does not cite authority or focus attention on any specific assignment, his argument is generally to the effect that the court failed to explain and apply satisfactorily the provisions of G.S. 20-148. An examination of the charge does not disclose error in this respect. Moreover, appellant has failed to show prejudicial error in respect of any matter involved in this list of assignments.

No error.

VICTOR BERTON WAGNER, JESSE LEE WILSON AND CARL WINFRED WILSON, CO-EXECUTORS UNDER THE WILL OF LOVE HONBAIER, DECEASED; JESSE RAY HONBAIER, SR., AND WIFE, ESTER VERONA HONBAIER; JESSE RAY HONBAIER, JR., AND WIFE, ELLA LOUISE BURR HONBAIER; SADIE IDA HONBAIER SHEPHERD AND HUSBAND, BAXTER CLAY SHEPHERD; KATIE ESTER HONBAIER SHOAF AND HUSBAND, WILLIAM CLAY SHOAF; MINNIE FRANCES HONBAIER BURLESON AND HUSBAND, U. S. BURLESON, JR.; DORA HONBAIER GREENE AND HUSBAND, J. EDWARD GREENE; VIVIAN RAY DEAL BARNETTE AND HUSBAND, ANDREW BARNETTE, SR.; IDA RACHEL GREENE TILLEY AND HUSBAND, ARTHUR WAYNE TILLEY; MARY EDNA GREENE PHIFER; KATIE LEE GREENE SWARINGEN AND HUSBAND, MARSHALL L. SWARINGEN; TOMMIE LEE HONBAIER, SR., AND WIFE, PANSY HONBAIER; TOMMIE LEE HONBAIER, JR., AND WIFE, BETTY BELL HONBAIER; KATIE HONBAIER WAGNER AND HUSBAND, VICTOR BERTON WAGNER, INDIVIDUALLY; NANCY LEE WAGNER THOMPSON AND HUSBAND, WILLIAM T. THOMPSON; MINNIE HONBAIER WARREN AND HUSBAND, C. R. WARREN; ADDIE HONBAIER LYERLY AND HUSBAND, GERRY J. LYERLY; CLARA HONBAIER TAYLOR AND HUSBAND, JAMES HASKEL TAYLOR, AND CARL WINFRED WILSON, INDIVIDUALLY, AND WIFE, FRANCES WILSON, v. STEPHEN WAYNE HONBAIER, VERONA KATE SHOAF, WILLIAM CLAY SHOAF, JR., TERRY WAYNE BURLESON, PATSY ANN BURLESON, JACK DONALD BURLESON, JAMES EDWARD LOVE GREENE, ANDREW BARNETTE, JR., CURTIS BARNETTE, SYLVIA BARNETTE, MARY ANNE COVENO, B. R. PHIFER, JR., GREGORY CARLTON HONBAIER, CAROLYN FAY WAGNER JOHNSTON, AND VICKI LYNN THOMPSON, ALL OF WHOM ARE MINORS; AND JULIAN C. JOHNSTON, HUSBAND OF CAROLYN FAY WAGNER JOHNSTON; THE UNBORN ISSUE OR THE UNBORN LINEAL DESCENDANTS OF THE BLOOD OF JESSE RAY HONBAIER, SR., DORA HONBAIER GREENE, TOMMIE LEE HONBAIER, SR., AND KATIE HONBAIER WAGNER; AND THE UNBORN ISSUE OR THE UNBORN LINEAL DESCENDANTS OF THE BLOOD OF MINNIE HONBAIER WARREN; ADDIE HONBAIER LYERLY, CLARA HONBAIER TAYLOR AND CARL WINFRED WILSON.

(Filed 21 May, 1958.)

1. Appeal and Error § 21—

An exception to the signing of the judgment presents the single question whether the facts found by the court below are sufficient to support the judgment.

2. Executors and Administrators § 24—

Family agreements for the settlement of an estate to adjust family differences and controversies are favored by the law and are valid and binding when approved by the court, but nevertheless family agreements will not be allowed to amend or revoke a will solely because of dissatisfaction of the devisees with its provisions.

3. Same—

The rule that the law looks with favor upon family agreements does not prevail if the rights of infants are unfavorably affected.

4. Same— Family agreement for settlement of estate approved in this case.

Under the will in question the present value of the amount the grandchildren of testator and contingent beneficiaries would ultimately receive, under one construction, was some 22 per cent of the value of the estate. Certain of the children of testator were preparing a caveat, and thereafter a family settlement was agreed to and signed by all the beneficiaries who had reached their majority, under which settlement the grandchildren and contingent beneficiaries would have 5 per cent of the estate set aside in a trust fund for their benefit. *Held:* It appearing that it was extremely doubtful that the will would withstand a caveat based on the ground of mental incapacity of testator at the time of executing the instrument, and that if the will were set aside all the contingent beneficiaries and the grandchildren except one, who had signed the agreement, would receive nothing, the decree approving the family settlement upon appropriate findings and conclusions, is affirmed.

APPEAL by minor defendants by and through their respective guardians *ad litem* from *Olive, J.*, March Term 1958 of ROWAN.

This is an action instituted on 24 February 1958, for the purpose of obtaining the court's approval of a family settlement agreement.

Love Honbaier, a citizen and resident of Rowan County, North Carolina, died on 26 October 1956, leaving a last will and testament dated 23 November 1953. This last will and testament was probated in common form in the office of the Clerk of the Superior Court of Rowan County; the pertinent parts thereof read as follows:

"2nd. My executors are authorized and directed to sell all of the personal property which I am seized and possessed of at the time of my death and collect all money due my estate and divide same, after the provisions mentioned in the foregoing paragraph have been complied with (the payment of debts), equally among my heirs hereinafter named; and in making this bequest I am not unmindful of my beloved wife's rights to dower and a year's allowance as provided by law. (The wife of the testator died 14 November 1957.)

"3rd. I hereby authorize and direct my executors hereinafter named to divide all of my real estate among my children Ray, Tommie, Lee, Addie, Minnie, Katie, Clara, Dora and my grandson, Carl Wilson, son of my deceased daughter, Nellie Gray Wilson. It is my will and desire that my said real estate not be sold for a division among the aforementioned persons, but that same shall be divided equally and that each shall receive an equal share in valuation of my said real estate; and that when same is equally divided among my said above-named children and grandson, they shall hold their share for their

natural life, and if any of the above-named persons should die without issue, then his or her share shall be divided equally between my heirs, otherwise same is to be equally divided among their heirs at their death."

The testator's personal estate at the time of the hearing was valued at $14,873.37, and his seven tracts of land, consisting of approximately 600 acres, at $91,850.00.

This cause came on for hearing before his Honor and it was agreed in open court that the right of trial by jury was waived and that this action should be heard by the court both as to the law and the facts. The facts found, pertinent to a decision, are hereinafter stated.

That all parties in *esse* and those in *posse* who have or might in the future have any interest or claim in the estate of Love Honbaier, have voluntarily become parties to this action or have been made parties thereto; that all parties in *esse* but not *sui juris*, as well as those in *posse*, are duly represented by guardians *ad litem* who have filed answers in their behalf; and the court held, "That all parties in interest are duly and properly before the court in such a manner as to be bound by the decree of court and are properly represented by counsel in the action and at this hearing."

The court further found, "That there is a *bona fide* dispute among the devisees of Love Honbaier as to the mental capacity of the said testator at the time of the execution of his will; that Jesse Ray Honbaier, Clara Honbaier Taylor and Tommie Lee Honbaier, Sr., Addie Honbaier Lyerly and Minnie Honbaier Warren, five of the devisees, have threatened to file a caveat to the said will; that local and out-of-town attorneys have been consulted and are now ready to file a caveat on the basis of the testamentary incompetency of testator to execute the said will; that on the advice of such attorneys the threatening caveators have active support of more than 30 witnesses who will testify to the mental incompetency of the said Love Honbaier at the time he made his will; that the dispute revolving around the testator's testamentary capacity is a *bona fide* dispute and that the parties thereto are making adverse contentions in good faith; that the determination of the rights of the parties by litigation would be long, expensive and wasteful; that the result of the trial in Superior Court would be uncertain; that the losing parties would doubtless appeal to the Supreme Court; that further trials might be necessary before reaching a conclusion to the caveat issue, if litigated;

"That if said caveat proceedings were begun it would act as a constant barrier to the establishment of family harmony; that the trial of said case would undoubtedly attract wide attention and publicity and would tend to expose to public gaze intimate family affairs which

should be guarded within the family circle; that such a trial would further disrupt and tend to destroy the peace, honor and dignity of the family, resulting in the embarrassment and humiliation of the members thereof; and that such a trial would plunge the family into litigation which would, without question, extend for a long period of time and be attended by an enormous amount of expense, uncertainty and risk.

"That if the caveat proceedings were successful and the will of the testator were set aside, the eight named devisees would receive the full estate of the testator, share and share alike under the laws of the intestate succession; that in such an event, all minor parties to this action and all parties to this action in *posse* would receive nothing; that the greatest risk of receiving nothing in the caveat proceedings would be taken by such minor parties and parties in *posse*.

"That the language used by testator in paragraph 3 of his will raises legal doubt as to the title to all of the land embraced in the testator's estate; that said language is susceptible of two interpretations, one of which will vest the title to all of testator's land presently and the other of which will delay the ultimate vesting until the successive deaths of all of the eight named devisees."

The parties to the proposed family settlement agreement seek to have the court authorize the Clerk of the Superior Court of Rowan County, North Carolina, to appoint a commissioner to sell the testator's real estate, subject to confirmation of the respective sales by the said Clerk of the Superior Court, and to authorize the commissioner to make conveyances of title, free and clear of all restrictions or complications of testator's will.

It is further provided in the family settlement agreement:

"That the commissioner, after payment of the costs of each and every sale as taxed by the Clerk of the Superior Court of Rowan County, shall pay over to the Wachovia Bank and Trust Company as trustee, immediately upon the filing of the commissioner's final report, five per cent (5%) of all of the money remaining in his hands, which five per cent (5%) shall constitute a part of the corpus of the trust herein provided for."

It is likewise provided that the executors be required to pay in to the trust fund five per cent of any of the amounts remaining in their hands as co-executors at the time of filing their final report, which five per cent shall constitute a part of the corpus of the trust provided for in the family agreement.

"That the said trust together with all accruing income shall be known and designated as the 'Children's Fund' and the said trustee

shall pay out and distribute the 'Children's Fund' from time to time as follows:

"Upon the death of any one of the following persons, namely: (1) Jesse Ray Honbaier, Sr., (2) Dora Honbaier Greene, (3) Katie Honbaier Wagner, (4) Minnie Honbaier Warren, (5) Addie Honbaier Lyerly, (6) Tommie Lee Honbaier, Sr., (7) Clara Honbaier Taylor, (8) Carl Winfred Wilson, the trustee shall pay from the Children's Fund an amount equal to 12.5% of the value of the said Children's Fund at the date of death of the first to die of the named eight persons, which said payment shall be to the lineal issue of the first deceased, per *stirpes;* but should there be no such lineal issue of said first deceased, then said trustee shall divide said amount into equal parts, the number of parts being determined by the number of above-named persons having lineal issue at the date of death of the first to die of the named eight persons, and each equal part as so determined, shall be divided, and paid to, the respective lineal issue, per *stripes.* (Thereafter, as the deaths of the remaining devisees occur, 1/7th, 1/6th, etc. shall be distributed in the manner above set out.)

"That the said commissioner and the said co-executors shall pay absolutely to Jesse Ray Honbaier, Sr., Dora Honbaier Green, Addie Honbaier Lyerly, Minnie Honbaier Warren, Tommie Lee Honbaier, Sr., Katie Honbaier Wagner, Clara Honbaier Taylor and Carl Winfred Wilson, immediately upon the filing of the commissioner's final report and the co-executors' final settlement, respectively, all of the remainder of the moneys in their hands, share and share alike, provided, however, the money payable by the said commissioner to the said eight named persons shall be subject to the just debts, costs and other liabilities of the said estate of the said Love Honbaier."

This proposed family settlement has been signed by all the seven living children of Love Honbaier, as well as by Carl Wilson, the son and only child of Nellie Gray Wilson, the deceased daughter of the testator. The agreement has likewise been signed by all the other twelve grandchildren of Love Honbaier, except two who are minors and represented by guardians *ad litem.* The respective spouses of those signers of the agreement who are married have also signed the agreement.

The findings of fact set out the life expectancy of each of the children of the testator and of the grandson, Carl Wilson. The life expectancy of these eight devisees average 27.23 years. The court found as a fact, "That with an average life expectancy of 27.23 years, the named eight devisees would be entitled, under the Annuity Tables in G.S. 8-47 and on the basis of a 6% return, to receive as their part in the real estate of the testator 78%, or all but 22% if the will were not set

aside; that 22% therefore of the value of the testator's real estate is the maximum that the issue of the named eight could receive under said will; this 22% interest of the issue is subject to being defeated altogether in the event the caveat proceedings are carried to a successful conclusion; that the preservation and establishment of a certain sum equivalent to 5% of the value of the testator's lands at an early date under the family settlement agreement is more desirable from the standpoint of the issue of the named eight than the anticipation of an uncertain 22% at a date possibly years in the future when some conclusive adjudication might be made regarding the respective rights of the issue living and in *posse, inter se,* and after extended and expensive litigation and depreciation in property values."

The court further found, "That the execution and the judicial implementation of the said family settlement agreement will prevent dissipation and waste of the estate of Love Honbaier and will more nearly accomplish the primary objects and effectuate the real intentions of the testator than could be accomplished by a rejection of said family settlement agreement and a relegation of the parties to bitter family strife and long drawn-out litigation."

Whereupon, the court entered judgment approving the family settlement agreement and directing the guardians *ad litem* appointed in this action to sign the agreement on behalf of all persons represented by them; and the court further entered the necessary orders to carry out the terms and provisions of the family settlement agreement.

From the judgment entered, the guardians *ad litem* appeal.

Graham M. Carlton, W. T. Shuford, Paul G. Stoner, and J. Lee Wilson, attorneys for plaintiffs, appellee.

Charles E. Williams, Jr., T. H. Suddarth, Jr., and Hubert E. Olive, Jr., guardians ad litem, for appellants.

DENNY, J. The only exceptions in the record are those noted by the guardians *ad litem* to the signing of the judgment. These exceptions present the single question whether the facts found by the court below are sufficient to support the judgment. *Merrell v. Jenkins,* 242 N.C. 636. 89 S.E. 2d 242; *Beaver v. Paint Co.,* 240 N.C. 328, 82 S.E. 2d 113; *Paper Co. v. Sanitary District,* 232 N.C. 421, 61 S.E. 2d 378; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203.

"Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. *Spencer v. McCleneghan,*

202 N.C. 662, 163 S.E. 753; *In re Estate of Wright,* 204 N.C. 465, 168 S.E. 664; *Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341; *Bohannon v. Trotman,* 214 N.C. 706, 200 S.E. 852; Schouler, Wills, Executors and Administrators (6d), sec. 3103." *Redwine v. Clodfelter, supra; Fish v. Hanson,* 223 N.C. 143, 25 S.E. 2d 461; *Bailey v. McLain,* 215 N.C. 150, 1 S.E. 2d 372; *In re Will of McLelland,* 207 N.C. 375, 177 S.E. 19; *Tise v. Hicks,* 191 N.C. 609, 132 S.E. 560.

A will is not an instrument, however, to be amended or revoked at the instance of devisees who are merely dissatisfied with its provisions. *Rice v. Trust Co.,* 232 N.C. 222, 59 S.E. 2d 803.

The rule that the law looks with favor upon family agreements does not prevail if the rights of infants are unfavorably affected. *In re Reynolds,* 206 N.C. 276, 173 S.E. 789. Ordinarily, the rights and interest of infants are the guiding star in determining the reasonableness and validity of such instruments. *Redwine v. Clodfelter, supra.* However, as stated in *Tise v. Hicks, supra,* "Family settlements * * * when fairly made, are favorites of the law. * * * They proceed from a desire on the part of all who participate in them to adjust property rights, not upon strict legal principles, however just, but upon such terms as will prevent possible family dissentions, and will tend to strengthen the ties of family affection. The law ought to, and does respect such settlements; it does not require that they shall be made in accord with strict rules of law; nor will they be set aside because of objections based upon mere technicalities."

It is not practical, in the instant case, to set out all the findings of fact found by the court below. These findings, conclusions of law, and the judgment of the court, cover 39 pages of the record. However, upon a careful review of the record, it is evident that it is extremely doubtful that Love Honbaier possessed sufficient mental capacity to make a will on 23 November 1953.

The amount of the trust fund set up for the grandchildren would seem to be rather small; even so, all thirteen of them, except two who are minors, have signed the agreement. There can be no doubt about the legal right of the seven living children of Love Honbaier, and his eleven grandchildren who are *sui juris,* to bind themselves by the proposed family settlement. *Hunter v. Trust Co.,* 232 N.C. 69, 59 S.E. 2d 213. Furthermore, in light of the doubtfulness of the last will and testament of Love Honbaier to withstand a caveat, it would seem to be for the best interest of the minors in *esse,* as well as for those in *posse,* who are represented by guardians *ad litem* in this action, to approve the proposed family settlement agreement.

In the case of *Bailey v. Wilson,* 21 N.C. 182, Gaston, J., in speaking for the Court, said: "It is objected that the agreement of compromise

was wholly voluntary, and that a court of Equity will not enforce its specific execution. Where there is a fair doubt as to the rights of parties, an agreement entered into without fraud, for the compromise of those rights, is not a voluntary agreement, and is a fit subject for the jurisdiction of a court of Equity. * * * Such arrangements are upheld by considerations, affecting the interests of all the parties, often far more weighty than any considerations simply pecuniary."

The judgment of the court below is in all respects

Affirmed.

MARGARET E. HARDY FINKE AND HUSBAND, ROBERT A. FINKE, AND J. A. JONES, TRUSTEE, v. FIRST-CITIZENS BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE; HARRY L. HARRIS AND WIFE, HAZEL HARDY HARRIS; R. H. HARDY AND WIFE, DOROTHY MURRILL HARDY; ELSIE HARDY THIEL AND HUSBAND, W. J. THIEL; LULA HARDY PRIVETTE AND HUSBAND, W. B. PRIVETTE; MARY HARDY SOUDERS AND HUSBAND, R. G. SOUDERS; E. A. HARDY AND WIFE, CARRIE RAY HARDY, AND MOLLIE ELIZABETH HARDY, WIDOW.

(Filed 21 May, 1958.)

1. **Wills § 31—**

In the construction of a will, the general pervading purpose of the testator as gathered from the instrument considered as a whole must be given effect, and minor inaccuracies or inconsistencies must be reconciled to the dominant purpose if possible by any reasonable construction and otherwise they must yield to the general purpose as expressed in the writing.

2. **Wills § 33d— Ultimate beneficiaries held not entitled to demand payment of corpus of trust during life of widow, since such payment would defeat dominant purpose of testator for her support.**

The will in suit devised testator's homeplace to his widow for life and provided that the residue of the estate be held in trust for the purpose of preserving a home for testator's wife and children during her life, with provision that the widow might change her residence at the expense of the trust if she should desire, that a proportionate part of the income from the trust be paid to the widow monthly, and that the rest of the income be paid to the children, with further provision that each child, upon arriving at the age of 25 years, upon demand, should be entitled to his proportionate part of the *corpus* of the estate. At the time of testator's death all of his children were 25 years of age or over. *Held:* The dominant purpose of testator was to provide for his widow during her lifetime, and since this purpose would be defeated if the entire *corpus* of the trust should be paid over to the children during the widow's life,

none of the children is entitled to the payment of his share of the *corpus* of the trust upon demand prior to the death of the widow.

HIGGINS, J., dissents.

APPEAL by plaintiff, Margaret E. Hardy Finke, from *Fountain, Special Judge*, at October Term, 1957, of GREENE.

Civil action involving construction of the last will and testament of Herman F. Hardy.

The plaintiff, Margaret E. Hardy Finke, is one of seven surviving children of the testator. She brings this action for the purpose of requiring the First-Citizens Bank and Trust Company, Trustee under the will, to set apart and convey to her a one-seventh part of the trust estate in accordance with Item II, Sec. 4 of the will.

Answers filed by the defendants point to inconsistent provisions appearing in the will and raise questions requiring interpretation by the court to determine the testator's intent.

The essential facts are set out in the judgment, which, in pertinent part, is as follows:

". . . and the plaintiffs and defendants, through their respective counsel, having agreed in open court to waive a jury trial and agreed that the Judge could find the facts, make its conclusions of law and render judgment thereon. No oral evidence was offered. The parties in open Court stipulated as follows:

"1. That Herman F. Hardy died on April 26, 1947, leaving a last will and testament which was duly admitted to probate on April 30, 1947, by the Clerk of the Superior Court of Greene County, North Carolina, which said will is as follows:

(Preliminary recitals omitted as not being pertinent.)

"ITEM I. I bequeath to my beloved wife, Mollie Elizabeth Hardy, to be hers absolutely, my household furniture and other tangible personal property used in connection with my residence at the time of my death, including pleasure automobiles and petty cash, but excepting stocks, bonds and other securities and choses in action, and also excepting agricultural implements.

"ITEM II. The rest, residue, and remainder of my estate, of every nature and wherever situated, I bequeath and devise to the First-Citizens Bank and Trust Company, Trustee, however, for the periods of time and for the purposes and uses hereinafter set forth as follows:

"1. To preserve my residence at the time of my death as a home for my wife and children during the lifetime of my wife:

out of the general funds of my estate to pay taxes, insurance premiums, repair bills, and other expenses necessary to keep the house and grounds in proper condition according to the judgment of my wife. If my wife shall desire to change her residence, then my trustee, at her written request, shall sell or lease the same in the way and on the terms that it shall deem best, and apply all or as much of the proceeds as shall be necessary to the purchase or lease of another residence, according to the wishes of my wife, adding any surplus resulting from such sale or lease to the general funds of my estate. After the death of my wife, this residence, or the one substituted therefor, shall be treated as part of my general estate.

"2. To hold, manage, exchange, convert, sell, convey, lease, improve, invest, reinvest and keep the residue of my estate invested in such stocks, bonds, or other securities or properties as shall from time to time be approved by the trustee.

"3. To pay over to my wife one-eighth (1/8) of the net income from my estate, in monthly installments as nearly equal as possible during her lifetime. After the death of my wife, to treat the part of the trust estate set aside for her benefit as a part of the residual estate hereinafter disposed of.

"4. The residue of my estate shall be held by my trustee herein named equally, for the benefit of all my children. Such of my children as have reached the age of twenty-five (25) years at the time of my death, if they so demand, shall be entitled to have paid over and conveyed to him or her, his or her proportionate part of my estate, both real and personal; and as my remaining children shall arrive at the age of twenty-five years, they shall likewise be entitled, if they shall so demand, to have their proportionate part of my estate, both real and personal, paid over and conveyed unto them by my said trustee.

"5. So long as any part of my estate, real or personal, is held in trust by my trustee herein named for the benefit of either of my children under this will, such child shall receive the net income paid to him or her only by said trustee.

"6. The share held in trust for any child of mine dying with issue or issues surviving shall be held for the benefit of such issue or issues; and as each of such issue or issues shall become of age, he or she shall receive a proportionate part of the share held for his or her parent; the share of a child dying without issue shall be merged with the shares of my other children.

"7. If at any time the income from this trust estate, together with their income from other sources, shall not be sufficient for the support of my wife, and for the support of my children, then I authorize my trustee to use enough of the principal for these purposes, to the end that this trust estate might be of the greatest good to my wife and children.

"8. I do hereby fully authorize and empower my trustee herein named, at any and all times during the continuance of this trust, in order to properly protect, operate, manage, finance, and refinance the trust estate in its hands, to borrow money and secure the same by deed of trust or mortgage, if necessary; to sell and convey by deed in fee simple, any part of the trust estate, either real or personal, in its hands, either publicly or privately, and to do any and all other things necessary and proper to be done in its discretion for the best interest and protection of my said estate.

"ITEM III. I do hereby constitute and appoint the First-Citizens Bank and Trust Company my lawful executor, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

"IN WITNESS WHEREOF, I, the said Herman F. Hardy, do hereunto set my hand and seal, this the 20th day of January, 1942.

HERMAN F. HARDY (SEAL)

(Attestation clause omitted as not being pertinent)"

"2. That the First-Citizens Bank and Trust Company, Executor and Trustee named in said will, duly qualified as Executor before the Clerk of Superior Court of Greene County, North Carolina, on April 30, 1947, and entered upon its duties as such Executor in which capacity it is now serving as Executor and Trustee under the terms of said will.

"3. That Mollie E. Hardy, widow of the testator, is now 73 years of age, and is now living in the home referred to in Item II, subsection 1 of the will of said testator which is being and has been maintained by the said First-Citizens Bank and Trust Company as Executor and Trustee out of the general funds of the estate of said testator as directed by said testator under the provisions of said item of said will.

"4. That said testator left surviving his widow and the following children, to wit: Hazel Hardy Harris; R. H. Hardy, Elsie Hardy

Thiel; Lula Hardy Privette; Mary Hardy Souders; E. A. Hardy and Margaret Hardy Finke; that all of said children are now living and their respective husbands and wives are parties to this action.

"5. That since the institution of this action the plaintiff Robert A. Finke, husband of the plaintiff Margaret E. Hardy Finke, has died, and the said plaintiff Margaret E. Hardy Finke is now unmarried and is now residing with her mother, Mollie Elizabeth Hardy, widow, in the homeplace or residence referred to in Item II, subsection 1 of the said last will and testament of H. F. Hardy, deceased.

"6. That the deed of trust referred to in article 18 of the plaintiffs' complaint from Margaret E. Hardy Finke and husband, Robert A. Finke, to J. A. Jones, Trustee, securing a note payable to First-Citizens Bank and Trust Company in the sum of $2,000.00, which constituted a lien on the interest of the said Margaret E. Hardy Finke on the lands described in article 16 of the plaintiffs' complaint has been paid and satisfied, and the said J. A. Jones, Trustee, is no longer a necessary or proper party to this action.

"7. That this action was brought by the plaintiff Margaret E. Hardy Finke for the purpose of having her interest in the estate of H. F. Hardy, deceased, set apart unto her, under the provisions of Item IV *(sic)* of said Will. That all the devisees under said will, except the said Margaret E. Hardy Finke, through their counsel announced in open court that it was their desire that all of said properties remain intact and in the hands of the First-Citizens Bank and Trust Company, Executor and Trustee, until the death of Mollie Elizabeth Hardy, widow of said testator, and that in their opinion such was the purpose and intent of said testator. That the First-Citizens Bank and Trust Company, Executor and Trustee under said will, in its answer herein filed and in open court requested that the Court interpret and construe the will of the said testator and direct it as Trustee as to its duties in regard thereto as trustee thereunder.

"8. That prior to the institution of this action an action was instituted before the Clerk of Superior Court of Greene County, under the provisions of G.S. 35-2 for the purpose of determining whether or not Margaret E. Hardy Finke was incompetent for want of understanding to manage her own affairs; that upon hearing before a jury it was found by the jury that the said Margaret E. Hardy Finke for want of understanding by reason of mental weakness and mental defect to be incompetent to manage her affairs and a judgment was entered on these findings of the jury to that effect, and Garland E. Waters was appointed trustee of the said Margaret E. Hardy Finke as provided by G.S. 35-2. That since said action another action has been instituted in the Superior Court of Greene County and it has been

found that the said Margaret E. Hardy Finke does now have sufficient mental capacity to handle her own affairs and is qualified to continue this action and that the said Margaret E. Hardy Finke is now *sui juris* and has adopted and ratified all former proceedings had by her herein.

"9. That on the date of the death of Herman F. Hardy, testator, all of the children of said testator were twenty-five years of age or more, and that all parties having any interest in the subject matter are properly before the Court and bound by this decree.

"10. That the principal assets of said estate in the hands of the Executor and Trustee, consists of the real property described in article 16 of the plaintiffs' complaint (a farm containing 466.63 acres more or less) and farming implements and equipment used in connection with cultivation of crops grown upon the same.

"11. That it was stipulated and agreed by counsel for all parties that judgment herein by this Court could be rendered and signed out of term and out of this district.

"That upon the foregoing stipulations and upon a consideration of the Last Will and Testament of Herman F. Hardy, deceased, the Court finds and concludes that it was the intention of the testator that the trust estate established by his last will should remain intact and handled by the Trustee named in his will, during the life of Mollie Elizabeth Hardy, and that it was his intention that plaintiff not be permitted as a matter of right to require a conveyance to her of her interest in the estate, as provided in Item IV of said will, during the lifetime of her mother.

"IT IS NOW THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED, upon careful consideration of the said will as a whole, that it was the intention of Herman F. Hardy by his last will and testament herein set forth to devise and bequeath his property to the First-Citizens Bank and Trust Company as Trustee, to the end that the trust estate should be held and handled by the said Trustee during the life of Mollie Elizabeth Hardy, wife of said testator, and upon her death to be held or distributed as provided in said will among his living children or their issue surviving, as provided in Item II of said will. Said First-Citizens Bank and Trust Company is directed to continue to handle said property as Trustee, as provided by said will until the death of Mollie Elizabeth Hardy. IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs' prayer for relief be, and the same is hereby denied, and the costs of the action will be taxed against her."

From the judgment entered, the plaintiff appeals.

Owens & Langley and Jones, Reed & Griffin for plaintiff, appellant.

Wallace & Wallace and William F. Simpson for defendant First-Citizens Bank and Trust Company, appellee.

JOHNSON, J. The trial court in construing the will concluded that the testator's dominant intent was to care for his surviving widow, Mollie Elizabeth Hardy, and that in order to carry out this intent the trust estate must be held intact by the Trustee during the life of the widow, notwithstanding the inconsistent provisions appearing in Item II, Sec. 4, of the will, to the effect that as and when a child arrives at the age of twenty-five, he or she shall then be entitled to a one-seventh part of the corpus of the trust estate. The ruling of the court below is supported in principle by numerous authoritative decisions of this Court.

In *Alexander v. Summey*, 66 N.C. 577, 582, it is said: "The general and leading intention of the testator must prevail where it can be collected from the will itself; and particular rules of construction must yield something of their rigidity if necessary to effect this purpose."

In *Holman v. Price*, 84 N.C. 86, 88, Smith, C. J., speaking for the Court, said: "A leading principle in the interpretation of wills is to ascertain and recognize the general pervading purpose of the testator, and to subordinate thereto any inconsistent special provisions found in it."

In *Hunt v. Jones*, 173 N.C. 550, 92 S.E. 601, it was held, notwithstanding a conflict of language, that the will, when construed as a whole, disclosed a dominant intent on the part of the testator to divide his estate equally among his children. The Court said: "It is also a rule of construction that the dominant idea pervading the whole will must control, and that minor considerations must yield if in conflict with it; and it may well be said of the will before us, as was said in *Lassiter v. Wood*, 63 N.C. 363: 'It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator, as gathered from the will, is always to be carried out by the court, and minor considerations, when they come in the way, must yield. Especially is this so when the purpose is in consonance with justice and natural affection.'"

In *Raines v. Osborne*, 184 N.C. 599, 601, 114 S.E. 849, 850, it is said: "In the construction of a will, the predominant and controlling purpose of the testator must prevail when ascertained from the general provisions of the will over particular and apparently inconsistent expressions to which, unexplained, a technical force is given."

In *Cannon v. Cannon*, 225 N.C. 611, 619, 36 S.E. 2d 17, Stacy, C. J., speaking for the Court, said: "The central consideration is the general

purpose of the will. *Holland v. Smith,* 224 N.C. 255, 29 S.E. (2d) 888. The object of all construction is to arrive at the intent and purpose as expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose without excessive regard for minor inaccuracies or inconsistencies. *Krites v. Plott, supra* (222 N.C. 679). These latter variations are to be reconciled, if reasonably accomplishable within the limits which the law prescribes, otherwise they must yield to the general purpose as expressed in the writing. *Carroll v. Herring,* 180 N.C., 369, 104 S.E., 892."

See also *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Hubbard v. Wiggins,* 240 N.C. 197, 81 S.E. 2d 630; 37 Am. Jur., Wills, Sec. 1137; *Coffield v. Peele,* 246 N.C. 661, 100 S.E. 2d 45.

Here it is noteworthy that at the time of the death of the testator all his children were twenty-five years of age or over. Yet he left his will unchanged, with various provisions indicating a dominant intent that his widow should be cared for during her life out of the trust estate created by the will. Item II, Sec. 1, provides that the Trustee out of the trust funds shall preserve and maintain the residence for the widow during her life. This item also provides that the widow may change her residence at the expense of the trust if she so desires. Section 3 of the same item provides that the Trustee shall pay one-eighth of the net income of the trust to the widow in monthly installments for life. Also, by section 7 of this item the Trustee is given power to draw upon the corpus of the trust for the support of the widow if the income is not sufficient for that purpose.

If the plaintiff is entitled to receive her share of the corpus during the life of her mother, then the other six children are entitled to the same treatment, and if all the children should demand their shares, the trust estate would be wiped out. Nothing would remain with which to maintain the residence for the widow or provide for her upkeep and support. In short, to parcel out the corpus of the trust estate under the construction urged by the plaintiff would destroy the trust and render inoperative sections 1, 3, and 7 of Item II. On the other hand, the trial court's construction of the will does not destroy or make inapplicable any item of the will. The children will get their shares of the trust property under the provisions of Item II, Sec. 4. The time of enjoyment is merely delayed until the death of the widow. Manifestly, this construction comports with the dominant intent of the testator as expressed in the will.

The judgment below is

Affirmed.

HIGGINS, J., dissents.

JOSEPH C. GLENN, BY HIS NEXT FRIEND, MRS. NORA G. GLENN, v. THE CITY OF RALEIGH, NORTH CAROLINA, A MUNICIPAL CORPORATION.

(Filed 21 May, 1958.)

1. Appeal and Error § 60—

A decision on a former appeal constitutes the law of the case in respect to the questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal upon substantially the same evidence.

2. Municipal Corporations § 12—

Where a city receives a net income in a substantial amount from the operation of one of its parks maintained as a part of its recreational and amusement program, the fact that its overall budget requirements for its entire recreational programs shows a deficit does not alter the fact that the operation of the park imports a pecuniary advantage to the city so as to exclude the application of governmental immunity in its operation.

3. Same—

Where part of a municipal park is used for revenue-producing concessions and attractions, the fact that another part of the park contains a picnic-recreational area opened to the public free of charge, does not affect the doctrine of governmental immunity, and a person injured in the picnic area through the negligence of a municipal employee while acting in the discharge of his duties is not precluded from recovery by the governmental immunity doctrine, it being inferable from the record that the picnicking facilities of the park were substantial factors in drawing patrons for the revenue-producing concessions and that the several areas of the park were merely parts of a composite whole.

4. Trial § 21½—

Where defendant introduces no evidence and does not move for nonsuit until after argument to the jury has begun, the failure of the court, in the exercise of its discretion, to treat the motion as having been aptly made renders the motion ineffective.

5. Municipal Corporations § 12—

Where all of the evidence on the question of governmental immunity raises but the single inference that the doctrine is inapplicable to the facts, the court may instruct the jury to find in support of such inference if the evidence is found to be true.

6. Appeal and Error § 39—

The burden is on appellant to make it appear not only that the ruling complained of is erroneous, but also that the error is material and prejudicial.

APPEAL by defendant from *Phillips, J.*, and a jury, at 2 September Civil Term, 1957, of WAKE.

Civil action in tort by the plaintiff to recover damages for personal injuries alleged to have been sustained by him at Pullen Park in the

City of Raleigh as the result of being struck by a rock thrown by a power grass mower of the rotary type.

The plaintiff was injured on the afternoon of 14 May, 1953. He and a group of his high school friends had gone to Pullen Park, a public park maintained by the City of Raleigh, to have a picnic supper. The plaintiff was sitting on a picnic table when hit on the head by the rock. The power mower was cutting grass about 50 or 60 feet from where the plaintiff was sitting. It was being operated by an employee of the City. The rock weighed about 6½ ounces. The plaintiff's skull was fractured and he was seriously, painfully, and permanently injured by the blow.

It was stipulated and admitted by the defendant that the mower was owned by the City of Raleigh and was being operated by Walter Lucas in the scope and course of his employment by the City.

Issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint. Answer: YES.

"2. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $25,000.00."

From judgment on the verdict the defendant appeals.

Paul F. Smith for defendant, appellant.
Douglass & McMillan for plaintiff, appellee.

JOHNSON, J. This case was here at the Spring Term, 1957, on defendant's appeal from a verdict and judgment in favor of the plaintiff. The decision, upholding the ruling of the lower court in denying the defendant's motion for judgment of nonsuit but granting a new trial for errors committed by the trial court in charging the jury, is reported in 246 N.C. 469, 98 S.E. 2d 913.

The chief contention urged on this appeal, as on the former one, is that the City of Raleigh is immune from liability to the plaintiff under application of the doctrine of governmental immunity. The decision on former appeal resolved this question against the City. This being so, its contention now made must be viewed in the light of the rule that a decision of this Court on former appeal constitutes the law of the case in respect to the questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal upon substantially the same evidence. *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864; *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673. On former appeal the Court's decision as to the question of governmental immunity is stated in crucial part by *Parker, J.,* as follows:

"Considering plaintiff's evidence in the light most favorable to him, and disregarding defendant's evidence which tends to establish another and a different state of facts, or which tends to impeach or contradict his evidence, which we are required to do on motion for judgment of nonsuit (*Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676), it is our opinion that the net revenue of $18,531.14 for the fiscal year 1 July 1952 to 30 June 1953 received by the city of Raleigh from the operation of Pullen Park for that period, which was used by the city for the capital maintenance of the park area, building items, paying salaries, buying fuel, etc., (the evidence that the $18,531.14 was spent in the amusement area only is the defendant's evidence), was such as to remove it, for the purposes of the consideration of a motion for judgment of nonsuit, from the category of incidental income, and to import such a corporate benefit or pecuniary profit or pecuniary advantage to the City of Raleigh as to exclude the application of governmental immunity. The required inferences from plaintiff's evidence as set forth in the Record are sufficient to protect him from a nonsuit on this ground."

The crucial evidence on which the defendant was denied governmental immunity on former trial and appeal was the testimony of City Manager Carper to the effect that for the fiscal year 1952-1953 the City of Raleigh collected *net revenue* of $18,531.14 from its operation of Pullen Park, As to this, Carper's testimony was the same on retrial. In fact, the evidence bearing on both the question of governmental immunity and the issue of actionable negligence was essentially the same at both trials. This is conceded by the defendant in its brief by this statement: "Factually, the evidence in the second trial does not materially differ from the evidence at the first trial. For that reason the defendant will not contend in this appeal, if the Court's rulings on the admission and exclusion of testimony were correct, that there was insufficient evidence of negligence on the part of the defendant's servant. It will contend that there was an improper admission and exclusion of evidence; that the Judge's charge was not in conformity with law; and that the defendant was not liable for the negligence of its servant in the operation of any part of Pullen Park, but in any event, that it was not liable for the negligence of its servant in an area of the Park for which no charge was made for use by the public."

The defendant makes a two-fold argument in urging that the former decision leaves open the question of governmental immunity.

First, the defendant points to the fact that the record on former appeal discloses that whereas City Manager Carper's testimony as to *net revenue* of $18,531.14 was heard by the jury, his further testimony as to the overall costs of operating the City's entire recreation program

and all its park facilities was given in the absence of the jury. The record on former appeal discloses that Mr. Carper (witness for the plaintiff) testified on cross-examination, in the absence of the jury, that the City spent $90,024.95 on maintenance of all parks and $68,-223.00 for its entire recreation program. On retrial, Carper's testimony as to the foregoing items of expense was received in evidence in the presence of the jury without objection. However, since these items were excluded from jury consideration on the first trial, the defendant assumes that the law of the case respecting the question of governmental immunity was established by the former decision solely on the basis of consideration of the factor of net revenue derived by the City from Pullen Park, with no consideration being given to the factor of overall costs of operating the City's recreation and park programs. Since the evidence of this latter factor of costs was before both the Judge and the jury on retrial, the defendant now contends that both factors should be considered together, and that when the item of net revenue from Pullen Park is considered in relation to the overall costs of operating the City's recreation and park programs, the question whether the doctrine of governmental immunity applies in this case is cast in a different light than on the former appeal. The defendant insists that when due consideration is given the factor of overall costs amounting to some $158,243.95, the item of $18,531.14 net revenue from Pullen Park constitutes only "incidental income," insufficient in amount to exclude application of the doctrine of governmental immunity, within the meaning of the rule stated by the Court on former appeal.

In considering the foregoing contention of the defendant we take note of these facts disclosed by the evidence: Pullen Park embraces an area of about 42 acres. On one side of the Park is an area of about three acres where revenue-producing concessions and amusements are located, among which are the swimming pool, the merry-go-round, a small train which takes passengers around a loop, and concession stands where food and drinks are sold. City Manager Carper testified that "The gross receipts from these four operations for the year July 1, 1952 to June 30, 1953, were . . . $42,640.94. The net return on these operations for that period, . . . was $20,765.55." The rest of the Park is devoted for the most part to use-free public recreation facilities, such as ball fields, playgrounds, parking areas, picnic areas with tables, fireplaces and shelters for picnicking. There is also a lake in the Park.

We conclude that the item of $18,531.14 received as net revenue from the Park, when considered in connection with the overall budget requirements for the operation of the City's entire amusement and recreation programs, constitutes receipts over and beyond "incidental income," and "imports such a corporate benefit or pecuniary profit or pecuniary advantage to the City of Raleigh as to exclude the applica-

tion of governmental immunity," within the meaning of the decision on former appeal. The court below correctly so ruled.

Next, the defendant contends that even if it be held that the City's immunity from tort liability is lost by reason of the large amount of net revenue derived from the Park, even so, the lost immunity should be restricted to the three-acre amusement area where the revenue was produced, with the doctrine of governmental immunity continuing to apply in the picnic-recreation area which was open to the public free of charge. The contention is untenable. On this record it is inferable that the picnicking facilities of the Park were substantial factors in drawing patrons into the Park and that the picnickers furnished substantial patronage for the revenue-producing concessions and attractions in the amusement area of the park. The use of the picnic and amusement areas by the patrons of the Park is so interrelated that these areas may not be treated separately in applying the doctrine of governmental immunity. It would be an unnatural application of this doctrine to say that there is no governmental immunity at the swimming pool or at the merry-go-round or at the train or at the concession stands, but that immunity does apply with all its rigor in the surrounding picnic area and at the table where the plaintiff was injured. The trial court properly treated the several areas of the Park as a composite whole in determining the question of governmental immunity.

It is noteworthy to observe that on retrial the defendant presented its defense of governmental immunity in a different procedural manner than on former trial. At the first trial, the defense of governmental immunity was raised by motion for judgment as of nonsuit. On retrial, the defendant was permitted to amend its answer and plead governmental immunity by way of further defense. At the close of the plaintiff's evidence, the defendant did not move for judgment of nonsuit. Its counsel announced that the defendant would offer no evidence, and did not move for nonsuit. The case proceeded and counsel for the plaintiff made one argument to the jury, the first of two arguments for the plaintiff. Whereupon the jury was excused on request of counsel for the defendant. Counsel then moved "for judgment of nonsuit for the record at the close of all the evidence in the case," requesting the court in the exercise of its discretion to treat the motion as having been made seasonably at the close of the evidence. Plaintiff objected. Whereupon the court denied the motion. Counsel for defendant then addressed this inquiry to the court: ". . . your Honor: I was wondering whether or not that, as I understand now, the Court is actually passing on the motion for judgment of nonsuit, and not doing it on the grounds of when it was made." The court replied: "I am passing on the motion as now made." Defense counsel then re-

quested the presiding Judge to rule as a matter of law on its plea of governmental immunity. The Judge intimated that such ruling was unnecessary since he intended to give the jury a peremptory instruction on the question of governmental immunity. However, on further request of defense counsel, the Judge ruled as a matter of law, in the absence of the jury, that upon the evidence adduced the City is not immune from liability under the doctrine of governmental immunity, and later, in his charge to the jury, the presiding Judge gave a peremptory instruction in favor of the plaintiff on the question of governmental immunity.

Since the trial court did not, in the exercise of its discretion, treat the defendant's motion for nonsuit as having been made at the close of the evidence, the defendant's motion later made did not serve to raise the question of governmental immunity. G.S. 1-183. See also *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822. Cf. *Temple v. Temple*, 246 N.C. 334, 98 S.E. 2d 314. However, no harm came to the defendant from the delay in moving for nonsuit. This is so because the defendant's plea of governmental immunity was adequately ruled upon by the trial Judge, both in his direct ruling in the absence of the jury in response to the defendant's request for such ruling, and also in his peremptory instruction to the jury. We find no prejudicial error either in the foregoing ruling of the court or in the peremptory instruction. Ordinarily, where, as here, on the question of governmental immunity, all the evidence points in the same direction, with but one inference to be drawn from it, an instruction to find in support of such inference, if the evidence is found to be true, will be upheld. See *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716. The defendant's exceptions to the trial court's ruling and to his peremptory instruction on the question of governmental immunity are overruled.

While the assignments of error chiefly urged on this appeal relate to rulings on the question of governmental immunity, the defendant has brought forward in its brief numerous other assignments relating to rulings on the admission and exclusion of evidence and to the court's instructions given the jury. These assignments have been examined with care. They present no new question requiring discussion. We find in them no error of sufficient moment to justify a new trial. Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial and that a different result likely would have ensued, with the burden being on the appellant to show this. *S. v. Rainey*, 236 N.C. 738, 74 S.E. 2d 39; *Call v. Stroud*, 232 N.C. 478, 61 S.E. 2d 342; *Wilson v. Lumber Co.*, 186 N.C. 56, 118 S.E. 797.

Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No Error.

STATE v. JOHNNIE D. KNIGHT, JR.

(Filed 21 May, 1958.)

1. Homicide § 25—

The evidence in this case tending to show that defendant brutally assaulted his victim in an attempt to commit the crime of rape, inflicting wounds causing death, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the first degree.

2. Kidnapping § 1—

Evidence tending to show that after defendant had brutally assaulted his victim, he removed her from her home while she was in a dying condition and hid her body in a wood, in an attempt to cover up and blot out the evidence of his crime, is insufficient to show a taking and carrying away of the deceased as an element of the crime of kidnapping, even though she was still alive when he took her out of the car in the woods.

3. Homicide § 27c—

Where the evidence is sufficient to be submitted to the jury on the theory of defendant's guilt of murdering his victim in an attempt to commit the crime of rape, but is insufficient to show defendant's guilt of the crime of kidnapping, an instruction that defendant would be guilty of murder in the first degree if the jury should find that the murder was perpetrated in the attempt to commit the crime of rape or in the commission of the felony of kidnapping, must be held prejudicial as permitting the jury to rest its verdict on a theory not supported by the evidence.

4. Criminal Law §160—

Where the court submits the question of defendant's guilt on one theory supported by the evidence and also on another theory which is not supported by the evidence, and it is impossible to ascertain whether the verdict of the jury rested on the unsupported theory, a new trial must be awarded.

5. Criminal Law § 154—

On appeal from conviction of a capital felony, the Supreme Court will take cognizance *ex mero motu* of prejudicial error appearing on the record even though such error is not assigned by defendant.

6. Homicide § 27h— Evidence held to require submission of question of defendant's guilt of murder in the second degree.

The State's evidence tended to show that defendant, who was deaf and dumb, entered a house in which a woman was alone, wrote a proposal

of sexual intercourse on a note, that she became scared, tried to make him leave and hit him, and that thereupon he brutally and fatally assaulted her, but did not try to have intercourse with her. *Held:* While the evidence is sufficient to support the theory of murder committed in the attempted perpetration of the felony of rape, it also supports the inference that defendant did not intend to commit rape but sought to have intercourse with his victim on a voluntary basis, and that his assault upon her was precipitated when she struck at him while she was trying to drive him from the house, and therefore it is the duty of the court upon such evidence to submit the question of defendant's guilt of murder in the second degree, in addition to the question of defendant's guilt of murder in the first degree, or not guilty.

7. Criminal Law § 109—

If there is any evidence or if any inference can be fairly deduced therefrom tending to show defendant's guilt of a less degree of the crime charged, it is the duty of the court, under appropriate instructions, to submit that view to the jury.

PARKER, J., concurs in result.

APPEAL by defendant from *Bundy, J.*, and a jury, at August Term, 1957, of NASH.

Criminal prosecution upon a bill of indictment charging the defendant with the murder of Mrs. Myra Brown Manning.

The jury returned a verdict of guilty of murder in the first degree, without recommendation of life imprisonment. Judgment was pronounced imposing the death sentence, from which the defendant appeals, assigning errors.

Attorney General Patton and Assistant Attorney General Moody for the State.

W. O. Rosser and W. O. Warner for the defendant, appellant.

JOHNSON, J. The first assignment of error challenges the trial court's ruling in denying the defendant's motion for judgment as of nonsuit as to the charge of first degree murder. The assignment brings into focus the evidence on which the State relies. It is summarized in pertinent part as follows:

The deceased, Myra Brown Manning, aged 43, lived with her husband and two sons just beyond the corporate limits of the Town of Bailey in Nash County. The defendant, Johnnie D. Knight, Jr., is a deaf and dumb Negro, who worked at various odd jobs in the vicinity of Bailey. His age is not shown, but he is referred to as a man. He went to school from 1939 to 1946 and reached the sixth grade. One of the defendant's odd jobs was feeding hogs for Unus Peel in a pasture located a short distance back of the Manning home.

Mrs. Manning's husband worked for Farmer Brothers, whose place of business was about a mile from the Manning Home. She usually went for him in the family car when work was over in the afternoon, but on the afternoon of 5 March, 1957, she did not go for him. At about 5:40 p. m. Rayborn Manning, her son, arrived home and found the car was not there. In the house he found signs of an apparent struggle: his mother's glasses were lying on the table. Shoe marks were on the floor, marks were on the wall, and the rug in the bedroom was turned sideways. Her shoes were there, but were "a little ways apart." The bedspread was turned back, and what appeared to be black knee prints were on the bed, and his mother's hair net was lying on the bed. A piece of note paper, balled up, was lying on the corner of the bedspread. Rayborn left the house and located his father at a nearby store. They went to the home of Mrs. Manning's sister. The car was not there, so they returned home after calling peace officers. The husband and the officers described in detail the signs they found in the Manning home. They testified to the same conditions found earlier by the son and, in addition, that bloodstains were seen at various places and that the fire poker was in the wood box upside down with indications it had been used as a weapon. The family car was gone from the back yard. Searching parties were organized and went out from the home. Later that night the dead body of Mrs. Manning was found near the town dump heap, some 25 or 30 yards beyond where the car was stuck in the mud on the side of a dirt road. Mrs. Manning's body showed she had been cut, beaten, mutilated and killed in a shocking manner.

A large work-shoe track was found near Mrs. Manning's body. The witness Jack Griffin measured the width and length of the track. The heel appeared to have left the imprint of the brand of the shoe. Next morning, when Johnnie Knight went down to feed the hogs back of the Manning home, Griffin saw him and after he left went out and measured his tracks and found they had the same measurements and brand imprint as the track found near the body of Mrs. Manning.

Later in the day, the defendant was taken into custody by Sheriff Womble. He was taken to the Bailey Police Department. In his pocket were found a hawkbill knife with blood on it, a pencil and notebook, and some cards on which were pictures of naked white women. That night (6 March, 1957), in the city jail in Rocky Mount Sheriff Womble and S. B. I. Agent Wilson examined the defendant by the method of having him write notes in the form of answers to written questions. The defendant was examined again by the same method on 12 March, 1957. Each time he confessed killing Mrs. Manning.

The evidence discloses that both confessions were made under circumstances rendering them competent and admissible, and justifying

the inference that they were voluntarily made under application of rules applied in numerous decisions of this Court. See *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603. Two confessions later made by the defendant were excluded, for failure to show to the satisfaction of the court that they were voluntarily made.

In his confessions of 6 and 12 March the defendant stated in part: that he knew Mrs. Manning was alone in the house; that he knocked on the front door and got into the house; that he went there "to try to f... her"; that by means of a written note—the one found on the bedspread—he made a proposal of sexual intercourse to Mrs. Manning; that she got scared and tried to make him leave the house; that he struck her with the fire poker and also cut her throat with his knife, and then wrapped a towel around her neck and put her in the Manning family car parked behind the house; that he drove the car out to the place where it was found near the town dump heap, pulled Mrs. Manning out, and left her in the woods about 50 feet beyond the car, where she was later found; that she was not dead when he took her out of the car. The defendant later went with the officers and pointed out where he left the car, showed them how he pulled Mrs. Manning out of the car, pointed out a spot of blood on the ground where the body had been found, and found for them in a nearby cornfield a piece of towel with bloodstains on it.

Dr. John Chamblee, who examined the body to determine the cause of death, testified in part as follows:

"The first finding on the head was a deep cut on the back left side of the head which was approximately 2½ inches long and went through all of the layers of the skull down to the bone. . . . It was a ragged type of wound. In my opinion that wound was made from a blow by a blunt instrument rather than a cut from a sharp instrument. . . . It (referring to throat wounds shown on a photograph) shows a gaping wound in the center of the throat just below the level of the voice box. That wound entered into the windpipe, cut into the windpipe.... A number of cuts and bruises were also found on the body and on the throat there were several light cuts. They were through the skin but did not go deeper than the skin. They were criss-crossed across her throat about three of them approximately six inches long, . . . Also on the left side of the throat at the lower part of the throat there was a stab type wound. . . . Also there was a large bruise on the left side of the jaw. . . . There was a bruise across the bridge of the nose, a big bruise surrounding the right eye, a smaller bruise at the corner of the left eye, and there were three bruises on the outer surface of the left forearm. There was a large bruise on the right shoulder,

. . . There were two bruises on the inner surface of the right thigh approximately the size of a silver dollar, . . . On examination of the left hand there was a deep cut across the fingers that was to the bone on the index and middle finger. . . . There was a deep cut between the thumb and the index finger into the palm of the hand on the fatty part of the palm next to the thumb and there were several light cuts across the palm of the hand. They were not clean through the skin but they were shallow cuts made, in my opinion, with a sharp instrument. Coming back to the largest wound in the center of the throat, . . . it was kind of a rounded wound like someone had cored it out. The wound was open. . . . I examined her to see whether she had been raped and my examination and lab tests ruled out rape. In my opinion Mrs. Manning's death was caused from loss of blood from the cuts on her throat and the cuts on the back of her head. She bled to death." Dr. Chamblee further testified that the cut wounds "could have been made with an instrument like" the defendant's knife which was offered in evidence; and that "the blow on her head could have been produced by such an instrument as" the fire poker exhibited to the witness.

It is manifest that the State's evidence was sufficient to carry the case to the jury on the issue of murder in the first degree and to justify the inference that the deceased was killed by the defendant in the attempt to perpetrate the felony of rape. The motion for judgment as of nonsuit was properly overruled.

However, a new trial must be awarded for errors in the charge. The record discloses that the trial Judge instructed the jury that it should return one of three verdicts, to wit: (1) guilty of murder in the first degree as charged in the bill of indictment; (2) guilty of murder in the first degree with recommendation that the punishment be imprisonment for life in the State's Prison; or (3) not guilty.

The presiding Judge, being of the opinion that all the evidence on which the State relied tended to show a murder committed in the perpetration or attempted perpetration of either the felony of rape or of kidnapping, submitted the case to the jury under the felony-murder statute, G.S. 14-17, which provides in part as follows: "A murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, *rape,* robbery, burglary *or other felony,* shall be deemed to be murder in the first degree. . . ." (Italics added.)

The jury was instructed that depending on how it found the facts to be from the evidence, under application of the law as given the jury by the court, it could find the defendant guilty of murder in the first degree upon the ground that he killed the deceased in the perpetration or attempt to perpetrate either or both of the crimes of rape or kid-

napping. As previously noted, the evidence was clearly sufficient to carry the case to the jury on the issue of murder committed in the attempted perpetration of the crime of rape. However, we are constrained to the view that the evidence does not justify the inference that the killing was committed in the perpetration or attemped perpetration of the felony of kidnapping. True, the defendant stated in his confession that the deceased was still alive when he took her out of the house and that she was also alive when he pulled her out of the car near the dump heap. It is further noted that he stated in his confession that he killed her in the "wood," meaning where he left her near the dump heap. But the record is silent as to what additional blows, if any, the defendant struck the deceased after taking her mutilated body out of the car in the woods. And all the evidence of substance *on which the State relies* tends to show the defendant attempted to force the deceased to have sexual intercourse with him and that while she was defending herself and trying to drive him from her home, she was subjected to a murderous assault with a fire poker and a hawk-bill knife, and that she was in a dying condition when the defendant took her from the house. The doctor who later examined the body, after describing deep cut wounds on her head and about her throat, said she bled to death. In his confession the defendant stated that he hit her with the poker and cut her at the house. The gash wound on the back of her head, which the State contends was administered with the fire poker, went through to the skull bone. Signs of loss of much blood were found in the house. The defendant in his confession said he tried to mop it up with towels before taking her out of the house. And the evidence discloses that in the back seat of the car where she was placed by the defendant it "was bloody all over inside . . . just like you had . . . sprayed the whole automobile."

The evidence relating to the defendant's acts and conduct in carrying the deceased from her home and hiding her in the woods is insufficient to show a taking and carrying away of the deceased as an element of the crime of kidnapping. *S. v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497. See also *S. v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649. On the contrary, the reasonable inference deducible from this phase of the evidence is that the defendant in removing the deceased from the home was trying to cover up and blot out the evidence of his murderous assault and attempt at rape. It thus appears that the instruction as given by the trial Judge permitted the jury to rest its verdict on a theory not supported by the evidence, namely that of kidnapping. We have no way of knowing whether the jury did or did not rest its verdict on the theory of kidnapping. Therefore, since the instruction was calculated to prejudice, and may have prejudiced,

the defendant, it must be held for error. See *S. v. Alston,* 228 N.C. 555, 46 S.E. 2d 567; 24 C.J.S., Criminal Law, Sec. 1922, pp. 1019 and 1020; 41 C.J.S., Homicide, Sec. 427a, pp. 287 and 288. While the error is not assigned by the defendant, nevertheless, since we are here dealing with a capital case, we take cognizance of the error *ex mero motu.* In *S. v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921, this Court, speaking through Valentine, J., said: "In this enlightened age the humanity of the law is such that no man shall suffer death as a penalty for crime, except upon conviction in a trial free from substantial error and in which the constitutional and statutory safeguards for the protection of his rights have been scrupulously observed. Therefore, in all capital cases reaching this Court, it is the settled policy to examine the record for the ascertainment of reversible error. (Citing authorities) If, upon such an examination, error is found, it then becomes the duty of the Court upon its own motion to recognize and act upon the error so found. . . . This rule obtains whether the prisoner be prince or pauper."

Our study of the record also brings into focus a phase of the evidence which seems to require further consideration of the Judge's charge to the jury. In the defendant's confession we find he made statements inconsistent with those relied on by the State to support its theory of murder committed in the attemped perpetration of rape. The statements which are at variance with the rape-murder theory are in substance as follows: that he had known Mrs. Manning about a year; that he had been to her house before; that he went to the door on this occasion, knocked, and was admitted. After getting inside, he said he wrote the note making the proposal of sexual intercourse; that the note was written on the notebook pad he had in his pocket; that in this manner he said "he asked her for some"; that she said "no," and tried to hit him; that he then cut her. He further said he did not try to have sexual relations with Mrs. Manning. While the greater volume of the confession-testimony may tend to support the State's theory of murder committed in the attempted perpetration of the felony of rape, nevertheless the foregoing line of testimony, if believed, is sufficient to support the inference that the defendant had no intent to rape Mrs. Manning but sought only to have intercourse with her on a voluntary basis, and that his assault upon her was precipitated when she struck at him while she was trying to drive him from the house. We are constrained to the view that this line of evidence, when tested by authoritative decisions of this Court, required that the jury be permitted to consider a lesser degree of homicide than murder in the first degree.

It is true, as the State contends in its brief, that it is rarely the case where the felony-murder statute, G.S. 14-17, applies that the jury should be permitted to consider a lesser degree of homicide than murder in the first degree. "If, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court, under appropriate instructions, to submit that view to the jury." *S. v. Spivey,* 151 N.C. 676, 686, 65 S.E. 995; *S. v. Miller,* 219 N.C. 514, 14 S.E. 2d 522; *S. v. Perry,* 209 N.C. 604, 184 S.E. 545. See also *S. v. Streeton, supra* (231 N.C. 301).

We conclude that the foregoing evidence, and other testimony of a corroboratory nature, was sufficient to justify, though not require, the inference of a lower degree of homicide than murder in the first degree, namely, murder in the second degree, and that the trial court erred in not so instructing the jury.

For the errors pointed out the defendant is entitled to a new trial. It is so ordered.

New Trial.

PARKER, J., concurs in result.

JAMES M. BULMAN v. SOUTHERN BAPTIST CONVENTION.

(Filed 21 May, 1958.)

1. Appeal and Error § 19—

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced *ex mero motu*. Rules of Practice in the Supreme Court, Nos. 19(3) and 21.

2. Appeal and Error § 21—

An exception and assignment of error to the judgment presents for review the single question whether the facts found support the conclusions and judgment, and does not bring up for review the findings of fact or the evidence upon which they are based.

3. Process § 8d—

Findings of fact to the effect that defendant nonresident corporation was not doing business in this State, had no property here, and that the cause of action did not relate to any contract or tort committed in this State, *held* to support the court's conclusion that the defendant was not subject to service of process by service on the Secretary of State.

APPEAL by plaintiff from *Johnston, J.*, at 12 November Civil Term, 1957, of GUILFORD (Greensboro Division).

Civil action by the plaintiff to enjoin certain officers of the Southern Baptist Convention from performing the ordinary duties of their offices, upon the alleged ground that they were improperly elected in disregard of the Bylaws of the Convention.

The case was heard below on special appearance and motion of the defendant to quash the purported service of process, upon the ground that the defendant has never engaged in such business or activity in the State of North Carolina as would subject it to the jurisdiction of the courts of the State.

The trial court, after hearing evidence offered by both sides, found facts and made conclusions of law as follows:

"FINDINGS OF FACT.

"1. The plaintiff is a citizen and resident of Rowan County, North Carolina. The instant action was initiated in the Superior Court of Guilford County on the 26th day of August, 1957, by the filing of a complaint alleging that the officers of the defendant Southern Baptist Convention were improperly elected and that if they are allowed to carry out their duties as officers of the said Southern Baptist Convention, that the plaintiff will suffer irreparable damage.

"2. Service of process on the defendant was sought to be made by serving the Secretary of State of North Carolina on 22 September,

1957, as agent for the defendant. The summons was directed to: 'The Sheriff of Wake County. You are commanded to summon Hon. Thad Eure, Secretary of State of North Carolina, Raleigh, North Carolina, for service upon Southern Baptist Convention.'

"3. The defendant is a foreign corporation organized and existing under the laws of the State of Georgia and having its principal office located in Nashville, Tennessee. The defendant has not procured a certificate of authority from the Secretary of State of North Carolina to transact business in this state; it has never been licensed to do business in this state, nor has it applied for domestication herein. The defendant has never designated, selected, or authorized anyone to act as a process agent or officer for it in North Carolina.

"4. The defendant Southern Baptist Convention is a general organization of Baptists in the United States and its territories existing to promote Christian missions at home and abroad and other objects such as Christian education, benevolent enterprises and social services which said defendant may deem proper and advisable for the furtherance of the Kingdom of God. The Convention is independent and sovereign in its own sphere, but does not and will not claim or attempt to exercise any authority over any other Baptist body, whether church, auxiliary organization, association or convention.

"5. The Southern Baptist Convention does not now and has not in the past owned any property in the State of North Carolina, either real or personal, and does not have any local agent in the State of North Carolina. Any property in the State of North Carolina which is owned by a Baptist organization belongs either to the local churches or to some corporation such as the Southeastern Seminary or the Sunday School Board.

"6. The Southern Baptist Convention does not have any bank account in the State of North Carolina and does not collect monies within the State. The funds which are donated to the work of the Southern Baptist Convention come through the North Carolina Baptist Convention, a separate and independent corporation organized and existing under the laws of the State of North Carolina. The amounts contributed to the Southern Baptist Convention by the North Carolina Baptist Convention are decided upon by said North Carolina Baptist Convention and the Southern Baptist Convention has no control over the amounts or over the monies contributed until the funds are received in the offices in Nashville, Tennessee.

"7. The Southern Baptist Convention is a general organization to which various Baptist Churches belong, the organization being for the purpose of carrying into effect the benevolent intention of the various Baptist constituents by organizing and directing a plan for eliciting, combining and directing the energies of the denomination for the propa-

gation of the Christian gospel. The Convention meets once each year, elects its officers, hears reports from the various boards and committees, makes recommendations for allocation of funds, and promulgates plans for the coming year.

"8. The Southern Baptist Convention has at no time, nor does it now:

"(a) Maintain any office or place of business within the State of North Carolina.

"(b) Have or maintain a listing in any telephone, business, city, or other directory within said state.

"(c) Maintain any employees or agents within said state.

"(d) Own, lease, possess, or otherwise control or use any property or facilities of any type or kind within said state.

"9. No officer, director, nor any managing or local agent of the defendant resides or performs duties on behalf of the defendant in the State of North Carolina. No one is authorized to or does make contracts or representations for or on behalf of the defendant in North Carolina. The cause of action alleged by the plaintiff does not arise out of any contract made in the State of North Carolina or to be performed within this State.

"10. The defendant has not transacted or done business in the State of North Carolina nor been present therein. Any activities and contacts of its representatives within this State are irregular, isolated, casual and insubstantial items; they are trivial and purely incidental to the general promotional and directory activities carried on by the defendant."

"CONCLUSIONS OF LAW

"1. No personal service of process and complaint has been made upon the defendant, or any of its officers or agents. The defendant has entered a special appearance solely for the purpose of making its motion.

"2. The defendant has not transacted or done business in the State of North Carolina, nor has it been present within the State through its officers, agents, or in any other manner. The activities and contacts of the defendant within the State have been casual, incidental and insubstantial, and have not been such as would make it reasonable and just under traditional concepts of fair play and substantial justice to subject the defendant to suit in the courts of this State under the circumstances of this case. Defendant's activities and contacts in this State have been insubstantial and negligible in quantity and the cause of action alleged in the complaint does not arise out of nor is it connected with such activities. At no time has the defendant transacted any substantial part of its ordinary business in this State.

"3. The cause of action alleged in the complaint does not arise out of any contract made in North Carolina, or to be performed in North Carolina.

"4. The cause of action alleged in the complaint does not arise out of any business solicited in North Carolina by mail or otherwise.

"5. The cause of action alleged in the complaint does not arise out of the production, manufacture or distribution of 'goods' by the defendant with the reasonable expectation that such 'goods' were to be 'used or consumed' in North Carolina and were so 'used or consumed.'

"6. The cause of action alleged in the complaint does not arise out of tortious conduct in North Carolina.

"7. The attempted service of summons and complaint on the defendant is invalid and should be quashed and set aside. The action should be dismissed for want of jurisdiction over the person of the defendant."

Upon the foregoing findings of fact and conclusions of law, the court entered judgment decreeing that the attempted service of process on the defendant be quashed and set aside and that the action be dismissed for want of jurisdiction of the court over the defendant.

From the judgment entered, the plaintiff appeals.

William W. White, Jr., for plaintiff.

McLendon, Brim, Holderness & Brooks, and C. T. Leonard, Jr., for the defendant.

JOHNSON, J. This appeal is predicated in the main upon assignments of error to the effect that the trial court erred in making the crucial findings of fact and conclusions of law. By Assignments Nos. 1 to 6, inclusive, the plaintiff attempts to challenge the sufficiency of the evidence to support Findings of Fact Nos. 3, 5, 6, 8, 9, and 10. By Assignments Nos. 7 to 15, inclusive, he attempts to challenge the refusal of the court to adopt nine findings tendered by him. By Assignments Nos. 16 to 22, inclusive, the plaintiff attempts to challenge separately each of the seven conclusions of law made by the court.

The foregoing assignments of error, 22 in number, are not supported by exceptions previously noted. The exceptions appear in the record under the assignments of error. This is not in compliance with our rules. See Rules 19 (3) and 21, Rules of Practice in the Supreme Court, 221 N.C. 544.

The infraction of rules here presented is similar to that in *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118, from which we quote: "The appellant in his case on appeal undertakes to set out six assignments of error based on a like number of exceptions. However, the exceptions

appear nowhere in the record except under the purported assignments of error. Such exceptions are worthless and will not be considered on appeal."

To like effect is the decision in *Rigsbee v. Perkins,* 242 N.C. 502, 504, 87 S.E. 2d 926, 927, where it is said: "Thus it is manifest that the assignment of error on which the appeal is predicated is not supported by an exception. And the rule is that only an exception previously noted in the case on appeal will serve to present a question of law for this Court to decide. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208. The function of the assignments of error is to group and bring forward such of the exceptions previously made and noted in the case on appeal as the appellant desires to preserve and present to this Court. *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. An assignment of error, as in the case at hand, not supported by an exception comes to naught and will be disregarded."

See also *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602, where it is said: "The appeal seems to be predicated in the main upon assignments of error to the effect that the court erred in making findings of fact Nos. 5, 13, 18, and 20. But these assignments are not supported by exceptions previously noted as required by our rules. See Rules 19 (3) and 21, Rules of Practice in the Supreme Court, 221 N.C. 544.

"When it is claimed that findings of fact made by the judge are not supported by competent evidence, a litigant who would invoke the right of review must point out specifically the alleged error. This he must do by exception. The assignment of error alone will not suffice. *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664.

"The function of the assignment of errors is to group and bring forward such of the exceptions previously made and noted in the case on appeal as the appellant desires to preserve and present to the Court. *Moore v. Crosswell.* 240 N.C. 473, 82 S.E. 2d 208; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175. Therefore an assignment of error not supported by an exception will be disregarded. *Moore v. Crosswell, supra; Donnell v. Cox, supra; S. v. Gordon, ante,* 356. This rule is mandatory and will be enforced *ex mero motu.*"

See also *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445; *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208.

In the instant case, the only exception cognizable under our rules is the general exception to the judgment. This brings here for review the single question whether the facts found support the conclusions and judgment. It does not bring up for review "the findings of fact or the evidence on which they are based." *Hoover v. Crotts,* 232 N.C. 617,

61 S.E. 2d 705; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488. It is manifest that the findings of fact support the conclusions and judgment.

The judgment below is

Affirmed.

D. J. HINCHER v. THE HOSPITAL CARE ASSOCIATION, INC.

(Filed 21 May, 1958.)

1. Trial § 22b—

Defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and clarify it, may be considered on motion to nonsuit.

2. Trial § 24a—

When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered.

3. Insurance § 38— Evidence held to show that operation was for pre-existing condition within exclusion clause of hospital insurance.

Plaintiff instituted this suit to recover medical expenses for a goitre operation performed subsequent to the date of the hospital policy sued on. Plaintiff testified to the effect that she had visited her doctor on several occasions prior to the application for the hospital policy in suit and had suffered similar symptoms both before and after making the application, but that the doctor did not tell her until after the policy was issued that she had a goitre. Deposition of the doctor, introduced by defendant, was to the effect that the goitre condition, for which the operation was performed, had its inception prior to the date of the application. *Held:* Plaintiff's evidence, together with defendant's evidence in clarification and explanation thereof, but not in contradiction therewith, establishes as a matter of law that the operation was for a condition which existed prior to the effective date of the policy, and therefore was within the exclusion clause of the policy.

4. Trial § 30—

Ordinarily, where all the evidence bearing upon an issue points in the same direction, with but one inference to be drawn from it, an instruction to find in support of such inference, if the evidence is found to be true, is proper.

APPEAL by defendant from *Crissman, J.,* and a jury, at January Civil Term, 1958, of WILKES.

Civil action to recover for hospital and surgical benefits under a certificate of insurance of the Blue Cross type.

The plaintiff sued to recover for hospital and surgical expenses covered by the insuring clauses of the certificate. The defendant denied liability, relying upon exclusion clauses which provide that none of the policy benefits will be available to any person hospitalized or operated upon "for any condition, disease, or injury which existed on or before the effective date" of the certificate.

The defendant alleged that the plaintiff's surgical operation was due to a condition existing on the effective date of the certificate. This plea, by way of affirmative defense, presented the only controverted issue in the trial below.

The evidence bearing on the issue may be summarized as follows: The plaintiff made application for the certificate on 10 November, 1955. It became effective 1 January, 1956. On 4 May, 1956, while the certificate was in full force and effect, the plaintiff was admitted to the Davis Hospital in Statesville and underwent surgery for a goitre condition. She incurred hospital and surgical bills totalling $343.80, which the defendant has refused to pay.

On cross-examination the plaintiff testified: "I know Dr. Warner of Statesville; he was connected with the Davis Hospital in Statesville. Dr. Warner saw me with regard to my illness, my physical condition, but I don't recall the first time that he did see me. I didn't know to keep the dates and so I didn't keep the dates. He saw me in September, 1955, but I can't recall whether he saw me on the 10th day of September, 1955. As a matter of fact, I don't recall whether he saw me three times in September, 1955, or not. I didn't keep the dates, but I do recall going to Davis Hospital in September, 1955. I don't recall how many times I had seen Dr. Warner before I was admitted to the Davis Hospital in September, 1955, but I don't recall the number of times. I didn't keep the dates and therefore I don't know whether I saw Dr. Warner twice in October, 1955, or not. I can't recall offhand whether I saw Dr. Warner twice during October, 1955; I mean I have seen him a lot. I don't know whether it was twice during the month of October, 1955. . . . I won't say whether it was six times prior to November, 1955, because I don't know. . . . I saw Dr. Warner before I signed the application but I don't recall how many times I saw him before I signed it. . . . Well, I had seen him more than one time prior to November, 1955, but I won't say how many times because I didn't recall how many times, . . .

"When I went to the hospital on May 4, 1956, at the time they operated during that stay in the hospital, they operated on my neck, that is all I know. I don't know whether I had a goitre. *A goitre is what the*

doctor was supposed to have operated for. That is what he told me he operated for. (Italics added.)

"Well, I have had a choking for a long time and headaches and I still have it, and have had that choking for some time. I have never been to the doctor with a goitre in my throat. I have never went to him with intentions of saying that I had a goitre because I never had thought that I ever had and I still don't. I still have the choking and am not any better; in fact, I am worse than I was before the operation. When I went to see Dr. Warner the first time in September, 1955, I complained to the doctor of nervousness and recurrent choking and tightness in my throat and that I had trouble swallowing. I won't recall the date because I don't know, but I have told him that several times when I would go to him because it was right. He is the doctor and I did not know what I had except I knew I had a headache and a choking and that is all I knew. I just told the doctor how I felt and he made some examinations and had two metabolism tests made and he made a blood count and urinalysis and other tests and they ran several tests on me. I don't know exactly when my choking started because I didn't know I would have to keep the dates, *but I had this choking feeling when I first went to see Dr. Warner.* When the doctor took this goitre out in May, 1956, he did not tell me when it had started and he did not tell me when I first came to see him in September, 1955, that I had a goitre." (Italics added.)

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. Motion overruled. Defendant excepted.

The defendant offered the deposition of Dr. W. A. Warner, taken by the plaintiff. In essential part it is as follows:

Direct examination by Mr. Osteen: "My name is W. A. Warner and I am a physician practicing at Davis Hospital in Statesville. I am engaged in the general practice.

"I know Dorothy J. Hincher and I have examined this woman. I first saw her on September 10, 1955, and have had occasion to examine her since that time. I examined her on May 4, 1956, and have examined her a number of times since that time. She is still under my care.

"When I first saw Mrs. Hincher on September 10, 1955, she was complaining of nervousness, recurrent bouts of choking, tightness in her throat, trouble swallowing. She stated she had had no previous goitre history and that there had been no weight loss, no increased appetite, etc. Physical examination revealed blood pressure of 136/84, pulse 84. Examination of the thyroid, I thought, was diffusely enlarged, non tender, freely movable. It was my feeling at this time that the patient had a goitre and in all probability the goitre was toxic. She was instructed to return September 16, 1955, at which time she stated she felt terrible. She had been nervous all week with frequent headaches.

She was hospitalized then and the following studies were done: BMR was +1 and the repeat examination was +3. Blood cholesterol was 117 mg.%. All other laboratory work including complete blood count, urinalysis, sedimentation rate and Wasserman were normal. At that time I asked Dr. John Rosser, member of our surgical staff, to examine her thyroid gland. His opinion as written on the consultation sheet was 'Thyroid gland slightly enlarged but not enough to cause symptoms, it would seem to me. I advise observation and conservative therapy for the time being.'

"I also asked Dr. J. R. Stewart, who was our otholaryngologist, to laryngoscope Mrs. Hincher to find out whether this thyroid was compressing her throat. She was therefore laryngoscoped on September 22nd and no pathology was visualized. Because all studies indicated this thyroid was non-toxic, patient was discharged on medical care. I next saw her on October 8, 1955, when she stated she felt better. I next saw her on October 29, 1955, when she said she continued to feel better in most ways, that is her headaches were less frequent. She stated she was still quite nervous, was still having choking and smothering spells. It was felt that there was no change in the physical examination at this time. She was next seen on November 14, 1955, when she said she had a splitting headache for the previous two days and that her nervousness was worse. She was seen again December 3, 1955. Her symptoms were essentially the same as on the previous visit. She was seen again on the next day when she said she had had a headache for the previous week. . . .

"I next saw her on January 28, 1956, when she complained of nervousness and trembling hands. Her next visit was on February 11, 1956, when she stated she had had a migraine headache all week, that she was unable to sleep and was 'choking again.' I next saw her on March 3, 1956, when she stated she had been feeling better until 2 or 3 days prior to the visit. Since then she had been more nervous than usual. She returned to my office on March 15th complaining of a generalized headache.

"I next saw her on April 7, 1956, at which time she stated her headache was still persisting. She was next seen April 23, 1956, again with another headache. She thought her nervousness was less at that time. She stated she was again 'choking' in her throat. I next saw her on May 4, 1956, when she said she was feeling worse. It was her feeling that her 'choking' had now reached a stage where 'I cannot stand it any longer.' She was hospitalized on that date. Laboratory studies at that time showed a basal metabolism of +3, normal urinalysis, blood count, serum calcium 9.4 mg.% and a serum cholesterol of 223 mg.%. At this time I referred her to Dr. Paul Lanier Ogburn, another surgeon

on our staff. He thought her thyroid was enlarged but it was also his feeling that the thyroid was non-toxic. On May 9, 1956, I recorded in the progress notes: 'Continues to have choking, smothering, tension headaches. Patient is a severe Psycho-neurotic, but I still feel that a subtotal thyroidectomy would be justified on the basis that she may have some obstructive tissue.' Consequently, she was scheduled for surgery on May 14, 1956, and a subtotal thyroidectomy was done. At that time it was found that each thyroid lobe was approximately two times normal size with the left lobe being slightly larger than the right.

"The headaches, nervousness, could have come from conditions other than goitre trouble; in fact, she has continued to have headaches since her surgery. I thought she had a goitre the first time I saw her back in September, 1955, but at that time that it was relatively dormant. Based on my findings and my examination of Mrs. Hincher, I have an opinion satisfactory to myself and based on a reasonable medical certainty that the goitre was present prior to January 1, 1956, and that it was dormant or non-toxic. After January 1, 1956, it was my feeling that Mrs. Hincher became worse in the last two or three months prior to her surgery. It was my feeling that her goitre had probably increased in size.

"A goitre condition is not comparatively a simple condition to diagnose. A toxic goitre is relatively easy to diagnose, but a simple colloid goiter causes symptoms by mechanical obstruction and as such cannot be measured accurately externally. Based on my findings, on my examination of Mrs. Dorothy J. Hincher, I have an opinion satisfactory to myself based on a reasonable medical certainty as to whether or not the goitre condition could possibly not have existed prior to January 1, 1956, and it is my opinion that the goitre did exist prior to January 1, 1956, but probably increased in size several months prior to her surgery."

Cross Examination: "The condition for which she was admitted to Davis Hospital on May 4, 1956, was substantially the same physical condition that I found upon my seeing Mrs. Hincher the first time in September, 1955. In other words, she had nervousness, choking, tightness in the throat, trouble with swallowing, and these were the symptoms which I have specified and described and she had those symptoms. In my opinion, Mrs. Hincher had this goitre when I first saw her in September, 1955. The operation which was performed was done by Dr. Ogburn and he removed the goitre during the hospital admission of May 4, 1956."

At the close of all the evidence, the defendant renewed its motion for judgment as of nonsuit. Motion denied. Defendant excepted.

The defendant in apt time tendered in writing the following request for special instruction: "Gentlemen of the jury, I charge you that if

you believe the evidence in this case and find the facts to be by the greater weight of the evidence as all the evidence tends to show, it will be your duty to answer the first issue YES." Request denied. Defendant excepted.

The following issue was submitted to the jury and answered as indicated: "Was the hospitalization and the surgical operation upon the plaintiff due to a condition existing as of the effective date of the certificate? Answer: NO."

The parties having stipulated that the plaintiff should recover the sum of $343.80 in the event the issue should be answered in her favor, judgment was entered in accordance with the stipulation. The defendant appeals.

Claude V. Jones for appellant.
W. H. McElwee and W. L. Osteen for appellee.

JOHNSON, J. The defendant's chief assignments of error challenge the rulings of the trial court in denying its motion for judgment as of nonsuit and in refusing to give the jury the peremptory instruction as requested by the defendant.

"Defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and clarify it, may be considered on motion to nonsuit." *Robbins v. Crawford*, 246 N.C. 622, 99 S.E. 2d 852. See also *Nance v. Hitch*, 238 N.C. 1, 76 S.E. 2d 461, and cases there cited.

It is also established by our decisions that, "When the plaintiff offers evidence sufficient to constitute a prima facie case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered." See also *Thomas-Yelverton Co. v. Ins. Co.*, 238 N.C. 278, 77 S.E. 2d 692; *Goldberg v. Ins. Co.*, 248 N.C. 86, 102 S.E. 2d 521.

In the instant case it is apparent that various phases of the testimony of Dr. Warner, given as a witness for the defendant, harmonize with and tend to explain and clarify the plaintiff's testimony, without in any manner contradicting it. And when the plaintiff's testimony is considered in connection with the clarifying phases of the defendant's evidence, it is manifest that the defendant's affirmative defense is established as a matter of law by the plaintiff's evidence. We conclude, therefore, that the ruling of the trial court in denying the defendant's motion for judgment as of nonsuit must be held for error and reversed. This being so, it is not necessary to discuss at length the question whether the court also erred in denying the defendant's request for a

peremptory instruction. Ordinarily, where all the evidence bearing upon an issue points in the same direction, with but one inference to be drawn from it, an instruction to find in support of such inference, if the evidence is found to be true, is proper. *Commercial Solvents v. Johnson,* 235 N.C. 237, 243, 69 S.E. 2d 716, 721. Here it is manifest that the defendant was entitled to a peremptory instruction. For correct form of instruction, see *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757; *Peek v. Trust Co.,* 242 N.C. 1, 11, 86 S.E. 2d 745, 753; *Rhodes v. Raxter,* 242 N. C. 206, 210, 87 S.E. 2d 265, 268; *Commercial Solvents v. Johnson, supra.*

The judgment below will be

Reversed.

IDELL H. COCKMAN v. CURTIS E. POWERS.

(Filed 21 May, 1958.)

1. Automobiles § 19: Negligence § 14½—

One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.

2. Same—

One cannot escape liability for acts otherwise negligent because done under the stress of an emergency if such emergency was caused, wholly or in material part, by his own negligent or wrongful act.

3. Automobiles § 47— Evidence held insufficient to show negligence on part of defendant who was acting in sudden emergency.

Plaintiff's evidence tended to show that she called defendant late at night after her husband had gone to work on the night shift and insisted that defendant come to her home to talk with her in regard to reemploying her in his plant, that defendant drove up in the driveway and she came out and sat on the edge of the back seat with her feet in the open door, and that while they were talking plaintiff's husband suddenly arrived, jerked plaintiff's arm, that she jerked back and fell in the car, that plaintiff's husband, cursing and threatening defendant, threw something at him and started around the car toward defendant, and that while plaintiff's husband was thus subjecting him to physical and verbal attack defendant started the car and backed out of the driveway, that in some manner plaintiff caught in the door of the car and was dragged to her injury. *Held:* The evidence discloses that defendant was required to act in a sudden emergency, and upon plaintiff's evidence, was without fault in causing the emergency, and therefore the evidence fails to disclose negligence on his part under the circumstances.

4. Trial § 22a—

Plaintiff must recover, if at all, on the basis of the evidence offered,

and while on motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, no facts or inferences may be drawn from the evidence predicated upon a disbelief of her testimony.

APPEAL by plaintiff from *Phillips, J.*, November 25, 1957, Civil Term, of RANDOLPH.

Personal injury action.

Plaintiff alleged that the injuries she received on Sunday, November 11, 1956, shortly after midnight, were proximately caused by the defendant's negligent operation of his 1956 Mercury (4-door) automobile.

At the close of plaintiff's evidence, the court, upon defendant's motion, entered judgment of involuntary nonsuit.

Plaintiff excepted and appealed.

Hammond & Walker for plaintiff, appellant.

Moser & Moser and Vaughn, Hudson, Ferrell & Carter by Ralph M. Stockton, Jr., for defendant, appellee.

BOBBITT, J. Plaintiff's testimony is the only evidence as to the cause and circumstances of her injuries. Since the only question is the sufficiency of plaintiff's evidence to survive defendant's motion for judgment of nonsuit, a close examination of plaintiff's testimony is required. Her testimony, summarized in part and quoted in part, is set out below.

Plaintiff lived with her husband, Clarence Cockman, and their 10 and 1-year old sons, some three miles south of Asheboro. She was employed, and had been for some six months, as a sales clerk in an Asheboro store; but before this employment she had worked for defendant "at different jobs at the Powers Poultry Company in Asheboro for about a year."

On Saturday, November 10, 1956, plaintiff and her husband "had had an argument," and her husband was mad when he left home. He was to be at work from midnight until 7:00 a.m. and was not expected home until around 7 or 8 o'clock on Sunday morning. Plaintiff's 10-year old son was spending the week-end away from home. Only plaintiff and her 1-year old son, who was asleep, were at home; and plaintiff "didn't expect anyone else to come to (her) house that night."

Under these circumstances, "the early morning of November 11, 1956," plaintiff telephoned defendant. She located him at his place of business in Asheboro. In response to her statement that she wanted to see him and talk to him about work, defendant told her he had been asleep, "that he didn't want to come that night, or something on that order," but would come on Sunday morning. Plaintiff insisted that she had to see him then. Thereupon, defendant consented to come to plain-

tiff's house; and some 20 to 25 minutes after the telephone conversation defendant drove his 1956 Mercury from the public road into the private driveway at the Cockman home and parked. The Cockman driveway is a "car route wide" and leads straight to the "car house." When parked, the back end of defendant's car was "about two car-lengths or probably more, from the roadway."

When plaintiff heard defendant drive up and park, she went out to defendant's parked car. She had told defendant she would meet him there. Defendant did not get out of his car, nor did he open the front door. He opened the (right) back door, which opened at the rear towards the front; and plaintiff "got in and sat on the edge of the seat on the right side." Her feet and legs were "in the door-like, call it the running-board." Plaintiff was attired in "her lounging pajamas, 2-piece, red and trimmed in white, with long sleeves and long pants."

In her testimony on direct examination, plaintiff didn't "think that the headlights or parking lights were on," on defendant's car, and didn't "think that the motor was running," when she went out to the car or during her conversation with defendant in the car. On cross-examination, she was positive that the lights were out; and her testimony as to defendant's having "started up" the car, referred to below, tends to confirm her thought that the motor was not running.

In the car, defendant seated in the front seat under the steering wheel and plaintiff seated on the back seat on the right side "as when she got in the car," plaintiff and defendant talked "a few minutes." The gist of their conversation was that plaintiff was dissatisfied with her job as sales clerk in the Asheboro store and "asked if she could go back to work at (defendant's) poultry company."

The midnight conference terminated abruptly when plaintiff's husband, "a big man physically," drove up, stopped in front of the house, and went straightway to the parked Mercury.

Plaintiff's husband, cursing, jerked plaintiff by her hand or arm. Plaintiff "jerked back from him and . . . fell in the foot-board of the car." As plaintiff struggled to get up, her husband gave attention to defendant. Defendant remained seated in the front seat, under the steering wheel. Plaintiff "saw his (her husband's) head pass and it was in the front towards Mr. Powers." She "imagined" that her husband was "in a terrible state." She testified: "My husband threw something at Mr. Powers and cursed him and threatened him; I couldn't say what he said when he threatened him; I can't recall. He said something similar to 'I will kill you,' but he was talking so fast I couldn't understand." Earlier, she had testified: "My husband got out of the car and came up to the car I was in; he commenced cursing, talking fast; I can't exactly repeat what he was saying; I couldn't say he was cursing me or Mr. Powers; I don't know whether I could repeat what

was said but he just said, 'g-- d---,' and all such as that; he raised his voice and there was all kind of vulgar talk."

In this dilemma, under physical and verbal attack by plaintiff's husband, defendant "started up" his car and backed out of the driveway. In so doing, the car "jolted" and plaintiff was thrown out. In some manner, she was caught in the door and dragged 6-8 feet. Defendant did not linger to ascertain the extent of her injuries or to render assistance.

Plaintiff alleged that defendant and Cockman "engaged in an argument"; that defendant started and backed his car, suddenly and without warning to her, "just as the plaintiff was attempting to get out of the car"; and that "the right rear door of the said Mercury automobile caught plaintiff and threw her to the ground." Her testimony shows a violent assault by Cockman on defendant, not an argument between them. Also, her testimony was that she was *thrown out* of the car under these circumstances: "I was getting up from the foot-board when the car jerked; I was not sitting but I was down, my head was not down; I was trying to get up to get out; I was not flat on my back, I was not on my side, I was kind of in a sitting position." However, the variance between plaintiff's allegations and her testimony is not the basis of decision.

It would seem, accepting plaintiff's testimony, that plaintiff's husband did not correctly appraise the innocent purpose of plaintiff's meeting with defendant or the subject of their conversation. Be that as it may, the impression is indelible that plaintiff's husband's words and actions were such that defendant had reasonable ground to believe that he was in danger of suffering serious bodily harm or even death at the hands of his assailant. It is clear that, in starting and backing his car, he acted under circumstances of emergency. In fact, it is apparent that neither plaintiff nor defendant was then concerned with what the other was doing or might do. Rather, each was concerned with what plaintiff's husband was doing or might do.

Decision requires the application of well settled legal principles to a factual situation somewhat different from any heretofore considered by this Court. Indeed, despite diligent research, no decision in any jurisdiction involving a similar factual situation has come to our attention.

The doctrine of intervening negligence, *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894, and cases cited, as ordinarily applied, does not fit the present factual situation. The assault by Cockman on defendant did not intervene between defendant's act and plaintiff's injury. On the contrary, it preceded defendant's act and was the cause thereof. Plaintiff's testimony is explicit that defendant started and backed his

car while he was under violent attack by Cockman. Thus, defendant's act intervened between Cockman's wrongful act and plaintiff's injury; and the question is whether defendant's act may be considered *a negligent act* proximately causing plaintiff's injury. *Butner v. Spease,* 217 N. C. 82, 88, 6 S.E. 2d 808, which cites *Scott v. Shepherd,* 2 Bl. 892 (*Squib* case).

"One who is required to act in an emergency is not held by the 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." Stacy, C. J., in *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562; *Simmons v. Rogers,* 247 N.C. 340, 348, 100 S.E. 2d 849, and cases cited; 38 Am. Jur., Negligence Sec. 41; 65 C.J.S., Negligence Sec. 17.

The only reasonable inference that may be drawn from plaintiff's testimony is that defendant, under the circumstances, was required to act instantly, without opportunity to reason or to reflect, to protect himself from serious bodily harm; and that the threats and violence of plaintiff's husband were of such nature that defendant's attempt to leave the premises as quickly as possible cannot be considered doing what an ordinarily prudent man would not have done under the same or similar circumstances. Moreover, it would seem that the threats and violence of plaintiff's husband were of such nature as to destroy wholly defendant's capacity to make inquiry or observation as to plaintiff's position following her tussle with her husband in the back of defendant's car.

True, one cannot escape liability for acts otherwise negligent because done under the stress of an emergency if such emergency was caused, wholly or in material part, by his own negligent or wrongful act. *Brunson v. Gainey,* 245 N.C. 152, 95 S.E. 2d 514, and cases cited; 38 Am. Jur., Negligence Sec. 41; 65 C.J.S., Negligence Sec. 17(e).

On the basis of plaintiff's testimony, can it be fairly said that the sudden emergency with which he was confronted was caused, wholly or in material part, by defendant's wrongful conduct?

If it were our function to weigh plaintiff's testimony, it might, in some respects, impose an undue burden on credulity. Suffice to say, we must accept plaintiff's testimony at full face value in passing upon the legal sufficiency of the evidence to survive the motion for nonsuit.

It appears from plaintiff's testimony that her husband's rage and violence, without allowing either plaintiff or defendant an opportunity to explain the wholly innocent character of their meeting, was the sole cause of the emergency situation in which defendant acted. She testified that she hadn't given a thought "to whether there would be trouble at (her) house if (her) husband returned that night."

As to defendant, be it remembered that plaintiff is quite positive

that defendant came to her house on this occasion reluctantly, because of plaintiff's insistence and for the sole purpose of discussing plaintiff's request for re-employment at defendant's place of business. There is nothing in plaintiff's testimony to the effect that there had been any prior relationship between plaintiff and defendant except that of employee and employer, which had terminated some six months previously, or that defendant knew that plaintiff was alone, or that she and her husband had quarreled, or that the purpose of their meeting was other than that stated by plaintiff in her telephone conversation, or that his conduct after arrival involved any improper or wrongful act on his part, or that he had reason to anticipate sudden and unexplained violence on the part of plaintiff's husband if he were at home or came to his home. Accepting plaintiff's testimony, the most that can be said is that defendant was indiscreet in going to plaintiff's home or in not refusing to talk with plaintiff under the circumstances described in her testimony.

Accepting plaintiff's testimony, it may be that she, with knowledge of facts she did not communicate to defendant, set the stage for the sudden emergency by arranging for defendant to come to her home under conditions known to her but not communicated to defendant.

We conclude that the sudden and critical emergency in which defendant acted was not caused by any wrongful act of defendant but wholly by the violence of plaintiff's husband. If plaintiff set the stage therefor, this cannot avail her in her action against defendant.

If it be considered that this is an unrealistic appraisal of the factual situation, our answer is that plaintiff's testimony has made it so. Plaintiff must recover, if at all, on the basis of the evidence offered. While the evidence must be taken in the light most favorable to plaintiff, we are not at liberty to base decision on facts or inferences predicated upon disbelief of her testimony.

Affirmed.

DAN W. MARTIN, J. RALPH PIGG, GEORGE W. GAINEY, RAY K. PIGG, ORIE M. VALENTINE, JUNIOUS HAYWOOD, JAMES H. LOLLIS, NEWLAND D. LATTIMORE, PAUL L. TEEM, NATHAN O. ANDREWS, WILLIAM FRED EVITT, HAROLD D. MILLER, WAYNE M. BARNES, THERON A. WOFFORD, HARRY B. CHASE, O. K. TOWELL, HISURE D. DARNELL, WRISTON L. DEESE, JAMES H. LEWIS, SR., HERSHELL H. DARNELL, ERNEST E. CLEMONS, JOE SCHLAGEUHAUF, JAMES A. LIMBAUGH, PHILLIP C. WRIGHT, HENRY A. REED, HARRY B. UPRIGHT, RICHARD H. KELLY, HARRY K. CRESS v. LOCAL 71, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, A. L. GUNTER, AND EDWARD HARGETT.

(Filed 21 May, 1958.)

1. Associations § 5—

At common law unincorporated labor unions, having no existence separate and distinct from its members, cannot sue or be sued as a legal entity.

2. Same: Process § 7½—

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. G.S. 1-69.1, G.S. 1-97(6).

3. Process § 7½—

Where an unincorporated labor union makes a special appearance and moves to dismiss on the ground of want of valid service, the court, upon request, should hear the evidence, find the facts and decide whether or not the defendant is doing business in this State by performing any of the acts for which it was formed and had failed to appoint an agent upon whom due process could be served, and upon an adjudication that the service of summons under G.S. 1-97(6) was valid, without finding the facts, the cause must be remanded.

4. Appeal and Error §§ 6, 55—

Where, on appeal from order overruling defendant's motion to dismiss on the ground of want of valid service on defendant labor union and order overruling demurrer of defendant labor union and individual officers, who were personally served, the cause is remanded for proper adjudication of the motion to dismiss, the questions of law raised by the demurrer and the question whether a temporary restraining order was properly issued in the cause, will not be determined, since if it should be decided upon the further hearing in the lower court that the union had not been properly served with process, the other questions would be moot.

APPEAL by defendant from *Pless, J.*, 26 August 1957 Term of MECKLENBURG.

Action by plaintiffs, who are owner-operators of their equipment in the employment of Akers Motor Lines, Inc., and are members of, and represented by, the defendant Union as their exclusive bargaining

representative under the National Labor Relations Act, to restrain the defendant Union, and its agents, from enforcing the seniority provisions of a collective bargaining agreement entered into by and between the Akers Motor Lines, Inc., and the defendant Union for its members, which contract allegedly takes away from plaintiffs their seniority rights as employees of the Akers Motor Lines, Inc.

On 19 August 1957 the plaintiffs had the clerk of the Superior Court of Mecklenburg County to issue in this action a summons addressed to the sheriff of that county commanding him to serve it upon Local Union 71, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; A. L. Gunter and Edward Hargett, the defendants named in the action. The sheriff made his return on the same day showing that he had served the summons upon the defendants A. L. Gunter and Edward Hargett, and delivered to them copies of the summons and the complaint.

On the same date the plaintiffs had the Clerk of the Superior Court of Mecklenburg County to issue a summons addressed to the Sheriff of Wake County for service upon the Secretary of State of North Carolina, who in the summons is designated "statutory process agent" of the defendant Local Union. The Sheriff of Wake County, as shown by his return on the summons, served it on the Secretary of State of North Carolina on 20 August 1957 by leaving with him copies of the summons, the complaint and an order to show cause.

On 19 August 1957 J. B. Craven, Jr. Judge presiding over a term of Superior Court in Mecklenburg County, issued an order to show cause, based upon the complaint filed herein, commanding the defendants to appear before Judge Dan K. Moore at the Mecklenburg County Courthouse at 10:00 a. m. on 26 August 1957, and show cause, if any they could, why a temporary injunction should not be issued against the defendants, restraining them, among other things, from carrying out the present provisions of the collective bargaining contract between the defendant Local Union and the Akers Motor Lines, Inc., insofar as it adversely effects any seniority right of the plaintiffs.

On 26 August 1957 the defendant Local Union made a special appearance by its counsel before Judge Pless presiding over the 26 August 1957 Term of Mecklenburg County Superior Court, and moved that the action against it be dismissed on the ground that no service of process had been made upon it, and the court had acquired no jurisdiction over it, and that Judge Pless find the facts upon which he based his ruling on the motion to dismiss.

In an order dated the same day, though apparently rendered 30 September 1957, Judge Pless denied the motion to dismiss. In denying it, he found no facts, and there is nothing in the record to show that he heard any evidence, or that the parties offered any evidence, ex-

cept that there is in the record the complaint, and the summons above referred to, and except the order of Judge Pless issuing a temporary injunction against the defendants, until the further orders of the court. Judge Pless' order issuing the temporary injunction states that the matter came on to be heard upon Judge Craven's order to show cause, and then his order states: "and being heard, and it appearing to the undersigned, and being found as facts, that the defendants have been properly served with process, that the defendants are present and before the court." This order is dated 26 August 1957, though it appears from the record that with the consent of all parties the court reserved its rulings, and entered the order out of term on 30 September 1957.

It seems from the record that with the consent of the parties, Judge Pless rendered all his rulings on 30 September 1957, and out of the term, though all bear date 26 August 1957.

On 29 October 1957 the Secretary of State of North Carolina made a certificate to the effect that on 21 August 1957, he forwarded copies of the summons, complaint, and order to show cause served upon him to the defendant Local Union at 5100 North Tryon Street, Charlotte, North Carolina, its last known address, and that his letter to it containing the copies of the papers served upon him has not been returned to him, though his return address was upon the envelope.

On the day that the Local Union made its motion to dismiss the action against it, all the defendants filed a demurrer to the complaint upon three grounds: one, the court has no jurisdiction of the subject of the action, two, there is a defect of parties defendant, three, the complaint does not state facts sufficient to constitute a cause of action. On the same day that Judge Pless entered an order denying the Local Union's motion to dismiss the action against it, he incorporated in the same order a ruling overruling the demurrer.

From the order denying its motion to dismiss the action against it, the Local Union appeals. From the order overruling the demurrer to the complaint, and from the order issuing a temporary injunction, all the defendants appeal.

Pierce, Wardlow, Knox & Caudle for Plaintiffs, Appellees.
Robert S. Cahoon for Defendants, Appellants.

PARKER, J. It seems apparent that all of Judge Pless' orders and decrees, though dated 26 August 1957, by consent of the parties were signed by him on 30 September 1957 out of term. The record states that the first notice of these decrees and orders had by any of the defendants was when defendants' counsel received on 2 October 1957 a letter from plaintiffs' counsel enclosing copies of these decrees and

orders. Judge Pless signed the defendants' exceptions and appeal entries on 9 October 1957.

The Local Union assigns as errors the refusal of Judge Pless to dismiss the action against it for the reason that no service of process has been had upon it, and it is not before the court, and that Judge Pless did not find the facts in respect to the motion.

The complaint alleges that the Local Union is an unincorporated labor union, which represents employees and collects dues therefor in the State, with its principal office and place of business in Mecklenburg County, and that A. L. Gunter and Edward Hargett are officers and agents of it, and residents of the State.

At common law unincorporated labor unions, having no existence separate and distinct from its members, cannot sue or be sued as a legal entity. *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268.

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. G.S. 1-69.1; G.S. 1-97(6); *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852; *Stafford v. Wood, supra.*

The Local Union in making its motion to dismiss the action against it, asked the court to find the facts upon which it based its ruling on the motion. Judge Pless found no facts on this motion to dismiss, and thereby committed error.

This Court said in *Youngblood v. Bright,* 243 N.C. 599, 91 S.E. 2d 559, in respect to whether an unincorporated labor union is subject to suit under the provisions of G.S. 1-97(6); "It was necessary to decision that the court consider evidence and find the facts as to whether defendant Union was doing business in North Carolina by performing acts in this State for which it was formed. Whether the facts alleged in the verified complaint, as to the presence and activities of defendant Union in North Carolina, if found to be true, would constitute doing business in this State within the meaning of G.S. 1-97(6), is a question not now before us."

There is nothing in the record to show that the Local Union, if doing business in this State by performing any of the acts for which it was formed, has failed to appoint an agent upon whom process can be served. It is ordered that the order denying the defendant Union's motion to dismiss the action against it be vacated, and the motion to dismiss is remanded for further hearing, so that the court below can hear evidence, find the facts, and decide as to whether or not the defendant Union has been properly served with process, and is or is not subject to suit as a legal entity under the provisions of G.S. 1-97(6).

Construction Co. v. Electrical Workers Union, supra, relied upon by

plaintiff is distinguishable. From evidence introduced in the case, and from defendant's joint answer introduced in evidence in the case, it clearly appears that the defendant Local Union is an unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed.

If upon a further hearing the court below should decide that the defendant Union has not been properly served with process, or is not subject to suit as a legal entity, the questions of law raised by its demurrer to the complaint, and the question as to whether a temporary injunction should be issued against it, its officers and agents, are moot questions. This Court said in *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532: "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, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." Therefore, the order overruling the defendant Union's demurrer and the temporary restraining order issued against it, its officers and agents, are vacated.

The defendants A. L. Gunter and Edward Hargett were properly served with process. They have made no motion to dismiss the action against them. They assign as error the overruling of their demurrer—which is a joint demurrer with the defendant Union—to the complaint, and they further assign as error the order temporarily restraining them and the defendant Union.

These are the only references to the defendants Gunter and Hargett in the complaint: They are officers and agents of the defendant Union and residents of the State. The temporary restraining order does not mention their names. There is nothing in the record to show what offices they hold in the Union, and nothing to show what acts, if any, they have done in respect to the matters and things alleged in the complaint. As they have been made parties apparently only because they are alleged to be officers and agents of the defendant Union, we deem it proper to vacate also the order overruling their demurrer and the temporary injunction against them as agents of the defendant Union.

If upon a further hearing it should be determined, after the court hears the evidence and finds the facts, that the defendant Union has been properly served with process, and is subject to suit as a legal entity under the provisions of G.S. 1-97(6), then the demurrer to the complaint and the order to show cause against it, its officers and agents will not present moot questions, and can properly be adjudicated by the court below.

Error and Remanded.

L. SNEED HIGH, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 May, 1958.)

1. Appeal and Error § 51—

The evidence must be taken in its entirety in determining its sufficiency to overrule motion for nonsuit entered at the close of all the evidence.

2. Trial § 20—

Whether the evidence is sufficient to require its submission to the jury is a question of law.

3. Trial § 22a—

On motion to nonsuit, the court does not pass upon the credibility of the witnesses or the weight of their testimony, but must take the evidence favorable to plaintiff as true and resolve all conflicts of testimony in plaintiff's favor.

4. Railroads § 4— Evidence held sufficient to be submitted to jury on question of railroad's negligence and not to show contributory negligence as a matter of law.

The evidence tended to show that defendant railroad company maintained a crossing of its tracks by a narrow private road, that the road made a 90 degree turn about 20 feet from the tracks and crossed the tracks at right angles, that from the turn to the nearest track was about 20 feet and the grade up to the tracks approximately 20 per cent, that intestate, who was familiar with the crossing, stopped his car 20 feet from the crossing and then 5 feet from it, that both intestate and his wife looked and did not see a train, that defendant's south-bound train could have been seen for only 600 feet from the crossing, that it was coasting 60 miles an hour downgrade, that the engineer failed to blow his whistle or ring the bell at the whistle post some 800 feet from the crossing, and that the engine hit the rear of the car just before it had cleared the crossing. *Held:* The evidence was sufficient to be submitted to the jury on the issue of the negligence of the railroad company and does not disclose contributory negligence on the part of intestate barring recovery as a matter of law.

5. Negligence § 19c—

Nonsuit on the ground of contributory negligence may not be entered unless the testimony tending to prove contributory negligence is so clear that no other conclusion can be reasonably drawn therefrom.

APPEAL by defendant from *Seawell, J.*, September, 1957 Term, CUMBERLAND Superior Court.

Civil action to recover damages for wrongful death of plaintiff's intestate alleged to have been caused by the actionable negligence of the defendant. Issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. From the judgment on the verdict, the defendant appealed.

Sanford, Phillips, McCoy & Weaver, Wood & Spence for defendant, appellant.

Clark & Clark By: J. B. Clark, Jr., for plaintiff, appellee.

HIGGINS, J. The sole question of law presented by this appeal is whether the evidence, taken in its entirety, was sufficient to survive the defendant's motion for nonsuit entered at the close of all the evidence. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463; *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1; *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541.

Whether the evidence is sufficient to require its submission to the jury is a question of law. The court does not pass upon the credibility of the witnesses or the weight of their testimony. "It takes it for granted that the evidence favorable to the plaintiff is true, and resolves all conflict of testimony in his favor." *Bundy v. Powell,* 229 N. C. 707, 51 S.E. 2d 307.

The evidence introduced at the trial disclosed that plaintiff's intestate was killed by defendant's south-bound freight train at a grade crossing just south of Hope Mills in Cumberland County. The accident occurred at seven o'clock, p. m., on May 9, 1955. For more than a year the plaintiff's intestate had been employed as a section hand on the defendant's double track line. He lived in a company house less than one-fourth mile north of the crossing. From the intestate's house and another company house near it, a dirt road (apparently the only outlet) ran south, parallel to the tracks and on the railroad's right of way. The road made an abrupt turn to the left and crossed the tracks at a right angle. From the turn to the nearest track at the crossing was about 20 feet, and the elevation up to the tracks was approximately 20 per cent. The crossing was wide enough for only one car. In driving a car upgrade to the crossing, the hood obstructed the view both of the approach and the tracks so that care was necessary in negotiating the crossing. The defendant built the crossing and maintained it.

From the crossing, the approaching train could be seen for a little more than 600 feet. Beyond that point the approach was concealed by a cut and by a growth of timber. Approximately 200 feet further north around the curve there was a whistle post intended as a warning for those seeking to use the crossing.

The plaintiff, with members of his family, including his wife, attempted to negotiate the crossing when the defendant's train, consisting of 98 freight cars powered by one or more electric units and diesel engines, struck the rear of the car just before it completed the crossing. At the time, the train was drifting at 60 miles per hour and making

very little noise. There was evidence from an employee of the railroad who was sitting on his porch near the whistle post that the whistle did not blow at the post, but did blow an instant before the accident. The evidence was conflicting as to whether the train was late or on time.

According to the wife, who was in the car beside the plaintiff's intestate, he stopped about 20 feet from the track, looked both ways, then moved up the grade until the bumper was about five feet from the west track and stopped a second time. "We looked both ways, we didn't see no train and so we pulled on up on the crossing and started across, that is when . . . we seen the train and that is when it struck us. . . . The train struck the left rear part of the automobile."

The plaintiff's intestate was familiar with the location of the whistle post and had the whistle blown it is a permissible inference the additional warning would have kept him from entering upon the track until the train had passed, or could have caused him to speed up sufficiently to have cleared it ahead of the train. The short distance in which the train could be seen (600 feet), its speed (60 miles per hour), its silence (drifting), and especially the failure to blow the whistle or ring the bell which the whistle post indicated ought to have been done approximately 200 feet before the train came into view, with other attendant circumstances constituted sufficient evidence to go to the jury on the question of defendant's negligence.

The defendant urgently contends even if the evidence be held sufficient on the question of negligence, nevertheless it shows plaintiff's intestate was contributorily negligent as a matter of law. *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370, and cases there cited. See also, *Bumgarner v. R.R.*, 247 N.C. 374, 100 S.E. 2d 830; *Faircloth v. R.R.*, 247 N.C. 190, 100 S.E. 2d 328; *Jones v. R.R.*, 235 N.C. 640, 70 S.E. 2d 669.

We think the case at bar can be distinguished from those relied on by the defendant in which the driver of the vehicle was held guilty of contributory negligence as a matter of law. In this case the driver's view to the north was limited to approximately 600 feet. The speed of the drifting train, its silent movement, the steep grade from the road to the tracks necessitating low gear and slow movement, the narrow crossing, all serve to emphasize the need for notice which the sounding of the whistle at the post would have given while the speeding train was yet out of sight. The difficulty of the approach required more time than is necessary for an ordinary grade crossing. Nevertheless, without this additional notice the car almost cleared the track and an instant more would, perhaps, have avoided the accident. "A judgment of involuntary nonsuit cannot be rendered on the theory that the plea of contributory negligence has been established . . .

unless the testimony tending to prove contributory negligence is so clear that no other conclusion can be reasonably drawn therefrom." *Bundy v. Powell, supra,* and cases cited; *Dosher v. Hunt,* 243 N.C. 247, 90 S.E. 2d 374.

The wife of the intestate testified she was sitting by her husband; that he stopped the car 20 feet from the crossing and then stopped five feet from it; that both looked and did not see the approaching train. " . . . the court will not sustain a motion for judgment of involuntary nonsuit for the reason plaintiff's evidence tends to show that he failed to keep a proper lookout when the evidence in respect thereto is conflicting." *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683.

This case, on both questions involved—negligence and contributory negligence—falls within that twilight zone which separates cases in which the court may say with assurance that jury questions are presented and those in which with equal assurance it may say the evidence was insufficient. We are inclined to the view that the evidence was sufficient to repel the motions for nonsuit, and in submitting the case to the jury, there was

No Error.

MRS. IRENE PERKINS ISLEY, v. W. F. ISLEY & COMPANY, INC.; MRS. MARY BELLE LEWIS ISLEY, INDIVIDUALLY; MRS. MARY BELLE LEWIS ISLEY, EXECUTRIX OF THE ESTATE OF W. F. ISLEY, DECEASED; HOWARD G. STRUNKS; HARRY L. HOLTON.

(Filed 21 May, 1958.)

Corporations § 19—

Plaintiff's evidence *held* insufficient to sustain her allegations that the individual defendants, who held controlling interest in defendant close corporation, conspired together and paid themselves unreasonable and unconscionable salaries, thereby diminishing the amount available for dividends, and that defendant corporation had failed to distribute its earned surplus to the stockholders, thereby depriving plaintiff of dividends, there being no evidence as to the salary paid any individual officer or tending to show what services such officers performed, or that the corporation had retained assets in excess of those needed to continue operations.

APPEAL by plaintiff from *Olive, J.,* September 9, 1957 Civil Term of GUILFORD.

Plaintiff seeks to recover compensatory and punitive damages from the individual defendants for an asserted fraudulent conspiracy to deprive her of her proportionate share of the earnings of corporate de-

fendant and to compel the corporate defendant to pay from its surplus and earnings dividends on its capital stock. The action was begun 25 November 1955.

The complaint in substance alleges: W. F. Isley & Company, a North Carolina corporation, was created in 1935 with an authorized capital stock of 500 shares of a par value of $100 per share. It was authorized to and did begin business when 75 shares were subscribed and paid for. No additional stock has been issued. Plaintiff owns 34 of the 75 shares which are outstanding. The remaining shares are owned by the individual defendants in proportions unknown to plaintiff. Plaintiff served as a director until 1940 when she resigned. The individual defendants now constitute the board of directors. W. F. Isley was also a director until his death in October 1954.

On 31 July 1955, the end of the corporate defendant's fiscal year, it had total assets of $20,036.53. The net worth of the corporation was $17,191.80, giving the stock a book value of $229.22 per share. A cash dividend of 10% was declared. The last previous dividend was in 1940 when a like 10% was declared. During the fiscal year ending with July 1955 the corporation paid salaries to salesmen in the amount of $3,445, to officers in the amount of $6,340, and other office salaries in the amount of $2,550. It had a profit for that year of $1,440.96; for the year ending with July 1954, a profit of $48.51; for the year ending in 1953, a net loss of $1,448.24; for the year ending in 1952, a profit of $2,378.97; and for the year ending in 1951, a net loss of $157.17.

W. F. Isley & Company is "a close corporation" operated by the majority shareholders for their own benefit and profit. The individual defendants "who hold controlling interest in stockholders' meetings and in directors' meetings have conspired to defraud the plaintiff of her share in the earnings in the defendant corporation by unreasonable and unconscionable salaries to themselves, thereby showing a smaller net profit for distribution to the stockholders and also by failing to distribute the earned surplus to the stockholders."

Each defendant answered. The answers admit plaintiff's stock ownership and that individual defendants are the remaining stockholders and are directors of the corporation. They allege they have acted honestly and in good faith for the best interests of the corporation and its shareholders; they have annually examined the corporation's needs and have not declared dividends because the assets are needed to continue operation. They allege that a substantial part of the officers' salaries referred to in the complaint in fact represent wages paid to the officers who spent a material part of their time in the company's shops performing manual labor manufacturing its products.

At the conclusion of plaintiff's evidence the court sustained the motions of defendants to nonsuit.

Robert H. McNeely for plaintiff, appellant.
John R. Hughes for defendant, appellees.

PER CURIAM. Plaintiff offered no evidence to show the nature or character of the business in which the corporate defendant was engaged, nor did she offer any evidence to show the volume of sales in any year, the manufacturing costs, inventories of raw materials or manufactured products. She offered no evidence from which the court or jury could ascertain what salaries had been paid to any officer. The evidence merely showed total salaries paid. She offered no evidence tending to show that the salaries paid to the officers, salesmen, or other office employees were not reasonable. There is no evidence to show what services they performed nor how efficient or inefficient they were in the performance of their duties. She offered the minute books and financial reports prepared for the corporation by certified public accountants. These records show that the directors, at the end of each fiscal year, carefully considered the financial condition of the company and its probable fiscal needs for the coming year. The records disclose that the company's accountant and financial counselor advised against the payment of dividends, because all of the corporation's assets were needed to continue operations. The earnings records do not disclose a consistent capacity to produce income. If $7,500 was sufficient for corporate needs in 1935, it would seem reasonable to require twice that capital investment for the same volume of business in 1955. Conceding that plaintiff alleged facts sufficient to withstand a demurrer, it is apparent plaintiff's testimony fails to require submission of issues to a jury. *Gaines v. Mfg. Co.*, 234 N.C. 331, 67 S.E. 2d 355. Both *allegata* and *probata* are necessary.

Affirmed.

SOUTHEASTERN BAPTIST THEOLOGICAL SEMINARY, INC. v. WAKE COUNTY AND THE TOWN OF WAKE FOREST.

(Filed 21 May, 1958.)

Appeal and Error § 49—

Where, in the submission of a controversy to determine whether certain of plaintiff's properties are exempt from taxation (G.S. 105-296(4)), there is conflict between the agreed statement and an exhibit attached as to the nature and use of certain of the properties and the relationship of the occupant to plaintiff, and as to other properties, the facts agreed are insufficient to determine with definiteness the taxable status of such properties, the cause must be remanded for further proceedings.

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

WINBORNE, C. J., concurs in result.

APPEALS by plaintiff and defendants from *Fountain,* Special Judge, December Special Civil Term, 1957, of WAKE.

Controversy without action submitted under G.S. 1-250 relating to the taxable status of properties, consisting of sixteen separate units, located in the Town of Wake Forest and identified only by street address.

Wake Forest College, plaintiff's predecessor in ownership, had listed these properties regularly for a number of years for taxation by Wake County and the Town of Wake Forest and had paid the ad valorem taxes assessed thereon. For 1957, over plaintiff's objection, these properties were listed by defendants; and plaintiff paid under protest the taxes assessed thereon.

Plaintiff seeks to recover the amounts of 1957 taxes paid by it to defendants, contending that G.S. 105-296(4), enacted under authority of Article V, Section 5, Constitution of North Carolina, exempts these properties from taxation.

The court below held that six off-campus residence buildings rented from plaintiff and occupied as residences by administrative officers or faculty members were exempt, but that the agreed facts were insufficient to show that the remaining ten properties were exempt.

Plaintiff and defendants excepted and appealed from judgment in accordance with said ruling.

Mordecai, Mills & Parker for plaintiff, appellant.

Thomas A. Banks and Wright T. Dixon, Jr., for defendant Wake County, appellant.

J. C. Keeter for defendant Town of Wake Forest, appellant.

PER CURIAM. G.S. 1-250 requires that the parties "agree upon a case containing the facts on which the controversy depends." The present submission does not comply with this requirement.

The agreed statement of facts sets forth that "there are buildings on each unit, and the buildings thereon are presently used as residences exclusively by the officers, instructors, students and their families of said Seminary, have been so used since the acquisition of title; and the occupants pay reasonable rentals to the Seminary, the names, amount of rent and the relationship, if any, of the occupant of each property to the Seminary being as set forth in Exhibit 'A' hereto attached." Exhibit B, an attached map, shows the location of each unit except "312 Falls Rd."

An examination of Exhibit A shows: (1) "312 Falls Rd. House removed, New Trailer Park now occupies site. Eleven trailer coaches now using park. Rental $12.50 per month each. All residents are students"; (2)"309 West Ave. Unoccupied"; (3) "102 S. Wingate (and) 106 S. Wingate. Both buildings removed, Seminary Cafeteria now occupies these lots"; (4) "303 Pine St. Barrack. Removed November 1956. Vacant Lot"; and (5) "203 N. Wingate. House removed. Area now used as Seminary Parking Lot." It is noted that 102 S. Wingate and 106 S. Wingate, referred to in (3) above, are listed as separate units in the agreed statement.

If Exhibit A is correct, there are no buildings "presently used as residences exclusively by the officers, instructors, students and their families of said Seminary," on any of the six properties referred to in the preceding paragraph. The agreed statement and Exhibit A are in conflict.

As to each of the remaining ten properties, Exhibit A shows the street address thereof, the name of the "renter," the relationship of the "renter" to the institution, e.g., "Student," "Adm. Officer," "Faculty," and the amount of rent paid by each "renter" to plaintiff.

Neither the agreed statement nor Exhibit A provides any descriptive data as to any residence building or the number of occupants or their relationship to the "renter," or as to the relationship, if any, between the present use of these properties and plaintiff's educational program, or as to the availability for like use of other properties of plaintiff now recognized by defendants as tax-exempt, or as to any other facts which might bear upon the taxable status of these allegedly exempt properties.

Obviously, the conflict between the agreed statement and Exhibit A makes it impossible to pass on the six properties involved in such conflict. Moreover, the agreed facts are insufficient to determine with definiteness the taxable status of the remaining ten properties; and,

since the cause must be remanded, we deem it appropriate to vacate the judgment of the court below in its entirety, without approving or disapproving any of the rulings on which the judgment was based.

If the parties so desire, they may submit an agreed statement setting forth with particularity in respect of each of the sixteen properties "the facts upon which the controversy depends" as required by G.S. 1-250.

The cause will be remanded for further proceedings. This is in accord with the procedure in *Guilford College v. Guilford County,* 219 N.C. 347, 13 S.E. 2d 622, where the facts were set forth in greater detail than in the present agreed statement.

Judgment vacated and cause remanded.

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

WINBORNE, C.J., concurs in result.

CLYDE H. HUTCHINS v. W. HORACE CORBETT, WILBUR R. CORBETT, AND WADDELL A. CORBETT, T/A CORBETT PACKAGE COMPANY.

(Filed 21 May, 1958.)

Automobiles § 42d—

Evidence tending to show that the driver of a tractor-trailer on a four-lane highway, separated into two east-bound and two west-bound lanes, was traveling west and, in attempting to turn around on the west-bound lanes, had driven the tractor so that it was headed east in the south lane for west-bound traffic, with the trailer completely blocking both west-bound lanes, and that plaintiff, traveling at a lawful speed and blinded by the lights of the tractor, struck the side of the trailer, *is held* not to show contributory negligence as a matter of law on the part of plaintiff.

APPEAL by defendants from *Hall, J.,* November, 1957 Civil Term, DURHAM Superior Court.

Civil action for personal injuries alleged to have been caused by the actionable negligence of the defendant. The main defense relied upon by the defendant is the contributory negligence of the plaintiff.

The evidence disclosed the following: On August 8, 1956, at about 10:15 p. m., the plaintiff was driving his automobile westerly on Highway No. 70 near Durham. No. 70 is a four-lane boulevard type paved highway, the two north lanes for west-bound traffic, and the two south lanes for east-bound traffic, with a strip between the north and south

lanes. It is the by-pass around Durham. As the plaintiff passed over the crest of a hill (going west) he saw in front the lights of a vehicle shining in his direction which he thought were in the south lane (for east-bound traffic). He was blinded by the lights. " . . . the next thing he knew he heard his wife 'holler,' 'Lookout, Honey,' whereupon he applied his brakes and 'it just smacked me, . . .' " The plaintiff was driving within the speed limit.

The driver of the defendants' tractor-trailer, intending to travel Highway 70A into the City of Durham, had inadvertently passed the point where it turned off. He attempted to turn back to the intersection for the purpose of going into town. He had completed the turn to the extent that the cab was in the left lane for west-bound traffic, but headed east, and the body of the tractor-trailer extended at about a 45-degree angle, completely blocking both lanes for west-bound traffic. The trailer body was "of wood, the color of painted barns . . . and faded." The plaintiff was severely injured.

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered for the plaintiff. From the judgment on the verdict, the defendants appealed.

Reade, Fuller, Newsom & Graham, By: F. L. Fuller, Jr., for defendants, appellants.

E. K. Powe for plaintiff, appellee.

WINBORNE, *C.* J. Plaintiff, the appellant, states in his brief filed the evidence show contributory negligence as a matter of law? There is no evidence the plaintiff was exceeding the speed limit or otherwise violating safety laws. Should he have seen the trailer which completely blocked his road in time to have avoided running into it? The circumstances clearly make the question one for the jury. In discussing the law of the case, nothing need be added to what this Court has said in *Burchette v. Distributing Co.*, 243 N. C. 120, 90 S. E. 2d 232; and *Wilson v. Webster*, 247 N.C. 393, 100 S.E. 2d 829.

No Error.

IN THE MATTER OF THE CUSTODY OF CATHY CANDICE DAVIS AND KAREN JILL DAVIS.

(Filed 21 May, 1958.)

1. Courts § 1—

Where a motion for a bill of *quia timet* is made to enjoin defendant

from litigating the matter in another court, an adjudication solely that plaintiff would not be bound by any order which such other court might render in the premises constitutes a mere advisory opinion and is erroneous, it being no part of the function of the courts to give advisory opinions or to answer moot questions.

2. Appeal and Error § 2—

While ordinarily questions not determinative of the appeal will not be decided, when a question of pure law is in controversy, the Supreme Court may, in the exercise of its supervisory jurisdiction, determine the question in order to avoid protraction of the litigation.

3. Injunctions § 2—

Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy.

4. Courts § 2—

If a court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect, and stay, quash or dismiss the suit.

5. Injunctions § 4g—

Order was issued in the superior court of one county adjudicating the right to custody of the children of the parties. Thereafter, defendant instituted proceedings in the domestic relations court in another county for modification or change of the decree. Plaintiff moved in the first action for a bill of *quia timet* to restrain defendant from prosecuting the action in the domestic relations court. *Held:* An adequate legal remedy is available to plaintiff by motion in the domestic relations court to dismiss the proceeding if that court is without jurisdiction, and therefore the remedy of injunction will not lie. Neither a bill of peace nor a bill of *quia timet* applies to the factual situation in this case.

APPEAL by Mrs. Barbara R. Davis from *Hall, J.*, 15 October 1957 Civil Term of DURHAM.

On 17 July 1957 Charles R. Davis and his wife, Barbara R. Davis, were living in a state of separation, without being divorced. They had two children born of the marriage: Cathy Candice Davis aged four years and Karen Jill Davis two years old. Charles R. Davis was residing in Durham, and Barbara R. Davis was residing with the two children in Charlotte. On that date Charles R. Davis, pursuant to the provisions of G. S. 17-39, filed a petition requesting the issuance of a writ of *habeas corpus* to determine the custody of Cathy Candice Davis and Karen Jill Davis, addressed to the Honorable Clarence W. Hall, Resident Judge of the Fourteenth District—the Durham District.

On the same day Judge Hall issued a writ of *habeas corpus*, addressed to the Sheriff of Mecklenburg County and Barbara R. Davis, commanding them to have Cathy Candice Davis and Karan Jill Davis before him in the Superior Court courtroom in Durham at 10:00 o'clock

a. m. on 30 July 1957, there to receive, abide by and perform such orders as may be made by him.

Judge Hall heard the matter in the courtroom in Durham on 30 and 31 July 1957. Charles R. Davis and Barbara R. Davis and the children were present in person, and each parent was represented by counsel. After hearing the parties at length Judge Hall on 31 July 1957 entered an order awarding the custody of the two children to the mother, but providing in the order that the father should have the children one week out of each calendar month. No appeal was taken.

On 30 September 1957 Barbara R. Davis filed a petition with the Domestic Relations Court of Charlotte, in which she stated the substance of Judge Hall's order, and then alleged that when Charles R. Davis returned the two children to her on 10 August 1957 and on 14 September 1957 from a one-week visitation with him, the children were sick and upset, and required immediate medical attention. She prayed that the court inquire into the matter, and, for the best interests of the children, abolish the provision in Judge Hall's order that Charles R. Davis shall have the children one week out of each calendar month.

On 8 October 1957 counsel for Charles R. Davis, filed in the Superior Court of Durham County a motion for a bill *quia timet*, in which he alleges that a copy of the petition filed by Barbara R. Davis with the Domestic Relations Court of Charlotte was served on him on 3 October 1957, and prays that the court issue an order restraining Barbara R. Davis, her counsel, and the Judge of the Domestic Relations Court of Charlotte from hearing the matter until the same can be heard in the Superior Court of Durham County on 15 October 1957 before Judge William Y. Bickett, who was presiding over the October Civil Term 1957 of Durham Superior Court. On the same day Judge Bickett signed an order commanding Barbara R. Davis to appear before him on 15 October 1957, and ordering that Barbara R. Davis, and her counsel, be restrained from a hearing of the petition addressed to the Domestic Relations Court of Charlotte, until the motion for a bill *quia timet* can be heard.

Judge Clarence W. Hall was presiding over Durham Superior Court on 15 October 1957. On that date Charles R. Davis, and his counsel, and Barbara R. Davis, and her counsel, agreed that the motion for a bill *quia timet*, which Judge Bickett had made returnable before him on that date, should be heard by Judge Hall. Upon the hearing Judge Hall made what his order calls findings of fact to this effect: Charles R. Davis is not required to appear before the Domestic Relations Court of the city of Charlotte on the 16th of October, or any other

date, pursuant to the notice and petition heretofore served on him, as that court is without jurisdiction to hear and pass on the petition filed with it by Barbara R. Davis, and that the Superior Court of Durham County is the only and proper jurisdiction to pass upon the custody of the children by virtue of the order signed by him on 31 July 1957. Whereupon, Judge Hall adjudged that "Charles R. Davis shall not be bound by any order of the Domestic Relations Court of the city of Charlotte in Mecklenburg County respecting the custody of Cathy Candice Davis and Karen Jill Davis, minors, from this date forward."

From Judge Hall's judgment on 15 October 1957 Barbara R. Davis appeals.

William W. White, Jr., for Barbara R. Davis, appellant.
Blackwell M. Brogden for Charles R. Davis, appellee.

PARKER, J. It is by no means certain that the Domestic Relations Court of the city of Charlotte will ever make any order respecting the custody of the two infant daughters of Charles R. Davis. Judge Hall in his order of 15 October 1957 did not restrain Barbara R. Davis, her counsel, and the Judge of the Domestic Relations Court of the city of Charlotte from hearing the petition of Barbara R. Davis, but made what his order calls findings of fact, and merely rendered an advisory opinion that "Charles R. Davis shall not be bound by any order of the Domestic Relations Court of the city of Charlotte in Mecklenburg County respecting the custody of Cathy Candice Davis and Karen Jill Davis, minors, from this date forward." In rendering this advisory opinion, Judge Hall committed error.

This Court said in *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532: "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, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter."

To find that Judge Hall committed error in rendering an advisory opinion, without more, would leave the crucial question of whether the Judge of the Superior Court of Durham County should restrain Barbara R. Davis, her counsel, and the Judge of the Domestic Relations Court of the city of Charlotte from hearing her petition filed with it unsettled, and would, probably, result in an effort by Charles R. Davis in the Superior Court of Durham County to obtain an injunction, as requested in his bill *quia timet*. Ordinarily, questions not determinative of the appeal are not decided, but in this instance

we feel justified in expressing our opinion under the facts here. It is a pure question of law. For a similar procedure on our part see *DeBruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553.

This Court said in *Hardware Co. v. Cotton Co.,* 188 N.C. 442, 124 S.E. 756: "There is a bill known as *quia timet.* 'A bill *quia timet* is in the nature of a writ of prevention and is entertained as a measure of precaution, justice, and to forestall wrongs or anticipated mischiefs, as where a guardian or other trustee is squandering an estate, or where one in possession of property which another unjustly claims is likely to lose the evidence of his title by delay in asserting and testing the hostile claim. *Bailey v. Briggs,* 56 N.Y. 407, 415.' Words and Phrases, p. 452. *Fittichauer v. Metropolitan Fire Proofing Co.,* 61 Atl., 746, 748, 70 N.J. Eq., 429."

McIntosh's N. C. Practice and Procedure, 2d Ed., Sec. 2470, states: "Bills *quia timet* were known in the old equity practice as a preventive remedy, so named from the fear of the party that future probable injury might be done to his rights in property. It was distinguished from a bill of peace by the purpose in view, the bill of peace being to prevent vexatious litigation, and a bill *quia timet to* prevent future litigation by removing existing causes or difficulties. Two forms of this bill were used to preserve evidence, and a third to quiet title by removing a cloud which might affect it." Sections 2471, 2472, 2473 and 2474 of McIntosh's work discuss the use of this bill to preserve evidence, to quiet title, and statutory changes. See also 30 C.J.S., Equity, p. 363, as to bills *quia timet.*

A bill *quia timet* does not apply to a factual situation such as we have here.

There is an equitable remedy known as a bill of peace to prevent vexatious litigation and a multiplicity of suits, but under the facts here such a bill has no application. *Hardware Co. v. Cotton Co., supra;* 19 Am. Jur., Equity, Sec. 81, entitled "Repeated or Continuing Wrongs; Bill of Peace."; McIntosh, Ibid, Sec. 2469.

Charles R. Davis, by what he calls a bill *quia timet,* seeks to restrain Barbara R. Davis, her counsel, and the Judge of the Domestic Relations Court of the city of Charlotte from hearing the petition filed in that court by her, on the ground that court has no jurisdiction to pass on the question of the custody of his children by reason of Judge Hall's order of 31 July 1957.

Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy. *Whitford v. Bank,* 207 N.C. 229, 176 S.E. 740; *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; *Armstrong v. Armstrong,* 230 N.C. 201, 52 S.E. 2d 362; *Cotton Mills Co. v. Duplan*

Corp., 245 N.C. 496, 96 S.E. 2d 267; 43 C.J.S., Injunctions, pp. 450-453.

If a court finds at any stage of the proceedings, that it is without jurisdiction, it is its duty to take proper notice of the defect, and stay, quash or dismiss the suit. *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136; 21 C.J.S., Courts, p. 176. "This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. . . . So, *ex necessitate,* the court may, on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceeding." *Branch v. Houston,* 44 N.C. 85.

Charles R. Davis, if his position is sound that the Domestic Relations Court of the city of Charlotte has no jurisdiction, is not entitled to the equitable relief of an injunction as prayed for in his motion, for the simple reason that he has a full, adequate and complete remedy at law, which is as practical and efficient and as prompt in its administration as an injunction, by making a motion in the Domestic Relations Court of the city of Charlotte to dismiss the petition filed in that court by Barbara R. Davis for lack of jurisdiction.

The appellee Charles R. Davis will be taxed with the costs.

Error.

VERNELL B. BENNETT AND HER HUSBAND, JAMES M. BENNETT v. O. L. CAIN, ADMINISTRATOR OF THE ESTATE OF GEDDIE F. CAIN, DECEASED, AND O. L. CAIN, INDIVIDUALLY AND HIS WIFE, HESBA CAIN; A. B. CAIN AND WIFE, LILLIAN CAIN; HILARY T. CAIN AND WIFE, ISABEL CAIN; RUTH C. BALLENGER, WIDOW; SELMA REGAN AND HUSBAND, ROBERT REGAN; LUCAS CAIN AND WIFE, HERMA CAIN; ELVIN CAIN AND WIFE, SARAH CAIN; MINNIE ALLEN AND HUSBAND, J. E. ALLEN; NELSON COBLE AND WIFE, PETE COBLE; MARGARET PAIT AND HUSBAND, FELTON PAIT; PAUL COBLE AND WIFE, LOUISE COBLE; EULA MAE DAVIS AND HUSBAND, JOSEPH DAVIS; HARVEY COBLE AND WIFE, MRS. HARVEY COBLE; EMPIE CAIN AND WIFE, LILA CAIN; EUNICE CAIN; JULIUS CAIN AND WIFE, VERNICE CAIN; HARVEY CAIN AND WIFE, SALLIE CAIN; F. C. CAIN AND WIFE, RITA CAIN; WESLEY BRITT, SINGLE; PEGGY RATLEY, MINOR; LAVERN BRITT, MINOR; JOE BRITT, MINOR AND WIFE, LINDA BRITT, MINOR; HILDA B. ELLIS, MINOR, AND HUSBAND, EDWARD ELLIS, MINOR; AND ALL UNKNOWN HEIRS AND DISTRIBUTEES OF GEDDIE F. CAIN, DECEASED.

(Filed 21 May, 1958.)

1. Adoption § 1—

Statutes dealing with adoption and creating rights to succession in an adopted child ordinarily will be given prospective effect only under the general rule that statutes in derogation of the common law will be strict-

ly construed, but where the statute expressly provides that its provisions shall apply to adoptions whether granted before or after the effective date of the act, there is no occasion for interpretation, and the act applies to the devolution of estates of those dying intestate after the passage of the act, regardless of the date of the decree of adoption.

2. Same: Descent and Distribution § 6—

Under the provisions of sec. 6, Chapter 813, Session Laws of 1955, an adopted child is entitled to inherit property from the brother of the adopting parent, notwithstanding that the decree of adoption was entered prior to the passage of the statute. G.S. 28-149, G.S. 29-1, G.S. 48-23.

3. Descent and Distribution § 1—

The Legislature has the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act.

APPEAL by defendants from *Mallard, J.*, November 1957 Term of BLADEN.

Clark, Clark & Grady for plaintiff, appellees.
Hester and Hester for defendant, appellants.

RODMAN, J. Vernelle B. Bennett (hereafter referred to as plaintiff) was adopted for life by Minnie Cain Beard and husband by decree of the Superior Court of Cumberland County on 13 February 1923. Mrs. Beard died 22 July 1955. She had no natural descendants. Plaintiff was her only adopted child.

Geddie F. Cain, a brother of Mrs. Beard, died intestate in Bladen County in June 1956. O. L. Cain, a brother of Geddie F. Cain, is administrator of his estate. The remaining defendants are a brother and nephews and nieces of Geddie F. Cain.

Plaintiff asserts that as the adopted child of Minnie Cain Beard, deceased, she is entitled to share in the estate of Geddie F. Cain. Defendants deny plaintiff's asserted right.

The measure of plaintiff's right is found in the statutes regulating adoption, descent and distribution. Adoption, the creation of the artificial but legal relationship of parent and child, was not known to the common law. Our first statute authorizing and regulating adoptions was ratified 3 March 1873. Under that Act, as under the present statute, the relationship was created by decree of a court upon a petition properly filed. The Act permitted adoption for minority or for life of the adopted child. When the adoption was for life, the petitioner was accorded the privilege of permitting the adopted child to inherit from him. But the Legislature did not give the adopting parent the privilege of investing his adopted child with unlimited succession rights. Sec. 3, c. 155, Laws 1872-73; Revisal 177; C.S. 185; *Love v. Love,*

179 N.C. 115, 101 S.E. 562; *Grimes v. Grimes*, 207 N.C. 778, 178 S.E. 573.

The adoption did not constitute a revocation *pro tanto* of a will previously made by the adopting parent. *Sorrell v. Sorrell*, 193 N.C. 439, 137 S.E. 306. The adoption did not vest in the adopting parent any right to inherit from the adopted child. *Edwards v. Yearby*, 168 N.C. 663, 85 S.E. 19.

Not until 1941 did the Legislature make a material change in that portion of the adoption statute which prescribed the right to succession to property on death. The Legislature, in 1941, made numerous amendments to the adoption statute. Among other amendments it provided: ". . . where adoptions are for life succession by, through, and from adopted children and their adoptive parents shall be the same as if the adopted children were the natural, legitimate children of the adoptive parents. . . . Further, for all other purposes whatsoever a child adopted for life and his adoptive parents shall be in the same legal position as they would be if he had been born to his adoptive parents." That Act further provided that an adopted child could not inherit from his natural parents or natural kin except when necessary to prevent the property from escheating. Sec. 4, c. 281, P.L. 1941. But this enlargement of our adoption statute granting the right to take by unlimited inheritance was, by the express provision of sec. 8, restricted to adoptions occurring subsequent to 15 March 1941, the date of ratification. *Phillips v. Phillips*, 227 N.C. 438, 42 S.E. 2d 604.

The 1947 Legislature dealt with adoption proceedings, descent and distribution in three separate packages. C. 832 amended the Statute of Descents by adding three rules. Rule 14 so added provided: "An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents."

A like change was made in the Statute of Distribution by c. 879.

The attempt to rewrite the adoption statutes proved abortive since c. 885 of the Session Laws of 1947 contained no enacting clause and hence had no validity. *In re* Advisory Opinion *in re* House Bill No. 65, 227 N.C. 708, 43 S.E. 2d 73.

The 1949 Legislature duly enacted the adoption statute which was approved but not enacted by the 1947 Legislature. C. 300 S.L. 1949. This statute, incorporated as c. 48 of the General Statutes, with modifications and amendments made by the 1953, 1955, and 1957 Sessions, is the statute law of this State relating to adoption as it exists today.

Were the rights accorded adopted children by the 1947 and 1949 Legislatures to inherit as if they were the natural, legitimate children of their adoptive parents applicable to adoptions occurring prior to

the ratification of those Acts or did the Leigslature intend to make all three of the statutes apply only to those who were adopted subsequent to the effective dates of those Acts? When this question was presented to the Court, it was called upon to ascertain legislative intent by applying well-recognized rules for statutory construction.

Statutes dealing with adoption and creating rights of succession to property in an adopted child are in derogation of the common law. Hence they are strictly construed. *Grimes v. Grimes, supra; Ward v. Howard,* 217 N.C. 201, 7 S.E. 2d 625. Applying this rule, the Court, in *Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836, 18 ALR 2d 951 (rehearing denied, 232 N.C. 521, 61 S.E. 2d 447) reached the conclusion that it was not the intent of the Legislature that those adopted prior to the statutory changes should take more than was permitted at the time of the adoption.

That the Court reached the correct legislative intent is, we think, evidenced by the fact that no change was made by the Legislatures of 1951 or 1953.

The 1955 Legislature, by c. 813, again amended the statutes of descent and distribution and the statute regulating adoptions and in each instance provided in substance that the adopted child should have the same right to inherit by, through, or from the adoptive parent as if he were the legitimate child of the adoptive parent. G.S. 28-149, G.S. 29-1, and G.S. 48-23. Sec. 6 of the 1955 statute expressly provides: "The provisions of this Act shall apply to adoptions, whether granted before or after the effective date of the Act," and sec. 9 declared the effective date 1 July 1955. Here then is explicit language by the Legislature that the right of an adopted child to take property as a result of intestacy occurring subsequent to 1 July 1955 should be governed and controlled by the statutes of descent and distribution in effect on 1 July 1955. There is no occasion for interpretation.

The power of the Legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative act cannot be doubted. *Rutherford v. Green,* 37 N.C. 121; *Woodard v. Blue,* 103 N.C. 109; *Nelson v. Hunter,* 140 N.C. 598; *In re Morris Estate,* 138 N.C. 259; *Edwards v. Yearby, supra; Corporation Com. v. Dunn,* 174 N.C. 679, 94 S.E. 481; *Rhode Island Hospital v. Doughton,* 187 N.C. 263, 121 S.E. 741; *Trust Co. v. Shelton,* 229 N.C. 150, 48 S.E. 2d 41; *Wilson v. Anderson, supra; Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632; *Ostrander v. Preece,* 103 ALR 218; *Irving Trust Co. v. Day,* 314 U.S. 556, 86 L ed 452.

Both the adoptive parent and her brother in whose property plaintiff asserts a right died subsequent to the ratification and effective

date of the 1955 statute. This statute gave plaintiff the right to participate in the division of the Cain estate.

Affirmed.

STATE v. LLOYD HANCOCK.

(Filed 21 May, 1958.)

1. **Automobiles § 39—**

The physical facts at the scene of a collision may speak louder than testimony of witnesses.

2. **Automobiles § 56: Negligence § 23—**

The wilful, wanton, or intentional violation of a safety statute, or the inadvertent or unintentional violation of such statute when accompanied by recklessness amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, constitutes culpable negligence, but the inadvertent or unintentional violation of a safety statute, standing alone, does not constitute culpable negligence.

3. **Automobiles § 59— Evidence of culpable negligence held insufficient to be submitted to the jury in this prosecution for manslaughter.**

The State's evidence tended to show that defendant was driving his car at a lawful speed, and the physical facts tended to show that he was operating it on his right side of the highway. The only evidence to the contrary was the testimony of one witness, who was following one of the cars involved in the collision, to the effect that he saw the defendant's car approaching from the opposite direction on its left side of the highway, that the preceding car then swerved left, and that defendant's car then swerved to its right, resulting in a head-on collision, all within a distance of approximately 50 feet while the cars were traveling, respectively, approximately 45 and 50 miles per hour. *Held:* The evidence fails to show an intentional, wilful, or wanton violation of G.S. 20-146, or an unintentional violation of this statute accompanied by heedless indifference to the rights and safety of others, and therefore nonsuit should have been entered in this prosecution of defendant for manslaughter.

APPEAL by defendant from *Carr, J.*, October Term 1957 of LEE.

This is a criminal action. The defendant was tried upon a bill of indictment charging him with the felonious slaying of Flonnie Godwin Fisher.

The State's witness, Willard Phillips, testified that he was traveling south on Highway No. 1 on the day in question, about four car lengths behind the Chevrolet car occupied and driven by Flonnie Fisher; that the Chevrolet was traveling about 50 miles per hour. "I had to slow down. * * * There was a lot of traffic and I could not get around it. * * * After I had followed the car approximately two miles, I somehow

noticed her height. She was a fairly short woman. And then I turned and glanced back at the car ahead of me and when I looked at her I saw this other car meeting us on our side of the road; on the right side, * * * in the righthand lane headed south, and about the time I noticed it, she swerved to her left. * * * " He further testified that when Flonnie Fisher swerved to the left on meeting the defendant in the Lincoln car on her right-hand side of the road (defendant's left-hand side of the road), the defendant swerved to his right and the two cars met headon about the center of the highway. "When she swerved to the left the Lincoln car and the Chevrolet were about 50 feet apart. * * * When I first saw the Lincoln car it was only 50 feet from her, close to 50 feet."

After the collision the Chevrolet car came to rest almost directly across the highway, headed east, with its rear wheels resting on the center line of the highway and 4 feet and 3 inches of the Chevrolet automobile was on the west side of the highway. The Lincoln car came to rest with its right front wheel off the pavement on the eastern side of the highway headed in a northeasterly direction with the rear portion of the car occupying the central portion of the eastern half of the highway, or the north-bound lane thereof.

The defendant testified that he never turned left across the center line of the highway and that his car collided with the Fisher car when he was about to meet and pass another car, and that the Fisher car pulled out from behind in an effort to overtake and pass the car the defendant was meeting.

The jury returned a verdict of guilty as charged. From the judgment imposed, the defendant appeals, assigning error.

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

Pittman & Staton, Lowry M. Betts, Neill McK. Salmon for defendant.

DENNY, J. The defendant's 7th and 23rd assignments of error are directed to the failure of the trial court to allow his motion for judgment as of nonsuit, interposed at the close of the State's evidence and renewed at the close of all the evidence.

Exclusive of the testimony of the witness Phillips, all the other evidence of the State and of the defendant tends to show that the collision occurred not in the center of the highway but in the eastern lane thereof, the defendant's proper lane. Neither does the record contain any evidence tending to show any physical facts by way of tire marks or debris in the highway to indicate that the Lincoln car, driven

by the defendant, was on the wrong side of the highway immediately before or at the time of the collision. On the contrary, the physical facts tend to show otherwise. Sometimes, physical facts at the scene of a collision speak louder than the testimony of a witness or witnesses. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659; *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724.

Moreover, there is no evidence that the defendant's car was being driven at an excessive rate of speed. The State's evidence is to the effect that Flonnie Fisher was driving her car about 50 miles per hour and never decreased her speed before the collision. The defendant testified that at the time of the collision he was traveling about 40 to 45, not over 50 miles per hour. This is the only evidence disclosed by the record as to the speed of the defendant's car.

It is clear, therefore, that if the Chevrolet was being driven south at 50 miles per hour, and the Lincoln car was being driven north from 40 to 50 miles per hour on its wrong side of the highway, as testified to by the witness Phillips, then the Lincoln car crossed back to its proper side of the highway and the collision occurred within less than one-half of a second from the time the witness testified he first saw the Lincoln car. Certainly this evidence would be, under our decisions, without any probative value if the witness had testified as to the speed of the Lincoln car rather than as to its location on the highway. *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821; *S. v. Becker,* 241 N.C. 321, 85 S.E. 2d 327.

The witness Phillips further testified that he was traveling 50 miles per hour, following the Fisher car; that he "whipped out to miss the wreck * * * I turned right to avoid the collision. * * * I did not see the automobile driven by Mrs. Fisher traveling on the left-hand side of the road at the time the collision occurred."

In *S. v. Cope,* 204 N.C. 28, 167 S.E. 456, Stacy, C. J., speaking for the Court, said: "The violation of a statute or ordinance, intended and designed to prevent injury to persons or property, whether done intentionally or otherwise, is negligence *per se,* and renders one civilly liable in damages, if its violation proximately result in injury to another; for, in such case, the statute or ordinance becomes the standard of conduct or the rule of the prudent man. * * *

"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. * * *

"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. * * *

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

In *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580, the defendant was operating his automobile on the wrong side of the road, at an unlawful rate of speed, while intoxicated.

In the case of *S. v. Spivey,* 230 N.C. 375, 53 S.E. 2d 259, the evidence tended to show that the defendant was intoxicated and that the collision between his automobile and that of a motorcycle, resulting in the death of the cyclist, occurred on the defendant's left side of the highway.

In *S. v. Goins,* 233 N.C. 460, 64 S.E. 2d 289, the defendant was operating his automobile on the left side of the highway at an unlawful rate of speed on a blind curve.

In each of these additional cases the respective defendants operated his automobile (1) on the left-hand side of the road; (2) at an unlawful rate of speed; or (3) in such manner as to disclose a reckless disregard of consequences or a heedless indifference to the rights and safety of others; or (4) while under the influence of an intoxicant. *S. v. Jessup,* 183 N.C. 771, 111 S.E. 523; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Swinney,* 231 N.C. 506, 57 S.E. 2d 647; *S. v. Bournais,* 240 N.C. 311, 82 S.E. 2d 115; *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132. Cf. *S. v. Smith,* 238 N.C. 82, 76 S.E. 2d 363 and *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916.

The rule in the application of the law with respect to an intentional or unintentional violation of a safety statute is simply this: The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143.

In our opinion, the evidence disclosed on this record fails to show an intentional, wilful, or wanton violation of G.S. 20-146, or an

unintentional violation of this statute accompanied by such recklessness or irresponsible conduct, or heedless indifference to the rights and safety of others, as to import criminal responsibility. *S. v. Cope, supra.*

The ruling of the court below on the motion for judgment as of nonsuit is

Reversed.

HAROLD BARRETT AND JIMMY PERSON, ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHER PERSONS SIMILARLY SITUATED WITH A COMMON OR GENERAL INTEREST, v. CITY OF FAYETTEVILLE, NORTH CAROLINA.

(Filed 21 May, 1958.)

1. Signatures—

A signature written by another at the request or with the consent of the person whose signature it purports to be, is effective.

2. Municipal Corporations § 3—

Where it appears from the evidence that some of the signers of a petition for a referendum on the question of annexation of territory by a municipality also affixed the names of their spouses to the petition, but that each spouse did and does regard and adopt such signature as his or her own, such signatures should be counted, and when the petition, including such names, contains the names of more than 15 per cent of the qualified voters of the territory sought to be annexed, attempted annexation of such territory by the municipality without a referendum is ineffective. G.S. 160-446.

APPEAL by defendant from *Nimocks, J.*, April Term 1957 of CUMBERLAND.

The plaintiffs seek to restrain the defendant City of Fayetteville, its officials, agents, servants and employees, from exercising any governmental control or jurisdiction over the area described in the complaint, which area the said City purported to annex by ordinance on 11 October 1956.

The pertinent facts as stipulated by the parties and found by the court are as follows:

1. That at the regular meeting of the City Council of Fayetteville held on Monday, 20 August 1956, a petition was filed by about 535 residents for the annexation by the City of Fayetteville of the contiguous territory described by metes and bounds in the complaint. At said meeting it was ordered by the City Council that a public hearing be held on the question of such annexation at the regular meeting of the City Council on Monday, 24 September 1956.

2. That notice of such hearing was duly advertised, and at the meeting on 24 September 1956 a petition was filed pursuant to the provisions of G.S. 160-446, purportedly signed by 213 persons opposing such annexation and requesting a referendum. The petition was referred to a committee composed of one person seeking the annexation of the area, one person seeking a referendum, and the City Clerk, to ascertain whether 15% of the qualified voters resident in the area had signed the petition requesting a referendum, and the matter was continued until the regular meeting of the Council on 11 October 1956.

3. That at the meeting held on 11 October 1956, the City Council made findings as follows: (a) That 583 qualified voters were resident in the area proposed to be annexed. (b) That 15% of said number is 87.45. (c) That 213 names were on the petition requesting a referendum filed with said City Council at the meeting held on 24 September 1956; that 93 of these names were not registered voters; that 12 of these names were persons who lived outside the area under consideration for annexation; that 13 of these names were not actually affixed by the 13 persons named, leaving 95 names on the petition requesting a referendum unquestioned.

4. That at said meeting on 11 October 1956 and before final action on the question of annexation, proponents of annexation filed an affidavit of 15 persons whose names appeared on the petition requesting a referendum, asking that their names be withdrawn from said petition and the withdrawal of these names was allowed by the City Council, leaving 80 names. Whereupon, the City proceeded to adopt an ordinance annexing the area involved.

5. The court found these additional facts: That at said meeting on 11 October 1956 and before final action on the question of annexation, affidavits were filed by 12 of the parties whose names had been affixed to the original petition requesting a referendum, by others (and whose names had been eliminated by the City Council), asking that their names be counted on the petition opposing annexation and requesting a referendum for reasons set forth in said affidavits; that if counted these 12 would increase the number of names to 92.

6. That of the 15 persons asking by affidavit that their names be withdrawn from the petition requesting a referendum, only 14 should be withdrawn and one, James Barfield, should not be allowed as he had asked in one affidavit that his name be counted and asked in another affidavit that his name be withdrawn. Deducting 14 names from the 95 counted leaves 81 names.

7. That of the 12 persons appearing on the petition requesting a referendum who asked by affidavit that their names be counted, 9 should be counted; that adding the 9 names that should be counted to

the 81 names, made a total of 90 names appearing on the petition requesting a referendum, that should be counted.

8. The court found that when the proper names were counted and deducted as aforesaid, 90 names remained, which is more than 15% of 583, the number of qualified voters resident in the area involved; that the petition signed by more than 15% of the qualified voters resident in the area proposed to be annexed was duly filed pursuant to the provisions of G.S. 160-446.

Upon the foregoing findings of fact, the court concluded as a matter of law that a petition was signed by more than 15% of the qualified voters resident in the area proposed to be annexed at the advertised meeting of 24 September 1956 and that therefore the City Council was without authority to adopt the ordinance annexing the contiguous territory in question and that said annexation is illegal. Whereupon, the court entered judgment out of term on 31 December 1957 declaring the ordinance void and of no binding force or effect, and permanently restrained the City of Fayetteville from exercising any governmental authority or control over said area.

The defendant appeals, assigning error.

D. S. Carter, MacRae, Cobb & Berry for plaintiff, appellees.
Robert H. Dye for defendant, appellant.

DENNY, J. The defendant assigns as error the findings that nine of the twelve persons whose names were placed on the original petition by someone other than by the persons named should be counted as valid signatures, and that 90 names appearing on the original petition requesting a referendum should be counted.

Each one of the nine persons referred to above filed an affidavit with the City Council of the City of Fayetteville on 11 October 1956 setting forth that his or her name was signed to the petition in opposition to the annexation of the area involved by the City of Fayetteville, by his wife or her husband, as the case might be, in his or her presence, and at his or her instruction, direction, and request; that at the time of signing and at the present time, he or she did and does regard and adopt such signatures as his or her own; that the affidavit was given for the purpose of having the City Council of the City of Fayetteville count his or her signature in checking said petition.

In 80 CJS., Signatures, section 6, page 1291, et seq., it is said: "Generally, a signature may be made for a person by the hand of another, acting in the presence of such person, and at his direction, or request, or with his acquiescence, unless a statute provides otherwise. A signature so made becomes the signature of the person for whom it is made, and it has the same validity as though written by him."

In this jurisdiction it is permissible for one to sign his name by himself "or sign by the adoption of his name as written by another, or he may make his mark, even though he may not be able to write himself." *Lee v. Parker,* 171 N.C. 144, 88 S.E. 217. But the signature, if written by another, must be made at the request or with the consent of the person whose signature it purports to be. *Lee v. Parker, supra.*

Likewise, in *S. v. Abernethy,* 190 N.C. 768, 130 S.E. 619, Stacy, C. J., speaking for the Court, said: "Not only may the signature be anywhere, unless otherwise provided by statute, but it is also permissible in the absence of an enactment controlling the matter, for the maker either to sign the instrument by affixing his own signature, or to adopt a signature written for him by another." See also *Devereux v. McMahon,* 108 N.C. 134, 12 S.E. 902, 12 LRA 205.

In light of the pleadings, stipulations, affidavits, and minutes of the City Council of the City of Fayetteville, as appear of record, the findings to the effect that the respective names of the nine persons whose names had been signed to the original petition requesting a referendum, by another, should be counted, thereby making a total of 90 names on the petition which should be counted, are amply supported by the evidence and such findings, as well as the conclusions of law based thereon, must be upheld.

Thus it appears that the area in controversy cannot be annexed by the City of Fayetteville unless and until a majority of the qualified voters in the area proposed to be annexed cast their ballots in favor of such annexation in an election called and conducted as prescribed by statute. *Rheinhardt v. Yancey,* 241 N.C. 184, 84 S.E. 2d 655.

The judgment of the court below is

Affirmed.

JOHN JACOB PETERSON v. McLEAN TRUCKING COMPANY.

(Filed 21 May, 1958.)

Automobiles § 54a: Master and Servant § 41—

Under the terms of the contract in question, lessor was to provide personnel and equipment for trips authorized by lessee's franchise, the drivers to be under complete control of the lessee's supervisor and the vehicles to be marked with lessee's identification on such trips. Plaintiff, an employee of lessee, was injured on a trip under lessee's franchise. The driver was paid by lessor, but lessee was required by the contract to reimburse lessor for his wages. *Held:* The driver, on the trip in question, was an employee of lessee, and plaintiff, having recovered compensation of lessee under the Workmen's Compensation Act, may not maintain an action against lessor at common law as a third person tort feasor.

APPEAL by plaintiff from *Preyer, J.*, First Week of September 23, 1957 Term of FORSYTH.

Civil action to recover for personal injury and property damage as result of alleged negligence of one Richard Dewey Brower, 11 August, 1955, in operation of a tractor-trailer in which plaintiff was riding, on Virginia State Highway 100, approximately five miles south of Pulaski, Virginia,—he, the said Brower, being at the time an alleged employee of defendant,—allegedly driving said tractor-trailer under the supervision, direction and control of defendant—in manner stated.

Defendant, in answer filed, denies in material aspect the allegations of the complaint.

And for further answer sets up three further defenses.

Plaintiff replies.

After the pleadings were filed the parties made stipulations of fact. And thereupon defendant moved that the action be dismissed for that the admissions set forth in the pleadings and in the stipulations show:

1. * * * "That the allegedly negligent driver stood in no such relationship to defendant as to make the doctrine of *respondeat superior* applicable."

2. * * * "that the present action is barred by the provisions of Chapter 97 of the General Statutes of North Carolina, being the Workmen's Compensation Act, and in particular Sections G.S. 97-9 and 97-10 thereof for that" (a) "the allegedly negligent driver falls within the class granted immunity from common law actions such as this" * * * and (b) "defendant clearly falls within the class granted immunity from common law actions such as this";

3. * * * that "no issue based upon the doctrine of *respondeat superior*" is left "to be submitted to the jury for that it is established as a matter of law that defendant cannot be held liable for the negligent acts set forth in the complaint";

And 4. For that under the admission so stated "no cause of action exists against defendant."

The stipulations of the parties are substantially these:

At the time of the injury in question the plaintiff was riding in a tractor-trailer unit leased from defendant by Carolina Motor Express Lines, Inc., hereinafter referred to as CMX, and driven by one Richard Dewey Brower. Plaintiff was the head driver of the unit and Brower was his assistant.

Plaintiff was employed by CMX, a bankrupt corporation in receivership with Earl R. Cox as Receiver.

Defendant, hereinafter referred to as McLean, is a North Carolina corporation which has a contract with Earl Cox as Receiver, whereby the Receiver "agrees to employ McLean Trucking Company to manage

the properties and operations of Carolina Motor Express Lines, Inc.," in consideration of $1,000 per month.

Under the terms of the working agreement between the two corporations, McLean was to provide personnel and equipment for CMX operations. All drivers for CMX were originally trained by McLean but separate seniority lists for the drivers were maintained and, once trained, the CMX drivers were under complete supervision of a CMX supervisor; whereas McLean drivers were under direction and control of a McLean supervisor. When the employment of a driver was transferred from one corporation to the other, he was placed at the bottom of the seniority list. CMX business records, personnel files, payrolls, tax records, equipment, and certain of its employees were maintained separately from those of McLean. CMX and McLean operated under separate franchises issued by the Interstate Commerce Commission and McLean had no authority to operate over the route assigned to CMX. At the time of the accident the unit was being operated under CMX franchise and was so marked.

Plaintiff was originally a driver for McLean, but had been transferred to CMX approximately one year prior to the accident. And as to employment status of Brower at the time of the accident, it is stipulated that "on August 1, Brower requested through the McLean supervisor that he be transferred to CMX. Brower was told that the request would be taken up with the supervisor of drivers for CMX. Thereafter, on or about August 2, 1955, Brower was assigned to trips by the CMX supervisor, and he had made two or three trips for CMX as an assistant driver prior to the date of the accident. Brower was never notified that he was a permanent employee of CMX." The accident occurred August 11, 1955, after plaintiff and Brower had been operating the unit together on the CMX route since August 7, 1955. "During all of these trips beginning August 7, 1955, both Brower and Peterson were acting in accordance with instructions of the CMX supervisor."

Plaintiff was on the payroll of CMX and Brower was on the payroll of McLean; but "McLean charged the entire amount disbursed to or for Brower on account of said trips to special accounts set up and maintained to set apart all expenses incurred in CMX operations in accordance with usual practices. The amount so disbursed to Brower by McLean was reimbursed to McLean by CMX."

Under a lease agreement between CMX and McLean, McLean agreed to lease certain trucks and equipment to CMX, the possession and control of which was to be vested exclusively in CMX. And it was to furnish all services and supplies necessary to operate the property, including "all wages and charges against wages for all persons concerned in operation, maintenance, direction, or otherwise concerned

with said property" and "any and all losses and expenses arising from the method or manner of the operation and maintenance of said property by the lessee."

Plaintiff has applied for and received benefits under the Workmen's Compensation Act through CMX, and now sues McLean at common law.

The determinative question, therefore, as stated by appellee, is: Whose employee was Brower at the time he injured plaintiff?

The cause heard, out of term, with the consent of the parties, and upon the pleadings and stipulations made, and upon said motion by defendant, the trial court being of opinion that "plaintiff has no cause of action or remedy at common law against the defendant" so adjudged, and dismissed the action at the cost to plaintiff.

Plaintiff excepted to the entering of the judgment, and appeals to Supreme Court and assigns error.

Clyde C. Randolph, Jr., Robert L. Styers for plaintiff, appellant.

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

WINBORNE, C. J.: Plaintiff, the appellant, states in his brief filed on this appeal that matters relating to proof of negligence and damages are not presented for review, but that "the question is simply this: Do the admitted facts bar the plaintiff's action as a matter of law?" The answer is "Yes". For, basically, on this question there arises, as stated by defendants appellees, the question as to "whose employee was Brower at the time he injured plaintiff?" The admitted facts shown in the record of case on appeal respond "CMX".

The answers to these questions are found in the opinions of this Court in the cases of: *Wood v. Miller*, 226 N.C. 567, 39 S.E. 2d 608; *Brown v. Truck Lines*, 227 N.C. 65, 40 S.E. 2d 476; *Roth v. McCord*, 232 N.C. 678, 62 S.E. 2d 64. See also *McGill v. Freight*, 245 N.C. 469, 96 S.E. 2d 438.

All these involved agreements are strikingly similar to the agreement here in hand: (1) Whereby lessor-owner leased truck and drivers to lessee; (2) Provisions whereby lessee took complete control of truck for the particular trip involved; (3) Stipulation that the lessee would attach its identification mark on the truck, and (4) specifying the above with particularity.

Indeed, as stated in *Wood v. Miller, supra*: "The relationship between the driver of the truck and the defendant is determinable, in the main, from the terms of the trip lease agreement. This is a question of law under applicable principles of law." And the Court then goes on to say: "It is generally held that the relationship of master

and servant is created when the employer retains the right to control and direct the manner in which the details of the work are to be executed and what the laborer shall do as the work progresses," citing and quoting from opinion in *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137.

In the light of these applicable principles, the admitted facts point unerringly to the conclusion that CMX, the lessee, expressly assumed direction and control of the operation of the truck in question for the duration of the term of the lease. And while it is true that McLean was to pay Brower, it appears that it was to be reimbursed therefor by CMX. Such an arrangement does not nullify the legal effect of the action of CMX in assuming the control and direction of the operation of the truck and responsibility to the public for its operation. See *Shapiro v. Winston-Salem*, 212 N.C. 751, 194 S.E. 479; also *Wood v. Miller, supra.*

For reasons stated the judgment from which appeal is taken is Affirmed.

HAZEL IJAMES AND HUSBAND, HOWARD IJAMES, UNDINE JACKSON AND HUSBAND, ELLIS JACKSON; HILDRETH HANEY AND HUSBAND, CLAY HANEY; C. WAYLAND SWAIM; DARRELL B. SWAIM AND WIFE, BERTHA SWAIM; AND HOMER LEE SWAIM, BY DARRELL B. SWAIM, ATTORNEY IN FACT, *v.* WILLIAM SHERMAN SWAIM AND WIFE, JANICE A. SWAIM.

(Filed 21 May, 1958.)

1. Judgments § 3½—

A consent judgment must be interpreted in the light of the matters in controversy in the proceeding and the purposes the parties thereto intended to accomplish by it.

2. Partition § 4f—

Prior to partition, one tenant in common conveyed his interest in fee to another tenant by deed without the joinder of his wife. In the partition by the commissioners and in the consent judgment entered after exception to the report, it appeared that the grantee tenant was allotted, in addition to his own share, the share of the grantor tenant, but that the share of the grantor tenant was identified solely to make certain which land would be subject to the dower of the wife of the grantor tenant if she survived him. *Held:* The mere identification in the commissioner's report and in the consent judgment of the share of the grantor tenant cannot have the effect of reinvesting the grantor tenant with any interest in the land.

APPEAL by plaintiffs from *Sharp, S. J.*, January, 1958 Civil Term, GUILFORD Superior Court (High Point Division).

In this civil action the plaintiffs allege in substance, (1) they are the owners and entitled to possession of lots Nos. 1 and 11 described in the proceeding for the partition of the A. B. Swaim lands; (2) the defendants are in the wrongful possession and have wrongfully received the rents and profits; (3) the defendants claim an interest in the lots which constitutes a cloud upon the plaintiffs' title. They ask that they be declared to be the owners and be placed in possession; that they have an accounting and have the cloud removed.

The defendants, by answer, assert that they are the owners in fee of the two lots; that they are rightfully in possession and have been in the exclusive possession for approximately thirty years.

The parties admit the following: A. B. Swaim died intestate in the year 1926, leaving him surviving Deby Swaim, his widow, and the following six children as his heirs at law: Mabel Weir, Cora Welch, Homer Swaim, Sherman Swaim, Marie Moore, and Cay Swaim Powell. The widow died prior to December, 1927.

On January 29, 1927, Homer L. Swaim, by warranty deed, conveyed a 1/6 undivided interest in the described lands to W. S. (Sherman) Swaim. The parties stipulated the deed conveyed the grantor's interest in the fee. On December 23, 1927, Mabel Weir and Cora Welch instituted a proceeding against Estelle Swaim, Homer Swaim, Sherman Swaim and wife, Marie Moore and husband, Cay Swaim Powell and husband, and Sherman Swaim, administrator of A. B. Swaim, for the partition of the A. B. Swaim lands. Homer Swaim was alleged to be a nonresident of the State of North Carolina. Process on him was served by publication.

The petition alleges: " . . . that each of said parties is seized in fee and possessed of 1/6 undivided interest in said lands, save and except the said Homer Swaim, who has conveyed his 1/6 undivided interest by deed to the said Sherman Swaim in which deed the said Estelle Swaim (wife of Homer) did not join and by virtue of the said deed the said Sherman Swaim is now the owner of 1/3 undivided interest in said premises."

The commissioners appointed for the purpose made partition of the lands. Tracts Nos. 6 and 7 were allotted to Sherman Swaim as his own 1/6 in value by inheritance. Tracts Nos. 5 and 11 were allotted to H. L. Swaim (Homer) and Sherman Swaim. These two tracts represented the 1/6 in value which Homer Swaim had inherited but which he had conveyed to Sherman by deed referred to in the plaintiffs' complaint and in the petition for partition, and in the order appointing the commissioners.

Exceptions were filed to the commissioners' report and thereafter a consent judgment was entered and signed by the clerk on August 14, 1929. In the consent judgment tracts Nos. 1 and 5 were exchanged one

for the other. Otherwise, the consent judgment left the allotment as made by the commissioners. Five of the six children of A. B. Swaim signed the consent judgment. Homer alone did not sign. The consent judgment contained the following: "It is, therefore, by and with the consent of the parties, ordered, adjudged and decreed by the court that (1) Tracts #1 and #11 be allotted to H. L. Swaim, a deed to which has heretofore been executed by H. L. Swaim to W. Sherman Swaim, without the joinder of his wife, Estelle Swaim, and which is more definitely and particularly described as follows:" (Here follows the description of Tracts Nos. 1 and 11).

Both H. L. (Homer) Swaim and his wife, Estelle Swaim, died prior to the institution of this action. The plaintiffs are the heirs at law of Homer Swaim. The parties stipulated the special proceeding for partition was regular and that each defendant was properly before the court.

The trial court entered judgment from which is here quoted that part pertinent to decision on this appeal:

"This Cause being regularly calendared for trial at this term of Court and coming on for hearing, counsel for both plaintiffs and defendants request the Court to rule upon the legal effect of the consent judgment dated August 14, 1929, in the special proceeding attached to both the complaint and the answer, entitled *Mabel Weir, et al. v. Estelle Swaim, et al.*, it being conceded by plaintiffs and defendants that if the consent judgment did not convey title to Tracts 1 and 11 of the A. B. Swaim Estate to H. L. Swaim in derogation of the deed dated January 29, 1927, from Homer L. Swaim to W. S. Swaim, which deed is recorded in Book 554, at page 165, in the Office of the Register of Deeds of Guilford County, N. C., that the defendants in this action are the owners of and entitled to the possession of the land described in the complaint in this action by virtue of the deed dated January 29, 1927, from Homer L. Swaim to W. S. Swaim, which deed is recorded in Book 554, at page 165, in the Office of the Register of Deeds of Guilford County, and is attached to the amended complaint as Exhibit A, and that the action should be dismissed. * * *

"After considering the pleadings and stipulations, the arguments of counsel, the Court is of the opinion, and so holds, that the consent judgment in the special proceeding entitled *Mabel Weir, et al., v. Estelle Swaim, et al.*, throughout recognized the validity of the aforesaid deed from Homer L. Swaim to W. S. Swaim; that the effect of said judgment was merely to segregate and identify the portion of the estate of A. B. Swaim to which Homer L. Swaim would have been entitled had he not conveyed away his interest to W. S. Swaim, and to identify the lands which might at some future date become

subject to the dower interest of Estelle or Stella Swaim, wife of Homer L. Swaim."

The court adjudged that the defendants are the owners in fee of the two lots; that the plaintiffs have no interest therein. From the judgment, the plaintiffs appealed.

D. C. McRae, Haworth & Riggs, By: John Haworth, for plaintiffs, appellants.

York & York, By: C. A. York, Jr., for defendants, appellees.

HIGGINS, J. For the purposes of this appeal, the parties agree the judgment below is correct unless the consent decree in the partition proceeding operates as a conveyance of Lots Nos. 1 and 11 to Homer L. Swaim. The decree must be interpreted in the light of the matters in controversy in the proceeding and the purposes the parties thereto intended to accomplish by it.

Prior to the institution of the partition proceeding the plaintiffs' ancestor, Homer L. Swaim, had sold and conveyed by deed all his interest in the A. B. Swaim estate to Sherman Swaim. The parties stipulate this deed conveyed the grantor's interest in fee. However, Homer's wife, Estelle Swaim, did not sign the deed. Hence her inchoate right of dower did not pass by the deed.

Two of the heirs of A. B. Swaim, Mrs. Weir and Mrs. Welch, instituted the partition proceeding for the purpose of having each tenant's share allotted according to his interest, 1/6 each to Mabel Weir, Cora Welch, Marie Moore, and Cay Swaim Powell; and 1/3 to Sherman Swaim. Sherman acquired 1/6 by inheritance and 1/6 by Homer's deed. In drafting the petition and the orders pursuant thereto, the parties and their counsel realized that Estelle Swaim, Homer's wife, not having signed his deed, would be entitled to dower in Homer's share should she survive him. The provisions in the petition, order for partition, the report of the commissioners were all so drawn as to separate and identify that part of the estate which Sherman acquired under Homer's deed in order that the land to which Estelle's dower might attach, in the event she survived Homer, would be identified and the other tracts be entirely free from her claim.

The commissioners made due report of their partition and allotment of shares. Exceptions were filed to the report. The parties thereupon entered the consent decree involved here. The decree served to change the report of the commissioners only to the extent that tract No. 1, allotted to Mrs. Moore, was re-allotted to H. L. Swaim and Sherman Swaim, and that tract No. 5, allotted to them, was re-allotted to Mrs. Moore. The 1/6 interest which Sherman inherited from the estate was allotted as tracts Nos. 6 and 7.

The sole purpose of the partition proceeding was to sever the unity of possession and fix the boundaries of the respective shares and allot to each his share in accordance with his interest in the whole. Homer Swaim had made a deed. His interest was gone. Nothing in the proceeding suggests an intent on his part to buy back into the estate or an intent on the part of any tenant in common to sell or give, or restore to him any interest therein. The whole proceeding manifests a clear intent to the contrary. *Edwards v. Batts,* 245 N.C. 693, 97 S.E. 2d 101; *Elledge v. Welch,* 238 N.C. 61, 76 S.E. 2d 340; *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918; *Martin v. Bundy,* 212 N.C. 437, 193 S.E. 831; *Valentine v. Granite Corp.,* 193 N.C. 578, 137 S.E. 668.

The course of conduct of all parties to the consent decree serves to confirm the defendants' contentions that Homer Swaim retained no part in his father's estate. The record fails to disclose any move by Homer Swaim or his heirs to assert any claim under the partition decree until the plaintiffs brought this suit on March 28, 1957, more than 27 years after the decree was entered, and almost 30 years from the date he sold and conveyed his interest.

The plaintiffs cite *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209, as authority for their contention the partition deed operates as a conveyance, notwithstanding no words of conveyance are used. Examination of that opinion will disclose that a number of questions arose in the proceeding: indebtedness, validity of deeds, etc. The parties settled their differences by mutual concession, arranging payments and cancellations of certain conveyances, and signed the judgment accordingly. On the other hand, in this case Homer was out of the state and out of the estate. He neither claimed nor conceded anything.

The decision of Judge Sharp is fully sustained by many decisions of this Court, among them: *Edwards v. Batts, supra; McLamb v. Weaver,* 244 N.C. 432, 94 S.E. 2d 331; *Elledge v. Welch, supra; Southerland v. Potts,* 234 N.C. 268, 67 S.E. 2d 51; *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474.

For the reasons here assigned, the judgment is

Affirmed.

STATE v. DONALD EUGENE COURTNEY.

(Filed 4 June, 1958.)

1. **Assault and Battery § 17: Rape § 28—**

A verdict of guilty of assault on a female is a permissable verdict under an indictment for rape.

2. Assault and Battery § 4—

G.S. 14-33 relates only to punishment and creates no new offense.

3. Assault and Battery § 7—

In a prosecution of a male person for assault upon a female, the presumption is that the defendant is over 18 years of age, with the burden upon defendant to show as a matter of defense, relevant solely to punishment, that he was not over 18 years of age at the time the offense was committed, if this be the case.

4. Assault and Battery § 11—

An indictment for assault upon a female need not charge that defendant was over 18 years of age at the time of the alleged assault in order to support punishment as for a general misdemeanor, since the age of the defendant is no part of the offense but relates solely to punishment.

5. Indictment and Warrant § 9—

An indictment must allege every essential element of the offense it purports to charge.

6. Criminal Law § 32—

A plea of not guilty puts in issue every essential element of the crime charged.

7. Assault and Battery § 12—

Where the indictment contains no averment that defendant was over 18 years of age at the time of the alleged assault, defendant's plea of not guilty, without more, does not put in issue whether he was over 18 years of age at the time the offense was committed.

8. Assault and Battery § 17—

Ordinarily, whether a defendant was over 18 years of age at the time the offense was committed, so as to warrant punishment as for a general misdemeanor upon conviction of defendant of assault upon a female, is for the determination of the jury and not the court, and may be appropriately determined upon a separate issue, with presumption that defendant was over 18 years of age being evidence for the consideration of the jury upon the question.

9. Same—

When a male defendant, during the progress of his trial on an indictment charging an assault on a female or a more serious crime embracing the charge of assault on a female, testifies that he was more than 18 years of age at the time of the assault, and there is no evidence or contention to the contrary, the collateral issue as to defendant's age need not be submitted to or answered by the jury in order for the verdict of guilty of assault upon a female to warrant punishment as for a general misdemeanor. *S. v. Grimes*, 226 N.C. 523, modified to this extent.

PARKER, J., dissenting.

HIGGINS, J., concurs in dissent.

STATE *v.* COURTNEY.

APPEAL by defendant from *Pless, J.*, December 2, 1957, Regular Criminal Term, of MECKLENBURG.

Criminal prosecution on indictment charging that defendant, on the 7th day of November, 1957, "did unlawfully, wilfully, and feloniously rape, ravish and carnally know Shirley Allen, a female, forcibly and against her will," etc.

Verdict: "Guilty of assault on a female."

Judgment, imposing a prison sentence of not less than 12 nor more than 18 months, was pronounced.

Defendant excepted and appealed.

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

Amon M. Butler, James B. Ledford and L. Glen Ledford for defendant, appellant.

BOBBITT, J. The only exceptive assignment of error is that the verdict does not support the judgment. Defendant contends that, since there was no jury finding that he was a man or boy over 18 years of age at the time of the alleged assault, the maximum legal sentence was a fine not in excess of $50.00 *or* imprisonment for a term not in excess of 30 days.

According to the agreed case on appeal, the undisputed evidence was that the alleged assault occurred November 7, 1957, the date alleged; and defendant testified (December 2, 1957), on direct examination by his own counsel: "I am 19 years old. . . . Yes, I was in the armed services for 17 months and 25 days. I have an honorable discharge."

The precise question is whether, under these circumstances, defendant's testimony as to his age eliminated the necessity for a jury determination that he was over 18 years of age at the time of the alleged assault.

The verdict, "Guilty of assault on a female," was a permissible verdict and was accepted. Decisions to the effect that when a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a proper verdict, do not apply. See *S. v. Gatlin*, 241 N.C. 175, 84 S.E. 2d 880; *S. v. Perry*, 225 N.C. 174, 33 S.E. 2d 869. Defendant does not challenge the acceptance of the verdict or any other feature of the trial.

It is noted further that we are not concerned with a situation such as that considered in *S. v. Brown, ante*, 311, 103 S.E. 2d 341, and cases cited, where the verdict returned and accepted was insufficient to support the pronouncement of *any* judgment.

Section 3620, Revisal of 1905, provided: "Assault, punishment for. In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays, shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape."

By Chapter 193, Public Laws of 1911, the General Assembly amended said Section 3620 by adding at the end thereof the following: "or to cases of assault or assault and battery by any man or boy over eighteen years of age on any female person." As so amended, said Section 3620 was brought forward and codified as Section 4215, Consolidated Statutes of 1919.

CS 4215 was amended by Chapter 189, Public Laws of 1933, relating to the competency of communicated threats in certain assault cases where the defendant's plea is self-defense. As so amended, CS 4215 was brought forward and codified as Section 14-33, General Statutes (Volume 1) of 1943. Section 14-33, General Statutes of 1943, was rewritten by Chapter 298, Session Laws of 1949; and as rewritten the relevant statutory provisions are now codified as Section 14-33 of the General Statutes (Volume 1B) as recompiled in 1953.

Ch. 193, Public Laws of 1911, amending Revisal, Sec. 3620, was first construed in *S. v. Smith*, 157 N.C. 578, 72 S.E. 853. The indictment, which contained no allegation as to the defendant's age, was for an assault with intent to commit rape. The verdict was, guilty of "assault and battery on Lillian Whitson—the defendant Turner Smith being over eighteen years of age." The judgment imposed a 2-year prison sentence. After serving thirty days, the defendant, in *habeas corpus* proceedings, urged as ground for immediate discharge that, absent an allegation that he was more than eighteen years old, the maximum lawful sentence was thirty days. This Court found no error in the order discharging the writ and remanding the petitioner to custody.

These specific holdings in *S. v. Smith, supra,* have been followed consistently by this Court:

1. The said 1911 Act "was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or boy over eighteen years of age, upon a woman," for "it was always a crime for a man, or a boy over eighteen years of age, to assault a woman." As stated succinctly by Barnhill, J., (later C. J.), in *S. v. Jackson*, 226 N.C. 66, 36 S.E. 2d 706: "G.S. 14-33 creates no new offense. It relates only to punishment."

2. The presumption is that the male person charged is over 18

years of age; and the fact, if it be a fact, that he is not over 18 years of age, relevant solely to punishment, is a matter of defense. *S. v. Lewis,* 224 N.C. 774, 32 S.E. 2d 334, and cases cited. In *S. v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621, and in *S. v. Herring,* 226 N.C. 213, 37 S.E. 2d 319, it is stated that the burden of establishing this defense rests on the defendant.

3. Since it is not an essential element of the criminal offense, it is not required that the indictment allege that the defendant was a male person over 18 years of age at the time of the alleged assault. *S. v. Jones,* 181 N.C. 546, 106 S.E. 817; *S. v. Lefler,* 202 N.C. 700, 163 S.E. 873.

Prerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge. *S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497; *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, and cases cited; 27 Am. Jur., Indictments and Information Sec. 54; 42 C.J.S., Indictments and Information Sec. 100.

A plea of not guilty puts in issue *every essential element of the crime charged. S. v. McLamb,* 235 N.C. 251, 256, 69 S.E. 2d 537, and cases cited; 14 Am. Jur., Criminal Law Sec. 268; 22 C.J.S., Criminal Law Sec. 454.

Although not an essential averment, if in fact the indictment charges that the defendant is a male person over the age of 18 years, as in *S. v. Lewis, supra,* and other cases, it may be considered, nothing else appearing, that the defendant's plea of not guilty is a denial of this nonessential averment; but where as here the indictment does not so charge it cannot be said that the defendant, simply by his plea of not guilty, puts in issue whether he was over 18 years of age at the time of the alleged assault.

In *S. v. Lefler, supra,* Adams, J., quotes the following from *S. v. Smith, supra:* "It is best, and certainly safe, that the court should require the jury under a special issue submitted to find the facts necessary to determine the grade of the punishment; . . . and if it is found that he (the man or boy) was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, whether his age is stated in the indictment or not."

Whether a deadly weapon was used, whether serious damage was done, whether there was an intent to kill, whether there was an intent to commit rape, relate directly to the defendant's *conduct* in relation to the alleged assault; but whether he was then *a man or boy over 18 years of age* relates solely to the defendant's *personal status* at the time of the alleged assault.

Whether defendant was over 18 years of age is a collateral matter, wholly independent of defendant's guilt or innocence in respect of

the assault charged; and it would seem appropriate, as pointed out by Walker, J., in *S. v. Smith, supra,* that this be determined "under a special issue." Unless the necessity therefor is eliminated by defendant's admission, this issue must be resolved by a jury, not by the court. *S. v. Lefler, supra; S. v. Grimes,* 226 N.C. 523, 39 S.E. 2d 394; *S. v. Terry,* 236 N.C. 222, 72 S.E. 2d 423. And, upon the trial of such issue, the presumption that defendant was over 18 years of age at the time of the alleged assault is evidence for consideration by the jury. *S. v. Lefler, supra; S. v. Lewis, supra; S. v. Grimes, supra.*

Appellant relies principally on *S. v. Grimes, supra;* and candor compels the admission that this decision, based largely on *S. v. Lefler, supra,* tends in some measure to support his contention.

In *S. v. Lefler, supra,* the indictment did not charge that the defendant was a male person over the age of 18 years, but did charge that he "did unlawfully, wilfully and feloniously beat and wound one Dora Shoe, she being a female, by throwing her body upon the Bank of South Yadkin River, and thereby seriously and permanently injuring the said Dora Shoe . . ." The jury's verdict was "Guilty of simple assault." The judgment imposed a prison sentence of 12 months.

Neither the evidence nor the judge's charge was included in the record on appeal. Absent the evidence and charge, this Court surmised that the verdict "signified an assault without the use of a deadly weapon or without the infliction of serious injury." Whether the defendant, during the trial, contended that he was not over 18 years of age, does not appear; nor does it appear that the court, in instructing the jury, submitted for their consideration and determination whether defendant was over 18 years of age at the time of the alleged assault. It would appear that the skeleton record on appeal caused such uncertainty as to the significance of the verdict as to cause this Court, "in the absence of a finding as to the defendant's age," to award a new trial.

In *S. v. Grimes, supra,* the defendant was first tried in the Recorder's Court and thereafter in superior court on a warrant charging simply that he unlawfully and wilfully assaulted Mrs. J. C. Perkins, a female. The State's evidence tended to show that defendant, on a Rocky Mount Street, at nighttime, beat Mrs. Perkins and caused her face to bleed. The defendant testified, denying that he was in any way involved in the alleged assault. While he did not testify directly as to his age, he did testify that he had been in the Maritime Service of the United States Government for five or more years. The jury returned a verdict of "Guilty of an assault on a female as charged in the warrant." After verdict, the court, over defendant's objection, allowed the solicitor's motion to amend the warrant so as to charge that de-

fendant was "a male person over the age of 18 years"; and thereupon the court imposed a prison sentence of 18 months.

The opinion by Stacy, C. J., states: "Hence, to take the case out of the general rule and place it in the exception, the jury should determine in its verdict, specifically or by reference to the *charge,* the circumstances of aggravation which make the offense a general misdemeanor. *S. v. Lefler, supra; S. v. Lewis, supra.*" (Our italics) (Note: "Charge" is used in the sense of accusation by warrant or indictment, not in the sense of instructions to the jury.) The opinion concludes: "There was no error in allowing the solicitor to amend the warrant, as this was a matter resting in the sound discretion of the trial court. *S. v. Brown,* 225 N.C. 22, 33 S.E. 2d 121. Coming as it did, however, after verdict, the amendment was ineffectual to supply the deficiency of the jury's finding. So, conforming to the precedent of the *Lefler* case, supra, the present cause will be remanded for another hearing. *Venire de novo.*"

The ruling that the court had the power, in its discretion, to allow said amendment to the warrant implied that the warrant as amended did not charge a different criminal offense from that of which the defendant had been convicted in the Recorder's Court. *S. v. Cooke,* 246 N.C. 518, 98 S.E. 2d 885, and cases cited.

In *S. v. Grimes, supra,* the verdict established that the defendant was guilty of the criminal offense charged in the warrant, to wit, an assault on a female. Assume that, absent an admission that he was over 18 years of age at the time of the alleged assault, punishment for a general misdemeanor could not be imposed unless and until a jury found that he was over 18 years of age. Ordinarily, the illegality of the judgment does not vacate the verdict; but the established practice is to set aside the judgment and remand the cause for proper judgment on the verdict. *S. v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126, and cases cited; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Tyson,* 223 N.C. 492, 27 S.E. 2d 113; *S. v. Palmer,* 212 N.C. 10, 192 S.E. 896; *S. v. Smith,* 174 N.C. 804, 93 S.E. 910.

It seems appropriate to call attention to the cases discussed below.

In *S. v. Stokes,* 181 N.C. 539, 106 S.E. 763, the indictment charged that defendant assaulted one Jessie Brown, "she being a female over the age of eighteen years of age." It did not allege that the defendant was a male person or that he was over eighteen years of age. Upon defendant's plea of "guilty of assault on a female," a prison sentence of three months was imposed. This Court found no error in the judgment.

In *S. v. Jones,* 181 N.C. 546, 106 S.E. 817, where the indictment charged an assault with intent to commit rape, the jury returned a

verdict of "Guilty of an assault on a female." The judgment imposed a prison sentence of two years. The defendant excepted and moved to arrest the judgment on the ground that the bill did not allege that he was a male person over 18 years of age. Commenting on this exception, *Hoke, J.* (later C. J.) said: "The proof clearly showed that the defendant was over eighteen at the time of the alleged assault, and on the trial no question was made as to that fact." The opinion concludes: "On the record, there has been no error shown that would justify the Court in disturbing the results of the trial, and the judgment of the court below is affirmed."

In *S. v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474, the indictment was for rape. It was not alleged that defendants were male persons over the age of 18 years. The verdict was "Guilty of assault upon a female." The judgment, as to each defendant, imposed a prison sentence of 18 months. Both defendants were married men. One defendant testified that his codefendant was 25 years of age. This Court found no error, specifically holding that the instructions to the jury, which did not refer to the age of either defendant, were correct.

In *S. v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621, the indictment was for an assault with intent to commit rape. The jury returned a verdict of "Guilty of an assault on a female, he being a male person over the age of 18 years," and judgment imposing a prison sentence of 18 months was pronounced. The defendant excepted to the court's refusal to give this special instruction: ". . . if you should find that there was no intent to commit rape, and no deadly weapon used and no serious bodily harm done, you may return a verdict of a simple assault." After noting that this request for special instruction was not made in apt time, *Schenck, J.,* stated that the exception to the failure to give such instruction was untenable "for the further reason that all the evidence, both of the State and of the defendant, was to the effect that the person assaulted was a female and the defendant was a male person. The burden of showing that the defendant was under 18 years of age is a defense and rested on the defendant. *S. v. Smith,* 157 N.C. 578, 72 S.E. 853. There was no evidence to this effect, and for this additional reason the court was not required to give same."

In *S. v. Jackson, supra,* in separate indictments, it was charged that defendant, a male person over 18 years of age, did assault (1) Mrs. Earl Walker, a female person, and (2) Mrs. E. L. Jackson, a female person. A *nol. pros.* was entered to the indictment charging that defendant assaulted Mrs. Jackson. To the indictment charging that defendant assaulted Mrs. Walker, the defendant tendered and the court accepted a plea of guilty of simple assault. The judgment imposed a prison sentence of two years, "suspended upon payment of $100.00

into the Office of Clerk of Superior Court for use and benefit of wife and $50.00 on the 25th of September and monthly thereafter." Upon appeal, the judgment was stricken and the cause remanded for proper judgment. Decision was not predicated on the fact that the judgment imposed a prison sentence of two years but on the ground that the defendant, having excepted to the judgment and appealed therefrom did not consent to the conditions upon which the sentence was suspended.

In *S. v. Dickey,* 228 N.C. 788, 44 S.E. 2d 207, the defendants, in separate bills of indictment, were charged with assault with intent to commit rape. As to defendant Logan, the verdict was "Guilty of an assault on a female." As to defendant Logan, the judgment imposed a prison sentence of "not less than 12 nor more than 18 months." The record contained no evidence as to the age of defendant Logan. This Court found no error in the judgment.

In *S. v. Grimes, supra,* referring to the *Stokes, Jones, Morgan* and *Jackson* cases, the opinion makes two observations: (1) that the question then considered "was not in focus, or mooted," in said cases; and (2) that "in all these cases the bills were for more serious offenses or more aggravated assaults."

In *S. v. Faison,* 246 N.C. 121, 97 S.E. 2d 447, where defendant was tried upon an indictment charging assault on a female with intent to commit rape, he, the defendant, being a male person over the age of 18 years, the jury's verdict was "Guilty of an assault on a female." A prison sentence of two years was imposed. The defendant did not testify. According to the State's evidence, he was a hotel waiter; but, except as the evidence relating to his employment and conduct implied, there was no testimony as to his age. A prison sentence of two years was imposed. In a *per curiam* opinion, this Court found no error.

In *S. v. Robbins,* 246 N.C. 332, 98 S.E. 2d 309, where defendant was tried upon an indictment charging assault with intent to commit rape, the jury's verdict was "Guilty of assault upon a female." A prison sentence of two years was imposed. In the trial, defendant testified he was 24 years of age. This Court, in opinion by Winborne, C. J., held there was no error "in the judgment from which appeal is taken."

In the *Faison* and *Robbins* cases, and in the *Stokes, Jones, Kiziah, Morgan, Jackson* and *Dickey* cases, referred to above, the defendant did not assign as error the jury's failure to make a specific finding that the defendant was a man or boy over 18 years of age. Even so, the established practice of this Court is to take notice, *ex mero motu,* of defects appearing on the face of the record proper; and the verdict and judgment are essential parts of the record proper. G.S. 7-11; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320, and cases cited.

Here, as in *S. v. Robbins, supra,* the defendant, testifying at the

trial, stated that he was over 18 years of age. There was no evidence or contention to the contrary. He does not now contend that he was not over 18 years of age at the time of the alleged assault nor does he seek a jury determination of that issue. He contends that, although the verdict should stand, the judgment imposing the prison sentence of 12-18 months is unlawful; and that the cause should be remanded for a judgment imposing a fine not exceeding $50.00 or imprisonment not exceeding 30 days; and the sole reason assigned is that the jury failed to make a specific finding on the uncontroverted collateral issue relating to his age.

Under the circumstances, we think that the collateral issue as to his age was eliminated by his own testimony. For present purposes, it is sufficient to say that the unqualified statements (quoted above) in *S. v. Grimes, supra,* are modified to this extent, namely, that when a male defendant, during the progress of his trial on an indictment charging an assault on a female or a more serious crime embracing the charge of assault on a female, testifies that he was over 18 years of age at the time of the alleged assault and there is no evidence or contention to the contrary, the collateral issue as to defendant's age need not be submitted to or answered by the jury. His testimony, under such circumstances, relating to such collateral issue, relevant solely to punishment, must be considered an admission on which the court may rely in the trial of the cause and in pronouncing judgment.

No error.

PARKER, J., dissenting: The bill of indictment did not charge that the defendant was a male person over 18 years of age. The verdict was "Guilty of an assault on a female."

This Court said in *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458: " . . . verdicts and judgments in criminal cases ought to be clear and free from ambiguity or uncertainty. The matters involved — the enforcement of the criminal law and the liberty of the citizen — are worthy of exactitude."

"The judgment and sentence (in a criminal case) must be responsive to, and in accord with, the verdict of the jury, or the finding of the court, where the trial is by the court without a jury; and if the jury, by their verdict have determined the character of the crime, the court cannot go back of it to any fact of record to aid its sentence, since it is the verdict which gives validity and effect to the judgment so far as the character of the crime is concerned." 24 C. J. S., Criminal Law, Sec. 1579(a).

A court cannot lawfully pronounce sentence for an offense higher in degree or grade than that of which the defendant was convicted.

S. v. Palmer, 212 N.C. 10, 192 S.E. 896; 24 C.J.S., Criminal Law, p. 98. In the *Palmer* case the verdict as to Edgar Palmer was "guilty of simple assault." The judgment as to Edgar Palmer was: "The jury having returned a verdict of simple assault against the defendant Edgar Palmer, the court finds as a fact from the evidence in the case that said simple assault on the part of Edgar Palmer inflicted serious injury to the person of Ernest Bowers, the court finds as a fact that the injuries sustained by the defendant Ernest Bowers, at the hand of Edgar Palmer, to-wit, a broken jaw, serious cuts and lacerations and bruises on the head and face, were serious injuries within the meaning of the law: Therefore the judgment of the court is that the defendant be confined in the common jail, . . . , for a period of four (4) months." This Court found no error in the trial, but remanded the case for a proper judgment, for the reason that upon conviction of a simple assault the court could not impose a sentence for more than 30 days, or inflict a fine for more than fifty dollars.

In *S. v. Lefler,* 202 N.C. 700, 163 S.E. 873, the defendant was indicted for an assault and battery upon Dora Shoe, a female, thereby seriously and permanently injuring her. He was convicted of a simple assault, and was sentenced to imprisonment for a term of 12 months. The Court said: "It was not necessary to aver that the 'man or boy' at the time of the assault was 'over eighteen years old'; the age of the assailant is a matter of defense. *S. v. Smith,* 157 N.C. 578; *S. v. Jones,* 181 N.C. 546. This does not imply, however, that the jury is not required to determine the defendant's age. . . . As pointed out in the same case (*S. v. Smith,* 157 N.C. 578) there is a presumption of his capacity—a presumption that he is over the age of eighteen; and in the absence of evidence *contra* the jury would be justified in reaching this conclusion. But the presumption is only evidence and even if there is no testimony in rebuttal it remains evidence for the consideration of the jury. . . . In the present case the verdict was, 'Guilty of simple assault.' This may have signified an assault without the use of a deadly weapon or without the infliction of serious injury. To justify the sentence imposed the defendant must have been over the age of eighteen years, and as to this there is no finding by the jury. If he was over eighteen years of age the punishment would not be restricted to a fine of fifty dollars or imprisonment not exceeding thirty days, although a deadly weapon was not used and serious injury was not inflicted. In the absence of a finding as to the defendant's age, we must award a new trial."

In *S. v. Grimes,* 226 N.C. 523, 39 S.E. 2d 394, the warrant charged the defendant with "assault on Mrs. J. C. Perkins, a female." Verdict: "Guilty of an assault on a female as charged in the warrant." After

verdict and before judgment, the solicitor moved to amend the warrant so as to charge an assault on a female by a man or boy over eighteen years of age. Objection by defendant; overruled; exception. Judgment: 18 months on the roads. The Court said: "Here, the verdict pronounces the defendant guilty of an assault on a female, *simplicitor.* No deadly weapon was used and no serious damage was done. Whether the permissible punishment is restricted, or in the discretion of the court, depends upon the age and sex of the defendant. These must appear in order to support a judgment as for an aggravated assault. *S. v. Smith,* 157 N.C. 578, 72 S.E. 853. . . . Generally, in charges of assault or assault and battery with varying degrees of aggravation, the jury may convict of the assault or assault and battery and acquit, in whole or in part, of the circumstances of aggravation. Citing authority. Questions of jurisdiction and limitation of punishment are dependent upon the offense charged and the plea of the defendant or the finding of the jury. Citing authority. To this general rule, however, there seems to be at least one exception. When a 'man or boy over eighteen years old' commits an assault or assault and battery on 'any female person,' even though no deadly weapon be used and no serious damage is done, the case is regarded as a general misdemeanor and the punishment is in the discretion of the court. Citing authority. Hence, to take the case out of the general rule and place it in the exception, the jury should determine in its verdict, specifically or by reference to the charge, the circumstances of aggravation which make the offense a general misdemeanor." The Court held that there was no error in allowing the solicitor to amend the warrant as it was a matter within the sound discretion of the trial court, but coming as it did after verdict, the amendment was ineffectual to supply the deficiency of the jury's verdict. So conforming to the precedent of the *Lefler* case, *supra,* the case was remanded for a *venire de novo.*

In *S. v. Terry,* 236 N.C. 222, 72 S.E. 2d 423, the warrant charged the defendant with an assault on a female. The defendant entered a plea of guilty as charged, and was remanded to jail for judgment at a later day during the term. Two days after the defendant's plea of guilty was entered, the court permitted the solicitor, over the defendant's objection, to amend the warrant so as to allege that the defendant was over eighteen years of age at the time of the assault. The court found as a fact from the testimony of the defendant's mother and from the physical appearance of the defendant "that the defendant was 23 years of age at the time of the assault." Judgment: Imprisonment for two years. This Court held that the sentence was in excess of that permitted by law for the offense originally charged in

the warrant to which warrant the defendant pleaded guilty, set it aside, and ordered a new trial upon the warrant as amended.

In *S. v. Smith,* 157 N.C. 578, 72 S.E. 853, the defendant was indicted for an assault with intent to commit rape. A sentence of imprisonment for two years was upheld on the ground that the verdict was guilty of an assault and battery upon a woman, the defendant being at the time of the assault over eighteen years of age.

In *S. v. Lewis,* 224 N.C. 774, 32 S.E. 2d 334, the warrant charged that the defendant, a male person over the age of eighteen years assaulted one Ila Mae Holmes, a female person. Verdict: "Guilty as charged in the warrant." A sentence of imprisonment for two years was sustained on the ground that the jury found by reference to the charge in the warrant the circumstances of aggravation which made the offense a general misdemeanor.

In *S. v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621, the indictment charged the defendant with an assault to commit rape upon one Margaret Wilson, a female. Verdict: Guilty of an assault upon a female, the defendant being a male person over eighteen years of age. A sentence of imprisonment for eighteen months was upheld. A similar verdict was rendered in *S. v. Efird,* 186 N.C. 482, 119 S.E. 881.

In the following cases where the indictments did not charge that the defendants were male persons over eighteen years of age, and the verdict did not find that the defendants were male persons over eighteen years of age, sentences of imprisonment for assault on a female person in excess of thirty days were upheld. *S. v. Jones,* 181 N. C. 546, 106 S.E. 817; *S. v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474; *S. v. Dickey,* 228 N.C. 788, 44 S.E. 2d 207; *S. v. Robbins,* 246 N.C. 332, 98 S.E. 2d 309.

In *S. v. Faison,* 246 N.C. 121, 97 S.E. 2d 447, the indictment charged an assault on a female with intent to commit rape, he, the defendant, being a male person over eighteen years of age. Verdict: Guilty of an assault on a female. A sentence of imprisonment for two years was upheld.

In *S. v. Stokes,* 181 N.C. 539, 106 S.E. 763, the indictment did not charge that the defendant was a male person over eighteen years of age. Plea: Guilty of an assault on a female. A sentence of imprisonment for three months was sustained.

As the majority opinion correctly states, in the *Stokes, Faison, Jones, Kiziah, Dickey* and *Robbins* cases, the respective defendants did not assign as error a sentence in excess of that authorized by G.S. 14-33, for the reason that the verdict did not find that the defendant was a male person over eighteen years of age, either by specific words in the verdict, or by a verdict of guilty as charged, when the indictment charged

that the defendant was a male person over eighteen years of age.

What shall we do with these contradictory cases in our Reports? The majority opinion states that *S. v. Grimes, supra,* should be modified to this extent, that when a male defendant testifies in such cases that he is over eighteen years of age at the time of the assault, and there is no evidence to the contrary, the issue as to defendant's age need not be submitted to or answered by the jury, for the reason that it is an admission by the defendant upon which the court can rely. With such a holding, I do not agree.

If a person is tried on a warrant charging him with operating an automobile while intoxicated, it being a second offense, and the verdict is simply guilty of drunken driving, can a sentence in excess of the punishment for a first offense be upheld, if the defendant in his trial testified that he had been convicted before of a similar offense? In *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203, the warrant charged the defendant with operating a motor vehicle on a public highway while under the influence of intoxicating liquor, this being a second offense. J. H. Hatcher, a State Patrolman, testified without objection: "This is the second offense of driving under the influence of liquor. He (the defendant) plead guilty on the first offense, approximately two years ago." The defendant did not testify, and offered no evidence. It seems that the evidence that it was defendant's second offense of drunken driving was not denied. Verdict: "Guilty." The Court said: "The judgment entered is stricken and the cause remanded for proper judgment. In remanding the cause for the stated purpose, we observe that, while there is allegation and evidence that defendant had been adjudged guilty of violating G.S. 20-138 on a prior occasion, this feature was in no way submitted to or passed on by the jury. Hence, the verdict cannot be regarded as a conviction of a second offense within the meaning of G.S. 20-179. It is well established that 'where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty.' *S. v. Miller,* 237 N.C. 427, 75 S.E. 2d 242, and cases cited. 'Whether there was a former conviction or not was for the jury, not for the court.' *Clark, J.* (later C.J.), in *S. v. Davidson,* 124 N.C. 839, 32 S.E. 957; G.S. 15-147."

Article I, section 13, of the North Carolina Constitution, guarantees to every person charged with crime the right to a trial by jury, and, upon a plea of Not Guilty, provides that the defendant shall not be convicted of any crime but by the unanimous verdict of a jury in open court. It is the verdict of the jury which gives validity and effect to

the judgment as to the character of the crime which the defendant has committed. The jury by its verdict in the instant case, to-wit, "guilty of an assault on a female" has determined the character and degree of the offense and the maximum punishment. A sentence of imprisonment based on this verdict cannot exceed thirty days. G.S. 14-33. The sentence here is imprisonment for eighteen months: a sentence not authorized by the jury's verdict. In my opinion, the Court is not empowered by law to go back of the verdict into the record to uphold a sentence of imprisonment of the defendant of eighteen months, which imprisonment is for an offense higher in degree or grade than that of which the jury convicted him. Where will such a holding lead us? Doesn't it impair, if not destroy, a person's constitutional right to a trial by jury?

A sentence of imprisonment for a simple assault on a female in excess of the maximum limit fixed by G.S. 14-33 does not vacate the verdict, but requires that the case be remanded to the lower court for a proper judgment, as authorized by the statute. *S. v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126; *S. v. Austin,* 241 N.C. 548, 85 S.E. 2d 924; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *S. v. Malpass,* 226 N.C. 403, 38 S.E. 2d 156; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151.

I think that this case should be remanded to the lower court for a proper sentence upon the verdict. In my opinion, this is a sounder legal position than awarding a new trial.

In my judgment, the cases set forth above sustaining sentences of imprisonment for more than thirty days for assault on a female, when the verdicts did not find by specific words in the verdicts, or by reference to an averment in the indictments, that the defendants were over eighteen years of age at the time of the assault, are wrong in upholding the sentences, and on that specific point should be overruled.

In the *Stokes* case, *supra,* and in the *Faison* case, *supra,* the pleas were guilty of an assault on a female. I think the Court was in error in sustaining the sentence of imprisonment of three months in the *Stokes* case, and the sentence of two years imprisonment in the *Faison* case, on the ground that the sentences were not supported by the pleas.

I take my stand squarely and firmly on the constitutional ground that no person ought to be in any manner deprived of his liberty, but by the law of the land, North Carolina Constitution, Article I, section 17, and that the law of the land requires that a judgment and sentence of imprisonment must be responsive to, and in accord with, the verdict of the jury.

I am authorized to say that Justice Higgins concurs in this dissenting opinion.

DAN NICHOLAS v. SALISBURY HARDWARE AND FURNITURE CO.

(Filed 4 June, 1958.)

1. Dedication § 2—

Intent is essential to the dedication of land to the public by the owner, and while such intent may be inferred from the circumstances without a formal act of dedication, such circumstances must be unmistakable in their purpose and decisive in their character, and mere use by the public of the land for ingress and egress has no tendency to establish a dedication.

2. Same— Evidence held insufficient to show dedication of alley to the public.

The evidence tended to show that an alley owned by plaintiff had been used by the public generally for a period of over thirty years for ingress and egress and that the city worked the alley so that trucks could get in and out, but also that the receiver for plaintiff's predecessor in title sold the adjacent land subject to an easement in the land in question in favor of named persons, that the city sued plaintiff for *ad valorem* taxes on the alley and that plaintiff paid the taxes to the city and county thereon, and that when plaintiff advised the city not to use the land except for the police and fire departments, the city stopped all other uses until permission for such other uses was granted. *Held:* The evidence is insufficient to show a dedication of the alley to the public.

3. Easements § 3—

A party asserting an easement by prescription has the burden of proving all the elements essential to its acquisition, including that his use of the easement was continuous and uninterrupted for twenty years and was adverse or under claim of right, and a permissive use of another's land cannot ripen into an easement by prescription regardless of length of time.

4. Same—

Use of another's land will be presumed permissive until the contrary is shown.

5. Limitation of Actions § 7—

When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit.

6. Same—

Where a receiver has full authority to institute suit, his appointment will not suspend the running of the statute of limitations against the estate. G.S. 1-507.2, G.S. 55-148.

7. Easements § 3—

Defendant's evidence tended to show the open and notorious use of an alleyway for a period of more than thirty years except for a short time

when a sewer was laid, that such use was begun prior to the appointment of a receiver for plaintiff's predecessor in title and had been continuous up until the institution of this action to remove the cloud on title, in which plaintiff averred that defendant claimed an estate or interest in the land adverse to plaintiff. *Held:* The evidence is sufficient to be submitted to the jury on the question whether defendant acquired a right of way over the land by prescription.

JOHNSON, J., concurring in part and dissenting in part.

RODMAN, J., dissenting.

BOBBITT, J., concurs in dissent.

APPEAL by defendant from *Rousseau, J.*, September 1957 Term of ROWAN.

Statutory action to quiet title to a strip of land fronting 10 feet on Church Street, Salisbury, North Carolina, and extending back between parallel lines for a depth of 200 feet.

The complaint alleges that plaintiff is the owner in fee and in possession of this strip of land, which is described by metes and bounds, and that the defendant asserts a claim adverse to his interest of an easement over this land for purposes of ingress and egress to its adjacent property, which constitutes a cloud upon his title. Wherefore, plaintiff prays that he be declared the owner in fee of this land, free from any claim of the defendant.

The defendant in its answer denies that plaintiff is the owner in fee and in possession of this land, and asserts that plaintiff has merely described in his complaint "one of Salisbury's most established public alleys." For a further answer the defendant pleads two defenses. One, a dedication of this land by its owners to the public at large, and an acceptance of the dedication by the public generally, and the city of Salisbury, which kept up the alley and subsequently paved it. Two, if this strip of land be declared not a public alley, then the defendant has acquired by prescription an easement for purposes of ingress and egress over it by a continuous adverse user for more than 20 years.

Plaintiff's evidence tends to show the following facts: In 1920 W. F. Snider was living in a residence on a large lot owned by his wife and himself on the corner of West Innes and Church Streets in the city of Salisbury. The lot extended back about 200 feet to a warehouse of the defendant that was there at that time. There was no alley on this lot at the time. There was no way to enter the lot from the corner of Innes Street down to the defendant's warehouse on Church Street. Sometime after 1920 different parties bought the lot and houses, cleared off the houses, and subdivided the lot. The alley was placed on the lot after the Sniders sold it.

On 1 April 1922 W. F. Snider and wife conveyed to Frank R. Brown by deed properly recorded on 4 May 1922 a part of their lot. The lot conveyed to Brown fronted 76.5 feet on Church Street, and part of its description is as follows: "Thence with Church Street South 47 deg. 45 min. West 76.5 feet to a stake in line of Church Street, corner Salisbury Hardware and Furniture Company (the defendant); thence with line of Salisbury Hardware and Furniture Company South 42 deg. 45 min. East 200 feet to a stake." The description of the lot conveyed to Brown embraces the strip of land, which is the subject of this action.

On 18 April 1922 Marie E. Kenerly and her husband by deed, properly recorded on 20 April 1922, conveyed to Frank R. Brown lot 8 of the W. F. Snider property, which fronted 17.5 feet on Church Street, and adjoined on its East side the lot Brown had purchased from the Sniders.

On 6 September 1924 Frank R. Brown and his wife by deed, properly recorded on 9 September 1924, conveyed these two lots to Brown Insurance & Realty Company.

At the September 1926 Term of the Superior Court of Rowan County, in the case of *Sam Carter et al. v. Perpetual Building & Loan Association, Brown Insurance & Realty Company et al.*, P. S. Carlton was appointed permanent Receiver of the Brown Insurance & Realty Company.

By virtue of an order entered at the September 1927 Term of Rowan Superior Court, P. S. Carlton, Receiver of Brown Insurance & Realty Company, conveyed by two separate deeds dated 1 October 1927, which are recorded, all of the two lots held by him as Receiver to the Post Publishing Company, and to James M. Davis and wife, except the strip of land which is the subject of this action. The deeds to the Post Publishing Company, and to James M. Davis and wife, except in full in the record. The summary of the deed to the Post Publishing Company in the record does not show the granting of an easement. The summary of the deed to James M. Davis and wife contains this language from the deed: "Also an easement or right of way over the following described lot: Beginning at a stake on the East side of Church Street 204 feet South 47 deg. West from the South corner of the intersection of Innes and Church Streets, corner Salisbury Hardware & Furniture Company; thence with line of Salisbury Hardware & Furniture Company South 42 deg. 45 min. East 100 feet to a stake; thence North 47 deg. 45 min. East 10 feet; thence Northwest and parallel with Innes Street 100 feet to Church Street; thence South 47 deg. West with Church Street 10 feet to the beginning." The strip of land upon which this easement is granted is the strip of land which

is the subject of this action. However, the strip of land which is the subject of this action runs back from Church Street 200 feet, and this easement runs back from Church Street 100 feet.

At the May 1935 Term of Rowan County Superior Court, P. S. Carlton, as Receiver, filed a report stating that he held several houses and lots free from encumbrances, except taxes, and, in his opinion, this property should be advertised for sale privately.

By virtue of an order entered at the May 1936 Term of the Rowan County Superior Court, P. S. Carlton, Receiver, conveyed to plaintiff by deed dated 26 May 1936, and recorded on 14 September 1937, the strip of land which is the subject of this action. The description of this strip of land in this deed is the same as that used in the Receiver's deed to James M. Davis and wife in granting them an easement over it. This deed states that this strip of land is "subject, however, to the easements or rights of way for the purpose of ingress, egress and regress in, to, upon or over said lot heretofore conveyed by F. R. Brown, or Brown Insurance & Realty Company, or P. S. Carlton, Receiver, to Post Publishing Company of (sic) James M. Davis and wife, Rebecca Davis, or others, as will appear by reference to the deeds, conveyances or written contracts heretofore made."

The plaintiff testified in substance on direct examination: That he bought this strip of land at an auction sale, paying for it a valuable consideration, and that Mr. Linn Bernhardt, president of the defendant, was present at the sale. This is the substance of his testimony on cross-examination: The strip of land was paved when he bought it. He does not know what use was made of this alley before he bought it. That he paid P. S. Carlton, the Receiver, $260.00 for this alley and 2 lots in another part of the city. He did not pay any taxes on this alley to the city or county, until the city sued him for taxes on it about 1952. The defendant began using the alley in 1948 when it made a parking lot, and entrance into the lot. He doesn't know what it did before then. He knew that people in automobiles, delivery trucks, express trucks and people on foot have used the alley since 1936. The plaintiff was recalled as a witness, and testified in substance: The tax suit was for taxes on this strip of land. He paid the judgment for taxes. He has continued to pay taxes on it since the tax suit. He has paid county taxes on this strip of land. No one has paid taxes on it since he bought it.

Plaintiff introduced in evidence the judgment roll of a suit instituted by the city of Salisbury against him and his wife on 9 March 1950 in the Superior Court of Rowan County. This judgment roll consisted of the summons, complaint, judgment and final report and settlement of the commissioner. The summons was served on the de-

fendants on 10 March 1950. The complaint alleges that the defendants are the owners of the strip of land, which is the subject of this suit, and describes it by metes and bounds, using the same description as in the deed of P. S. Carlton, Receiver, to the plaintiff, which is the same description used in plaintiff's complaint here, and then alleges that the defendants are indebted to the city for ad valorem taxes on this strip of land from 1936 to 1949, inclusive, in the principal sum of $272.18. Judgment was entered against the defendants on 25 August 1952 in the principal sums of $272.18 and $49.96, and a commissioner was appointed to sell the property. On 11 October 1952 the commissioner reported to the court that the defendants had paid all of the taxes, interest and costs due under the judgment.

About the time the above taxes were paid, the city of Salisbury had been using this alley to collect garbage and trash from several stores on Main and Innes Streets. On 6 October 1952 plaintiff wrote the city manager a letter requesting that this alley not be used by the city, except by the police and fire departments, unless it obtained permission from him. On 7 October 1952 the city manager of Salisbury wrote a letter to the stores on these streets and to the defendant, in which was copied plaintiff's letter to the city, requesting them to have their trash placed at the curbline of West Innes Street or Main Street for collection, and stating, should there be any modification of plaintiff's decision, he would communicate with them.

The city manager testified in substance: When the city received plaintiff's letter, it immediately stopped using the alley. Plaintiff subsequently gave the city permission to use it, and the city did so. He was city manager from July 1949 to January 1955. The city did not maintain the alley so far as he knew.

Defendant has a deed for a lot fronting on Church Street. Its corner on the North comes to the edge of the paving on the alley.

The defendant offered evidence substantially as follows:

Testimony of Delmar Goodman. He has worked for defendant since 2 October 1929. The alley was paved before he began work there. The defendant and its customers have been using this alley continuously since 1929 for delivering and using merchandise. There is a ramp at the back of defendant's building which connects with the alley. The doorway on the ramp was used by defendant's trucks for loading and unloading.

Testimony of R. L. Bernhardt, Jr., secretary-treasurer of defendant. He has been employed by defendant since 1937. His grandfather and father were presidents of the defendant. The defendant, its employees and customers have been using this alley every day since 1924 up to the present, except a short time when a sewer line was laid. On cross-

examination he said the defendant had no deed for the alley, it had "no scrap of paper" from plaintiff authorizing it to use it.

Testimony of Henry Bernhardt, president and general manager of defendant. He is 32 years old, and cannot remember when the defendant did not use the alley constantly. The defendant does not have any deed or agreement that it can use the alley.

Testimony of Henry Hobson. He knows the defendant has used the alley for the last 25 or 30 years. Substantially similar testimony was given by Paul Reynolds and W. D. Kizziah.

Testimony of J. T. Graham. He has been a customer of defendant since 1920. In 1920 there was an alley, but he can't say it was the alley, which is the subject of this suit. As a customer of defendant, he has used the alley.

Testimony of J. H. Weant. He worked for the city of Salisbury for 33 years, beginning work in 1919. He was street superintendent. He knew the alley before it was paved. For the city, he kept it worked with a road machine belonging to the city, so trucks could get in and out. The alley was paved by the Hedrick Paving Company. The city had a shop back in there for several years. The city used the alley going to and from its shop. The defendant and the public used the alley. People parked their cars back in there. The stores back in there used the alley. J. H. Weant's testimony does not show who paid for paving the alley.

Testimony of John Hoffman, 84 years old. He used the alley to go back and forth to the defendant's place of business from the time he was a small boy up to the present. The public used the alley ever since he was big enough to know anything.

Testimony of R. L. Roseman, 76 years old. He used the alley since 1923 up until the past few years to go to the defendant's place of business, and to the rear of two other stores. The public generally used the alley since 1918 or 1919.

Testimony of J. H. McKenzie, Postmaster of Salisbury. The public generally has used the alley since the early 1920s to the present. He used it in going back and forth to defendant's place of business. On cross-examination he said he did not think the alley was used before an auction sale of the Snider property.

Testimony of Charlie Neal. There are two or three alleys there. One on each side that you go in on. He used both alleys over a period of years, and has seen the public use them.

Testimony of Julian Smith. He handled freight through the alley to most all the stores from 1930 to 1941. Everybody used the alley.

Testimony of Harris Strickler. He has used the alley for 25 years.

Testimony of Charlie Wilhelm, a police officer of the city of Salis-

bury for 35 years. The public has been using the alley since 1923.

The court submitted the following issue to the jury: "Is the plaintiff the owner and in the possession of the land described in the complaint and in a deed from P. S. Carlton, Receiver, to the plaintiff, registered in book of deeds 234, page 294?" The jury under a peremptory instruction answered the issue, Yes.

From a judgment entered in accordance with the verdict the defendant appeals.

Hayden Clement and D. A. Rendleman for plaintiff, appellee.
Nelson Woodson for defendant, appellant.

PARKER, J. The defendant assigns as error the refusal of the trial court to submit to the jury the following issue tendered by it: "Is the property described in the complaint a public alley, as alleged in the answer?" The defendant further assigns as error this part of the charge: "The court holds as a matter of law upon the evidence that the alleyway in controversy is not a public road."

The defendant asserted in its answer that the plaintiff, or his predecessors in title, dedicated this alley to the public at large, and an acceptance of the dedication by the public generally and by the city of Salisbury, which kept up the alley, used it, and paved it.

There is no evidence in the case of any express dedication of the alley to some proper public use, and of a formal acceptance of the alleged dedication. There is no evidence of any sale of land with reference to a map or plat showing this alley. The question we are faced with is whether there is any evidence to sustain the defendant's allegations in its answer of a dedication by the owner, or owners, of the strip of land in controversy as a public alley, and of an acceptance of the dedication.

It is familiar learning that the owner of a strip of land can dedicate it as an alley to the public, and the intention to dedicate may, in a proper case, be inferred from the circumstances without a formal act of dedication. 16 Am. Jur., Dedication, p. 363; Anno. 58 A. L. R. 240-241.

The intention of the owner to set apart land for the use of the public is the foundation and very life of every dedication. *Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867. In this case the Court quotes with approval from Washburn on Easements, 3rd Ed. p. 188, as follows: "The acts and declarations of the landowner indicating the intent to dedicate his land to the public use must be unmistakable in their purpose and decisive in their character to have that effect."

This Court said in *Tise v. Whitaker,* 146 N.C. 374, 59 S.E. 1012: "It is well understood with us that the right to a public way cannot

be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms or it may be implied from conduct on the part of the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us in numerous and well considered decisions."

The case of *Summerville v. Duke Power Co.*, 4 Cir., 115 F. 2d 440, was an action to recover damages for the closing of a street or alley in the city of Charlotte, North Carolina. The Court said: "It is clear that there was no dedication by the owner of the strip of land in controversy as a public street or alley. The mere fact that it was used by the occupants of the houses on the property as a means of ingress or agress has no tendency to establish such dedication, nor does the fact that its use by the public was permitted."

"The owner's intention to dedicate some particularly described land to a public use must be clear. It may be manifested by his affirmative acts whereby the public use is invited and his subsequent acquiescence in such use, by his express assent to, or deliberate allowance of, the use, or merely by his acquiescence therein. . . . In order to establish a dedication, the acts and declarations of the owner must not be inconsistent with any dedication." 16 Am. Jur., Dedication, Sec. 20.

From the authorities which we have cited it seems clear that no owner of this strip of land, which is the subject of this action, has done anything from which a clear intent, unmistakable in purpose, to dedicate this strip of land to the public can be drawn or inferred. The fact that P. S. Carlton, the Receiver, in 1936 acting under an order of the court, sold and conveyed this strip of land to plaintiff, and stated in the deed that it was "subject, however, to the easements or rights of way for the purpose of ingress, egress and regress in, to, upon or over said lot heretofore conveyed by F. R. Brown, or Brown Insurance & Realty Company, or P. S. Carlton, Receiver, to Post Publishing Company of (sic) James M. Davis and wife, Rebecca Davis, or others, as will appear by reference to the deeds, conveyances or written contracts heretofore made," is inconsistent with any dedication to the public of this strip of land, while it was in his possession as Receiver. It would also seem from this statement in the deed that F. R. Brown and Brown Insurance & Realty Company also granted

easements of ingress and egress over this strip of land, which is inconsistent with any dedication to the public of this strip of land by him or the corporation. W. F. Snider and wife conveyed a lot embracing this strip of land to F. R. Brown, who, in turn, conveyed it to Brown Insurance & Realty Company. There is no evidence from which it can be inferred that the Sniders dedicated this strip of land to the public. The mere fact that plaintiff permitted the public, in company with others having an easement, to use this strip of land, has no tendency to establish a dedication by plaintiff. The fact that plaintiff has paid taxes to the city and county on this strip of land since 1936 tends to negative any alleged intent on his part to dedicate it to the public. Annotation L. R. A. 1916B, p. 1175 *et seq.* The fact that the city of Salisbury sued plaintiff for ad valorem taxes on this strip of land, and collected them, and is still collecting taxes from plaintiff on it, tends to show there has been no dedication and acceptance. *Lee v. Walker,* 234 N. C. 687, 68 S.E. 2d 664; 16 Am. Jur., Dedication, Sec. 80; Annotation L. R. A. 1916B, p. 1175 *et seq.* When the city received a letter from plaintiff in 1952 requesting it not to use this strip of land, except for the police and fire departments, the fact that it immediately stopped using it tends to show no dedication and acceptance. This stoppage of use of this alley by the city, and its suit for taxes on this alley tends to show a permissive use of the alley by the city, and not a use by a claim of right by reason of a dedication and acceptance. The alley was paved by the Hedrick Paving Company, but there is no evidence as to who had it done, or who paid for the paving. The fact that J. H. Weant for the city worked the alley so trucks could get in and out, under all the facts here, is not sufficient to permit an inference that there has been a dedication and acceptance of this alley.

Dedication is an exceptional and peculiar mode of passing title to an interest in land. The Supreme Court of California in *City and County of San Francisco v. Grote,* 120 Cal. 59, 52 P. 127, 128, 41 L.R.A. 335, 65 Am. St. Rep. 155, said: "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use."

The assignments of error as to the court's holding as a matter of law upon the evidence that the alley is not a public alley, and to its refusal to submit an issue in respect thereto, are overruled.

Defendant assigns as error the part of the charge to the jury in which the court stated it held as a matter of law upon the evidence in the case that the defendant has no easement in the alley, and further assigns as error the refusal of the court to submit this issue timely tendered: "Is the defendant the owner of an easement over the prop-

erty described in plaintiff's complaint, as alleged in the answer?"

Defendant claiming a right of way by prescription over the strip of land which is the subject of controversy, has the burden of proving all the elements essential to its acquisition. *Williams v. Foreman,* 238 N. C. 301, 77 S.E. 2d 499; *McCracken v. Clark,* 235 N. C. 186, 69 S.E. 2d 184; *Perry v. White,* 185 N. C. 79, 116 S.E. 84.

Defendant must show, among other things, not only that it used a way over this land continuously and uninterrupted for twenty years, but also that such use was adverse or under a claim of right. *Williams v. Foreman, supra; Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906; *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153; *Tise v. Whitaker, supra.*

A mere permissive use of a way over another's land, no matter how long continued, cannot ripen into an easement by prescription. *Williams v. Foreman, supra; Weaver v. Pitts,* 191 N.C. 747, 133 S.E. 2. "Permissive use is presumed until the contrary is made to appear." *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371.

Defendant's evidence tends to show that it, its employees, and customers have been using this alley every day since 1924 up to the present, except a short time when a sewer line was laid. Plaintiff in his complaint alleges upon information and belief "that the defendant claims an estate or interest in said land adverse to the plaintiff, and that said alleged claim of the defendant is based upon an easement for the purpose of ingress and egress over said lands." Plaintiff, on cross-examination, said he alleged the above in his complaint. It would seem that plaintiff has alleged that the defendant is claiming an easement in this alley under a claim existing in its favor independent of all others. *Stanley v. Mullins,* 187 Va. 193, 45 S.E. 2d 881.

Plaintiff contends that if there has been any adverse use of this alley by defendant, it has not been a continuous adverse use for 20 years, for the reason that the appointment of the Receiver in 1926 stopped the running of any adverse use by the defendant.

It is well recognized law in this jurisdiction from the earliest times that when the Statute of Limitations has begun to run, no subsequent disability will stop it. *Pearce v. House,* 4 N.C. 722; *Mebane v. Patrick,* 46 N.C. 23; *Chancey v. Powell,* 103 N.C. 159, 9 S.E. 298; *Copeland v. Collins,* 122 N.C. 619, 30 S.E. 315; *Cameron v. Hicks,* 141 N.C. 21, 53 S.E. 728; *Holmes v. Carr,* 172 N.C. 213, 90 S.E. 152; *Caskey v. West,* 210 N.C. 240, 186 S.E. 324; *Battle v. Battle,* 235 N.C. 499, 70 S.E. 2d 492.

Ordinarily, the mere appointment of a receiver will not suspend the running of the Statute of Limitations, but the Statute of Limitations may be tolled where the circumstances are such that his appoint-

ment in effect precludes the bringing of suit. 54 C.J.S., Limitation of Actions, Sec. 249(c); 34 Am. Jur., Limitation of Actions, Sec. 249. See Annotation 21 A. L. R. 961, where it is stated, with cases cited, that "as a general rule, the mere appointment of a receiver will not suspend the running of the Statute of Limitations against an action on a debt due from the insolvent."

In *O'Connell v. Chicago Park District*, 376 Ill. 550, 34 N.E. 2d 836, 135 A. L. R. 698, it was held that the possessions of successive adverse holders of chattels may be tacked in determining the period of limitations. The Supreme Court of Illinois had this to say as to the effect of the appointment of a receiver on the running of the Statute of Limitations: "The cause of action having once accrued, the statute began to run at once, because the possession was wrongful from the outset, and no subsequent demand and refusal could start it afresh. *Watkins v. Madison County Trust & Deposit Co. supra.* The appointment of a receiver did not stop its running. *Houston Oil Co. of Texas v. Brown,* Tex. Civ. App., 202 S.W. 102, *certiorari* denied, 250 U.S. 659, 40 S. Ct. 9, 64 L. Ed. 1194; 4 Cook on Corporations, 7th Ed., p. 3367, section 871. The statute runs against the right of action, not against the holder thereof. *Hooker v. East Riverside Irrigation District,* 38 Cal. App. 615, 177 P. 184." See also 2 C. J. S., Adverse Possession, p. 730.

P. S. Carlton, Receiver of Brown Insurance & Realty Company, had express statutory authority, G.S. 55-148, to "demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation" of which he was Receiver. This statute is now codified as G.S. 1-507.2.

The defendant's evidence tends to show its adverse use of this strip of land since 1924. At that time a cause of action accrued in behalf of the owner of this strip of land by reason of such adverse use. Brown Insurance & Realty Company became the owner of this strip of land on 9 September 1924, and owned it when it went into Receivership in 1926. The cause of action by reason of such adverse use by the defendant having accrued in behalf of Brown Insurance & Realty Company before the appointment of its Receiver, the appointment of its Receiver did not stop the running of such adverse use.

After a careful examination of the evidence, we think that the question of whether the defendant has acquired a right of way over this strip of land by prescription should be determined by a jury.

The defendant on that question is awarded a
New Trial.

JOHNSON, J., concurring in part and dissenting in part: I concur in the conclusion that the evidence justifies a jury trial on the issue of prescription. Also, I am of the opinion that the evidence is sufficient to carry the case to the jury on the issue of dedication.

RODMAN, J., dissenting: The law with respect to the acquisition of an easement by adverse user is clearly and concisely stated in *Henry v. Farlow*, 238 N.C. 542. As there shown by copious citations, user alone is not sufficient; the owner must be put on notice of the adverse character of the use.

The language of *Clarkson, J.*, in *R.R. v. Ahoskie*, 202 N.C. 585, is I think, appropriate to the facts shown by this record. He said: "Neighborly conduct either on the part of a person or corporation ought not to be so construed as to take their property, unless it has such probative force as to show adverse user for twenty years. Much of defendant's evidence is in the nature of omissions by plaintiff railroad company in not being unneighborly and chasing trespassers off its property. The fact that this was not done, cannot be held for acquiescence or adverse user on the part of defendants. This goes too far, and we cannot agree to this . . ."

The evidence as summarized in the opinion of the majority is plenary to show use of the alley by defendant and any others who desire to use, but nowhere have I been able to discern any evidence tending to show that defendant's user was different in character from that of the other citizens of Salisbury. The only difference that I have been able to discover is that the defendant probably used the alley more frequently than the other witnesses it produced to testify to the fact of user. To my mind this evidence negatives the idea of adverse possession even more than it negatives the idea of dedication; but, if adverse, did not the permissive use by others interrupt defendant's possession and prevent it from acquiring by adverse possession? G.S. 1-40.

It does not seem to me that the complaint which alleges a shadow presently cast on plaintiff's title can be interpreted as indicating the cloud has been in existence for more than twenty years. My vote is to affirm.

BOBBITT, J., concurs in dissent.

HENRY R. HALL, W. G. CLARK, BESSIE M. BURTON, MARY E. WHITE, M. C. WILLIAMS AND ELSIE L. WILLIAMS, PAULINE KANOS AND J. V. KANOS, ELIZABETH H. LAMBERT, ETHEL BROWN HARVEY, HATTIE G. MOORE, J. D. WADDELL, ANNE C. WADDELL, F. R. KEITH, ALMA V. TAYLOR, NOLA W. REEVES, J. S. McFADYEN AND HATTIE S. McFADYEN, ROY T. McDANIEL AND ZOULINE McDANIEL v. THE CITY OF FAYETTEVILLE, J. O. TALLY, JR., GEORGE B. HERNDON, W. P. DEVANE, EUGENE PLUMMER, DEWEY W. EDWARDS, INDIVIDUALLY, AND AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE.

(Filed 4 June, 1958.)

1. Boundaries § 12: Municipal Corporations § 25b—

A deed to property adjacent to a street, executed between private corporations, containing a recital that for the purpose of the description the street is 100 feet wide, is insufficient as a description showing the location of the street, and in reference proceedings to locate the boundaries of the street, the introduction of such deed in evidence does not affect the referee's finding that there was no map, plan or description introduced in evidence showing the location of the street.

2. Appeal and Error § 41—

The introduction in evidence of two private acts by plaintiffs which had not been pleaded, but which refer to two other private acts properly pleaded and introduced in evidence by defendants, will not be held for prejudicial error when it appears that the adverse parties were not taken by surprise by the introduction of the unpleaded acts and that the failure to plead them was not material.

3. Municipal Corporations § 25b—

In a reference proceeding to establish the boundaries of a municipal street, a finding as to the width of the street, which finding relates to the actual width of the street as then in use, and a finding that the municipality had not occupied or used the *locus in quo* for street purposes, which findings are in accord with the evidence as to the width of the street in actual use at that time, cannot be held for error.

4. Same—

The private act in question provided that the principal streets in the municipality should be 100 feet wide, and appointed commissioners to lay out streets. *Held:* The presumption that the public officers performed their duty will not of itself supply proof that a disputed strip of land along one of the principal streets was actually located within the 100 feet boundary of the street as surveyed and laid out by the commissioners.

5. Public Officers § 7a—

The presumption that a public officer has performed his duty cannot be used as proof of an independent and material fact.

6. Adverse Possession § 14—

The rule that individuals may not acquire title to any part of a munic-

ipal street by encroaching upon or obstructing the same in any way, G.S. 1-45, does not apply when the evidence fails to show that the municipality had any title or rights in the *locus in quo*.

7. Injunctions § 3—

Injunction will lie to prevent a municipality from taking possession of plaintiffs' land for the purpose of paving the same as a street, since if the municipality has no right or title thereto, no judgment could restore to plaintiffs the strip of land with its buildings on it in its original character, and therefore plaintiffs would suffer irreparable injury if the threatened seizure of the property were not enjoined.

8. Reference § 10—

On appeal from the referee's report, the judge of the superior court has authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or make additional findings of fact, and enter judgment on the report as amended. G.S. 1-194.

9. Appeal and Error § 49—

The findings of fact of the referee, supported by competent evidence and approved by the trial judge, as well as additional findings made by the judge upon the hearing and supported by competent evidence, are binding on appeal.

10. Same—

Where the crucial findings of fact made by the referee and approved and confirmed by the judge are supported by competent legal evidence and support the conclusions of law made by the referee and confirmed by the judge, the judgment supported by such findings and conclusions of law will be upheld.

APPEAL by defendants from *McKeithen, S. J.*, 18 February 1957 Term of CUMBERLAND.

Civil action by 20 plaintiffs, who separately own more than 20 lots on the East side of Gillespie Street in the city of Fayetteville, against the city of Fayetteville, its mayor, and the members of its city council, to restrain permanently the defendants from entering upon and putting the State Highway and Public Works Commission in possession of a strip of land along the Eastern edge of what is now used as Gillespie Street, and to have the claim of the city of Fayetteville that it owns this strip of land removed as a cloud upon their respective titles.

The land in dispute is a long, narrow strip of land along the Western edge of the several properties of the several plaintiffs, and along the Eastern edge of the land which has heretofore been used and occupied by the city of Fayetteville as Gillespie Street. The Western line of the strip of land in dispute is the Eastern edge of the present concrete sidewalk, and the Eastern edge of the street paving where no concrete sidewalk exists. The Eastern line of said strip of land in

dispute is a line shown as "Right of Way on East side" on a map entitled "Encroachments on the East side of Gillespie Street, April 29, 1952."

On 13 October 1952 Judge Chester R. Morris signed a temporary injunction against the defendants, and on 21 November 1952 he continued such order in effect until the final hearing of the action. At the December Special Term 1952 of court, Judge W. H. S. Burgwyn ordered a compulsory reference, and appointed Henry A McKinnon, Sr., of the Robeson County Bar, referee. The referee had hearings in the city of Fayetteville on 16 March 1953, on 23 March 1953, and on 30 June 1953. At such hearings the parties were represented by counsel.

The referee filed his report with the court on 21 May 1955.

HIS FINDINGS OF FACT SUMMARIZED.

One. As stipulated by the parties, plaintiffs are the owners of the lots described in their complaint, subject to any rights of the city of Fayetteville.

Two. Paragraph II of Chapter XXV of the Private Acts of the General Assembly of North Carolina, Session 1783, is as follows. This paragraph is copied verbatim. The substance of this paragraph relevant to this action is that after the passage of this Act the town of Cambleton (sic) shall be called Fayetteville, and James Gillispie (so spelled in the Act) and six other named persons are appointed commissioners to lay out streets in the town, that the principal streets be 100 feet wide, and all other streets as wide as the particular situation of houses and lots will admit. Paragraph V of said Act is as follows. This paragraph is copied verbatim. The substance of this paragraph material here is that the commissioners shall cause to be made an exact survey and a plan in which shall be mentioned all streets, which plan shall be returned to the next session of the Assembly, and a copy thereof lodged in the secretary's office, and a copy lodged with the Clerk of Cumberland County, or with the directors hereinafter mentioned.

Three. Chapter XXXII of the Private Acts of the General Assembly of North Carolina, Session 1784, refers to the Act of 1783, and enacts as follows. It is quoted verbatim. It states in substance that whereas the persons named by the 1783 Act have surveyed and laid off six principal streets and two squares in the town, as fully appears by a plan thereof returned to the last session of the Assembly and lodged in the secretary's office, therefore, be it enacted that the principal streets are confirmed and established agreeable to the said plan.

Four. There is no plat, map or plan in evidence showing the six principal streets and two squares which the 1784 Act states was re-

turned to the last session of the Assembly, and lodged in the secretary's office.

Five. There is not in evidence any map, plan or description showing the location, description or width of Gillespie Street as surveyed and laid out by the legislative acts of 1783 and 1784.

Six. There is not in evidence any map, plan or description showing the location, width or description of Gillespie Street as surveyed, laid off or adopted at any time by the city of Fayetteville, except maps made after 1 January 1952.

Seven. The street extending in a Southerly direction from Market Square in the city of Fayetteville is now, and has for a long time been called Gillespie Street. The street extending in a Northerly direction from Market Square is now, and has for a long time been called Green Street. The first street crossing Gillespie Street South of Market Square is Russell Street, though there is an alleyway or narrow street called Franklin Street entering Gillespie Street on its West side between Russell Street and Market Square. South of Russell Street, Gillespie Street is intersected on its East side by Holliday Street, and farther South is intersected on its West side by Blount Street, and on its East side, opposite Blount Street, by Campbell Avenue. Farther South, Pond Street intersects Gillespie Street on its East side.

Eight. The strip of land in dispute is on the East side of what has heretofore been used as Gillespie Street and is South of Holliday Street, crosses Campbell Avenue and Pond Street, and extends some distance South of Pond Street.

Nine. The center line of the first block of Gillespie Street, South of Market Square, and the center line of the first block of Green Street North of Market Square, if said center line of Gillespie Street were extended in a Northerly direction, and the center line of Green Street were extended in a Southerly direction, would not constitute a straight line, but would intersect at an angle North of Market Square in such a manner that if said center line of Green Street were projected Southwardly into Gillespie Street, it would enter Gillespie Street West of the center line of Gillespie Street, and would continue farther Westwardly the farther South it was extended.

Ten. Gillespie Street South of Market Square to Russell Street is 100 feet wide between the property lines, and has been that width for many years.

Eleven. The center line of Gillespie Street, as it is now laid out and paved to a point just North of Blount Street and Campbell Avenue, coincides with the center line of Gillespie Street as now claimed by the defendants.

Twelve. At a point just North of Blount Street and Campbell

Avenue the center line of Gillespie Street, as it is now laid out and paved, veers at a slight angle to the West of the center line of Gillespie Street as now claimed by the defendants — the center line as now claimed by the defendants being an extension in a straight line of the center line of the first block of Gillespie Street South of Market Square.

Thirteen. Until a short time prior to the institution of this action, which is less than two years, the defendants have not occupied, used, or attempted to use for street purposes the disputed strip of land.

Fourteen. The city of Fayetteville has not acquired by prescription or adverse possession the disputed strip of land.

Fifteen. The plaintiffs have not proved title to the disputed strip of land by prescription or adverse possession, and the title of plaintiffs to the lots as described in the complaint is by virtue of the ownership of said lots as stipulated by the parties.

Sixteen. The city of Fayetteville has no rights in or to the disputed strip of land.

Seventeen. On 12 July 1952 the city of Fayetteville gave the following notice to such of the plaintiffs as had erected structures on the disputed strip of land: "The North Carolina State Highway and Public Works Commission being about to pave Gillespie Street to a width of 72 feet, leaving 14 feet on each side for sidewalks and utility lines, the City Council of the City of Fayetteville at its meeting on 2 July 1952, directed notice to be given all owners of property abutting on Gillespie Street whose structures encroach thereon to remove the same from this 72 foot area within thirty days from the receipt of this notice and all other encroachments within six months from the receipt hereof, and that if they are not removed within such respective periods then they will be removed by the City at the expense of the abutting property owners."

Eighteen. The plaintiffs will be irreparably damaged, if the city of Fayetteville executes its statement to remove all structures of plaintiffs on this disputed strip of land, unless the plaintiffs removed them within the periods set forth in the city's notice.

HIS CONCLUSIONS OF LAW.

One. The city of Fayetteville does not hold title to the disputed strip of land in trust for the use and benefit of the public, and has no rights to it.

Two. Plaintiffs are entitled to an injunction restraining the defendants from putting or attempting to put the State Highway and Public Works Commission in possession of the disputed strip of land, and from removing the structures of plaintiffs thereon.

DECISION OF REFEREE.

The plaintiffs are entitled to an injunction permanently restraining the defendants from entering upon the disputed strip of land, and from putting or attempting to put the State Highway and Public Works Commission in possession of it, and from interfering with the ownership of it.

The defendants filed 16 exceptions to the referee's report.

The action came on to be heard upon the referee's report at the 18 February 1957 Term of Court before Judge McKeithen. Counsel for the parties in open court waived a jury trial, and agreed that the Judge could render judgment out of term and out of the judicial district. Judge McKeithen rendered his judgment on 23 October 1957.

His judgment states that after hearing counsel on both sides, and after considering all of the defendants' exceptions to the referee's report, and after having studied the evidence, it appeared to the court that the referee's report and findings of fact are correct and based upon competent evidence, and the law applicable thereto, except as modified in the following manner.

One. Defendants' exceptions 1 and 3 are allowed to the extent of showing that Gillespie Street from Market Square to Russell Street is a distance of two blocks, with Franklin Street intersecting Gillespie Street from the West at a point between Russell Street and Market Street.

Two. The referee should have found from the evidence the existence of Chapter CXXX of the Private Acts of the Assembly of North Carolina, Session 1821, and of Chapter LI of the Private Acts of the Assembly of North Carolina, Session 1822, which Acts were introduced in evidence by plaintiffs, and the court modified the referee's findings of fact by finding as a fact both Private Acts. The judgment sets forth verbatim the Preamble and Paragraphs I, II and III of the 1821 Private Act, which is entitled "An Act for the better regulation of the Town of Fayetteville." The Preamble of the 1821 Act states in substance that the report of the commissioners acting under authority of an Act passed by the Assembly in 1783 for laying out the principal streets in the town of Fayetteville has been lost so that the true width and extent of said streets are not correctly ascertained, and difficulties have occurred in the collection of taxes for the town. The relevant parts of Paragraphs I, II and III of said Act appoint five named commissioners to lay out streets in the town of Fayetteville with as little injury to the owners of lots and houses as may be, and that the streets be of such number, length, course and width as the commissioners may think best adapted for the purpose. The Act further provides that the commissioners shall cause an exact survey to be made of the town,

and a plan thereof, setting forth, among other things, the streets, which plan shall be returned to the next session of the Assembly and deposited in the secretary's office, and one copy thereof deposited with the Clerk of the Cumberland County Court, and one copy deposited with the commissioners appointed for the government of the town. The judgment sets forth verbatim the 1822 Private Act, which is an Act amending the 1821 Private Act above set forth. The Preamble to the 1822 Private Act states in substance that the commissioners appointed by the 1821 Private Act have found it impracticable to effect a survey of the town to have it returnable to the present session of the Assembly, and the powers vested in the commissioners by the second section of the 1821 Private Act are too extensive and large to be compatible with the liberal and impartial spirit of our form of government. The relevant parts of the 1822 Private Act provide for the appointment of an additional commissioner, and give the commissioners until the next session of the Assembly to make return of the plan of the town as by them surveyed. Judge McKeithen found as a fact that there was no evidence of any report or plan made pursuant to, or under the authority of, the two Private Acts of 1821 and 1822, respectively.

Three. Paragraph 13 of the referee's findings of fact is modified by striking out the words "or attempted to use." Another part of the referee's report is modified by inserting "second block" for "first block."

Four. Defendants' Exception Number 11, sub-paragraphs (b) and (c) as to the failure of the referee to find two facts, is sustained, and the referee's report is modified by the following additional finding of facts made by the court as requested by defendants. One. The West side of Gillespie Street is a straight line throughout its entire length as presently located. Two. There are no structures encroaching on the West side of that street as presently located.

Five. Defendants' Exception Number 12 as to the referee's failure to find a certain fact is sustained, and the referee's report is modified by the court's finding of the requested fact as follows: That until a short time prior to the institution of this action the entire width of Gillespie Street as claimed by the city of Fayetteville was not required for use as a street. All other exceptions of the defendants were overruled.

Judge McKeithen in his judgment approved and confirmed the referee's conclusions of law as correct and based on findings of fact supported by competent evidence.

Whereupon, Judge McKeithen approved and confirmed the referee's report, as modified by him, and permanently restrained the defendants from entering upon the lands of the plaintiffs as described in their complaint, being that property of the respective plaintiffs on Gillespie

Street in the city of Fayetteville, East of the present concrete sidewalk where there is a concrete sidewalk, and East of the present paving where there is no sidewalk.

From the judgment the defendants appeal.

Pittman & Staton and Sanford, Phillips, McCoy & Weaver for plaintiffs, appellees.

J. O. Tally, Jr. and Robert H. Dye for defendants, appellants.

PARKER, J. The defendants assign as error the referee's findings of fact numbered five and six, which were approved by the Judge, that there is not in the evidence any map, plan or description showing the location, description or width of Gillespie Street, as surveyed and laid out by the commissioners appointed by the Private Acts of the General Assembly of North Carolina, Sessions 1783 and 1784, and that there is not in the evidence any map, plan or description showing the location, width or description of the same street as surveyed, laid off or adopted at any time by the city of Fayetteville, except maps made after 1 January 1952. The defendants contend that these findings of fact are not correct for the reason that they introduced in evidence a deed from the Cape Fear Manufacturing Company to Electric Motor Repair Company, Inc., dated 6 January 1944, and recorded, conveying a certain lot, which is described as "beginning at a stake in the Eastern margin of Gillespie Street, for the purpose of this description Gillespie Street is 100 feet wide. . . ." A study of the evidence shows that the two above findings of fact are correct, and the language of the above deed between two corporations in no way contradicts the exact language of these findings of fact. This assignment of error is overruled.

The defendants assign as error the plaintiffs' introduction in evidence of the Preamble and Paragraphs I, II and III of Chapter CXXX of the Private Acts of the General Assembly, Session 1821, and Chapter LI of the Private Acts of the General Assembly, Session 1822, for the reason that these two Private Acts were not pleaded. G.S. 1-157. The defendants pleaded, and introduced in evidence Chapter XXV of the Private Acts of the General Assembly, Session 1783, and Chapter XXXII of the Private Acts of the General Assembly, Session 1784. Both of the Private Acts introduced by plaintiffs have reference, one directly and the other indirectly, to the 1783 and 1784 Acts introduced by defendants. The defendants make no issue as to the existence or terms of the two Private Acts introduced by plaintiffs, and there is nothing in the record to show that defendants were taken by surprise by these two Acts. Even if we concede that the two Acts introduced by plaintiffs are Private Acts (*Winborne v. Mackey*, 206 N.C. 554,

174 S.E. 577; *Bolick v. Charlotte,* 191 N.C. 677, 132 S.E. 660; but see 41 Am. Jur., Pleading, p. 296), and their admission in evidence technical error, we think that upon a consideration of the whole record in the instant case, such admission would not justify a new trial. See *Reid v. R. R.,* 162 N.C. 355, 78 S.E. 306. This assignment of error is overruled.

The referee found as a fact that Gillespie Street, South of Market Square to Russell Street, is 100 feet in width between the property lines, and has been that width for many years. This finding of fact was approved by the Judge. Defendants assign as error that the court did not find that Gillespie Street is 100 feet in width for its entire length. The finding of fact patently refers to the actual width of Gillespie Street as it appears today, and has appeared for many years, and the notice given on 12 July 1952 by the city of Fayetteville to certain of the plaintiffs to remove structures upon the alleged strip of land, shows that Gillespie Street as it appears today is not 100 feet in width for its entire length. This assignment of error is overruled.

The referee found as a fact that "until a short time prior to the institution of this action, less than two years, the defendants have not occupied, used, or attempted to use for street purposes the disputed strip of land." Defendants excepted to this finding. The Judge modified this finding of fact by striking out the words "or attempted to use," and approved the finding of fact as modified by him. This assignment of error is overruled, for the reason that this finding of fact approved by the Judge, as modified by him, is supported by competent evidence.

The defendants assign as errors the following two findings of fact of the referee, which were approved by the Judge: One. "The city of Fayetteville has not acquired by prescription or adverse possession the disputed strip of land." Two. "The city of Fayetteville has no rights in or to the disputed strip of land." The defendants also assign as error the referee's conclusion of law, approved by the Judge, that "the city of Fayetteville does not hold title to the disputed strip of land in trust for the use and benefit of the public, and has no rights to the disputed strip of land." These assignments of error are overruled.

The defendants contend, under the above assignments of error, that Chapter XXV of the Private Acts of the General Assembly, Session 1783, appointed James Gillespie and six other named persons to lay out streets in the town of Fayetteville, and that the principal streets shall be 100 feet wide. That Chapter XXXII of the Private Acts of the General Assembly, Session 1784, states that the commissioners named in the 1783 Act have surveyed and laid off six principal streets as fully appears by a plan thereof, and provides that the principal streets are confirmed and established agreeable to the plan. The de-

fendants contend that there is a presumption of law that the commissioners appointed by the 1783 Act laid off Gillespie Street to a width of 100 feet, and they cite in support of their contention *Quinn v. Lattimore,* 120 N.C. 426, 26 S.E. 638; *Frazier v. Gibson,* 140 N.C. 272, 52 S.E. 1035; *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322; and *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761.

Indulging the presumption that the commissioners appointed by the 1783 Act discharged their duty by surveying and laying out Gillespie Street with a width of 100 feet, such presumption will not, of itself, supply proof of the material and substantive fact that the disputed strip of land in the instant case was actually located within the 100 feet in width of Gillespie Street as surveyed and laid out by the commissioners. *Belk v. Belk,* 175 N.C. 69, 77, 94 S.E. 726, 730; *U. S. v. Ross,* 92 U.S. 281, 23 L. Ed. 707; *Sabariego v. Maverick,* 124 U.S. 261, 31 L. Ed. 430; *U. S. v. Carr,* 132 U.S. 644, 33 L. Ed. 483; 20 Am. Jur., Evidence, Sec. 175. See *S. v. Mann,* 219 N.C. 212, 13 S.E. 2d 247.

In *U. S. v. Ross, supra,* the Court said: "Because property was captured by a military officer and sent forward by him, and because there is an unclaimed fund in the Treasury derived from sales of property of the same kind as that captured, because *omnia praesumuntur rite esse acta,* and officers are presumed to have done their duty, it is not the law that a court can conclude that the property was delivered by the miltary officer to a treasury agent, that it was sold by him, and that the proceeds were covered into the Treasury. The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. . . . Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

Under these assignments of error the defendants contend that Gillespie Street is a public street, and no person can acquire title to any part of it by occupancy thereof, or by encroaching upon or obstructing the same in any way. G.S. 1-45. However, the findings of fact of the referee, supported by competent evidence, and his conclusion of law—all of which are approved and confirmed by the Judge—are that the city of Fayetteville does not hold title to the disputed strip of land in trust for the use and benefit of the public, and has no rights to it. Therefore, this strip of land is not a public street.

Defendants assign as errors the finding of fact that plaintiffs will be irreparably damaged if the city of Fayetteville carries out its promise or threats, and the conclusion of law that plaintiffs are entitled to injunctive relief. This finding of fact and this conclusion of law were approved and confirmed by the Judge. The threatened removal of plaintiffs' structures and buildings from the disputed strip of land by

the defendants, who have no title to, or right in it, so that this disputed strip of land can be paved as a part of Gillespie Street, will mean, if not enjoined, that no judgment at law can restore to plaintiffs this strip of land with the buildings on it in its original character. The finding of fact, approved by the Judge, is supported by competent evidence. Such an injury will be deemed irreparable, so as to warrant injunctive relief. *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; 28 Am. Jur., Injunctions, Secs. 48 and 150.

When the action came on to be heard on exceptions filed by the defendants to the referee's report, Judge McKeithen had authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or he could make additional findings of fact and enter judgment on the report as amended by him. G.S. 1-194; *Quevedo v. Deans,* 234 N.C. 618, 68 S.E. 2d 275; *Keith v. Silvia,* 233 N.C. 328, 64 S.E. 2d 178. It is manifest from a study of the judgment of the learned Judge, who is now deceased, that he carefully considered and passed upon all the exceptions filed by the defendants to the referee's report, and the evidence, and gave in his judgment his own opinion upon the facts and the law.

In *Kenney v. Hotel Co.,* 194 N.C. 44, 138 S.E. 349, Stacy, C. J., said for the Court: "It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.,* 177 N.C., 60. Likewise, where the judge, upon hearing and considering exceptions to a referee's report, makes different or additional findings of fact, they afford no ground for exception on appeal, unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to said findings." To the same effect see *Wade v. Lutterloh,* 196 N.C. 116, 144 S.E. 694; *Crown Co. v. Jones,* 196 N.C. 208, 145 S.E. 5; *Moore v. Brinkley,* 200 N.C. 457, 157 S.E. 129; *Thompson v. Hood, Comr. of Banks,* 203 N.C. 851, 166 S.E. 311; *Wilson v. Allsbrook,* 205 N.C. 597, 172 S.E. 217; *Maxwell, Comr. of Revenue, v. R. R.,* 208 N.C. 397, 181 S.E. 248; *Buncombe County v. Cain,* 210 N.C. 766, 188 S.E. 399; *Wilkinson v. Coppersmith,* 218 N.C. 173, 10 S.E. 2d 670; *Biggs v. Lassiter,* 220 N.C. 761, 18 S.E. 2d 419; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277.

The crucial findings of fact made by the referee, and approved and confirmed by the Judge, are supported by competent legal evidence, and these findings of fact support the conclusions of law made by the referee and confirmed by the Judge, and these findings of fact and

conclusions of law support the judgment rendered by the Judge. Hence, the judgment will be upheld.

The city of Fayetteville and the State Highway and Public Works Commission are both clothed with the power of eminent domain. This decision is not to be considered to prevent in any way either from seeking to condemn this strip of land under such power, if considered necessary in the public interest.

Affirmed.

STATE v. PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY AND ELIJAH H. HERRING

(Filed 4 June, 1958.)

1. Criminal Law § 26—

Conviction by a court without jurisdiction to hear and determine the question of guilt or innocence of defendants is a nullity and will not support a plea of former jeopardy in a subsequent trial upon a valid charge in a court having jurisdiction.

2. Same: Indictment and Warrant § 13—

When facts constituting double jeopardy do not appear from the allegations of the bill or warrant, the defense may not be taken advantage of by motion to quash.

3. Criminal Law §§ 16, 26—

Where judgment of the superior court on appeal from a municipal county court is arrested for want of jurisdiction because of amendment to the warrant in the superior court, the defendants may thereafter be tried upon a new warrant in the municipal county court. The superior court when sitting in the county in question was without original jurisdiction in the trial of misdemeanors. G.S. 7-64.

4. Indictment and Warrant § 13—

A motion to quash on the ground that the court was under duty to take judicial notice of a Federal decision establishing a defense to prosecution, is properly denied, since a motion to quash may not rest upon matters *aliunde* the record.

5. Trespass § 9—

The invasion of property in the possession of another is a crime under our laws, the severity of the punishment being measured by the character of the entry.

6. Same—

In a prosecution for criminal trespass, the State may either show that the property was in the actual possession of another or that such other

had right to possession, which by operation of law implies possession.

7. Trespass § 10—

Where the uncontroverted evidence discloses that the property was in the physical possession of the corporation named in the warrant and that defendants took possession over the protests of the corporation's agent in charge, with nothing in the State's evidence showing or tending to show any right to enter on the part of defendants after having been forbidden to do so, nonsuit is properly denied, the burden being upon defendants to establish that they entered under a *bona fide* belief of right, and that such belief had a reasonable foundation in fact.

8. Schools §§ 4c, 6b—

A city school administrative unit is a governmental agency separate and distinct from the city, and such administrative unit, having acquired more land than presently needed for school purposes, has legislative authority to lease the surplus, G.S. 115-126(5), either for a public or a private purpose so long as it exercises its discretion in good faith.

9. Schools § 6b—

Where a city school administrative unit leases surplus property not then needed for school purposes by an instrument stipulating that its use should be for a public or semipublic purpose, the law will presume the parties intended and contemplated use of the property without unlawful discrimination because of race, color, religion or other illegal classification.

10. Contracts § 12—

The parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful.

11. Constitutional Law § 20—

Where the operator of a golf course is charged with making a public or semipublic use of the property, it cannot deny the use of the property to Negro citizens solely because of race.

12. Criminal Law § 31—

A court cannot take judicial knowledge of facts found at another time by another court in another action, the judgment roll in such former action not being introduced in evidence.

13. Constitutional Law § 1: Criminal Law § 123: Trespass § 10—

Defendants in this prosecution for trespass moved to set aside the verdict on the ground that it had been established by a Federal court in a civil action in which defendants and the corporate owner of the property were parties, that defendants had a legal right to enter upon the land. The judgment roll in the Federal action was not introduced in evidence. *Held:* The State court cannot take judicial notice that the particular facts constituting the basis of this prosecution for trespass were the basis of the adjudication in the Federal court, and therefore defendants were not, as a matter of right, entitled to have the verdict set aside.

STATE *v.* COOKE, WOLFE, SIMKINS, STURDIVENT, MURRAY, HERRING.

14. Judgments § 32—

Since the defendants in this prosecution for trespass did not introduce in evidence the judgment roll in a civil action between defendants and the corporate owner of the property, the question of whether the Federal decision precluded prosecution under the doctrine of collateral estoppel was not presented. Whether the doctrine of collateral estoppel would have applied had the judgment roll been introduced in evidence, *quaere?*

APPEAL by defendants from *Fountain, S. J.,* February 3, 1958 Criminal Term of GUILFORD (Greensboro Division).

On 2 December 1957 a warrant issued from the Greensboro Municipal-County Court for Phillip Cooke, charging that on 7 December 1955 he "did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises."

Similar warrants were on the same day issued for each of the other defendants.

Defendants moved in the Municipal-County Court to quash the warrants. Their motions were overruled. They then entered pleas of not guilty. The court, after hearing the evidence, found each defendant guilty and imposed sentence. Defendants appealed to the Superior Court.

Attorney General Seawell and Assistant Attorney General Moody for the State.

Annie Brown Kennedy, Harold L. Kennedy, William A. Marsh, Jr., and C. O. Pearson for defendant appellants.

RODMAN, J. The cases were, without objection, consolidated for trial in the Superior Court.

Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court.

Before considering the merits of the cases, we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.

S. v. Cooke, 246 N.C. 518, 98 S.E. 2d 885, is relied upon for two of the three reasons assigned. An examination of that case is necessary to assay the merits of the motions. The crime with which defendants stand charged is a misdemeanor punishable by fine of $50 or imprisonment for thirty days, G.S. 14-134. The Municipal-County Court has

jurisdiction of the offense charged. In December 1955 these defendants were charged in warrants issuing from that court with trespassing on the property of *Gillespie Park Golf Course*. They were convicted and appealed to the Superior Court. That court's jurisdiction of the cases then before it was derivative and not original. In the exercise of its derivative jurisdiction, it was confined to an inquiry as to the truth of the charges contained in the warrants issuing from the Municipal-County Court. It could not, in the exercise of that jurisdiction, try defendants for a different crime. Nevertheless, the warrants were amended in the Superior Court to charge defendants with a trespass on the property of *Gillespie Park Golf Club, Inc.* Defendants were convicted of the crime charged in the amended warrants. Defendants appealed their conviction to this Court. We held that the amended warrant, by substituting another property owner, charged a different crime from the crime originally charged, and for that reason the Superior Court could not, in the exercise of its derivative jurisdiction, try defendants on the new criminal charge.

Since the conviction by a court without jurisdiction to hear and determine the guilt or innocence of defendants was a nullity and the sentence imposed void, defendants could thereafter be tried when properly charged in a court having jurisdiction. *S. v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871, cert. den. 342 U.S. 381, 96 L. Ed. 629. It is manifest there is here no double jeopardy. *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, on which defendants rely, has no application to the facts here presented. Double jeopardy is a valid defense when established by the facts. N. C. Constitution, Art. I, sec. 17; *S. v. Mansfield*, 207 N.C. 233, 176 S.E. 761. Where not disclosed by allegations of the bill or warrant, it is not a ground to quash.

In closing the opinion in the previous appeal, the writer, author of the opinion, said: "Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment."

The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G.S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G.S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the

crime charged, namely, trespass after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

The third and final reason assigned for quashing the warrants is the refusal of the court to take judicial notice of a judgment in a suit by defendants against the City of Greensboro, the Greensboro City Board of Education, and Gillespie Park Golf Club, Inc. (*Simkins v. City of Greensboro*, 149 F Supp. 562) which adjudged the plaintiffs in that suit had been denied the privilege of using the property involved in that litigation because of their color or race. A motion to quash is a proper method of testing the sufficiency of the warrant, information, or bill of indictment to charge a criminal offense. It is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. "The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied." *S. v. Cochran*, 230 N.C. 523, 53 S.E. 2d 663; *Richardson v. State*, 4 S.W. 2d 79; 27 Am. Jur., 695.

Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the motion and put defendants on trial for the offense with which they were charged.

To invade property in the possession of another is a crime under our laws. The severity of the punishment for such invasion is measured by the character of the entry. But the essential ingredient in the crime is possession by the person named in the warrant. If the possession is actual, the State need only establish that fact, but if the State fails to establish actual possession, it must establish a right to possession which by operation of law implies possession. *S. v. Clyburn*, 247 N.C. 455; *S. v. Cooke, supra; S. v. Baker*, 231 N.C. 136, 56 S.E. 2d 424.

Defendants do not controvert the fact that the corporation named in the warrant had physical possession of the property nor do they deny that over the protest of the agent of the corporation they took possession. The conduct depicted and not denied would suffice to convict defendants of a forcible trespass. G.S. 14-126. It could easily have resulted in a serious breach of the peace. The State did not, however, charge them with that offense. It charged only the less grave offense of entry after being forbidden. As a defense to that charge, it is sufficient for defendants to establish that they entered under a *bona*

fide belief of a right to so enter, which belief had a reasonable foundation in fact. *S. v. Faggart,* 170 N.C. 737, 87 S.E. 31; *S. v. Wells,* 142 N.C. 590; *S. v. Fisher,* 109 N.C. 817, but the burden is on the defendant to establish facts sufficient to excuse his wrongful conduct *S. v. Durham,* 121 N.C. 546; *S. v. Wells, supra.* There was nothing in the State's evidence showing or tending to show any right on the part of defendants to enter after having been forbidden to do so. Hence the court correctly refused to allow defendants' motion for nonsuit.

Defendants offered in evidence a lease dated 19 April 1949 from the Board of Trustees of the Greensboro City Administrative Unit to Gillespie Park Golf Club, Inc. This lease recited that the property therein described had in 1947 been leased to the City of Greensboro so that the city might operate a golf course thereon, that Greensboro had agreed to cancel its rights under the lease, that lessor was of the opinion that it would not need the property for school purposes during the next ensuing five years and "since a nine hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued during the term of this lease, such use being, in the opinion of the Board of Trustees, a public or semipublic use." The lease was for a period of five years at a rental of $1000 per annum, but with a provision that lessor might cancel upon sixty days' notice if the property was needed for school purposes or if lessor desired to sell. An extension agreement was put in evidence extending lessee's term. The asserted trespass occurred during the extended term.

There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements. Defendants offered in evidence bylaws adopted by lessee. The only two which may have any pertinency to this action are sections 1 and 2 of article 1. They provide: "SECTION 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board. SECTION 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guest, members in good standing of other golf clubs, members

of the Carolina Golf Association, pupils of the Professional and his invited guests."

The City Administrative Unit, a governmental agency separate and distinct from the City of Greensboro, had no authority to operate recreational facilities which were not in some way related to the operation of the public school system. The Legislature created both County and City Administrative Units "for purposes of school administration." G.S. 115-4. The Administrative Unit, having acquired more land than was presently needed for school purposes, had legislative authority to lease the surplus. G.S. 115-126(5), *Cline v. Hickory,* 207 N.C. 125, 176 S.E. 250; 38 Am. Jur. 169. In the exercise of its discretion it could in good faith lease for a public or a private purpose. Prior to its lease to Gillespie Park Club, it had leased the property to the City of Greensboro. The City had apparently used it for recreational purposes and had erected a golf course thereon. When that lease terminated, the school authorities leased to a private corporation, but in their lease were careful to state that lessee was taking and would use it for public or semipublic purposes, namely, the operation of a golf course. Having expressly declared that the use which the lessee would make was a public or semipublic use, the law will presume the parties intended and contemplated that the property should be used without unlawful discrimination because of race, color, religion, or other illegal classification. "It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful." *Beasley v. R.R.,* 145 N.C. 272; *Newberry v. City of Andalusia,* 57 So. 2d 629. Since the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. This Court gave definite recognition to the principle of equality of treatment as between whites and Negroes nearly three quarters of a century ago. *Puitt v. Commissioners,* 94 N.C. 709.

Dawson v. Mayor and City Council of Baltimore City, 220 F 2d 386; *Lawrence v. Hancock,* 76 F Supp. 1004; *Tate v. Department of Conservation and Development,* 133 F Supp 53; *Culver v. City of Warren,* 83 N.E. 2d 82, cited and relied upon by appellants are but applications of an established legal principle to the factual situations found to exist in each of those cases. This case in no wise questions the soundness of the legal principles there enunciated.

Since the decision in *Brown v. Board of Education,* 347 U.S. 483, 98 L. ed. 873, 74 S Ct 686, separation of the races in the use of public property cannot be required. Judge Fountain expressly charged the jury that defendants could not be discriminated against because of

color. He charged: "Now as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, *therefore would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone;* that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course."

It will be observed that Judge Fountain, in his charge, treated the lease as though it were made by the City of Greensboro in the exercise of one of its corporate functions. In fact the lease was made by the school unit which had no duty or right to operate a golf course but which voluntarily provided for public use.

The court further charged: "If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon the Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course by the citizens of Greensboro."

He further charged, after stating defendants' contentions with respect to their right to play: "I instruct you, members of the jury, if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass."

Defendants moved to set aside the verdict of guilty. As the basis for their motion they rely on *Simkins v. City of Greensboro, supra,* decided by the United States District Court in March 1957. Although defendants had the record in that case identified, they did not offer it in evidence. It is not a part of the record presented to us. Our knowledge of the facts in that case is limited to what appears in the published opinion.

Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought injunctive relief on the assertion that Negroes were discriminated against and were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary.

To support their motion, defendants say in their brief: "That to allow the verdict to stand would amount to a collateral attack on the Federal decision." The mere assertion that a court of this State has not given due recognition to a judgment rendered by one of our Federal courts merits serious consideration.

The State challenges the assertion that there has been an attack, collateral or otherwise, on the judgment rendered by the District Court. It maintains that the questions to be answered are these: (1) Should a court take judicial knowledge of facts found at another time by another court in another action; and if this question be answered in the affirmative, (2) is the State, in a criminal prosecution, concluded by facts found in a civil action to which it is not a party?

Since defendants for reasons best known to themselves elected not to offer in evidence the record in the Federal court case, it is apparent that the first question propounded must be answered. Unless we are to de-

part from previous adjudications by this Court and similar decisions by the Federal courts and the courts of sister States, the answer to that question must be no.

Speaking with respect to judicial notice, Chief Justice Marshall said: "The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages." *U. S. v. Wilson,* 7 Pet. 150, 8 L. ed. 640.

Mr. Justice Miller said: "While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially." *Schuler v. Israel,* 120 U.S. 506, 30 L. ed. 707. To like effect see *S. v. McMilliam,* 243 N.C. 775, 92 S.E. 205; *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125; *Hampton v. Pulp Co.,* 223 N.C. 535, 27 S.E. 2d 538; *Daniel v. Bellamy,* 91 N.C. 78; Bluthenthal v. Jones, 208 U.S. 64, 52 L. ed. 390; *Williams-Perry v. Reeder,* 17 N.W. 2d 98; *Naffah v. City Deposit Bank,* 13 A 2d 63; *Belyeu v. Boman,* 41 So. 2d 290; *James v. Unknown Trustees, Etc.,* 220 P 2d 831; *Swak v. Department of Labor & Industries,* 240 P 2d 560; *Paridy v. Caterpillar Tractor Co.,* 48 F 2d 166; *Morse v. Lewis,* 54 F 2d 1027; *Helms v. Holmes,* 129 F 2d 263; *Atlantic Fruit Co. v. Red Cross Line,* 5 F 2d 218; *Polzin v. National Co-op Refinery Ass'n.,* 266 P 2d 293; *Divide Creek Irrig. Dist. v. Hollingsworth,* 72 F 2d 859, 96 A.L.R. 937, with annotations; *White v. Central Dispensary & Emergency Hospital,* 99 F 2d 355, 119 A.L.R. 1002; *Robinson v. Baltimore & O. R. Co.,* 222 U.S. 506, 56 L. Ed. 288; 31 C.J.S. 627; 20 Am. Jur. 102.

Because the judgment in the case of *Simkins v. Greensboro* was not in evidence, the court had no knowledge in a legal sense of any facts there determined, and could make no pronouncement of law with respect to facts which were not in evidence. Judge Hayes' published opinion was available. That opinion is a declaration of the law on the facts which Judge Hayes found.

Since the court was not required to take judicial notice of the judgment in the civil action, we are not called upon to determine the effect which should have been given if offered in evidence.

When the doctrine of collateral estoppel should be applied is not always easily solved. In *Van Schuyver v. State,* 8 P. 2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property, *State v. Hogard,* 12 Minn. 293; *People v. Leland,* 25 N.Y.S.. 943; *Hill v. State,* 3 S.W. 764 (Tex.)

It is said in the annotation to *Mitchell v. State,* 103 Am. St. Rep. 17: "When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of *res judicata* applies. (citations) But where the judgment to which it is sought to apply the doctrine of *res judicata* was rendered in a civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of *res judicata* does not apply. (citations)"

The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare *U. S. v. Baltimore & O. R. Co.,* 229 U. S. 244, 57 L. Ed. 1169, and *Williams v. N. C.,* 325 U.S. 226, 89 L. ed. 1577. Other illustrations may be found in: *S. v. Dula,* 204 N.C. 535, 168 S.E. 836; *Warren v. Ins. Co.,* 215 N.C. 402, 2 S.E. 2d 17; *Powers v. Davenport,* 101 N.C. 286; *S. v. Boland,* 41 N.W. 2d 727; *People v. McKenna,* 255 P. 2d 452; *S. v. Morrow,* 75 P. 2d 737; *S. v. Cornwell,* 91 A. 2d 456; *S. v. Greenberg,* 109 A. 2d 669. Extensive annotations appear as a note to *Green v. State,* 87 A.L.R. 1251; 30A Am. Jur. 518. Defendants were not, as a matter of right, entitled to have the verdict set aside.

The exceptions to the admission and exclusion of evidence have been examined. We have found none which indicates prejudicial error or appears to warrant discussion.

We find

No error.

IN THE MATTER OF: STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. HENNIS FREIGHT LINES, INC., BOX 612, WINSTON-SALEM, NORTH CAROLINA, EMPLOYER NO. 42-35-025, DOCKET NO. 925.

(Filed 4 June, 1958.)

1. Master and Servant § 58—

Whether a person is an employee or an independent contractor within the meaning of the N. C. Employment Security Law must be determined, by direction of the statute, according to the rules of the common law. G.S. 96-8(g)(1).

2. Master and Servant § 62—

Findings of fact of the Employment Security Commission are conclusive on the courts when the findings are supported by competent evidence, G.S. 96-4(m), but findings of the Commission to the extent that they are not supported by competent evidence are not conclusive.

3. Master and Servant § 58—

Whether the lessor driver, or an employee of the lessor driver, is an employee of the lessee under a trip-lease agreement in interstate commerce is to be determined by the provisions of the lease agreement and is a question of law.

4. Carriers § 3—

An interstate carrier is liable in damages for injuries to third persons caused by the negligent operation of equipment leased by it under a lease agreement for a trip in interstate commerce under lessee's franchise.

5. Master and Servant § 58—

In determining who are "employees" within the N. C. Employment Security Act, consideration is to be given to the interpretation placed upon the federal statute by the Supreme Court of the United States.

6. Same—

Where an interstate carrier leases a motor vehicle for a trip under its franchise by agreement stipulating that lessor should furnish the equipment and pay the driver's salary and fully maintain and service the equipment, in consideration of a lump sum payment, the driver of such leased vehicle, whether he be the lessor owner or an employee of the lessor owner, is not an employee of the lessee within the meaning of the N. C. Employment Security Act.

APPEAL by plaintiff from *Johnston, J.*, September 2, 1957, Regular Civil Term, of GUILFORD, Greensboro Division.

Proceeding in accordance with procedure prescribed by Employment Security Law, G.S. Ch. 96, commenced by notice issued April 20, 1954, to determine whether Hennis Freight Lines, Inc., hereinafter called Hennis, is liable for additional contributions alleged to be due

under said statute for the calendar years 1950, 1951, 1952 and the first three quarters of 1953.

Hennis is a common carrier of freight in interstate commerce under an I.C.C. franchise. It is an employing unit under said Employment Security Law. As such, it reported and paid all contributions due on wages paid to employees on its payroll, including the operators of all motor tractors and trailers owned by it or leased by it on a permanent basis.

It conducted a part of its business, from time to time, by the use of tractors and trailers which it obtained from various owners under trip-lease agreements. Each such lease contained the following provisions:

"LESSOR (owner) HEREBY (a) Leases and delivers to the Lessee the following described motor vehicle(s) for the duration of a single outbound (return) trip to be used by Lessee in transporting property from.....to..... over routes (specify)..... and warrants that he or it is the legal owner of the vehicle and equipment described as follows: (description of vehicle) (b) Agrees that during the term of this agreement, the Lessor shall fully maintain, service and keep the vehicle(s) described in good repair, provide all gas, oil, tires and other equipment necessary and pay driver'(s) salary. (c) Warrants (1) that driver(s) furnished with such motor vehicle(s) is (are) competent and qualified to operate said equipment, and meets all of the requirements of all applicable laws, rules and regulations; (2) that the said equipment is in a good state of repair, and (3) meets all the requirements of all applicable State and Federal laws, rules and regulations of the Interstate Commerce Commission and the Public Service Commission of the States in, into or through which it is operated. (d) Agrees that the Lessee shall not be liable for any loss or damage to or destruction of said leased vehicle(s) while it is being operated by or is in the care and control of driver(s) furnished by the Lessor. (e) Agrees to indemnify Lessee against (1) any loss resulting from the injury or death of such driver(s) and (2) any loss or damage resulting from the negligence, incompetence or dishonesty of such driver(s).

"LESSEE (Hennis) HEREBY (a) Agrees that during the term of this lease, the said vehicle(s) shall be solely and exclusively under the direction and control of the Lessee who shall assume full common carrier responsibility (1) for loss or damage to cargo transported in such motor vehicle, and (2) for the operation of such vehicle.

"IT IS MUTUALLY AGREED that this agreement shall cover the period of time from the commencement of loading the motor vehicle(s) to the termination of the unloading.

"The Compensation to be paid by Lessee to the Lessor for the lease

of the vehicle(s) described herein shall be the sum of $..... which amount shall constitute full and complete payment by Lessee for all equipment and materials supplied, maintenance and operating expenses, wages of driver(s), all taxes, insurance, including social security, workmen's compensation and withholding tax."

Hennis, as required by the Interstate Commerce Commission, classified and entered upon its records as "Purchased Transportation" all payments made by it to such lessors. The tax auditor, upon whose investigation and report this proceeding was instituted, ascertained that in certain instances the lessor to whom Hennis made payment as stipulated in the lease had eight or more employees and hence was subject to the Federal Unemployment Tax Act. In such instances, he made no claim that Hennis was obligated for contributions under the Employment Security Law based on any portion of the amount paid by Hennis to the lessor-operator or on any amount paid by such lessor as compensation to his drivers. The claim for additional contributions relates solely to instances of "Purchased Transportation" where the particular lessor had less than eight employees and hence was not subject to the Federal Unemployment Tax Act.

The alleged basis of this claim for additional contributions is that such lessor-operator and the driver(s) furnished by such lessor were employees of Hennis within the meaning of the Employment Security Act. Hence, the contention is that Hennis must make contributions based on the amount of wages paid by the lessor to the driver(s) furnished by him or, in case of a lessor-operator, the amount to which he would have been entitled as wages for his services as driver.

Hennis contended, and now contends, that such lessors were independent contractors; and that neither the lessor nor persons employed by him to operate his equipment were employees of Hennis within the meaning of the Employment Security Law.

A transcript of evidence taken at hearings held May 12, 1954, and October 13, 1954, before a deputy commissioner, was filed with the Employment Security Commission, hereinafter called Commission. The Commission (Chairman) heard the matter on said record on December 10, 1956. Prior to decision, Hennis filed with the Commission its request for findings of fact and its request for conclusions of law. On April 19, 1957, the Commission (Chairman) filed its opinion No. 925. Upon its findings of fact and conclusions of law it adjudged that Hennis report and pay the said claim for additional contributions, together with interest thereon. The controversy relates solely to whether Hennis is liable for such additional contributions. If liable, there is no controversy as to *the amount* of the claim.

Hennis filed exceptions to the failure of the Commission to make

findings of fact and conclusions of law as tendered by it, and excepted to this portion of the Commission's finding of fact No. 3, as not supported by competent evidence, viz.:

"All such vehicles and drivers, while on trip-lease trips are dispatched and controlled by the dispatchers of the company. During the term of such trip-lease the vehicle is under the exclusive direction and control of the company which assumes full common-carrier responsibility for loss or damage to cargo being transported and also assumes full responsibility for the operation of such vehicle. The driver of such trip-lease vehicle, whether the owner-lessor or a driver furnished by such owner-lessor, is subject to the exclusive control of the company while operating such vehicle under such trip-lease agreement; that is, the company has the right under its agreement with the lessor to control such drivers in the performance of their duties, inasmuch as it has exclusive control of such vehicle."

On June 7, 1957, the Commission considered and overruled each and all of Hennis' exceptions and declared said opinion to be its final opinion. Thereupon, Hennis appealed to the superior court, bringing forward each and all of the exceptions theretofore filed to the Commission's said opinion.

The court held that the Commission erred in overruling Hennis' exception to the portion of the Commission's finding of fact No. 3 quoted above, and that the remaining facts found by the Commission did not justify the Commission's conclusions of law or its order. Thereupon, the court reversed the Commission's final order of June 7, 1957, adjudging "that the drivers of motor vehicles operating under trip-lease agreements, as described in the record, were not employees of Hennis Freight Lines, Inc., for the purpose of contributions under the North Carolina Security Law, and that Hennis Freight Lines, Inc., is not liable for the payment of contributions upon wages paid such drivers by the Lessors of motor vehicles operating under trip-lease agreements for the years in question."

The Commission excepted to said judgment and appealed.

R. B. Overton, D. G. Ball and R. B. Billings for plaintiff, appellant.
York & Boyd and A. W. Flynn, Jr., for defendant, appellee.

BOBBITT, J. The question for decision is this: Are the drivers of vehicles so leased (whether the owner or a third party employed by him), during the term of the lease, employees of Hennis, or are they independent contractors or employees of independent contractors, under the Employment Security Law?

Ch. 424, S.L. 1949, made these material changes in Sec. 96-8 of the General Statutes of 1943:

First: G.S. 96-8(g)(6), prescribing certain statutory criteria for determining whether an individual was an employee of an employing unit, the so-called ABC test, was stricken in its entirety. The statutory criteria so stricken was the basis of the following decisions: *Employment Security Com. v. Monsees*, 234 N.C. 69, 65 S.E. 2d 887; *Employment Security Com. v. Distributing Co.*, 230 N.C. 464, 53 S.E. 2d 674; *Unemployment Compensation Com. v. Insurance Co.*, 219 N.C. 576, 14 S.E. 2d 689; *Unemployment Compensation Com. v. Insurance Co.*, 215 N.C. 479, 2 S.E. 2d 584.

Second: G.S. 96-8(g)(1) was rewritten. As rewritten, it was codified as G.S. 96-8(g)(1) of the General Statutes of 1950, which provides: " 'Employment' means service performed . . . including service in interstate commerce . . . for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

Thus, whether the individuals here concerned are employees of Hennis or are independent contractors or employees of independent contractors must be determined according to the rules of the common law.

In *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301, and cases cited, this Court has discussed the distinction between an employee and an independent contractor and the various elements which ordinarily tend to identify either the employee relationship or the independent contractor relationship.

Appellant relies largely upon the Commission's findings of fact. It asserts: first, that the portion of finding of fact No. 3, quoted above, is supported by competent evidence; second, the Commission's findings of fact, to which Hennis did not except, independent of said portion of No. 3, support the legal conclusion that the drivers were employees of Hennis.

Unquestionably, if the Commission's findings of fact are supported by competent evidence, such findings of fact are conclusive and the court is bound thereby. G.S. 96-4(m); *Employment Security Com. v. Simpson*, 238 N.C. 296, 77 S.E. 2d 718, and cases cited.

Apart from said portion of No. 3, the Commission's findings of fact set forth the respective obligations of the parties under the lease agreement. Nothing in the findings of fact or in the evidence suffices to show that the relationship was in fact different from that established by the terms of the lease agreement. If said portion of finding of fact No. 3 is interpreted to show a different relationship, to that extent it is not supported by competent evidence. Since the lease agreement determines the relationship, a question of law is presented. *Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608.

The hybrid nature of these trip-lease agreements has caused much litigation. In reality, contrary to the Biblical admonition, a driver, employed and furnished by the lessor, must serve two masters. In *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133, Barnhill, J. (later C. J.), reviewed in detail the provisions of a lease agreement quite similar to that here involved. The conclusion was that, as between the lessor and the lessee, in respect of mutual contractual rights and liabilities, one to the other, the lessor had the status of independent contractor. (See *Newsome v. Surratt,* 237 N.C. 297, 74 S.E. 2d 732) But, as between the franchise carrier and its consignor, consignee, and third parties generally, the person who actually operated the vehicle (whether the owner or a third party employed by him) was the servant or employee of the franchise carrier.

An interstate carrier, which exercises its franchise rights by transporting its freight in leased equipment under leases such as that here involved, is liable in damages for injuries to third parties caused by the negligent operation of such equipment in the prosecution of such carrier's business. *Wood v. Miller, supra; Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 388; *Eckard v. Johnson,* 235 N.C. 538, 70 S.E. 2d 488; *Hill v. Freight Carriers Corp., supra; Newsome v. Surratt, supra.*

Moreover, with reference to the Workmen's Compensation Act, this Court has held: 1. The dependents of a lessor-operator, engaged in transporting freight for the lessee, an interstate carrier, under authority of the lessee's I.C.C. franchise and license plates, were entitled to recover death benefit compensation from the lessee. *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71. 2. The dependents of the lessor's driver, under like circumstances, were entitled to death benefit compensation from the lessee. *Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64. 3. The dependents of an assistant driver, aboard a tractor-trailer, then operated under like circumstances by the lessor, were entitled to death benefit compensation from the lessee. *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438. See also, *Peterson v. Trucking Co., ante,* 439, 103 S.E. 2d 479.

In the decisions cited in the two preceding paragraphs, it was held that the operator (whether the owner or his employee) while operating the leased equipment in furtherance of the business of the franchise carrier, was an employee of the franchise carrier in respect of hazards to which he and the public were subjected by reason of such operation. In such case, the interstate carrier is exercising its franchise rights by use of the services of the operator; and on this ground, and also on the ground of public policy, the interstate carrier has the liability of an employer for what occurs while the leased equipment is so operated. However, when we deal with a matter unrelated to what occurs during the operation of the leased equipment, the status of the operator is to be determined by whether the lessor is an independent contractor under the terms of the lease agreement. *Hill v. Freight Carriers Corp., supra.*

In the present case, no question arises as to the liability of the franchise carrier to a consignor, consignee, or third parties generally, on account of the operation of such leased equipment. Nor is there any question relating to the liability of the franchise carrier to the driver or his dependents under the Workmen's Compensation Act or otherwise in respect of injury or death caused by hazards to which the driver was subjected while exercising Hennis' franchise rights. The sole question here is whether, under the lease agreements, the compensation paid to such drivers, whether the lessor-operator or those employed by him, may be treated as wages paid by Hennis as an employer to its employees.

An "employer" (G.S. 96-8(f)) is required to make "contributions" in prescribed amounts (G.S. 96-9(b)) to the Unemployment Compensation Fund (G.S. 96-6) on "wages" (G.S. 96-8(n)) for "employment" (G.S. 96-8(g)) for each calendar year in which the employer is subject to the statute. (G.S. 96-9(a)). An "employer" as defined by G.S. 96-8(f), prior to the 1955 Act referred to below, was an "employing unit" (G.S. 96-8(e)) which, *inter alia*, "has, or had in employment," eight or more individuals.

Because of their interrelation, as stated by Barnhill, J. (later C. J.) in *Unemployment Compensation Com. v. Trust Co.*, 215 N.C. 491, 2 S.E. 2d 592: ". . . in interpreting our act serious consideration is to be given to the construction placed upon the Federal Statute by the administrative agency charged with its execution." *A fortiori*, serious consideration is to be given to the construction placed upon the federal statute by the Supreme Court of the United States.

Prior to the Act of Congress, "To extend and improve the employment compensation program," enacted September 1, 1954, 68 Stat. 1130, the provisions in respect of federal "Employment Taxes" applied only

to an employer of "eight or more." Internal Revenue Code of 1939, 53 Stat. 187, Sec. 1607(a). The 1939 provision, brought forward in the Internal Revenue Code of 1954, Sec. 3306(a), under the caption, "Federal Unemployment Tax Act," 68A Stat. 447, enacted August 16, 1954, was amended by said Act of September 1, 1954, by striking out "eight or more" and inserting in lieu thereof "4 or more." See USCA (1948), Title 26, Sec. 1607(a); also USCA (1955), Title 26, Sec. 3306 (a), and annotations. Hence, the lessors, here concerned either as drivers or as employers of drivers, were not subject to the Federal tax during the relevant period, to wit, 1950-1953. Nor were they subject to our Employment Security Law, which applied only to an employer "of eight or more." G.S. 96-8(f). To conform to the federal statute, G.S. 96-8(f) was amended by Sec. 3, Ch. 385, S.L. 1955, so as to apply to an employer of "four or more."

It is noted that a taxpayer, under the federal statute, was and is entitled to a credit, up to 90 per centum, of the amount of contributions paid by him into an unemployment fund maintained during the taxable year under an approved unemployment compensation law of a state. USCA (1948), Title 26, Sec. 1601; USCA (1955), Title 26, Sec. 3302.

Moreover, Sec. 96-8(f)(6) of the General Statutes of 1950, applicable to the relevant period, provided: "Any employing unit not an employer by reason of any other paragraph of this subsection, for which, within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Compensation fund; . . ." An employing unit within this definition was an "employer" within the meaning of G.S. 96-8(f).

Under the rules of the common law, whether such lessor was an independent contractor did not depend upon whether he had eight employees or more. These statutory provisions provide the explanation for the tax auditor's decision to treat a lessor who had eight or more employees as an employer liable for contributions under the Employment Security Law.

In *Harrison v. Greyvan Lines, Inc.,* 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947), the United States Supreme Court considered whether such lessor-drivers and their drivers were employees of the interstate carrier (lessee) or independent contractors, within the meaning of the federal act. Under the particular lease agreements there involved, the interstate carrier had and exercised at least as great a control over such lessor-drivers and their drivers as Hennis had and exercised under the facts of the present case. It was held that such

lessors were independent contractors and that the interstate carrier was not liable for the payment of the federal tax on account of compensation they received while operating the leased equipment in the prosecution of the business of the interstate Carrier. The court, in opinion by Mr. Justice Reed, said: "But we agree . . . that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. . . . It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Harrison v. Greyvan Lines, Inc., supra, was decided June 16, 1947. Prior to June 14, 1948, Sec. 1607(i), of the Internal Revenue Code, provided: "The term 'employee' includes an officer of a corporation." On that date, Congress amended Sec. 1607(i) by inserting before the period the following: ", but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules". 62 Stat. 438; USCA (1948), Title 26, Sec. 1607(i); USCA (1955), Title 26, Sec. 3306(i). As noted above, G.S. 96-8(g)(1) was amended by Ch. 424, S.L. 1949, to conform to said federal statute.

Appellant cites G.S. 96-8(e), which defines "employing unit." As rewritten by Ch. 322, S.L. 1951, G.S. 96-8(e) contains this sentence: "Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter *unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act,* whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work." While the quoted sentence had appeared in Sec. 19(e), Ch. 1, P.L. 1936, Extra Session, and in Sec. 96-8(e), of the General Statutes of 1943, the italicized words were inserted by the 1951 Act.

In our opinion, the quoted sentence has no bearing upon the status of the employee(s) of a lessor unless it is first determined that the lessor himself is an agent or employee of the lessee rather than an independent contractor. In *Texas Co. v. Higgins,* 118 F. 2d 636, it was held that an independent contractor was not covered as an employee under the federal Social Security Act, 42 USCA, Sec. 301 et seq. Judge

Learned Hand said: "A persuasive reason for this conclusion, at least in the case at bar, is that Congress could scarcely have meant a man doing a business like Thomas's to enjoy the benefit of unemployment allowances; and if he was not an 'employee,' his four assistants were not; the servant of a servant may be the master's servant, but the servant of an 'independent contractor' is not."

The lease agreement discloses a business venture by the lessor. The obligations and risks he assumes do not arise from an employee status. At his own expense, he provides "all gas, oil, tires and other equipment." He furnishes the driver(s) and pays his salary. Ordinarily, he, not Hennis, must bear the loss if his equipment is damaged or destroyed. *Hill v. Freight Carriers Corp., supra.* He is obligated to indemnify Hennis against loss incurred on account of the driver's injury or death and loss resulting from the negligence, incompetence or dishonesty of the driver. These are substantial commitments. It must be assumed that they affected materially the amount stipulated as the consideration to be paid by the lessee to the lessor.

"It seems untenable, in the absence of legislation for that purpose, to claim that any part of compensation paid for transportation involving the use of a truck and the service of its operator can be segregated and designated as 'wages'." *Commercial Motor Freight v. Ebright,* 143 Ohio St. 127, 54 N.E. 2d 297. Rather, the stipulated lease consideration constitutes full payment, in a lump sum, for the use of the vehicle, the services of the driver(s), and all other commitments assumed by the lessor under the lease.

As stated by Barnhill, J. (later C. J.) in *Hill v. Freight Carriers Corp., supra:* "While 'exclusive supervision and control' of the vehicle was vested in the defendant for the purpose of meeting the requirements of the I.C.C., actual possession or custody thereof was retained by plaintiff. It was to be operated by one of his choosing and in the selection of whom defendant had no part. Immediate control and supervision as to speed, manner of operation, hours of work, and the like necessarily remained with plaintiff."

It is inescapable, in view of the lessor's obligations under the lease, that the driver, in many respects, was subject to the direction and control of the lessor. Aside from matters pertaining to the maintenance of equipment, the driver was subject to discharge by the lessor, not by Hennis; and the lessor, if he elected to do so, could replace him by another qualified driver of his own selection.

Moreover, the driver's employment agreement as to compensation, tenure, and in all respects, was with the lessor. He had no contractual relationship with Hennis relating to his employment or compensation. So far as appears, the extent of the lessor's obligation to the driver(s)

in respect of compensation was unknown to Hennis. In fact, nothing was paid by Hennis to any driver as wages or otherwise; nor was he obligated to pay any such driver.

We conclude: 1. No part of the indivisible lease consideration paid by Hennis to a lessor who operated his own equipment under such lease may be considered as wages paid by an employer to his employee. As to their contractual rights and liabilities, *inter se*, the lessor was an independent contractor. 2. No part of the amount paid by the lessor, an independent contractor, to employees of his own selection, for a period that included the term of the lease, may be considered wages paid by Hennis as an employer to its employees. The conclusion stated results in affirmance of the judgment of the court below.

Affirmed.

ARTHUR O. ADAMS, NEXT FRIEND GEORGE LINDSAY ADAMS, MINOR *v.* STATE BOARD OF EDUCATION.

(Filed 4 June, 1958)

1. State § 3c—

The findings of fact of the Industrial Commission under the State Tort Claims Act are conclusive if supported by competent evidence. G.S. 143-293.

2. Negligence § 11—

Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care which concers with some negligent act or omission on the part of the defendant so as to constitute the act or omission of the plaintiff a proximate cause of the injury complained of.

3. Negligenc e§ 5—

Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and from which a person of ordinary prudence could have reasonably forseen that such a resultfi or some similar injurious result, was probable under the facts as they existed.

4. Negligence § 11—

In order for contributory negligence to bar plaintiff's recovery, defendant has the burden of proving not only that plaintiff was guilty of contributory negligence but also that such contributory negligence was a proximate cause of the injury.

5. Negligence § 12—

An infant between the ages of seven and fourteen is presumed incapable of contirbutory negligence, but the presumption is rebuttable.

6. Same—

The test for determining contributory negligence of a minor is whether the child acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances.

7. Same: State § 3b— Evidence held insufficient to support conclusion that minor was guilty of contributory negligence.

The evidence tended to show that the janitor of a school was operating a power mower on the playground in the morning before classes had started, during a period when pupils were allowed and accustomed to play, although the mower was not ordinarily used during play periods, that the mower was being operated after the guard covering the blade had been removed and that claimant, an eleven-year-old boy, while playing tag with two schoolmates, ran in the direction of the mower, closely pursued by his two companions, that notwithstanding the noise of the motor he did not see it until he was about 3 feet from it, approaching it from its side and rear, and that he slipped on the wet grass and skidded into the revolving blade. *Held:* The failure of the minor to heed the noise of the motor and turn sooner may not be inferred as a proximate cause of his injuries under the circumstances, since he had no notice or knowledge of the dangerous and exposed condition of the blade and might have escaped injury had not his foot slipped on the wet grass, and the evidence is insufficient to support the finding of the Industrial Commission that the minor's contributory negligence barred recovery under the State Tort Claims Act.

APPEAL by defendant from *Preyer, J.*, at January Civil Term, 1958, of GUILFORD (Greensboro Division).

Proceeding instituted before the North Carolina Industrial Commission under the State Tort Claims Act (Ch. 143, Article 31, General Statutes of North Carolina as amended) to recover for personal injuries to the plaintiff.

All the evidence was offered by the plaintiff. The hearing Commissioner found these material facts:

"1. That on September 22, 1954, the infant plaintiff, whose twelfth birthday was on October 14, 1954, was a regularly enrolled pupil in the fifth grade of Sumner School in Guilford County, . . .

"2. That on the date above set forth . . . Eugene Evans was the duly appointed and constituted janitor for said school; . . .

"3. That a part of Eugene Evans' regular duties was to mow the grass on the school grounds; that he did this work with a power lawn mower; that the engine which propelled this mower and its equipment was a large Stratton motor which developed seven or eight horsepower; that this motor was on top of a metal casing; that this metal casing was mounted on four rubber wheels; that there was a trailer attached to the rear of said casing which was mounted on two rubber wheels; that the operator of said mower sat on a raised seat on the top of said trailer; that this seat was about the same height

as the top of the motor on the metal casing; that the blade on the mower was at the front of the metal casing; that it was of the whirlwind type with a rotary blade and cut a swath of about thirty inches; that said mower, when in operation, moved at a speed about the same as a normal walking rate *and made the noise of a small motorcycle*; that this mower was originally equipped with a metal guard about 36 inches long and 6 inches wide which covered the entire top and front of the rotary blade; that this guard was adjustable according to the type of ground being mowed; that it protected the blade from bushes and other objects and also acted as a shield from said blade; that some time prior to September 22, 1954, this metal guard was taken off of the mower so that the motor could be repaired, and was never replaced; that said mower had been used to cut the grass on said school grounds since 1947, and that September 22, 1954, was the first or second day on which it had been so operated during said time without the guard thereon. (Italics added.)

"4. That on the date herein complained of the infant plaintiff, George Lindsay Adams, and his two friends, William Paskhal, age 11 and Jimmy Hamilton, age 10, were carried to the Sumner School in a regular school bus; that they arrived at said school at about 8 a.m., and got out of the bus at the usual stop on a circular driveway at the rear of the main school building; that they first went to their room and put their books up and then came back to the grounds at the rear of the school building to play chase, the infant plaintiff being chased by his two friends; that at said time the power lawn mower described in the preceding paragraph was being operated by Eugene Evans on a part of the area included in the playgrounds of said school, said part being a strip of land about 107 feet wide between the circular driveway and a public highway on the side of said school grounds; that between the circular driveway and the place where said mower was being operated there was a drainage ditch and just beyond that there was a terrace about 12 or 14 inches high; that the land behind the school building was higher than the land where the mower was being operated; that the chase began behind the school building and proceeded in the general direction in which the mower was being operated, although somewhat to the rear thereof; that the grass being cut by the mower at said time was high but did not conceal the mower or the operator thereof; that the infant plaintiff and his two companions crossed the circular driveway, went over the drainage ditch and terrace and came in on the right side of said mower; that the mower was then about 40 or 50 feet from the terrace; that the infant plaintiff had heard the noise made by the mower in operation but did not see the mower until he was about three feet from it; that he then attempted

to make a right turn to avoid colliding with the front end of said mower, and as he did so his right foot slipped on the grass and slid under the right end of said mower, coming in contact with its revolving rotary blade, thereby causing the injury to his said foot herein complained of; and that George Lindsay Adams was falling when Eugene Evans first saw him.

"5. That it was customary for the pupils to play on the playgrounds of Sumner School at the time herein complained of, and that Eugene Evans was aware of that fact.

"6. That at the time of said accident, the infant plaintiff was an average boy, having the normal capacity and experience of a child of his age.

"7. That as a result of said accident above described, the infant plaintiff was caused to suffer great bodily pain and mental anguish; that he was hospitalized for 7 or 8 days and was thereafter treated for his injury for a number of months; that he wore a cast on his injured foot for two or three months; that said injury did not reach the end of its healing period until approximately one year after said accident; that he suffered a 35 per cent permanent physical disability to said foot; and that by reason of said accident, the infant plaintiff, George Lindsay Adams, has been damaged in the total amount of $2500.00.

"8. That as herein set forth, Eugene Evans, while acting within the scope of his employment, was negligent, and such negligence was one of the proximate causes of said accident and the resulting damages suffered by the infant plaintiff.

"9. That as herein set forth, the infant plaintiff, George Lindsay Adams, was negligent, and such negligence was one of the proximate causes of said accident and the resulting damages suffered by him."

The hearing Commissioner made conclusions of law in pertinent part as follows:

"1. That Eugene Evans, janitor for the Sumner School, while acting within the scope of his employment was negligent in operating the power lawn mower, with the guard removed therefrom, on the playground area of said school at the time and under the circumstances herein described, and such negligence was one of the proximate causes of said accident and the resulting damages suffered by the infant plaintiff." . . .

"2. That the infant plaintiff, George Lindsay Adams, was negligent in failing to keep a proper lookout so he could observe said lawn mower *after he had been warned of its presence by the noise of its motor,* and in failing to reduce the speed at which he was running at the time and under the circumstances herein described, and that such

negligence was one of the proximate causes of said accident and the resulting damages suffered by him." . . . (Italics added.)

"3. That notwithstanding the negligence of Eugene Evans, the janitor for Sumner School, the plaintiff is not entitled to recover herein, in that George Lindsay Adams' contributory negligence was likewise a proximate cause of the accident giving rise hereto and the resulting damages suffered by him, and such contributory negligence is fatal to plaintiff's claim." . . .

"In view of the decision reached in this case, it becomes unnecessary to decide the question as to whether Eugene Evans was a State employee or a County employee at the time herein complained of."

Based upon the foregoing findings of fact and conclusions of law, the hearing Commissioner entered an order denying the plaintiff's claim against the defendant and taxing the plaintiff with the costs.

The plaintiff appealed to the Full Commission, where all the findings, conclusions, and the order of the hearing Commissioner were adopted and affirmed.

From this decision the plaintiff appealed to the Superior Court. There the court on review of the plaintiff's exceptions and assignments of error and after hearing the arguments of counsel, concluded that "the Findings of Fact made by the Full Commission are supported by competent evidence and are correct, except for that portion of the Findings of Fact which finds the plaintiff minor guilty of contributory negligence, and that the Conclusions of Law of the Full Commission based upon said Findings of Fact are correct, except that portion of the Conclusions of Law which finds the plaintiff minor guilty of contributory negligence and that the said award of the Full North Carolina Industrial Commission denying the plaintiff compensation on the ground that he was guilty of contributory negligence should be reversed, . . ." Whereupon judgment was entered in accordance with the foregoing conclusions. The decree points out and sustains such of the plaintiff's exceptions and assignments of error as the court deemed necessary to eliminate the Commission's findings and conclusions as to contributory negligence of the plaintiff. The judgment further decrees that the cause be remanded to the North Carolina Industrial Commission for findings as to whether the school janitor, Eugene Evans, was a State employee at the time of the injury sustained by the plaintiff, with further direction that no costs be taxed against the plaintiff.

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

Attorney General Patton, Assistant Attorney General Love, and Charles D. Barham, Staff Attorney, for the defendant, appellant.

Smith, Moore, Smith, Schell & Hunter for plaintiff, appellee.

JOHNSON, J. The Tort Claims Act provides that "the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. . . ." G.S. 143-293; *Bradshaw v. Board of Education,* 244 N.C. 393, 93 S.E. 2d 434.

Necessarily, then, decision turns on whether there is any competent evidence to support the Industrial Commission's finding and conclusion that the plaintiff was contributorily negligent in bar of recovery.

The question thus posed requires a recurrence to these fundamental principles of law: Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of. *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776; *Elder v. R. R.,* 194 N.C. 617, 140 S.E. 298; *Wall v. Asheville,* 219 N.C. 163, 13 S.E. 2d 260; *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904. Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed. *Hall v. Coble Dairies,* 234 N.C. 206, bot. p. 214, 67 S.E. 2d 63, 68; *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S. E. 2d 45; *Ellis v. Refining Co.,* 214 N.C. 388, 199 S.E. 403. It is essential that in order to establish contributory negligence, the defendant must show negligence on the part of the plaintiff as a proximate cause of the injury. *Brewster v. Elizabeth City,* 137 N.C. 392, 49 S.E. 885; *Construction Co. v. R. R.,* 184 N.C. 179, 113 S.E. 672; *Construction Co. v. R. R.,* 185 N.C. 43, 116 S.E. 3; *Davis v. Jeffreys,* 197 N.C. 712, 150 S.E. 488; *Stephenson v Leonard,* 208 N.C. 451, 181 S.E. 261. There fore, the negligence of the plaintiff and its proximate cause must concur and be proved by the defendant, and a failure to establish proximate cause, although negligence be proved, is fatal to the plea. *Brewster v. Elizabeth City, supra.*

The rule obtains in this jurisdiction that in determining whether a child is contributorily negligent in any given situation a *prima facie* presumption exists that an infant between the ages of seven and fourteen is incapable of contributory negligence, but the presumption may

be overcome. The test in determining whether the child is contributorily negligent is whether it acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances. *Caudle v. R. R.*, 202 N.C. 404, 163 S.E. 122. See also *Walston v. Greene,* 247 N.C. 693, 102 S.E. 124; Annotations: 107 A. L. R. 4; 174 A. L. R. 1080.

In *Rolin v. Tobacco Co.*, 141 N.C. 300, 314, 53 S.E. 891, the Court said in speaking to the question of contributory negligence respecting an eleven year old boy who was injured while at work: "Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine, to say that a child of twelve years comes within that class. Adopting the standard of the law in respect to criminal liability, we think that a child under twelve years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence. Mr. Labatt says: 'The essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributing fault, is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible.' . . . 'Between seven and fourteen a child is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity.' *T. C. & C. Co. v. Enslen,* 129 Ala., 336, 346. . . .

"In regard to the alleged contributory negligence of the plaintiff, he should have instructed the jury in accordance with the principles announced by the authorities herein cited. The jury could take into consideration the age, intelligence and knowledge of the plaintiff in regard to the machine and his capacity to know and appreciate the danger."

In *Hollingsworth v. Burns,* 210 N.C. 40, 185 S.E. 476, a boy of twelve skating in the street was hit by a car which admittedly was being operated in a negligent manner. Devin, J. (later C. J.), speaking for the Court, said: "Here the plaintiff was just twelve years of age and was engaged with other boys in a childish game, on roller skates, on or near a connecting street which was ordinarily not much used. . . .

"The courts recognize that the love of play is instinctive in childhood, and that children may be expected to act as children and upon childish impulses. One who possessed profound knowledge of the characteristics of human conduct said, long ago: 'When I was a

child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.' I Cor. 13-11. The law wisely takes into consideration the fact that a small boy will have only the understanding and the thought of a child, not that of a man."

The Commission's conclusory-finding that the plaintiff is barred of recovery by his own negligence is predicated on these inferences deduced from the plaintiff's evidence:

"That the infant plaintiff, George Lindsay Adams, was negligent in failing to keep a proper lookout so he could observe said lawn mower *after he had been warned of its presence by the noise of its motor,* and in failing to reduce the speed at which he was running at the time and under the circumstances herein described, and that such negligence was one of the proximate causes of said accident and the resulting damages suffered by him." (Italics added.)

It thus appears that the two elements of negligence found against the plaintiff, namely, failure to keep a proper lookout and failure to slow down, are predicated on the finding that the plaintiff failed to take timely heed of the noise made by the motor. In so limiting the elements of negligence found against the plaintiff, the Commission appears to have understood and made allowance for these basic features of the game of chase: that the chief objective of the person being chased is to avoid being caught or tagged by his pursuer, and that much of the strategy of the one pursued, especially when about to be caught, is to elude his pursuer by dodging, shifting, or sidestepping; and that the game requires the person chased to do much of his top speed running while looking back, with eyes on his pursuer, so as to be prepared to dodge and shift when about to be tagged. Therefore, since the Commission has limited the elements of negligence found against the plaintiff to failure to keep a proper lookout and reduce speed after being warned of the presence of the mower by the noise of its motor, the pivotal question for decision is: May negligence as a proximate cause of the plaintiff's injury be inferred from the plaintiff's failure to give earlier heed to the sound of the motor by turning sooner to avoid contact with the mower?

The only finding of the Commission as to how much noise the motor made is as follows: It "made the noise of a small motorcycle." This finding is based on the testimony of witness Evans, who was operating the mower. He testified as follows: "The motor makes much noise. It is a two-cylinder motor and makes almost as much fuss as one of those small motorcycles." No one testified as to how far the motor could be heard. William Paskhal testified: "I was behind them

(the plaintiff and Jimmy Hamilton) when George (the plaintiff) tried to cut around the lawn mower. I could hear the lawn mower but I was not paying attention to it. I reckon the lawn mower was three or four feet from George when George cut to his right. That is the first time I saw the lawn mower." The plaintiff testified as follows on cross-examination: "I really don't know why I didn't hear the lawn mower before I got that close to it. I was running with two other boys and I didn't see the lawn mower until I was about three feet away. I don't know why I was that close to the lawn mower before I saw it. I heard the lawn mower but I just didn't see it." It thus appears that the evidence, as well as the conclusory-finding of the Commission, is indefinite and speculative in respect to how much noise the motor made and how far it could be heard under existing conditions.

In further considering the question whether contributory negligence may be inferred from the plaintiff's failure to attempt to turn sooner from his course, in heed of the noise of the motor, these additional factors disclosed by the evidence appear to be relevant:

1. The plaintiff and his companions, William Paskhal and Jimmy Hamilton, were at play on the school playground during a regular play period, when the lawn mower was not supposed to be in operation. It was the practice of the school janitor to mow the grass on the playground only when the children were attending classes, and not to mow while they were at play. The janitor knew that some of the children came to school early, as did the plaintiff and his companions on this particular morning, and engaged in play before the first bell rang in the mornings. On the morning in question, because the weather had been hot and dry and the grass was tough, the janitor, contrary to his usual practice, said he took the machine out on the playground to mow while the dew was on the grass.

2. When the boys came out of the school building to begin their game of chase, they started near the circular driveway back of the school building. The playground lay out in front of them. The ground sloped downhill to a drain ditch. Beyond the ditch the ground sloped up and over a mound or terrace. The janitor was over behind the terrace operating the power mower. The plaintiff took the lead. He was followed first by William Paskhal and then by Jimmy Hamilton. When they crossed the ditch and approached the terrace, the plaintiff was still in front, closely followed by William, but all three were close together. The uncontradicted testimony of all the boys is that they did not see the power mower until after they passed over the terrace. The Commission found on the testimony of witness Evans that he was operating the mower about 40 or 50 feet beyond the terrace. He

was sitting on the trailer. Jimmy Hamilton said as he approached the terrace he could see only the janitor's head "over the mound or hill." The plaintiff said that after crossing the ditch "the only thing he saw was the janitor." Operator Evans said: "The first time that I saw George (the plaintiff) he was falling under the machine. . . . I didn't see the other boys until they all piled up. . . . If I had been looking in their direction I probably would have seen them; but I was looking in the direction to which I had started. I was looking straight ahead where I was mowing."

3. The evidence tends to show that the chase had reached high pitch when the boys approached and went over the terrace near where the mower was in operation. It is inferable that the plaintiff was about to be caught. All three boys were within three or four steps of each other. Their natural excitement at this stage of the game made them less heedful of outside noises, and furnishes plausible explanation why the plaintiff was close upon the mower before he attempted to turn and avoid colliding with it.

4. The plaintiff did not run into or trip over the mower. On the contrary, he slipped on the wet grass and skidded into the revolving blade. All the evidence tends to show that after crossing the terrace, the plaintiff approached the mower at an angle from the side and rear. Suddenly finding himself close to the machine, he attempted to shift around from the side toward the front, and in doing so his foot slipped on the grass and he slid into the front side of the mower, coming into contact with the revolving blade. The plaintiff testified in part: "The first time I saw the lawn mower we were close to it. *I glanced over there and saw it,* and I whirled around. . . . I had seen the lawn mower before, *but I don't know what condition it was in.* I turned to my right after I first saw the lawn mower about three feet away from me to get back up the hill and out of its way. The grass was wet; my foot slipped and the lawn mower was on top of my foot. The grass there was about two and a half feet high." (Italics added). It is noted that the Commission found that the grass "was high but did not conceal the mower or the operator thereof." Further explanation by the plaintiff on cross-examination: "I saw it and then turned to my right. When I turned to my right, my foot slid out from under me. I approached the lawn mower from the side. . . . After I saw it, I turned to my right. The grass was slick and I slid. That was when my ankle got caught in the blade."

Jimmy Hamilton testified in part: "I was behind George, and George fell over and we fell on top of him. . . . We sort of came together at right angles, I guess. . . .We fell over George and not on the lawn mower."

This line of testimony, showing that the plaintiff slid into the machine after slipping in the tall wet grass, tends to minimize further the probative force of the evidence relied on by the defendant to show negligence on the part of the plaintiff. It also brings into bold relief, as bearing further on the question of proximate cause, the element of negligence on the part of the defendant's janitor in operating the mower with the revolving blade completely exposed. He said he was operating the machine for the first or second time with the whirlwind rotary blade exposed, without the protective metal guard that fitted over the top and front of the blade. He said the safety guard which was left off "keeps the machine from throwing things out and *it keeps things from coming into contact with the blade from the outside.*" (Italics added.)

The plaintiff and his playmates had no notice or knowledge of the dangerous, exposed condition in which the lawn mower was being operated. Moreover, it is inferable that if the plaintiff's pivot foot had not slipped on the wet grass, he would have made his turn in safety. This being so, can it be said that in failing to heed the noise of the motor and turn sooner, the plaintiff, eleven year old boy, should have reasonably foreseen injurious results? We think not.

Under all the attending circumstances, we conclude that negligence as a proximate cause of the plaintiff's injury may not be predicated upon or inferred from his conduct as disclosed by the evidence in this case.

In this view of the case it is immaterial that the judgment entered below indicates that the court overruled the Commission's findings, (1) that the high grass failed to obscure the mower from the vision of the approaching plaintiff, and (2) that the plaintiff was an average boy having normal capacity and experience of a child of his age. Conceding, without deciding, that these findings are supported by the evidence, even so, the opinion prevails that the evidence here is insufficient to support the finding and conclusion that the plaintiff by his own negligence is barred of recovery. The court below correctly so held. The judgment entered is free of prejudicial error and will be upheld.

Affirmed.

IN THE MATTER OF JAMES D. GILLILAND, A PRACTICING ATTORNEY OF WARRENTON, WARREN COUNTY, NORTH CAROLINA.

(Filed 4 June, 1958.)

1. Attorney and Client § 9—

There are two methods by which an attorney may be disbarred, the one judicial and the other legislative.

2. Same—

Disbarment proceedings are in the nature of a civil action rather than a criminal prosecution.

3. Same—

The 1937 amendment to G.S. 84-28 providing that the Council of the North Carolina State Bar should have power to formulate rules of procedure governing disbarment proceedings which shall conform as near as may be to the procedure provided by law for hearings before referees in compulsory references, relates to the formulation of rules of procedure incident to hearings before the Council or the Trial Committee and not to procedure upon appeal to the Superior Court.

4. Jury § 5—

Where the right to trial by jury of issues of fact arising on the pleadings is given by statute, waiver of such right will not be presumed or inferred.

5. Attorney and Client § 9—

Failure of respondent in disbarment proceedings to demand jury trial and tender issues incident to his appeal from the Trial Committee to the Council and from the Council to the Superior Court does not waive his right to trial by jury in the Superior Court of the issues of fact raised by the pleadings, since neither G.S. 84-28 nor the rules and regulations of the North Carolina State Bar contain any provisions sufficient to deprive the respondent of the right to trial by jury in the Superior Court expressly granted by the statute.

6. Same—

The refusal of respondent's motion upon appeal to the State Bar Council to have the proceedings remanded to the Trial Committee for the consideration of additional evidence cannot be prejudicial when the trial in the Superior Court is by jury upon the written evidence in the cause, which includes the additional evidence introduced in the hearing before the Council.

APPEAL by respondent, James D. Gilliland, from *Mallard, J.*, Special November Civil Term, 1957, of WARREN.

Action commenced October 23, 1956, by the North Carolina State Bar, sometimes referred to as complainant, for the disbarment of respondent, a member thereof.

The Council of the North Carolina State Bar appointed three of

its members as a Trial Committee to hear and determine the issues arising on complainant's statement of charges and respondent's answer.

Three specific charges were made. Charge I related to respondent's conduct with reference to the Lynch divorce case. Charge II related to respondent's conduct with reference to the Wortham divorce case. Charge III related to respondent's conduct (1) with reference to notices sent to debtors concerning accounts receivable placed in respondent's hands for collection, (2) with reference to the solicitation of professional business through the medium of a collection agency controlled by respondent, and (3) with reference to the purchase by said collection agency of the remaining accounts receivable of an insolvent corporation, respondent being the attorney for the receiver from whom such purchase was made.

On December 7-8, 1956, a hearing was conducted by the Trial Committee. Evidence was offered by complainant and by respondent. On March 22, 1957, after the evidence had been transcribed, the Trial Committee heard arguments. On March 27, 1957, the Trial Committee filed its report.

The Trial Committee, based upon its findings of fact, recommended that Charge I be dismissed. (Thereafter, only Charges II and III were involved.)

As to Charges II and III, the Trial Committee made extensive findings of fact. Its "Conclusions" were as follows:

"That upon the foregoing findings of fact as to counts II and III, the Committee finds that the actions and conduct of the said James D. Gilliland herein set out were and are in violation of law and in direct violation and contravention of the Canons of Ethics of the North Carolina State Bar in that the said Gilliland has: (a) committed criminal offenses showing professional unfitness; (b) has been guilty of unlawful deceit, fraud and unprofessional conduct; (c) has violated the Canons of Ethics duly adopted and promulgated by the Council of the North Carolina State Bar; (d) has by such conduct brought the legal profession and the courts into disrepute; and (e) that he is an unfit person to continue in the practice of law in the State of North Carolina."

Thereupon, the Trial Committee recommended to the Council that respondent be disbarred.

Respondent, in 63 exceptions, challenged the findings of fact, "Conclusions" and recommendation of the Trial Committee. Also, in separate motions, he moved that the Council "remand and recommit this matter to the Trial Committee" (1) for the purpose of separating and distinguishing between its findings of fact and conclusions of law, and (2) for the purpose of correcting errors in material testimony and

for reconsideration by the Trial Committee on the basis of the corrected testimony. Exhibits, consisting of the affidavit of Julius Banzet, who had testified at the hearing, and copies of certain documents constituting portions of the record in the receivership proceedings, were attached to the motion last mentioned.

On April 12, 1957, the Council heard the matter "upon the Report of the Trial Committee," upon respondent's exceptions thereto, and upon respondent's said motions.

The Council denied respondent's said motions to remand and recommit to the Trial Committee, but admitted to the record "for consideration by the Council" the exhibits tendered by respondent.

The Council then denied and disallowed "each of the Exceptions of the Respondent," and adopted and affirmed, "except for the words 'as of November 5, 1954' appearing on line 5, page 12, of the Report of the Trial Committee," the "Findings of Fact and Conclusions of Law of the Trial Committee," and then ordered that the respondent be disbarred from and after April 12, 1957. As directed by the Council, the President of the North Carolina State Bar signed a judgment of disbarment.

Respondent, "reserving all motions and exceptions heretofore taken," excepted to said judgment and appealed therefrom to the Superior Court of Warren County. In addition, he brought forward the 63 exceptions he had theretofore made to the report of the Trial Committee.

In the superior court, at October Civil Term, 1957, by separate motion then filed, respondent moved that the court "remand and recommit this matter to the Council of the North Carolina State Bar for consideration by the Trial Committee of new evidence admitted by the said Council correcting previous prejudicial testimony before the said Committee, which said new evidence has never been considered by the Trial Committee." This motion, "in the discretion of the Court," was denied.

At said October term, complainant moved for immediate trial, but the court, upon respondent's objection, denied said motion. The court then ordered "that this cause be . . . set peremptorily for trial at the next term of Superior Court of Warren County, either special or regular, that is held for the trial of civil cases."

At the Special November Civil Term, 1957, when the cause came on for trial, complainant moved that "the Court proceed to hear all matters relative to this proceeding without the intervention of a jury, the respondent having failed to comply with the law relative to preserving his exceptions by tendering issues and demanding the right to have this matter heard by the jury." Thereupon, respondent moved

"that he be allowed a trial by jury of the issues of fact arising upon the pleadings in this matter," and tendered issues he deemed appropriate. The court allowed complainant's said motion and denied respondent's said motion, to which rulings respondent excepted.

Thereupon, the court, after reviewing the evidence, made findings of fact and conclusions of law substantially in accord with those set forth in the report of the Trial Committee and thereafter adopted by the Council. The court entered judgment disbarring respondent from the practice of law in the State of North Carolina. Respondent excepted and appealed.

Henry E. Fisher, William P. Mayo and Edward L. Cannon for complainant, appellee.

Robert S. Cahoon and Carl E. Gaddy, Jr., for respondent, appellant.

BOBBITT, J. At the hearing at November Special Civil Term, 1957, "It was admitted that no issues had been tendered by respondent and no request or demand made by him for trial by jury, before the Trial Committee or Council." So far as the record discloses, the question as to whether respondent was entitled to a jury trial was not raised until complainant made its said motion at said term.

This question is presented: Did respondent, by his failure to demand jury trial and tender issues incident to his appeals from the Trial Committee to the Council and from the Council to the Superior Court, waive or forfeit the statutory right to a jury trial expressly conferred by G.S. 84-28?

As stated by Stacy, C. J.: "There are two methods by which an attorney may be disbarred: 1. The one judicial. (Citations) 2. The other legislative. (Citations)" *In re West*, 212 N.C. 189, 193 S.E. 134. Here, as in the *West* case, the legislative method alone has been pursued. As stated by *Stacy, C. J.*, in the *West* case: "The proceeding partakes of the nature of a civil action, rather than that of a criminal prosecution. (Citations)"

The statute now codified as G.S. 84-28 is Sec. 11, Ch. 210, Public Laws of 1933, as amended by Sec. 3, Ch. 51, Public Laws of 1937.

In the 1933 Act, one provision of Section 11 stated, "upon appeal to the Judge of the Superior Court, the accused shall have the right to have his cause heard by a jury," but the last sentence of Section 11 provided, "In hearings before the Council (or committee) and in all appeals the procedure shall conform as near as may be to the procedure now provided by law for hearings upon the report of referees in references by consent." Referring to these provisions, Stacy, C. J., in *In re Parker*, 209 N.C. 693, 184 S.E. 532, observed, "It is well set-

tled that, in consent references, the parties waive the right to have any of the issues of fact passed upon by a jury." While noting that the validity of said Section 11 was challenged as denying a right to trial by jury in disbarment proceedings in violation of Article I, Sec. 19, Constitution of North Carolina, the reversal of the judgment of disbarment in the *Parker* case was put on other grounds.

The 1933 Act, as indicated, contained an express provision as to proceedings "in hearings before the Council (or committee) and *in all appeals* . . ." (Our italics) This was stricken by the 1937 Act, which, in respect of appeals, provided: "Upon such appeal to the Superior Court the accused attorney shall have the right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or council."

True, the 1937 Act provided that the Council (or committee) "shall formulate rules of procedure *governing the trial* of any such person which shall conform as near as may be to the procedure now provided by law *for hearings* before referees in compulsory references." (Our italics) Too, it provided that "such rules shall provide," *inter alia*, "for a complete record of the proceedings for purposes of appeal to the Superior Court." Obviously, without such record, there could be no trial in the superior court "upon the written evidence taken before the trial committee or council."

Considered in context, we think the provision for the formulation of rules of procedure refers to procedure incident to hearings before the Council (or committee), not to procedure incident to appeals from the Council (or committee) to the superior court. This provision appears in the same sentence that confers upon the Council (or committee) the jurisdiction to hear and determine the charges made and provides that the Council (or committee) "may invoke the processes of the courts in any case in which they deem it desirable to do so." Moreover, the succeeding sentence, in addition to the requirement that a complete record of the proceedings be made requires that the rules "shall provide for notice of the nature of the charges and an opportunity to be heard." All of these provisions refer clearly to procedure incident to proceedings and hearings before the Council (or committee).

Apparently, the Council so interpreted G.S. 84-28 when it adopted the "Rules and Regulations of the North Carolina State Bar." 205 N.C. 854; 221 N.C. 581. Article IX thereof relates to "Discipline and Disbarment of Attorneys." Section 2 of Article IX, containing subsections (a) through (w), purports to set forth in detail the procedure in disbarment proceedings. No provision thereof purports to provide

that a respondent's right to a jury trial is waived or forfeited if he fails to demand a jury trial and tender issues incident to his appeal from the Trial Committee to the Council or from the Council to the superior court. Nor is there any provision that the procedure in respect of appeals from the Council (or committee) to the superior court shall conform as near as may be to the procedure now provided by law *for appeals* in compulsory references.

It is noteworthy that said Rules and Regulations, not G.S. 84-28, provide for successive hearings before a Trial Committee and the Council. They provide that the initial hearing shall be before a Trial Committee which shall file its report with the Council, to which the respondent may file exceptions; and that the Council shall consider said report and determine the matter "upon the record of the said hearing." Subsection (k), which so provides, also provides that "no testimony or evidence will be taken by the Council and none heard other than such as is contained in the record filed by the committee which conducted the hearings." Subsection (l) provides that the Council, at any time before entering its final judgment, may, upon respondent's motion, remand the cause to the Trial Committee to hear newly discovered evidence and then make further findings in the light of all the evidence.

Subsection (n) provides that "said respondent may appeal, as provided in chapter 210, Public Laws, 1933," from an adverse judgment of the Council, by giving notice thereof as provided. The only provisions relating to an appeal from the Council to the superior court *implying* procedural requirements to be met by respondent are set forth in Subsection (o), which provides: "The record on appeal to the Superior Court shall consist of the statement and notice and answer, if any, and the transcript of the evidence, and the findings of fact and recommendations of the committee, and the findings and conclusions of the Council thereon, as well as the exceptions, if any, filed to the report of said committee by the respondent, and the judgment of the Council thereon and the assignments of error therein, as contended for by the respondent."

"It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or a criminal case. There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver." 31 Am. Jur., Jury Sec. 44; 50 C.J.S., Juries Sec. 110.

Consideration of the foregoing impels the conclusion, and we so hold, that neither G.S. 84-28 nor the Rules and Regulations of the North Carolina State Bar contain any provision sufficient to deprive respondent of the right expressly conferred by G.S. 84-28, upon appeal from the Council, to a trial by jury on the written evidence of the *issues of fact* arising on the pleadings.

Assignments of error, such as those directed to the competency of testimony, need not be considered. As to these, the judge presiding at the jury trial will make his rulings when the evidence is offered.

We deem it appropriate to consider now respondent's assignments of error to the refusal of the Council to allow respondent's motions to remand and recommit to the Trial Committee and to the refusal of the court to allow respondent's motion to remand to the Council with direction to recommit to the Trial Committee for consideration of evidence admitted and considered by the Council contrary to the provisions of said Subsection (k).

The matters set forth in the exhibits attached to respondent's motions were material as to Charge III(3). The evidence before the Trial Committee tended to show that the collection agency, allegedly controlled by respondent, was the highest bidder on August 7, 1954, when the receiver offered for sale at public auction the uncollected accounts receivable of Warrenton Grocery Company; that this sale was not confirmed until November 5, 1954; and that on October 30, 1954, prior to confirmation, the collection agency sold an interest in said accounts to one Wesson, a former salesman of the insolvent company, who had indicated to the receiver that he was considering making an increased bid for said accounts. This evidence tended to support the finding of the Trial Committee that respondent, while attorney for the receiver, and before confirmation of the sale to the collection agency, which he controlled, "did wilfully stifle any increased bid on the said accounts." Among the exhibits attached to respondent's motions was a copy of the court order in the receivership proceedings from which it appears that the sale to the collection agency was confirmed on October 2, 1954, and that the collection agency's transaction with Wesson *was 28 days after the confirmation of sale.*

The Council, on April 12, 1957, when it considered respondent's motions, deleted the specific finding that the receiver's sale was confirmed "on November 5, 1954"; and thereupon, except in this particular, the Council adopted the Trial Committee's findings of fact.

While the Council might well have remanded and recommitted the cause to the Trial Committee for its consideration of the exhibits attached to respondent's motions and for further findings of fact in the

light of such evidence, in view of present decision as to respondent's right to jury trial we do not see that respondent is prejudiced by its failure to do so. Under the circumstances here disclosed, a remand and recommitment to the Council and thence to the Trial Committee would seem a circuitous, needless and futile course.

As the case now stands, the exhibits attached to respondent's motions, by order of the Council, are now a part of "the written evidence." Hence, respondent will have the full benefit thereof upon his trial by jury in the superior court. The jury trial will be upon "the written evidence" in the cause, not the findings of fact made by the Trial Committee and adopted by the Council.

Error in the order denying respondent's right to a jury trial requires that the judgment, based on the court's findings of fact, be vacated; and that the cause be remanded for trial by jury. It is so ordered.

Error and remanded.

T. C. WILLIAMS, JR. AND MOTORS INSURANCE CORPORATION v. SOSSOMAN'S FUNERAL HOME, INC., AND WILLIAM E. MILLER.

(Filed 4 June, 1958.)

1. Automobiles § 17—

Where a collision occurs at an intersection controlled by a traffic light within a municipality so that G.S. 20-158(c) is inapplicable, and the municipal ordinance is not introduced in evidence, the rights of the parties will be determined upon the basis that motorists must give the lights their well-recognized meaning and give that obedience to them which a reasonably prudent operator would give.

2. Evidence § 6—

A party must establish that he belongs to the privileged class in order to be entitled to rely upon a statutory privilege.

3. Automobiles § 17—

If the driver of an ambulance believes *bona fide* that he is operating the vehicle on an emergency trip and gives the warning required by statute, he is accorded the statutory privilege and is entitled to rely on the assumption that other motorists hearing and understanding the sound of his siren will yield the right of way.

4. Same—

Notwithstanding the unequivocal testimony of certain witnesses that they heard the siren of the ambulance operated by defendant for a distance of some several blocks, the testimony of other witnesses, equally unequivocal, that they did not hear the siren until the ambulance was within a few feet of the intersection, is some evidence that the siren was

not in fact sounded in time to provide a warning to plaintiff motorist approaching along the intersecting street.

5. Same—

Provision of an ordinance permitting ambulances on emergency duty, giving proper warning, to proceed past red or stop signals after slowing down as may be necessary for operation, grants the privilege only when the ambulance can proceed with safety to others who have a legal invitation to use the intersection.

6. Automobiles § 41g—

In this action by a motorist entering an intersection while faced with the green traffic light to recover for damages and injuries received in a collision with an ambulance entering the intersection with its siren sounding and its red lights flashing, nonsuit on the ground that the ambulance had the right of way as a matter of law is properly denied when the evidence is conflicting as to whether plaintiff motorist could or should have heard the siren in time to have yielded the right of way and as to the speed at which the ambulance entered the intersection.

7. Automobiles § 17—

The duty of a motorist, even though entering an intersection while faced with the green traffic light, to use ordinary care and maintain a proper lookout, is not to be measured by the duty of a motorist traversing a railroad crossing, and although a motorist traversing an intersection must be vigilant and is charged with the duty of noting traffic along the intersecting street which a reasonably prudent man would see under the circumstances, he is not required to anticipate negligence on the part of other drivers.

8. Automobiles §§ 42g, 46— Evidence held not to show contributory negligence as a matter of law on part of motorist, entering intersection with green light, in failing to yield right of way to ambulance.

The evidence tended to show that plaintiff entered an intersection within a municipality at a lawful speed while faced with the green traffic light and that he did not hear the siren of an ambulance approaching from plaintiff's right along the intersecting street until the ambulance was a short distance from the intersection, that he looked for approaching traffic at four to eight car lengths from the intersection, and that the ambulance struck plaintiff's vehicle on its right. There was evidence that obstructions obscured the view between the vehicles until they were within 40 or 50 feet of the intersection, and that, although the ambulance had its red lights flashing and its siren sounding, the warning was not heard by certain witnesses until the ambulance was within a few feet of the intersection. *Held:* The evidence fails to show contributory negligence on the part of plaintiff as a matter of law, and an instruction that if plaintiff was within range where he could have heard the siren had he been listening he would be deemed to have heard that which he should have heard, but refusing to charge that the failure of plaintiff to have looked for approaching traffic along the intersecting street at a time when such vigilance would have been effective, constituted contributory negligence as a matter of law, is without error.

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

APPEAL by defendants from *Phillips, J.*, December 2, 1957 Regular Civil Term of CASWELL.

This action grows out of a collision of motor vehicles occurring about 1:00 p.m. on 5 July 1956 at the intersection of King and Concord Streets in Morganton. Plaintiff Williams was the owner and operator of a Chevrolet automobile. Williams sustained personal injuries. His automobile was damaged. Motors Insurance Corporation, as a collision insurance carrier on Williams' automobile, complied with the provisions of its policy and asserted its right as subrogee. Sossoman's Funeral Home was the owner of a Cadillac ambulance, the other motor vehicle involved in the collision. Defendant Miller was the driver of the ambulance.

King Street lies in a north-south direction. It is intersected by Concord Street, which lies in an east-west direction. Each street is thirty-two feet wide. The intersection is in a residential area. Hanging over the center of the intersection is an ordinary traffic light with the usual green, yellow, and red lenses. Williams was driving in a southwardly direction on King Street at a speed of 20-25 m.p.h. The ambulance was proceeding eastwardly on an asserted emergency call. Its speed is in controversy. Defendants' evidence tends to fix its speed at 30 m.p.h. or less while plaintiffs' evidence describes it as: "It was really coming pretty fast," and "at least 50 m.p.h." Defendant Miller testified the ambulance was equipped with five red lights, three on the top and one on each fender. In addition to the red lights the ambulance had a siren which, according to the testimony for defendants, could be heard by occupants of other automobiles who had their windows down five or six blocks away. Defendants' evidence was that the red lights and siren were put in operation when the ambulance started on its journey a block and a half from the point of collision. Plaintiff and the other occupants of his vehicle testified that they heard no sound of siren until the ambulance was within 30 or 40 feet of the intersection. There was additional testimony for plaintiff by witnesses in a position to hear that they did not hear the siren until the ambulance was within a few feet of the intersection.

At the northwest intersection of King and Concord is an embankment some three feet high and shrubbery which obstruct the view of operators of motor vehicles traveling as the Chevrolet and ambulance were traveling until one reached a point about 40 to 50 feet from the intersection at which time a driver could see 50 yards down the intersecting street.

The collision occurred in the southwest quadrant of the intersection.

The front of the ambulance struck the right side of the Chevrolet between the front door and the rear bumper. The Chevrolet was struck with such force that it was knocked against and broke a fire hydrant at the southeast corner of the intersection.

The Chevrolet approached and entered the intersection when the traffic light showed green on King Street.

Plaintiffs charge negligence against defendants in that (1) Miller operated his vehicle in a careless and reckless manner; (2) Miller failed to heed the red traffic light and yield the right of way to plaintiff; (3) Miller attempted to traverse the intersection at an unlawful rate of speed; (4) Miller failed to keep and maintain a reasonable and proper lookout for other traffic.

Defendants denied all allegations of negligence, and as a further defense pleaded that Miller was operating a duly authorized ambulance on an emergency mission, that he was operating the vehicle carefully and prudently, that proper warning signals were being given, and pursuant to provisions of an ordinance of Morganton and G.S. 20-156, he was not required to stop for the red light but was accorded priority in crossing the intersection. They also pleaded contributory negligence on the part of plaintiff in failing to keep a proper lookout and in failing to yield the right of way to the ambulance. The negligence asserted as a defense was also charged by defendants as the basis for a counterclaim for damages to the ambulance.

The jury found plaintiff was injured by the negligence of defendants, that he was not contributorily negligent, and assessed both property and personal injury damages. The issues relating to the counterclaim were not answered. Judgment was entered on the verdict. Defendants excepted and appealed.

D. Emerson Scarborough and H. Clay Hemric for plaintiff, appellees.
Smith, Moore, Smith, Schell & Hunter for defendant, appellants.

RODMAN, J. By motions to nonsuit defendants challenge the right of plaintiffs to recover. The reasons assigned are: (1) Defendant's vehicle was "an authorized emergency vehicle" on an emergency errand, and as such, given by statute and ordinance priority in the right to use the intersection and the right to travel at a speed made unlawful as to other vehicles. They merely exercised the rights accorded the ambulance, and negligence cannot be predicated on the exercise of legal rights. (2) Williams, operator of the Chevrolet, was contributorily negligent in (a) failing to yield the right of way to defendant's vehicle and (b) in failing to maintain a reasonable and proper lookout for emergency and other vehicles on the intersecting highway.

This collision occurred in a municipality. Hence the provisions of G.S. 20-158(c), relating to traffic lights outside of towns, has no application. No ordinance of Morganton declaring the consequences of a failure to heed the light was offered in evidence. The operators of the motor vehicles were, therefore, to interpret the signals and give that obedience thereto which a reasonably prudent operator would give. *Wilson v. Kennedy*, 248 N.C. 74.

The use of these lights is too general and well-known to raise any doubt as to meaning of each color and what is expected of an operator when confronted with a red light. It tells him to stop. Defendants recognize this meaning and ordinary application. They concede for the purpose of this appeal Williams had the green light and Miller, the red or stop light. But they say the red did not tell Miller to stop because (a) the State statute, G.S. 20-156, gave Miller the right of way, and (b) Morganton's ordinance declared authorized emergency vehicles may "proceed past red or stop signal or stop sign but only after slowing down as may be necessary for operation."

These laws do accord a privilege, but to exercise the privilege one must establish that he belongs to the privileged class. As said in 35 C.J.S. 185: "As a general rule, in an action or proceeding to enforce or establish an exemption right the burden is on him who seeks to enforce or establish it." Applications of the rule are illustrated in *Sabine v. Gill*, 229 N.C. 599, 51 S.E. 2d 1; *Henderson v. Gill*, 229 N.C. 313, 49 S.E. 2d 754; *S. v. Kelly*, 186 N.C. 365, 119 S.E. 755; *S. v. Simmons*, 143 N.C. 613; *S v Hayne*, 88 N.C. 625; *S. v. Hogg*, 6 N.C. 319; *Williams v. Branson*, 5 N.C. 417; *Oakley v. Alleghany County*, 193 A 316.

For the purpose of this appeal we may, as the parties and trial court apparently did, treat "official business," when applied to private automobiles, as meaning a trip made when the operator of the vehicle bona fide believes an emergency exists which requires expeditious movement. If the driver in fact has such belief and meets the statutory test by giving warning, he is accorded the necessary privilege. The audible sound required by the statute is one heard and understood or which should have been heard and its meaning understood by a reasonably prudent operator called upon to yield the right of way. *Funeral Service v. Coach Lines*, 248 N.C. 146.

Notwithstanding the unequivocal evidence from witnesses for defendants that they heard the siren when the ambulance began its journey and continued to hear it until the moment of the impact, the equally unequivocal testimony of the occupants of the Chevrolet and another witness just a few feet from the intersection that they did not hear the siren until the ambulance was within a few feet of the intersection is some evidence that the siren was not in fact sounded in time

to provide a warning to the plaintiffs. *Carruthers v. R.R.*, 218 N.C. 49, 9 S.E. 2d 498; *Johnson v. R.R.*, 205 N.C. 127, 170 S.E. 120; *Edwards v. R.R.*, 129 N.C. 78.

With this discrepancy in the evidence, the court could not, as a matter of law, hold that Miller had complied with the terms of the statute and was entitled to the right of way.

It is true, as defendants say, that the ordinance of Morganton which permits ambulances to "proceed past red or stop signals" does not require the siren to be sounded, but it does limit their right to proceed "only after slowing down as may be necessary for operation." This necessarily means, we think, that the special privilege can only be exercised when the ambulance can proceed with safety to others who have a legal invitation to use the intersection. To give it any other interpretation would change an ordinance intended to facilitate the safe movement of vehicles across intersecting highways into a trap for those invited to enter.

With the burden of proof on defendants to establish they belonged in the privileged class described in the statute and ordinance, the court could not, as a matter of law, hold that they had the prior right to use the intersection. If they did not have such right, plaintiffs were not, as a matter of law, negligent in accepting the invitation extended to them by the green light.

The assertion that the evidence establishes without contradiction that Williams failed to exercise the vigilance of a reasonably prudent driver is also raised by exceptions to the charge and is discussed in that connection.

The motion to nonsuit was properly overruled and the issue of contributory negligence was properly submitted to the jury.

Assignments of error 8, 9, 10, 11, 12, 13, 14, and 15 question the accuracy and sufficiency of the charge as it relates to the duty of an operator to look for the movement of other vehicles at intersections and the duty of an operator of an ordinary vehicle to yield the right of way to emergency vehicles.

The court, in charging the jury, gave as the basic rules applicable to the rights and duties of plaintiff Williams, the law as stated in *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25, and *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124. The jury was told that notwithstanding a green traffic light faced the operator of a motor vehicle, he could not go forward blindly, but was required to use ordinary care to maintain a proper lookout, to keep his vehicle under reasonable control, and to drive his vehicle at a speed reasonable and prudent under existing conditions. Dealing specifically with the duty to yield the right of way to emergency vehicles, the court charged: "Regardless of

whether the plaintiff actually heard the siren, if you find from the evidence that the siren was audibly sounded and that the plaintiff was within range where he could have heard the siren had he been listening, then the plaintiff will be deemed to have heard that which he should have heard and that which a reasonably prudent person exercising due care would have heard.

"The operator of an authorized emergency vehicle, being the defendant Miller in this case, while on an emergency call, has the right to proceed upon the assumption that when the required signal by siren is given, that other users of the highway will yield the right of way."

We think the court correctly measured the rights of an operator of an emergency vehicle and the duty of the driver of an ordinary vehicle to respect that right.

Williams testified that when three or four or five car lengths from the intersection, he observed the traffic light was green. He continued to observe it until he entered the intersection and so long as he could see the light, it remained green. On cross-examination defendants sought to show that Williams' attention was on the traffic light to the exclusion of traffic on the streets. In response to questions asked, he said that he looked for approaching traffic. Repeated questions led him to estimate the places at which he looked or attempted to look at four to eight car lengths from the intersection. Defendants point to the fact that vision down the intersecting street was obstructed until the driver reached a point estimated at 30 to 50 feet from the intersection. They contend that to look eight car lengths—100 feet or more, they say— from the intersection would avail nothing. Such attempt to look would, as a matter of law, fail to meet the standard of the prudent man and the court erred in not so informing the jury instead of leaving it to the jury to measure defendants' conduct under the rules which it had given.

The rule applicable to the duty of a motorist confronted with a green light is not to be measured by the duty of one traversing a railroad crossing. A railroad crossing is itself notice of danger. *Coleman v. R.R.*, 153 N.C. 322; 69 S.E. 251; *Quinn v. R.R.*, 213 N.C. 48, 195 S.E. 85. The traveler knows trains do not normally stop at highway crossings, and from the nature of the operation are not expected to stop. Reasonable prudence dictates the traveler should take precaution to see that he can cross in safety before entering the crossing.

Automobiles, unlike trains, may be stopped in comparatively short distances. They are not confined to a single line of movement. Of course the motorist must, as the court charged, be vigilant. He must remain alert and see and heed those things which a prudent driver

would see and guard against, but he is not required to anticipate negligence on the part of other drivers. *Jackson v. McCoury*, 247 N.C. 502; *Simmons v. Rogers*, 247 N.C. 340; *Williamson v. Randall*, 248 N.C. 20; *Hyder v. Battery Co., supra.*

We think the court's charge correct, when read as a whole, and no error was committed in permitting the jury to determine whether on all the evidence Williams was reasonably vigilant in the operation of his vehicle.

We interpret the ordinance of Morganton authorizing the chief of police to designate ambulances which may be used as emergency vehicles as empowering him to license specific vehicles for that purpose and not to authorize him to grant blanket authority to some person to operate any vehicle as an ambulance in an emergency. Sound reason would seem to exist for the interpretation we place on it. Presumably he would not authorize or license a particular vehicle that was not properly and adequately equipped both to handle patients and to warn other operators of its approach when used in an emergency. All of the ordinances are not in the record, and we do not know what standards were prescribed in order to obtain authorization. The constitutionality of the ordinance is not here challenged.

The evidence which defendants offered with respect to the authority to operate emergency vehicles by Sossoman's Funeral Home does not appear to be directed to this specific vehicle but to vehicles in general.

But conceding that due authority had been given to operate this particular vehicle in emergencies, the ordinance, as noted with respect to the motion to nonsuit, does not, as we read it, do more than permit its operator to disregard the red light when he can do so with safety. The charge dealing with the duty of the drivers to exercise due care in the operation of their vehicles was, we think, sufficient to cover this phase of the case.

Our examination of the assignments discloses no prejudicial error. No error.

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

IN THE MATTER OF THE ASSESSMENT OF ADDITIONAL INCOME TAXES AND INTEREST AGAINST VIRGINIA-CAROLINA CHEMICAL CORPORATION, RICHMOND, VIRGINIA, FOR THE FISCAL YEARS ENDED JUNE 30, 1952 AND JUNE 30, 1953.

(Filed 4 June, 1958.)

1. Taxation § 29—

Depreciation is the wearing out or obsolescence of property, the use-

ful life of which may be estimated with reasonable certainty; depletion is the exhaustion of a natural resource, and the time within which hidden resources, such as mineral deposits and oil, will be exhausted is highly speculative. Therefore, the law makes a distinction for income tax purposes between deductions for depreciation and for depletion.

2. Same—

Prior to the 1953 amendment to G.S. 105-147, the statute permitted a reasonable allowance for depletion without requiring that it should be calculated on percentage of cost, and the 1953 amendment made mandatory that which was permissible before.

3. Taxation § 23½—

The responsibility for interpreting a tax statute is placed on the Commissioner of Revenue, G.S. 105-264, and the Attorney General's opinion in regard thereto is advisory only. Constitution of North Carolina, Article III, Sec. 14; G.S. 114-2.

4. Taxation § 29— Petitioner held to have properly based depletion of mines on percentage of income in accordance with federal practice.

For the years prior to 1954 petitioner on its income tax returns based deductions for depletion of its phosphate mines on percentage of income, using the same method it used in its federal tax returns. G.S. 105-142. After the expiration of the tax period involved, the Commissioner of Revenue advised petitioner that the percentage of income method was not allowed by the statute, G.S. 105-147, and assessed additional taxes based upon depletion figured on percentage of cost. *Held:* In the absence of law or regulation to the contrary, the taxpayer's method of accounting and the federal practice control, and the Commissioner was without authority to make the retroactive regulation increasing petitioner's tax.

APPEAL by the Virginia-Carolina Chemical Corporation from *Sharp, S. J.*, November, 1957 Civil Term, WAKE Superior Court.

This cause was heard in the Superior Court upon petition to review decision No. 13 of the Tax Review Board affirming an assessment by the Commissioner of Revenue against the appellant for additional income taxes for the fiscal years ending June 30, 1952, and June 30, 1953. (G.S. 143-306, et seq.)

On April 5, 1955, the Commissioner of Revenue notified appellant that additional income tax was proposed for each of the years beginning July 1, 1947 through July 1, 1954, in the total amount of $20,495.31. The appellant taxpayer objected to the proposed assessment and requested a hearing. The Commissioner's amended decision upon the hearing recites: "This assessment was made pursuant to the provisions of G.S. 105-159, G.S. 105-160 and G.S. 105-241.1 and is based in part upon the report of the Federal Revenue Agent for the fiscal years June 30, 1947 to June 30, 1951 and upon office audits of this Department for the fiscal years ended June 30, 1952, 1953 and 1954. . . .

"It is therefore directed that the assessment of the additional tax and interest for each of the income years in question be and the same is hereby fully sustained."

The Tax Review Board, upon taxpayer's petition and after hearing, made findings of fact, among them:

"3. That Board finds that prior to the amendment to G.S. 105-147(8) by the General Assembly of 1953, depletion allowances, in the case of mines and other natural deposits, were required to be computed by using the original cost of the deposits and the cost of developing such deposits not otherwise deducted, or the book value of such assets as the amount to be recovered by a taxpayer over the estimated life of said assets. The Board further finds that percentage of income depletion is computed without reference to the original cost or the book value of the assets being depleted and that said percentage of income depletion was not authorized by law until July 1, 1953."

The Tax Review Board affirmed the Commissioner's decision. The taxpayer paid the tax under protest and appealed to the Superior Court of Wake County. By consent, trial *de novo* was had upon the record certified by the Tax Review Board, supplemented by the oral testimony of Mr. W. H. Hughes, Jr. The Superior Court made the following findings of fact:

"1. That Virginia-Carolina Chemical Corporation, a Virginia Corporation, is required to determine its income tax liability in accordance with the provisions of G.S. 105-134 II(1).

"2. That in determining the company's net income, subject to apportionment in this State, the company is permitted a deduction for depreciation and depletion allowances with respect to certain assets owned by the company during its income year.

"3. That prior to March 4, 1952, there had been no administrative practice on the part of the Commissioner of Revenue or his agents whereby percentage depletion was allowed as a deduction in determining net income and that there had been no formal rule or regulation adopted or promulgated by the Commissioner of Revenue authorizing the use of percentage depletion method in determining the deduction allowed for depletion.

"4. That there is no reasonable relation between actual depletion and percentage of gross income depletion in the case of mines and other natural deposits.

"5. That for the income tax years ending June 30, 1948 through June 30, 1953 the petitioner claimed as a deduction on its North Carolina income tax returns an item for depletion of its phosphate

mines; that the income tax returns filed by the petitioner for these years did not reflect the accounting method used in arriving at the amount claimed for depletion; and that for these income tax years the petitioner computed its depletion upon the basis of percentage depletion method.

"6. In the case of this petitioner's returns the Commissioner of Revenue, because of the lack of auditing facilities, accepted them without making a detailed audit of the depletion deductions.

"7. That for the income tax years ending June 30, 1952 and June 30, 1953 the Commissioner of Revenue by reason of the disallowance of the use of percentage income depletion issued an assessment against the petitioner in the total amount of $12,195.64 principal and $3,123.47 interest or a total of $15,319.11, and on June 12, 1957 the petitioner paid under protest the sum of $15,319.11 to the Department of Revenue."

The court affirmed the decision of the Tax Review Board, and sustained the assessment. The taxpayer brought the case here upon its exceptive assignments which raised questions (1) whether the findings are supported by competent evidence, and (2) whether the facts found support the judgment.

George B. Patton, Attorney General, Basil L. Sherrill, Assistant Attorney General, for the State.

Charles F. Blanchard for Virginia-Carolina Chemical Corporation, appellant.

HIGGINS, J. The taxpayer is a foreign corporation. In connection with, and as a part of its business during the years involved, it operated a large phosphate mine in Florida and a smaller one in Tennessee. Although a substantial part of its other business was carried on in North Carolina, no phosphate mining was done here. This controversy involves the depletion allowance the taxpayer is entitled to deduct from its gross income on account of its phosphate mining operations.

In the taxpayer's returns the deductions for depletion, though not specifically detailed, were based on percentage of income. The Commissioner of Revenue contended such deduction was not permitted under North Carolina law. He levied the additional tax based on cost. The additional tax involved here represents the difference in the method of determining deduction for depletion — whether on percentage of income as contended by the taxpayer, or on percentage of cost as contended by the Commissioner.

In order properly to interpret the North Carolina statutes here involved, it is necessary to keep in mind the distinction between *de-*

preciation and *depletion. Depreciation* is the wearing out or obsolescence of property such as buildings, machinery, etc., used in a trade or business. Such property is in the open, subject to inspection, and its useful life may be estimated with reasonable certainty. On the other hand, *depletion* is the exhaustion of a natural resource. The amount of the original deposit is hidden from sight and necessarily is unknown. The percentage of the whole which is withdrawn in any year is, therefore, a "guesstimate." *U. S. v. Ludley,* 274 U.S. 295. For a full discussion, see Mertens, Law of Federal Income Taxation, sec. 24. The time when a building and a machine may be replaced and the cost of replacement can be estimated within reasonable limits. The time when a mineral deposit will be exhausted or a well will cease to produce is highly speculative. Mineral and oil taken from the earth cannot be replaced. In the case of mines, their use is an exhaustion of a capital asset. The law makes a distinction, therefore, between deductions for depreciation and for depletion.

Our statute, G.S. 105-147, provides: "In computing net income there shall be allowed as deductions the following items:

> "8. A reasonable allowance for *depreciation and obsolescence* of property used in the trade or business shall be measured by the estimated life of such property; and in case of mines, oil and gas wells, other natural deposits and timber, *a reasonable allowance for depletion.* The cost of property acquired since January first, one thousand nine hundred and twenty-one, plus the additions and improvements, shall be the basis for determining the amount of *depreciation,* and if acquired prior to that date the book value as of that date of the property shall be the cost basis for determining *depreciation.*
>
> "In cases of mines, oil and gas wells, and other natural deposits, the cost of development not otherwise deducted will be allowed as *depletion,* . . .
>
> "In case the federal government determines *depreciation* or *depletion* of property for income tax purposes upon the basis of book value instead of original cost, the *depreciation* allowed under this article shall be upon the same basis." (emphasis added)

The emphasis is added for the purpose of pointing out that deduction on basis of percentage of cost is applicable to *depreciation* and not to *depletion. A reasonable allowance* is provided for *depletion.* There is no requirement it should be on the basis of cost.

The respondent virtually concedes as much in his brief: "The language of the above-quoted statute was not so clearly worded as to be completely free of doubt as to its meaning. However, both ap-

pellant and appellee agree that the gist of the statute, as it applies to the Virginia-Carolina Chemical Corporation tax for the years in question, is that the taxpayer is to be allowed a *reasonable allowance for depletion.*" (emphasis added)

The taxpayer for the years prior to June 30, 1954, based its deductions for depletion on percentage of income. It must be conceded, however, the returns did not show how the taxpayer calculated the deduction. The taxpayer used the same method, that is, percentage of income, in filing both its State and Federal tax returns. Although the Commissioner proposed to levy additional taxes for the years prior to June 30, 1954, based on percentage of cost rather than on percentage of income, nevertheless, in his final administrative decision he receded from his position for all years except those ending June 30, 1952 and June 30, 1953. The following explanation is given in the respondent's brief: "In summary, there were no rulings prior to 1952 by the Department of Revenue concerning depletion allowances. The correct analysis of the actions of the Department with respect to the three or four returns which had indicated for years prior to 1952 that percentage depletion had been taken as a deduction is that the Department of Revenue simply did not have sufficient auditors to pursue the matter, and the amounts involved were so small as to render investigation by the Department unprofitable, unless the Federal Bureau of Internal Revenue had indicated an adjustment should be made."

It is understandable why for practical reasons the North Carolina Department of Revenue should rely upon the tax returns accepted by the Federal Internal Revenue Service for a proper reflection of taxable income upon foreign corporations. It would seem the Commissioner's choice was limited to the following: (1) He could rely on the return of the taxpayer; (2) he could send accountants and experts to Florida and Tennessee to examine the mines; or (3) he could accept the determination made by the United States Internal Revenue Service, since the interests of both governments were identical—collection of taxes. Recognizing the necessity for following the last method, our General Assembly enacted G.S. 105-142:

> "The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income, *but shall follow as nearly as practicable the federal practice, un-*

less contrary to the context and intent of this article." (emphasis added)

The record in this case indicates that on February 25, 1952, for the first time, the Commissioner of Revenue officially inquired into the method of determining depletion allowance permitted under North Carolina law by addressing to the Attorney General the following inquiry:

"It has been the practice of this Department in the past to follow the Federal Department in its treatment of depletion methods and rates to be used by taxpayers in determining the deductible amounts on their income tax returns.

"The Federal Department permits several basic methods of which cost or fair market value is one, and percentage of gross income another, (The Federal Code, sec. 114,b). The percentage method has been permitted for oil and gas properties and for mining of various metals and minerals for some years."

* * *

* * *

"The Commissioner will appreciate . . . your opinion as to whether or not this Department can statutorily permit depletion on a basis other than cost or book value."

The Attorney General's reply to the Commissioner's inquiry is not in the record and consequently is not subject to our interpretation. However, the record does contain the Commissioner's interpretation in the form of two letters he addressed to the taxpayer. The first letter, dated December 1, 1954, contained the following: "An opinion of the Attorney General's office, rendered in March, 1952, ruled that it was improper under existing statutes to allow percentage depletion for North Carolina tax purposes. The North Carolina Legislature did, however, enact such a statute to apply to tax returns filed subsequent to June 30, 1953. In view of the aforementioned circumstances, it is requested that you furnish this office with the amount of depletion determined at 'cost' for each of the two years ending 6-30-52 and 6-30-53."

The second letter, dated January 20, 1955, contained the following: "The Attorney General advises that its opinion, as expressed in letter of March 4, 1952, relative to depletion, is still in order in that percentage of income depletion could not have been allowed under the provisions of our Statute prior to the amendment which became effective June 1, 1953, which provided for the allowance of percentage depletion for the mining of certain specific minerals. We would like to point out, however, that the Commissioner has administratively accepted returns where percentage of income depletion was deducted

for the years ending prior to the Attorney General's ruling, but has consistently disallowed percentage depletion for the period intervening between the date of the ruling and the date of the amendment to the law. Under the circumstances the Department is holding that percentage of income depletion would not be permissible for the years ending June 30, 1952 and June 30, 1953."

Whether the Commissioner properly interpreted the Attorney General's views is immaterial insofar as decision here is concerned. The responsibility of decision was placed on the Commissioner. As of the date involved, G.S. 105-264 provided: "It shall be the duty of the Commissioner of Revenue to construe all sections of this sub-chapter imposing . . . income or other taxes." (For subsequent amendments, see Ch. 1350, Session Laws of 1955; and Ch. 1340, Session Laws of 1957.) The Attorney General's opinion was advisory. Article III, Sec. 14, Constitution of North Carolina; G.S. 114-2; *Lawrence v. Shaw*, 210 N.C. 352, 186 S.E. 504.

It is conceded the Commissioner did not promulgate any rule or regulation with respect to the method by which reasonable allowance for depletion might be determined unless his letters of December 1, 1954, and January 20, 1955, may be so construed. These letters were written long after the expiration of the tax period here involved, after the taxpayer had made its returns and calculated and paid the tax in accordance with its own system of accounting and the method sanctioned by the "federal practice." This our State law permitted. In the absence of his own ruling to the contrary, in effect at the time, the Commissioner was without power to make a retroactive regulation increasing appellant's tax.

Analysis of the statutes in effect during the periods here involved leads to the conclusion that the cost method of determining deductions applied alone to property subject to depreciation and obsolescence, and did not apply to phosphate mines which were subject not to allowance for depreciation, but for depletion. Under the specific provisions of North Carolina law the taxpayer was permitted to calculate the deduction according to its own system of accounting, following the Federal practice. This view is supported by amendment to G.S. 105-147, Ch. 1031, Session Laws of 1953, which provided: "Notwithstanding any other provisions of this section, the allowances for depletion . . . in the case of certain mines and other natural deposits . . . shall be a certain per centum of the gross income from the property during the taxable year . . . (including phosphate rock) . . ." The amendment seems to have made mandatory that which was permissible before—percentage of income depletion. The amendment was passed at the first session of the General Assembly following the Attorney General's letter to the Commissioner. The timing of the

amendment and its contents strongly suggest it was intended as a legislative interpretation of existing law which the Commissioner had misinterpreted. The Session Laws of 1955, Ch. 1331, further amended G.S. 105-147 by providing: "The basis for determining the allowance for depletion shall be the book value of the property in all cases in which the Federal Government uses book value to determine the deduction allowance by it for depletion under the provisions of the Internal Revenue Code of 1954." The Revenue Code, Sections 11 and 12, provides for depletion of certain property on the basis of cost. However, Section 613 specifically provides that the allowance for depletion of phosphate mines shall be upon the basis of percentage of income.

The appellee on the argument conceded that the court's finding of fact No. 3 must be sustained in order to affirm the judgment. The essence of the finding is that prior to March 4, 1952, the Commissioner of Revenue had neither established an administrative practice nor had promulgated any rule or regulation authorizing the taxpayer to use percentage of income as a method of determining its depletion allowance. The answer is the taxpayer did not need a rule or regulation of the Commissioner permitting it to determine its deduction for depletion on the basis of percentage of income. The law gave the permission. In the absence of law or regulation to the contrary, the taxpayer's method of accounting and the Federal practice controlled. Both provide for depletion on the basis of percentage of income. The Commissioner did not contend and the court did not find that percentage of income would provide an unreasonable deduction for depletion. The record is clear that the Commissioner levied the additional tax upon the theory that the State law did not permit the deduction on the percentage of income basis but, on the contrary, required the deduction to be made on the basis of cost—a mistaken view of the law.

The evidence is insufficient support for the court's finding No. 3. The Commissioner was without authority to levy the additional tax. The judgment of the Superior Court of Wake County is

Reversed.

ROBERT L. DAVIS III AND WIFE ANNIE S. DAVIS, MARGARET DAVIS ALLEN AND HUSBAND, W. A. ALLEN, AND JANIE DAVIS GRIFFIN, UNMARRIED, v. FRANCIS MILLARD GRIFFIN, W. A. ALLEN III, AND FRANCES MARION ALLEN, MINORS, AND THE UNBORN NEXT OF BLOOD KIN OF ROBERT L. DAVIS III, THE UNBORN NEXT OF BLOOD KIN OF

MARGARET DAVIS ALLEN, AND THE UNBORN NEXT OF BLOOD KIN OF JANIE DAVIS GRIFFIN, APPEARING HERE BY THEIR GUARDIAN AD LITEM, SAM B. UNDERWOOD, JR.

(Filed 4 June, 1958.)

Partition § 4a—

In this proceeding for partition of a number of tracts of land, petitioners asserted title in fee simple in an undivided portion of each tract and a life estate in an undivided portion of each tract, with remainder in fee to defendants, minors and unborn children represented by guardian *ad litem*, but there was no allegation as to defendants' interest, and the will under which the nature of such interest could be determined was not set out. *Held:* Judgment for actual partition as prayed must be set aside and the cause remanded for reformation of the pleadings and the finding of necessary facts.

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

APPEAL by defendants from *Bundy, Resident Judge,* Third Judicial District, in Chambers, March 29, 1958, from PITT.

Special proceeding for actual partition of land, heard in Superior Court upon appeal by guardian ad litem of defendants from judgment of Clerk of Superior Court for partition as prayed.

From judgment of *Bundy,* Resident Judge, holding that Clerk of Superior Court had jurisdiction to grant the relief sought in the petition, and confirming in all respects the judgment of Clerk, defendant guardian ad litem appeals to Supreme Court and assigns error.

Lewis & Rouse for plaintiff, appellees.
Underwood & Everett for defendant, appellants.

WINBORNE, C. J. The order of partition signed by the Clerk appears to have been based upon the record of appointment of guardian ad litem, and pleadings.

There are no findings of fact.

Hence, it is appropriate to analyze the record and pleadings to ascertain if they are sufficiently definite and accurate to justify the conclusion reached by the Clerk. They do not appear to be.

In the caption of the petition Robert L. Davis III and wife, Annie S. Davis, Margaret Davis Allen and husband, W. A. Allen, and Janie Davis Griffin, unmarried, are named petitioners and Francis Millard Griffin, W. A. Allen III and Frances Marion Allen, minors, and the unborn next of blood kin of Margaret Davis Allen, the unborn next of blood kin of Janie Davis Griffin and the unborn next of blood kin of Robert L. Davis III are named as defendants.

And in paragraph 1 of the petition it is set forth that defendants W. A. Allen III and Frances Marion Allen are minors and reside with their parents W. A. Allen and Margaret Allen, and Francis Millard Griffin is a minor and resides with his mother, Janie Davis Griffin.

It is set forth in paragraph 2 of the petition (1) that Robert L. Davis III, Margaret Davis Allen and Janie Davis Griffin own (a) a fee simple interest in some undivided portion of each tract of land hereinafter described fifty-seven tracts, and (b) a life estate in some undivided portion of each tract of said land, and (2) that "the defendants herein named own a remainder in fee of the undivided portion of each and every tract hereinafter described in which the petitioners, Robert L. Davis III, Janie Davis Griffin, and Margaret Davis Allen own a life estate."

It is also set forth in said paragraph 2 of the petition that the lands in which the petitioners Robert L. Davis III, Margaret Davis Allen and Janie Davis Griffin own a portion in fee simple and a portion in life estate, with remainder in fee to "the defendants, herein named, in that portion in which said Robert L. Davis III, Margaret Davis Allen and Janie Davis Griffin own a life estate are described" as therein set forth. Then follows description of each of the fifty-seven tracts, and as to each tract the interests petitioners own are set forth. For example, after the description of the first tract it is stated that "the petitioners own a fee simple interest in two-fifths undivided interest in this tract of land and a life estate in three-fifths undivided interest in said tract of land." But there is no allegation as to defendants' interest.

And it is set forth in paragraph 3 of the petition that petitioners, naming them, are of full age, and that defendants W. A. Allen III, Frances Marion Allen and Francis Millard Griffin are minors without general or testamentary guardian.

In paragraph 4 of the petition it is set forth that "petitioners * * * desire to hold their interest in said lands in severalty or as tenants in common in fee simple to the extent that their interests in all the said tracts of land entitle them to hold and desire to hold the remainder of said tracts of land as by life estate *affected with the remainder and contingencies as to which each of said tracts is now affected;* and that the nature and quantity of tracts of land, described in paragraph 2 of the petition are such that an actual division thereof can be made among the aforesaid tenants in common. (Emphasis supplied) But the "contingencies" are not described.

"Wherefore, the petitioners pray:

"First: That the court appoint a guardian ad litem to represent said minors and unborn next of blood kin of Margaret Davis Allen,

the unborn next of blood kin of Janie Davis Griffin, and the unborn next of blood kin of Robert L. Davis III.

"Second: That commissioners be appointed to allot to the petitioners (naming them), as tenants in common, in fee simple, so many individual tracts of land as their interest in all of said tracts entitle them to hold separately and apart from the tracts in which they own a life estate.

"Third: That the costs incurred in this proceeding be taxed against the petitioners.

"Fourth: For such other and further relief to which they may be entitled under the law."

And the petition for the appointment Guardian ad litem, showeth to the court the purpose of the proceeding, reading in part "so that the petitioners would hold in severalty or as tenants in common in fee so much of said lands as their undivided interest in fee simple in all of the tracts of land described in the petition filed in this cause would justify, and would hold the other tracts by life estate with remainder in fee pursuant to the terms of the last will and testament of R. L. Davis." But the provisions of the will are not set out in the record.

And the record discloses that Sam B. Underwood, Jr., has been duly appointed guardian ad litem of minor defendants, Francis Millard Griffin, W. A. Allen III, and Frances Marion Allen, and of the unborn next of blood kin of Robert L. Davis III, Margaret Davis Allen and Janie Davis Griffin, in this proceeding, and authorized and directed to appear and defend the same on the minors' behalf as such guardian ad litem, and that he accepted the appointment and agreed to act faithfully and diligently in said capacity.

The guardian ad litem, answering in pertinent part, avers "that except as herein admitted the allegations of paragraph 2 of the petition are denied; it being specifically admitted that under the will of the late R. L. Davis, who died testate in Pitt County, and which said will is duly of record in the office of the Clerk of Superior Court of Pitt County in Will Book 6, at page 535, certain lands or interests therein were devised to the five children of the late F. M. Davis, namely * * *." Here the question arises as to "what interests". Does the will shed light? But it is not here!

Here follows genealogical data affecting the five children of the late F. M. Davis, (and) it is further admitted that subsequent to the death of R. L. Davis the late F. M. Davis, together with his wife, Lucy B. Davis, executed deeds for certain interests in the lands hereinafter described, as will more fully hereinafter appear."

Then there follows "admissions with respect to various parcels of land herein described * * * ":

"Tract No. 1 * * * known as the Marlboro Farm, devised by the will of R. L. Davis to the five children of F. M. Davis *for their lifetime in equal shares,* and *upon the death of Frances Marion Davis* his one-fifth share therein passed in fee to his brother and three sisters, so that a 3/60 undivided interest in the said tract of land was then held in fee by Janie Davis Griffin, a 3/60 undivided interest in fee was held by Margaret Davis Allen, and a 3/60 undivided interest was held by Robert L. Davis III; and *upon the death of Virginia Elizabeth Davis* her one-fifth (12/60) share therein passed to Janie Davis Griffin, Margaret Davis Allen and Robert L. Davis III, in the proportion of a 4/60 undivided interest to each, and that the share in fee which had passed to the said Virginia Elizabeth Davis *upon the death of Frances Marion Davis* likewise passed in the proportion of 1/60 to the said Janie Davis Griffin, Margaret Davis Allen and Robert L. Davis III, so that the said Janie Davis Griffin, Margaret Davis Allen and Robert L. Davis III, by virtue of the terms of the will of R. L. Davis and the deaths, as aforesaid, of Frances Marion Davis and Virginia Elizabeth Davis, now own each an 8/60 undivided interest in fee, a total of 24/60 undivided interest in fee, in this tract of land, together with a life estate in the remaining 36/60 (3/5) undivided interest in the said tract of land." (Emphasis supplied)

But if these two decedents only took a life estate under the will of R. L. Davis, how could any interest pass from them on their death? Indeed, there does not appear in the said answer any admission as to who owns the remainder in the 36/60 share, or the terms and conditions under which the remaining interest is held.

Then follows description of the fifty-seven tracts of land, with admission only as to interest owned by petitioners.

And for further answer and as an affirmative defense, the guardian ad litem avers and says:

"1. That G.S. 41-11 provides for a sale, lease or mortgage 'where there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not happened which will determine who the remaindermen are' but that such statute makes no provision for an actual partition or division such as is sought by petitioners in this proceeding, and that no statutory authority exists for the kind of partition contemplated and desired by petitioners in this proceeding.

"2. While it is admitted that the lands described in the petition are extensive in quantity and are made up of various types of improved and unimproved lands, the partitioning of such lands in the manner sought by the petition so as to have all of said tracts held in fee by Janie Davis Griffin, Margaret Davis Allen and Robert L. Davis III,

and all of the other tracts of land held by life estate of the said Janie Davis Griffin, Margaret Davis Allen and Robert L. Davis III, with the remainder over to their next of Blood kin, is not provided for by statute nor by the common law, and such lack of authority and failure of the court to have jurisdiction to grant the relief sought is specifically pleaded in bar of the petitioners' right to have the relief sought in this proceeding."

In the light of the admissions and denials set out in the answer, and the plea as hereinabove set forth, it would seem that for a proper consideration of the questions presented, this Court should have the benefit of acquaintance with the terms and conditions of the will of R. L. Davis,—and as to who are the remaindermen, and as to who are "next of blood kin" of petitioners and otherwise as the term is used in this proceeding.

Hence the judgment will be set aside and the cause remanded to the end that perhaps the pleadings may be reformed, or hearing had, and facts found and conclusions made as to justice appertains, and the law directs.

In future proceedings the parties may find it less confusing to consider only a tract selected as typical of each group of like factual situation.

The petitioners will pay the costs of this appeal.

Remanded.

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

STATE v. ALONZO NEAL.

(Filed 4 June, 1958.)

1. Homicide § 8a—

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice, but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner, and where fatal consequences of the negligent act were not improbable under all the facts existent at the time.

2. Same—

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

8. Homicide § 25— Evidence held sufficient to support conviction of involuntary manslaughter.

The evidence, considered in the light most favorable to the State, tended to show that defendant and his son-in-law, in an intoxicated condition, were walking to defendant's home late at night, that defendant came into his house and asked his wife for a gun and shell, that he took the gun and went back out of the house and that in just a matter of minutes his wife heard a shot. There was testimony of defendant, with corroborating evidence, to the effect that defendant saw something moving just beyond his yard, thought it was a piece of paper or a prowler, fired, and then discovered that he had shot his son-in-law inflicting fatal injury. *Held:* The evidence is sufficient to be submitted to the jury and sustain a verdict of guilty of involuntary manslaughter, since it discloses acts on the part of defendant importing a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others.

APPEAL by defendant from *Johnston, J.*, at December 2, 1957, Criminal Term GUILFORD Superior Court, Greensboro Division.

Criminal prosecution upon a bill of indictment charging defendant with the crime of murder in the first degree of Lucian Graves,—a true bill having been found at October 21 Criminal Term, 1957.

Upon the call of the case for trial, defendant being present and represented by counsel, the Solicitor for the State announced in open court that the State does not desire to put defendant on trial for first degree murder, but asks for a verdict of murder in the second degree or such verdict as the evidence and the law in this case may warrant.

The defendant through his counsel entered a plea of not guilty.

In Superior Court the Solicitor for the State and counsel for defendant stipulated that the deceased, Lucian Graves, came to his death as a result of a gunshot wound in his abdomen on the 22nd day of September, 1957; and that the shooting of Lucian Graves occurred in Guilford County outside the city of Greensboro, North Carolina.

Howard Richardson, brother-in-law of deceased Lucian Graves, each a son-in-law of defendant, as witness for the State testified on direct examination, briefly stated, as follows: "I saw Alonzo Neal at his home back on September 22, 1957, a little while before sundown * * * Me and Alonzo went together to Mt. Zion to Isley's Sweet Shop. While we were there Lucian Graves came * * * around 9:30 * * * After me and Alonzo Neal got to the Sweet Shop, around 7:30, we set around the fire a while,—drank beer, a couple of beers or two. We did nothing else. When Lucian got there, we set around and talked. Lucian bought me a beer * * * I didn't see Alonzo drink any * * * I couldn't say how many beers Alonzo Neal drank, I have no idea. Lucian drank beer. I don't know how many he drunk. I seen him drink one. I stayed at the Sweet Shop until around 12:30 or 1 o'clock when they closed

* * * All three of us were still together at that time. We left together * * * going * * * down to Neal Town to Neal's home * * * I was going to get one of the boys to carry me home * * * Lucian * * * usually spends the night * * * at Alonzo's house * * * The three of us were walking when we left the Sweet Shop * * * Alonzo * * * stopped and said he had to go out in the woods. And me and Lucian Graves kept on down the road * * * I stopped at the club house and Graves kept on going * * * The point where Alonzo went out in the woods is about half-way between Mt. Zion and Neal Town. It's about 200 yards or better from Neal Town to the club house where I stopped * * * The club was open and I reckon I stayed there about 30 minutes or better. After I left the club house I went down to Alonzo's. I did not see Alonzo in the meantime between the time that he dropped off there in the woods and the time I went in the club house. I did not see Lucian Graves, the deceased, from the time I left him there at the club house. When I left the club house and got to Alonzo's, the first person I saw was Alonzo. He was standing on the porch, I think * * * When I walked up to the porch * * * he said he had shot Lucian and 'come on with me to get an ambulance.' I went with him. I saw Lucian laying out in the yard, close by the porch; he was on his back. I saw the wound in his stomach, in front part of him. He was conscious. I remember him saying, 'Somebody help me.' That's all I understood him to say. After going for the ambulance, I returned to Alonzo's home * * * He was saying nothing then."

And the witness Richardson further testified substantially as follows: Returning after midnight, the three of them walked down Huffine Mill Road until they reached a dirt road leading toward Neal Town. It is a winding road along which there are several houses,—the settlement being known as Neal Town. The road runs about a mile or a mile and a half into that settlement. The road forks, and at the fork to the left the last house is that of Alonzo Neal. The road ends at the city dump. And during the times the witness had visited there he had seen papers strewn over the lawn.

There is evidence tending to show that defendant's house faces south; that the front porch is on the south side; that there is a drive coming into the house from the east and makes a little circle in the yard and goes back into the little road; that there is a telephone pole on Neal's property approximately forty feet from the house; that a cap was found 100 feet from the corner of the porch, just about where the little drive comes back into the drive; that about the point where the cap was found there was a large spot or puddle of blood; and that there was a trail of blood from the cap up to about two feet from the porch, where there were several splotches of blood.

And the officer testified that defendant did not tell him that he owned the land where the cap and blood were found.

There is evidence tending to show that the wound in deceased's stomach about the belt line was blown all open * * * seemed to be about two or three inches in diameter,—with intestines hanging down. And in this connection there is evidence that the gun used by defendant had a "poly-choke" on it, and that "the choke on the gun determines the pattern of the shell when it is fired, and, if fired at close range, the whole shot goes into the object which it hits."

The witness Richardson further testified in pertinent part: "* * * When I got down to Alonzo's house I * * * saw Alonzo standing on the porch. He did not have that weapon (indicating) in his hand * * * Alonzo said to me 'I shot Lucian, get an ambulance.' He also told me that he saw what he thought was a piece of paper that was in the yard. He also told me that prowlers had been around his house at night on previous occasions and that he shot to frighten them away if they were there * * * He also told me that he did not know it was Lucian when he fired * * * and that after he fired * * * and saw what was then a human he ran to it and discovered it was Lucian."

And there is evidence tending to show that defendant made other statements to the officers: (1) The first time at the hospital that "he had gone to bed and some time after had gone to sleep he heard his dog barking; that he had heard them barking on three or four occasions before and thought there were prowlers around the house, so he got his shotgun and went out on the porch and saw something move and he shot the moving object, and * * * went out and found that it was Lucian; that he went back to the house and told his wife, 'Lord, I have shot Lucian.'"

(2) Later at his house defendant stated "that he had been making his rounds and was coming in to his home down this driveway and saw something move out in the grass and he went in his house and asked his wife for the shotgun and a shell, and she got his gun and gave him a 16-gauge shell that wouldn't fit, and he said 'This don't fit, get me another shell.' He said she got a 12-gauge shell, the only two he had, and he put that in the gun and went back out in the yard and * * * saw this object moving by the driveway, and didn't bring the gun to his shoulder, but * * * just picked it up and fired * * * from his waist. He said he thought the object was a piece of paper, something moving * * * he was firing at * * * that after he shot at what he thought was a piece of paper * * * he realized then that he had shot Lucian and Lucian was asking for help and he helped him get back up to the edge of the porch, and then went in the house and asked his wife to call an ambulance."

And there is evidence without objection that "his wife said in his presence that he had not been home, that he had not been to bed, that he came into the house and asked for the gun and shell; that she got the gun and the shell and he went back out of the house and in just a matter of minutes she heard a shot. That statement was made by his wife * * * before he told * * * that he had been out making his rounds."

There is also evidence that the deceased when last seen by the witness Richardson on the road, "he was pretty heavily under the influence of beer."

The officer testified that defendant when seen at the hospital, to which deceased was taken, "seemed to be pretty well under the influence of something"; that "even so, he was calm."

And the witness Richardson, under cross-examination, testified "* * * I have frequently visited in the home of Alonzo Neal. On those occasions I have seen the deceased * * * while I was there * * * During the times I have seen him visiting in the home of Alonzo Neal I have never heard any quarrels between them * * * never heard of any trouble between them. It seems so that Lucian Graves enjoyed the use of Alonzo Neal's home * * * Lucian Graves and his wife are divorced. His wife is living elsewhere."

The case was submitted to the jury under charge of the court, and the jury for its verdict finds the defendant Guilty of Manslaughter. And to judgment pronounced and entered, defendant excepts and appeals to Supreme Court, and assigns error.

Attorney General Malcolm B. Seawell, Assistant Attorney General Moody, and Richard T. Sanders, Staff Attorney, for the State.

Harry R. Stanley for defendant, appellant.

WINBORNE, C. J. While defendant, through his counsel, brings forward and presents on this appeal several assignments of error based upon exceptions taken during the course of the trial and to portions of the charge, the one most stressfully urged for error relates to denial of his motions for judgment as of nonsuit.

In this connection, involuntary manslaughter is defined to be the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner, and where fatal consequences of the negligent act were not improbable under all the facts existent at the time. *S. v. Williams*, 231 N.C. 214, 56 S.E. 2d, 574, and cases cited. Indeed, as stated in *S v. Rountree*, 181 N.C. 535, 106 S.E. 669, "Culpable neg-

ligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

In the light of these principles, applied to the evidence in case in hand, taken in the light most favorable to the State, as is done in considering motions for judgment as of nonsuit, G.S. 15-173, the Court is of opinion and holds that a case for the jury is properly made to appear.

The circumstances under which the shooting occurred as reflected by the various statements made by defendant to officers are sufficient to import "a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others."

The matters to which other assignments of error relate have been given due and careful consideration, and in them prejudicial error is not made to appear. They require no express treatment.

Hence in the judgment from which appeal is taken, there is

No Error.

H. L. WILLIFORD v. SOUTHERN FIRE INSURANCE COMPANY.

(Filed 4 June, 1958.)

1. **Insurance § 13e—**

Where a policy of insurance sets forth the manner of computing loss covered thereby, such procedure must be followed in computing the loss.

2. **Insurance § 52—**

Where a policy of crop-hail insurance provides that the amount recoverable should not exceed a stipulated sum per acre without regard to the value of the crop, the procedure provided in the policy for figuring loss thereunder must be followed, and an instruction charging that the measure of damages would be the difference between the market value of the crop immediately before and immediately after damage by the risk covered, must be held for error.

3. **Appeal and Error § 51—**

The fact that plaintiff's evidence relates to an inapplicable theory of liability does not justify nonsuit, since plaintiff is entitled to have an opportunity to produce, if he can, evidence establishing liability upon the correct theory.

APPEAL by defendant from *Hall, J.*, October Term 1957 of DURHAM.

This is a civil action instituted by the plaintiff against the defendant Southern Fire Insurance Company to recover under the provisions of an annual percentage crop-hail insurance policy, No. H 24523,

issued by the defendant to the plaintiff, for damages allegedly caused by hail and wind on 11 August 1955, in a storm which was designated by the United States Weather Bureau as Hurricane Connie.

The policy of insurance was in full force at the time the alleged damage was sustained and covered 8.5 acres of tobacco. The crop was insured in the sum of $300.00 per acre or a total of $2,550.00.

The plaintiff alleges that on 11 August 1955, at approximately 10:00 p.m., the 8.5 acres of plaintiff's tobacco covered by the aforesaid policy of hail insurance were badly damaged by hail and concomitant wind. That as a result thereof the plaintiff's tobacco crop on the said 8.5 acres suffered a loss of approximately 33-1/3 to 50 per cent of the value of said tobacco. That the hail alone damaged the plaintiff's tobacco to a greater extent than 5 per cent which is the minimum requirement for a covered loss under the terms and provisions of the policy.

The jury answered the issues submitted as follows:

"Was the plaintiff's tobacco on the 8½ acres covered by the terms of Sourthern Fire Insurance Policy No. 24523 damaged to the extent of 5% or more by hail only?

"Answer: YES.

"What amount, if any, is the plaintiff entitled to recover of the defendant?

"Answer: $769.50 with interest from October 19, 1955."

The defendant appeals, assigning error.

Bryant, Lipton, Strayhorn & Bryant for plaintiff, appellee.
Joyner & Howison for defendant, appellant.

DENNY, J. The following provisions contained in the insurance policy under consideration must be considered in the disposition of this appeal:

1. "Determination of Loss. Unless otherwise provided, the amount payable hereunder shall not exceed the same percentage of the insurance applying per acre at date of loss as the ascertained percentage of insured loss per acre at such date, but not exceeding the actual loss sustained by the insured.

2. "Special Conditions (Additional perils.) On any insured acre of tobacco, this insurance covers loss by * * * wind when such wind is simultaneously accompanied by hail in an amount sufficient to damage the tobacco to the extend of 5% or more by hail only.

3. "Loss adjustment: tobacco. In determining any insured loss on tobacco, insurance shall apply only to marketable, commercial leaves. The individual leaf shall be the unit of measurement of loss. If adjustment is made before the tobacco is topped, such adjustment shall be

based on an average leaf production for mature plants of not less than 20 leaves. * * * Forty punctures, each puncture approximately ¾ square inch in area or the equivalent thereof shall constitute the total destruction of one leaf. If a leaf is severed at or near the stalk by a peril insured against, such leaf is totally destroyed. If a fractional part of one leaf is destroyed by either punctures or breakage the loss shall be in proportion. If loss occurs after harvesting has begun, the insured shall leave untouched in every damaged field not less than 30 consecutive plants for each acre, said plants not to be left on terrace row, outside row, or the ends of a row."

In the determination of any loss under the provisions of the policy of insurance involved in this appeal, it must first be determined what percentage or amount of the original coverage was in effect at the time the loss occurred. There is no dispute in respect to this provision. It is conceded that one-fifth, or 20 per cent, of the crop of tobacco grown on the 8.5 acres of tobacco covered by the policy had been harvested on the date of the alleged loss. Therefore, only 80 per cent of the original coverage of $300.00 per acre was in effect on the date of the alleged loss, to wit $240.00.

In 45 C.J.S., Insurance, section 979, page 1168, it is said: "In the absence of statute, the method of computing the loss under a policy of hail insurance, and the extent of insurer's liability therefor, is governed by the provisions of the policy. If the policy is an open one, the extent of liability is measured by the actual amount of damages sustained; but, if the policy is valued, as where it fixes the value of the crop per acre and provides for payment of the loss on the basis thereof, insured may recover on that basis, regardless of the actual value of the crop destroyed; and in this connection it is the uncertainty of amount which distinguishes the open from the valued policy."

The policy under consideration is what is known as a "valued policy." It fixes the amount recoverable not in excess of a certain amount per acre without regard to the value of the crop. The policy having fixed the amount of insurance recoverable, it deals with percentages of loss to the crop to be ascertained in the manner set out in the policy. There being no contention that the tobacco crop of the plaintiff was worth less than $240.00 per acre at the time of the alleged damage by hail and wind, the plaintiff would be entitled to recover that portion per acre which the ascertained percentage of the damage or loss per acre would bear to the amount of insurance in effect per acre. Or, to put it another way, if the jury should determine that the crop was damaged by hail to the extent of 5 per cent or more, and that the hail and wind accompanying the hail storm caused a loss of 33-1/3 per cent of the crop, the plaintiff would be entitled to recover one-third of

the $240.00, or $80.00 per acre, multiplied by the number of acres involved. *Glandon v. Farmers' Mutual Hail Ins. Ass'n. of Iowa,* 211 Iowa 60, 232 N.W. 804; *Lee v. National Liberty Ins. Co. of America* (Dist. Court, N.D. Texas), 35 F Supp. 898; *National Liberty Ins. Co. v. Herring Nat. Bank* (C.C.A. Texas), 135 S.W. 2d 219; *Twin City Fire Ins. Co. v. Grindstaff* (C.C.A. Texas), 152 S.W. 2d 845; *Insurance of North America v. Mathers* (C.C.A. Texas), 31 S.W. 2d 1095; Insurance Law and Practice, by Appleman, Volume 6, section 3888, page 246; Anno.—Hail Insurance—Construction, 4 A.L.R. 1300; 35 A.L.R. 268; 129 A.L.R. 1070.

The defendant assigns as error the refusal of the court below to sustain its motion for judgment as of nonsuit, interposed at the close of plaintiff's evidence and renewed at the close of all the evidence.

It will be observed that the jury was instructed to the effect that the measure of damages to be ascertained on the second issue "would be the difference between the market value of plaintiff's tobacco crop immediately before the damage by hail or by hail and winds simultaneously accompanied by hail, if you find that it was so damaged, and its value immediately thereafter."

The defendant excepts to and assigns as error that portion of the charge quoted above. The exception is well taken and must be sustained.

The amount recoverable under this policy, as we have heretofore pointed out, is not to be measured by the difference in the market value of the tobacco immediately before the alleged loss by hail and wind and its market value immediately thereafter; the amount recoverable, where the loss is less than total, is the percentage of loss per acre which such per cent bears to the amount of insurance per acre. *Glandon v. Farmers' Mutual Hail Insurance Ass'n. of Iowa, supra.*

It must be conceded that in computing loss under a policy of insurance, the manner of computing such loss, when set out in the policy, must be followed. *Andrews v. Insurance Co.,* 223 N.C. 583, 27 S.E. 2d 633; *Zibelin v. Insurance Co.,* 229 N.C. 567, 50 S.E. 2d 290; *Fidelity-Phenix Fire Ins. Co. v. Henry,* 248 Ky. 818, 60 S.W. 2d 111; *Glandon v. Farmers' Mutual Hail Insurance Ass'n. of Iowa, supra.*

In *Andrews v. Insurance Co., supra,* the court below charged the jury in effect that the measure of damages would be the difference in the reasonable market value of the airplane immediately before the fire and the reasonable market value thereof immediately thereafter. The defendant excepted to and assigned as error this instruction by the court and appealed. This Court sustained the assignment of error for the reason that the insurance policy upon which the action was bottomed prescribed the measure of recovery for loss of

the insured's aircraft. Likewise, the policy under consideration on this appeal prescribes the manner and method to be followed in ascertaining the percentage of loss.

In view of the theory upon which the case was tried below, it is apparent that much inadmissible evidence was admitted. That being so, the plaintiff in our opinion is entitled to have an opportunity to produce, if he can, evidence establishing the percentage of loss to his tobacco crop at the time of the alleged loss, to be ascertained in substantial conformity with the manner prescribed in the policy. Hence, the ruling of the court below on the motion for judgment as of nonsuit will be upheld. *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919, and cited cases.

Since there must be a new trial, we deem it unnecessary to discuss the appellant's additional assignments of error as they may not recur on the next trial.

New Trial

W. B. BYERLY, COMMISSIONER v. R. G. DELK.

(Filed 4 June, 1958.)

1. Judicial Sales § 7—

The remedy to compel the purchaser at a judicial sale to comply with his bid is by motion in the cause, and ordinarily the court will dismiss *ex mero motu* an independent action brought by the commissioner to compel the purchaser to comply with his bid.

2. Abatement and Revival § 3—

Where jurisdiction of the court has attached as to the parties and the subject matter in an action, which action remains pending for the purpose of granting relief thereafter sought by an independent action, the court will ordinarily dismiss the independent action *ex mero motu* in order to preserve orderly procedure and avoid multiplicity of suits and save costs.

APPEAL by plaintiff from *Olive, J.,* at March Term, 1958, of RANDOLPH.

Controversy without action to determine whether upon the facts agreed the defendant, high bidder at a judicial sale, may be required to pay the purchase money in compliance with his bid.

The instant action, instituted in Randolph County, is ancillary to an action previously instituted and still pending in Guilford County —High Point Division—entitled *"Ida Grace Taylor v. Fred M. Taylor."*

In the Guilford County case the plaintiff wife brought suit against her husband for alimony without divorce and for counsel fees, under

G.S. 50-16. The action was instituted 4 October, 1956. The plaintiff alleged in her complaint that the defendant was a nonresident of the State of North Carolina, and that after due diligence personal service could not be obtained upon him within the State. On the day the action was instituted, the clerk entered an order directing that the defendant be served with summons by publication. The same day the clerk also issued a warrant of attachment, directed to the Sheriff of Guilford County, commanding him to attach the property of the defendant found in his county. The writ was returned under date of 6 October, 1956, signed by the Sheriff of Randolph County, showing that it was executed by him that day by levying upon the defendant's interest in a specifically described lot located in the City of Asheboro, Randolph County. The lot, as shown by the record in the case on appeal, was and is held and owned by the plaintiff and the defendant as tenants by the entirety. The notice of summons by publication recites that the defendant was allowed until 24 November, 1956, to appear and plead to the complaint. However, on 18 October, 1956, after the notice had appeared in only two weekly issues of the newspaper, an order was entered by the presiding judge, awarding the plaintiff a *pendente lite* allowance of $150 a month and counsel fees of $150.

No appearance has ever been made by or for the defendant.

On 10 June, 1957, the case again came on for hearing before the presiding Judge, who found that the defendant had failed and neglected to make any of the payments required by the former order. Whereupon judgment was entered for the total of all past due instalments, to wit, $1,200.

On 10 July, 1957, Resident Judge Crissman, on motion of the plaintiff, entered an order appointing W. B. Byerly, Jr., commissioner, with power and direction to sell, for the satisfaction of the money judgment in favor of the plaintiff, the lot located in Asheboro, owned by the plaintiff and the defendant as an estate by the entirety. After upset bids and two resales conducted by the commissioner, R. G. Delk became the last and highest bidder for the lot at a price of $1,750. The sale was confirmed to him by order of Judge Crissman entered on 1 March, 1958, and on 5 March, 1958, deed was tendered purchaser Delk by the commissioner. He declined to accept the deed and refused to pay the purchase price, contending that the deed as tendered him by the commissioner was invalid because the Superior Court of Guilford County had no authority to order a sale of the lot owned by the plaintiff and the defendant as an estate by the entirety.

Thereupon, the instant action was instituted in the Superior Court of Randolph County as a controversy without action, under G.S. 1-

250, between commissioner Byerly as plaintiff and purchaser Delk as defendant. The facts agreed, as submitted to the court by the parties, embrace a copy of the judgment roll in the Guilford County case and other relevant facts as hereinbefore stated in substance.

When the agreed case came on for hearing before Judge Olive, he concluded that the Superior Court of Guilford County was without authority or jurisdiction to order a sale of the property owned by Ida Grace Taylor and Fred M. Taylor as tenants by the entirety. Accordingly, judgment was entered permitting purchaser Delk to rescind his contract to purchase the lot and taxing the plaintiff commissioner with the costs. From the judgment so entered, the plaintiff commissioner appeals.

Haworth & Riggs for plaintiff, appellant.
No counsel contra.

JOHNSON, J. It is established by authoritative decisions of this Court that where the purchaser at a judicial sale fails to comply with his bid, ordinarily the remedy is by motion in the cause, and not by independent action. On such motion the jurisdiction of the court is broad enough to give either the purchaser or any other interested party the relief which the situation as presented requires. The procedure by motion in the cause provides expeditious relief, prevents multiplicity of suits, and saves costs. If an independent action is brought, ordinarily the court *ex mero motu* will dismiss it. *Wilson, Ex Parte*, 222 N.C. 99, 22 S.E. 2d 262; *Marsh v. Nimocks*, 122 N.C. 478, 29 S.E. 840; *Long v. Jarratt*, 94 N.C. 444.

In *Long v. Jarratt, supra*, a purchaser at a judicial sale assigned his bid. The assignee paid the purchase price but died before deed was executed. His administrator and heirs at law instituted an independent action to compel execution of the deed. Merrimon, J., speaking for the Court, said: "The Court ought not, and will not, in another proceeding or action, take jurisdiction of the same parties and the same subject matter, and do therein what ought properly and regularly to be done in the incomplete proceeding. The law requires consistency in procedure, and in the exercise of jurisdictional authority. It avoids and prevents confusion and multiplicity of actions in respect to the same cause of action, and it will not allow its purpose in these respects, to be defeated by the consent, assent, or inadvertence of parties. Hence it will not tolerate the inconsistency and practical absurdity, of suspending or stopping an action before it is completed, and do what ought legitimately to be done in it, in another and distinct action.

"Therefore, when the Court sees its jurisdiction, already attached

as to the same parties and the same subject matter, in a former action not yet ended, interfered with by another subsequent action, in respect of a matter that ought properly to be considered and determined in the former action, the Court ought, *ex mero motu*, to refuse to proceed in respect to such matter, and send the parties complaining, to seek their remedy and relief in the former and proper action, and if the subsequent action has reference to such matter only, it ought at once to be dismissed, as having been improvidently brought. . . ."

In *Marsh v. Nimocks, supra,* it is said: "In a proceeding to sell land for assets the court of equity has all the powers necessary to accomplish its purpose, and when relief can be given in the pending action it must be done by a motion in the cause and not by an independent action. The latter is allowed only where the matter has been closed by a final judgment. If the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, etc., and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid the multiplicity of suits, avoid delay, and save costs. *Hudson v. Coble,* 97 N.C. 260; *Petillo ex parte,* 80 N.C., 50; *Mason v. Miles,* 63 N.C., 564, . . ."

The judgment rendered below will be treated as erroneous and set aside; and the action will be dismissed.

It is unnecessary to discuss serious procedural irregularities disclosed by the judgment roll in the Guilford County case.

Action dismissed.

EFTHIMIOS MARIAKAKIS AND VIRGINIA MARIAKAKIS v. S. D. JENNINGS, R. G. HANCOCK AND L. J. PHIPPS, TRUSTEE.

(Filed 4 June, 1958.)

Injunctions § 8—

Where the findings of fact of the court establishing the primary equity are supported by evidence, and defendants are fully protected by the provisions of the order continuing the injunction, and harm might result to plaintiffs from dissolution, order continuing the temporary restraining order to the final hearing will be affirmed.

APPEAL by defendants Jennings and Hancock from *Carr, J.,* in Chambers, Graham, N. C., April 5, 1958, of ORANGE.

Civil action to restrain defendants from exercising power of sale in a second deed of trust conveying real property as security for a certain note executed by one J. C. Parsons,—subject to which plaintiffs purchased the property.

A temporary restraining order was issued by *Hobgood, J.*, with order to show cause before *Carr, J.*, why same should not be continued to final determination of the action.

Upon hearing on verified pleadings, treated as affidavits, and other affidavits filed, *Carr, J.*, made findings of fact tending to show issues raised as to whether defendants may lawfully declare payment of the note in default, and concluded "that under the facts and circumstances shown by the evidence in this case it would be harsh, unjust, oppressive and inequitable for defendants to proceed with the foreclosure," and thereupon ordered that the temporary order of injunction be continued to final hearing on the issues raised in the pleadings and the evidence in the case, subject to right of defendants to move to have the restraining order vacated, if the installments of interest as required by the note held by defendants are not paid according to terms of the note as they fall due, and requiring bond in the amount of $1,000.00 to indemnify defendants from damages that they may sustain, if upon final hearing the issues be determined against plaintiffs.

Defendants Jennings and Hancock except thereto, and appeal to Supreme Court and assign error.

Henry A. Whitfield for plaintiff, appellees.
William S. Stewart for defendant, appellants.

PER CURIAM. It appearing from the record (1) that the findings of fact made by the judge, who heard the case, are supported by evidence; (2) that defendants are fully protected by the provisions of the order continuing injunction, hence no harm can come to defendants, and (3) that harm can come to plaintiffs by foreclosure sale; this Court holds that the order from which appeal is taken should be, and is

Affirmed.

L. M. POLLANDER AND C. PHILLIPS RUSSELL v. EDWIN J. HAMLIN, ROLAND GIDUZ, NEWS LEADER COMPANY, INC., AND THE NEWS, INC.

(Filed 4 June, 1958.)

Pleadings § 19b—

Demurrer for misjoinder of parties and causes is properly overruled when the complaint, properly construed, contains but one cause of action for the wrongful capture and control of defendant corporation by the individual defendants, and the allegations with respect to mismanagement and audit of the books do not state causes of action for which re-

lief is presently sought, but merely point to the necessity for court control of the corporation if the relief sought in the action is obtained.

APPEAL by defendants from *Williams, J.*, September-October 1957 Term of ORANGE.

Defendants appeal from an order overruling a demurrer predicated on the asserted misjoinder of parties and causes.

The complaint alleges plaintiffs and individual defendants agreed to form a corporation in which each would have an equal share. Pursuant to this agreement, defendant News Leader Company was incorporated in 1954. Russell was elected president, Pollander, vice president, Hamlin, treasurer, and Giduz, secretary. Thereafter Giduz and Hamlin conspired to seize control of the corporation. Pursuant to this conspiracy, they purported to call a meeting of the stockholders to adopt bylaws and elect directors. At the time fixed in the notice, the individual defendants and an agent of theirs claiming to represent The News, Inc., a corporation owned and controlled by Hamlin, held a meeting and, by a vote of three to two, elected directors and placed individual defendants in control. The News, Inc. is not a shareholder in News Leader Company, Inc. and had no right to vote or participate in a meeting of stockholders of News Leader Company, Inc. Defendants, by virtue of the control so wrongfully obtained, are using the corporation for their personal benefit, trading with themselves, and have brought News Leader Company, Inc. to an insolvent condition. They have refused the request for an audit of the company's books. Plaintiffs pray that the meeting at which defendants obtained control of News Leader Company, Inc. be declared void and that a receiver be appointed to take control of its assets with authority to audit its affairs and investigate the wrongs assertedly done it by its codefendants.

William S. Stewart for plaintiff, appellees.
J. Q. LaGrand for defendant, appellants.

PER CURIAM. We read the complaint to state but one cause of action: the wrongful capture and control of defendant News Leader Company, Inc. by the remaining defendants. The relief sought is to free it from that control and place it in the hands of the court (receivership) where its rights and obligations may be investigated and determined. The allegations with respect to mismanagement and audit of the books are not stated as causes for which relief is presently sought but merely to point to the necessity for court control when released from captivity.

Affirmed.

STATE v. ROOSEVELT BARTON.

(Filed 4 June, 1958.)

Homicide § 25—

Evidence that defendant intentionally shot the deceased with a deadly weapon, thereby proximately causing his death, raises the presumption that the killing was unlawful and was with malice, and is sufficient to warrant and support a verdict of guilty of murder in the second degree.

APPEAL by defendant from *Nimocks, J.*, October Criminal Term, 1957, of ROBESON.

Criminal prosecution for the murder of John H. Blanks, also known as Jackie Lowry.

The solicitor announced that the State would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of second degree murder.

Upon the verdict, "Guilty of Second Degree Murder," judgment, imposing a prison sentence, was pronounced, from which defendant appealed.

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

Hackett & Weinstein for defendant, appellant.

PER CURIAM. Defendant's only assignment of error is that the court erred in overruling his motion for judgment of nonsuit.

The only evidence was that offered by the State, which included plenary evidence that defendant *intentionally* shot the deceased with a deadly weapon, to wit, a 32 pistol, and thereby proximately caused his death; and, if the jury found the facts to be as this evidence tended to show, presumptions that the killing (1) was unlawful, and (2) was with malice, arose. *S. v. Mangum*, 245 N.C. 323, 96 S.E. 2d 39, and cases cited. Since this evidence was sufficient to warrant and support a verdict of guilty of murder in the second degree, defendant's motion for judgment of nonsuit was properly overruled.

No error.

RALPH FRAZIER ET UX v. SUBURBAN RULANE GAS COMPANY, INCORPORATED.

(Filed 4 June, 1958.)

Appeal and Error § 51—

Both competent and incompetent evidence must be considered on appeal in determining the sufficiency of the evidence to overrule nonsuit.

Petition by defendant to rehear the above-entitled cause which was decided by this Court on November 27, 1957, and is reported in 247 N.C. 256, 100 S.E. 2d 501.

The petition was allowed and briefs were invited on two questions: (1) In answering a hypothetical question, did the expert witness base his opinion upon assumed facts not in evidence? (2) If such evidence should be held to be incompetent or without probative value, is there enough evidence left to carry the case to the jury?

Larry S. Moore for defendant, petitioner.

Max F. Ferree, W. L. Osteen, W. H. McElwee for plaintiff, respondent.

PER CURIAM. The defendant appellant's brief in the original hearing contained the following: "No evidence was offered by the defendant . . . and the defendant appealed, seeking a reversal of the court below in submitting the case to the jury. . . . 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."

The plaintiff's evidence elicited by hypothetical question and answer was fully discussed in the original opinion. If the defendant's exception to the question and answer were valid they would entitle it not to a reversal, but to a new trial which its attorney of record says it does not want.

This Court has said many times over that on motion for nonsuit all the evidence in the case, both competent and incompetent, must be considered and given weight for reasons stated in *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919, and the many cases there cited. After due consideration, no reason appears why the former decision should be disturbed. The defendant will pay the costs.

Petition Dismissed.

ET & WNC TRANSPORTATION COMPANY, A CORPORATION, v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 30 June, 1958.)

1. Taxation § 38c—

The proper procedure for a taxpayer to determine liability for a tax is to pay the tax under protest and sue to recover such payment. G.S. 105-267.

2. Taxation §§ 28, 29—

There is a clear distinction made by statute between an excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the State, and an income tax on net corporate income based on a past fact of earned net profits. G.S. Chapter 105, Art. 4.

3. Constitutional Law § 27: Taxation § 29—Income tax on corporation engaged in interstate transportation is not direct burden on commerce.

An income tax imposed under G.S. 105-134, G.S. 105-136, on a foreign corporation engaged exclusively in interstate commerce does not impose a burden on interstate commerce in contravention of Art. I, sec. 8, of the Constitution of the United States, since no tax is imposed if such corporation should have no net income earned within North Carolina by reason of its interstate business, and the tax is imposed only upon that portion of its net income which is reasonably attributable to its interstate business done or performed within the borders of the State, without any discrimination against the taxpayer either in the admeasurement of the tax or the means for enforcing it, and the tax not being upon the franchise to engage in interstate business within the State.

4. Constitutional Law § 24—

The term "law of the land" as used in Art. I, sec. 17, of the State Constitution, is synonymous with "due process of law" as used in the Federal Constitution.

5. Same: Taxation § 29—

The imposition of an income tax under G.S. 105-134 and G.S. 105-136 upon a foreign corporation engaged exclusively in interstate commerce in regard to its operations within the State, which corporation rents a number of terminals and maintains a number of delivery trucks at such terminals in this State, and employs a number of residents in the State and engages in systematic and continuous business herein, is not in violation of due process of law, Art. I, sec. 17, of the State Constitution, Fourteenth Amendment to the Federal Constitution, there being no discrimination in the imposition of the tax.

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

APPEAL by plaintiff from *Hall, J.*, October 1957 Regular Civil Term of WAKE.

Civil action against the Commissioner of Revenue of the State of North Carolina to recover taxes paid under protest.

The action was heard upon an agreed stipulation of facts, the parties by their attorneys having in writing waived a jury trial. A summary of the agreed stipulation of facts follows:

One. Plaintiff, a Delaware corporation, with its principal office in Johnson City, Tennessee, is a common carrier of freight for compensation by motor vehicles in interstate commerce only between the States of North Carolina, South Carolina, Virginia, Georgia and Tennessee, except that in the State of Tennessee it also engages in intrastate business. All of its interstate business is authorized, permitted, supervised and directed under the jurisdiction of the Interstate Commerce Commission in accordance with the Federal Motor Carrier Act of the Congress of 1935, and amendments thereto (U. S. C. A., Title 49, Sec. 301 *et seq.*), and the Commerce Clause of the Federal Constitution (U. S. Const., Art. I, sec. 8, (3)). Its intrastate business in Tennessee is under the jurisdiction of the Tennessee Public Service Commission. It has no offices in North Carolina, except such as are incident to its motor freight terminals, which are necessary for its interstate operations in this State. It has never been domesticated in North Carolina. It has never been authorized by North Carolina to do intrastate business. All of its business in North Carolina is now, and always has been, exclusively interstate in character.

Two. The purpose of the action is to recover from the defendant income taxes in the sum of $15,812.80 paid to the State of North Carolina under protest by plaintiff.

Three. The income taxes, which the defendant required the plaintiff to pay, were levied pursuant to the provisions of G.S. Ch. 105, Art. 4, and in particular Sections 105-134 and 105-136 of said chapter and article.

Four. Plaintiff owns no real estate in North Carolina, but rents and maintains freight terminals in various places in the State solely for its interstate operations. These terminals are manned by employees of plaintiff, who usually live in the State, and whose duties pertain only to its interstate activities. Plaintiff hauls into North Carolina interstate freight only by its interstate motor vehicles. Plaintiff owns no personal property in North Carolina, except pickup and delivery trucks, together with furniture, fixtures and equipment necessary for its terminals. These pickup and delivery trucks are licensed in North Carolina. When freight is received at its various terminals in the State, it is delivered to the consignees, either direct from the interstate motor vehicles, or in delivery trucks stationed at the respective terminals. Its delivery trucks pick up interstate freight from its customers destined for or consigned to points or parties outside of North Carolina, and take it to its terminals. There such freight is billed and loaded into its interstate trucks, and transported to destinations out-

side of North Carolina. Usually when a full truckload of freight is shipped to or from any customer in North Carolina, its interstate trucks go to the customer's place of business. Sometimes such truckloads go by the terminals when it is too late to deliver the freight at night, or to get started, or when a Sunday or a holiday intervenes. In the case of less than truckload shipments, its pickup trucks gather freight from its customers for assembly into full truckloads at its various terminals in the State. These pickup trucks act as a part of its interstate shipments of freight. Plaintiff does not handle any purely intrastate shipments of freight in North Carolina. The only freight plaintiff handles is that which either originates outside of North Carolina, or is destined outside of the State.

Five. During its fiscal year from 1 July 1954 to 30 June 1955, plaintiff paid rentals on its terminals in North Carolina in the amount of $21,911.00. During its same fiscal year, it paid in North Carolina the following taxes:

Gasoline Taxes	$38,868.00
Truck License Taxes	$ 6,294.00
Personal Property Taxes	$ 394.00
N. C. Unemployment Taxes	$ 3,338.00
Intangible Property Taxes	$ 60.00
Total Taxes Paid in North Carolina	$48,954.00

During the same fiscal year, plaintiff paid substantial rentals and taxes in other States in which it operated, except in the State of Virginia. During its fiscal years ending 30 June 1955 and 30 June 1956, the interstate motor vehicles which plaintiff operated were largely based and taxed in Tennessee, and used Tennessee license plates in its operations under reciprocal agreements between Tennessee and the other States in which it operated, by which the interstate motor vehicles are to be taxed and licensed in the carrier's domicile or principal place of business. Under the reciprocal agreement between North Carolina and Tennessee, plaintiff, for its fiscal year ending 30 June 1955, paid license plate taxes to Tennessee for its interstate motor vehicles in the sum of $71,886.38. During its fiscal year from 1 July 1955 to 30 June 1956, plaintiff paid the same rentals on its terminals in North Carolina, and substantially the same amount of taxes in North Carolina, as it did during its preceding fiscal year, and also paid substantial rentals and taxes in other States in which it operated, except Virginia, and license plate taxes to Tennessee on its interstate trucks in the amount of $78,589.00.

Six. On 31 August 1954 defendant requested in writing that plaintiff furnish him certain information, and explain why it had not filed state income tax returns. On 9 September 1954 plaintiff furnished in writing the information requested, and stated it was not subject to income tax to North Carolina. On 7 October 1954 defendant wrote plaintiff that as Commissioner of Revenue of the State of North Carolina he proposed to assess and levy a tax upon its income pursuant to G.S., Ch. 105, and demanded that it furnish him from its books and records information whereby the amount of such tax might be determined.

Seven. On 3 January 1955, at plaintiff's request, a hearing was held in defendant's office, at which plaintiff presented evidence, and contended it was not subject to the payment of income tax to North Carolina. On 17 June 1955 defendant rendered a decision directing plaintiff to file state income tax returns.

Eight. On 28 June 1955 plaintiff filed state income tax returns for the years ending 30 June 1950 through 30 June 1954.

Nine. On 29 June 1955 defendant made an assessment against the plaintiff for state income tax as follows:

Year ending 30 June 1950	$ 4,265.23
Year ending 30 June 1951	$ 3,706.09
Year ending 30 June 1952	$ 1,735.20
Year ending 30 June 1953	$ 3,872.89
Year ending 30 June 1954	$ 890.44

Defendant by letter notified plaintiff of this assessment.

Ten. On 5 July 1955 plaintiff paid under protest to defendant the taxes set forth in paragraph nine.

Eleven. On 25 July 1955 plaintiff made a demand in writing upon defendant for a refund of the above taxes paid, with interest thereon, but defendant refuses to make a refund.

Twelve. On 19 July 1955 defendant made a further assessment against plaintiff for state income tax in the amount of $1,045.86 for a period of time from 1 January 1949 to 30 June 1949. Plaintiff paid defendant this tax under protest, and defendant refuses its demand to refund it.

Thirteen. On 23 September 1955 defendant made a further assessment against plaintiff for state income tax for its fiscal year ending 30 June 1955 in the amount of $295.00. Plaintiff paid defendant this tax under protest, and defendant refuses its demand to refund it.

Judge Hall, after considering the stipulations of facts and arguments of counsel, being of the opinion that the taxes assessed by the

defendant, and paid by plaintiff under protest were properly assessed and collected, rendered judgment that the plaintiff recover nothing from the defendant, and be taxed with the costs.

From the judgment plaintiff appeals.

Harkins, Van Winkle, Walton & Buck and Cox, Epps, Powell & Weller for plaintiff, appellant.

George B. Patton, Attorney General, and Basil L. Sherrill, Assistant Attorney General for defendant, appellee.

PARKER, J. Plaintiff has adopted the proper procedure to have determined the validity of the taxes assessed against it, which it paid. G.S. 105-267; *Buchan v. Shaw, Comr. of Revenue*, 238 N.C. 522, 78 S.E. 2d 317.

According to the agreed stipulation of facts, the taxes, which are the subject of this suit, were imposed and collected under the provisions of G.S. 105-134 and G.S. 105-136, which sections appear under Chapter 105 of the General Statutes, Article 4, "Schedule D. Income Taxes," as said sections were in full force and effect prior to the amendments and supplements to The Revenue Act enacted at the 1957 Session of the General Assembly. Session Laws of North Carolina 1957, Chapter 1340.

Chapter 105 of the General Statutes is designated "Taxation." Of this Chapter, Article 1, is designated "Schedule A. Inheritance Tax"; Article 2, "Schedule B. License Taxes"; Article 3, "Schedule C. Franchise Tax"; Article 4, "Schedule D. Income Tax"; Article 5, "Schedule E. Sales Tax"; Article 6, "Schedule G. Gift Taxes"; Article 7, "Schedule H. Intangible Personal Property."

While the towns, cities and counties in North Carolina impose ad valorem taxes on real and personal property of individuals, firms and corporations, the State of North Carolina does not.

The general purpose of Chapter 105, Article 4, "Schedule D. Income Tax," is expressed in G.S. 105-131, as follows: "To impose a tax for the use of the State government upon the net income in excess of the exemption herein allowed . . . (a) of every resident of the State; (b) of every domestic corporation; (c) of every foreign corporation and of every nonresident individual having a business or agency in this State or income from property owned, and from every business, trade, profession or occupation carried on in this State."

G.S. 105-134, II. Foreign Corporations, provides: "Every foreign corporation doing business in this State shall pay annually an income

tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules." The rule followed by the defendant here is set forth in paragraph 3 of G.S. 105-134, and provides that "the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this State during the income year to its gross receipts for such year within and without the State," and G.S. 105-134,3, (a), further provides that "the words 'gross receipts' as used in this subsection shall be taken to mean and include the entire receipts for business done by such company."

G.S. 105-136 provides a basis for ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the Interstate Commerce Commission to keep records according to its standard classification of accounting. This statute further provides how the net revenue within this State of such a corporation from operations shall be ascertained, when the business of such a corporation is in part within and in part without the State. It also provides that from the net operating income thus ascertained shall be deducted uncollectible revenue, and taxes paid in this State for the income year other than income taxes. G.S. 105-136 further provides: "For the purposes of this section the words 'interstate business' shall mean, as to transportation companies, operating revenue earned within the State by reason of the interstate transportation of persons or property into, out of, or through this State. . . ."

The appellant makes no contention that the *amounts* of the income taxes assessed against it, which it paid, are incorrect. It contends that these income taxes were not lawfully assessed and collected from it on two grounds. One. The statutes under which these income taxes were assessed and collected from it constitute a burden on interstate commerce, and violate the Commerce Clause of the Federal Constitution. Two. The collection of such income taxes violates the due process phrase of the 14th amendment to the Federal Constitution, and also Art. I, Section 17, of the North Carolina Constitution.

Chapter 105, Article 3, is designated "Schedule C. Franchise Tax." Section 105-114 of this article explicitly states the nature of this tax: "The taxes levied in this article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this article upon corporations are privilege or excise taxes levied upon: . . . (2) corporations not organized under the laws of this State for doing business in this State and for the benefit and protec-

tion which such corporations receive from the government and laws of this State in doing business in this State."

A comparison of Chapter 105, Article 3, "Schedule C. Franchise Tax," and Chapter 105, Article 4, "Schedule D. Income Tax" indicates a clear legislative intent to differentiate between these two types of taxes, for a clear distinction has been made by the General Assembly of this State between an excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the State, and an income tax on net corporate income, which is based on a past fact of earned net profits. The agreed stipulation of facts clearly shows that the taxes assessed and paid in the instant case were imposed on that part of plaintiff's net income earned within North Carolina by reason of its interstate business, and fairly attributable to its interstate business done or performed within the borders of the State of North Carolina. The statutes under which these taxes were assessed against plaintiff in precise words preclude a contention that it was the legislative intent that the taxes assessed and paid here were excise or privilege taxes.

When we consider a claim of immunity from taxation, we must come to grips with realities, not shadows. The taxes assessed and collected in the instant case are not in form nor in substance taxes on interstate commerce; nor are they taxes on gross income, nor are they franchise taxes. The taxes here assessed at a nondiscriminatory rate, and paid, were imposed upon that part of plaintiff's net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performed within the borders of the State of North Carolina. If plaintiff should have no net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performed within the borders of the State of North Carolina, it could not be required to pay income tax to the State of North Carolina.

In discussing the Commerce Clause of the Federal Constitution, Article I, section 8, (3), we deem this language in *Freeman v. Hewit*, 329 U.S. 249, 91 L. Ed. 265, pertinent: "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States. The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially

in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

In considering the question before us for decision, we must remember that when Chief Justice Marshall presided over the United States Supreme Court, there was no such thing in this nation as an income tax.

We find this language in *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135: " . . . in *Peck & Co. v. Lowe*, (decided May 20th last) 247 U. S. 165, 38 Sup. Ct. Rep. 432, (62 L. Ed. 1049), we held that the Income Tax Act of October 3, 1913, chap. 16 . . . , when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Article I, section 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden. . . . A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

In *Graves v. New York*, 306 U.S. 466, 83 L. Ed. 927, 120 A.L.R. 1466, it was held that the imposition by the State of New York of a nondiscriminatory income tax on the salary of plaintiff, an employee of the Home Owners' Loan Corporation, an instrumentality of the Federal Government, did not place an unconstitutional burden on the Federal Government, where Congress has not conferred on the salaries of such instrumentality an immunity from state taxation. The Courts said: "And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those

functions when carried on by the government itself through its departments. . . . The present tax is a nondiscriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." The Court's opinion closes with these words: "The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." See *Soltero v. Descartes*, 192 Fed. 2d 755.

Plaintiff relies upon *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L. Ed. 573. The basis of the decision in that case was not the fact that the foreign corporation was solely engaged in interstate commerce, but was that a tax, measured by the net income received from business transactions within the State of Connecticut, which tax as construed by the Connecticut Court, attached solely to the franchise of petitioner to do interstate business, even though it be fairly apportioned and nondiscriminatory, may not be imposed on the privilege of engaging in business in Connecticut that is exclusively interstate in nature. The Connecticut Supreme Court, *Spector Motor Service v. Walsh*, 135 Conn. 37, 61 A. 2d 89, construed its statute as "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign." The United States Supreme Court manifestly accepted this construction by the Supreme Court of Connecticut as controlling its interpretation of the state statute. In *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 92 L. Ed. 1832, the Court said: "As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on 'the privilege of engaging in interstate business.' " Since the tax imposed in the *Spector* case was for the *privilege* of engaging in interstate commerce, it violated the Commerce Clause of the Federal Constitution.

The Court in the majority opinion in the *Spector* case pointed out that "the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." The Court further on in the majority opinion uses this significant language: "The State is not precluded from imposing taxes upon other activities or aspects of this

business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

The language of the United States Supreme Court in the *Spector* case shows that the tax imposed in that case is entirely different from the tax imposed in the instant case. The incidence of the present tax is that part of plaintiff's net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performable within the borders of North Carolina, and not upon the franchise of plaintiff to engage in interstate business in North Carolina.

Defendant further relies on *Railway Express Agency, Inc. v. Virginia,* 347 U.S. 359, 98 L. Ed. 337, and quotes this part of the majority opinion: "It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." That case is distinguishable from the instant case, in that it involved a privilege tax and the formula imposed for assessment. It does not mention income taxes, nor does it abandon the local incident theory. Almost the closing words of the majority opinion are: "We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business." In addition, plaintiff's business in North Carolina, as shown by the agreed stipulation of facts, is more than the gathering up or putting down interstate commodities.

Plaintiff also relies upon the relatively recent case of *Com. of Pennsylvania v. Eastman Kodak Co.,* 385 Pa. 607, 124 A. 2d 100. That case is distinguishable. The Court said: "Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania."

As stated in the *Spector* case in the United States Supreme Court, that Court has consistently struck down, under the Commerce Clause of the Federal Constitution, states taxes upon the privilege of carrying on a business that is exclusively interstate in character.

In *Wisconsin v. Minnesota Min. & Mfg. Co.,* 311 U. S. 452, 85 L. Ed. 274, the majority opinion said: "The Commerce Clause is invoked. But it is too late in the day to find offense to that Clause because a state tax is imposed on corporate net income of an interstate enterprise

which is attributable to earnings within the taxing state, *Matson Nav. Co. v. State Bd. of Equalization*, 297 U. S. 441, 80 L. Ed. 791." Four judges dissented for the reason stated in the dissenting opinion in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 85 L. Ed. 267, 130 A. L. R. 1229. The dissenting opinion in the *Penney* case, written by Mr. Justice Roberts, was based in part on the fact that the tax exacted was not called an income tax, and had been "held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege." The dissenting opinion has this statement: "The respondent admittedly receives income in Wisconsin. No one questions the power of Wisconsin to lay a tax upon the receipt of that income." The majority opinion in the *Wisconsin v. Penney* case says: "For many years, corporations chartered by other states but permitted to carry on business in Wisconsin have been subject to a general corporate income tax act on earnings attributable to their Wisconsin activities. The state has, of course, power to impose such a tax. *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135, 38 S. Ct. 499, Ann. Cas. 1918E 748; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45."

In *Underwood Typewriter Co. v Chamberlain*, 254 U. S. 113, 65 L. Ed. 165, the Court said: "This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled."

In *Memphis Natural Gas Co. v. Stone, supra*, the State of Mississippi imposed a state franchise tax measured by the value of capital used, invested or employed in the State, upon a pipeline company, a part of whose pipeline passes through the State but which does no intrastate business and has never qualified therefor under the laws of the State. The Memphis Natural Gas Company is a Delaware corporation which owns and operates a pipeline for the transportation of natural gas. The line runs from the Monroe Gas Field in the State of Louisiana through the States of Arkansas and Mississippi to Memphis and other points in the State of Tennessee. Approximately 135 miles of the pipeline lie within Mississippi; at two points within that State there are compressing stations. It was stipulated that the Gas Company has never engaged in any intrastate commerce in Mississippi; that it has only one customer within the State, the Mississippi Power and Light Company, to which it sells gas from its interstate line at wholesale from several delivery points; that the Gas Company has never qualified under the laws of Mississippi to do intrastate business within that State; that it has no agent for the service of process and that it has no office within the State; and that its only employees and repre-

sentatives in Mississippi are those necessary to maintain the pipeline and its auxiliary appurtenances. The Gas Company has paid all ad valorem taxes assessed against its property in Mississippi pursuant to the State law. The Supreme Court of the State of Mississippi in 201 Miss. 670, 29 So. 2d 268, approved the imposition of the tax and construed the state tax as "an exaction . . . as a recompense . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." The attack on the Mississippi statute was that it violated the Commerce Clause of the Federal Constitution by putting a tax on the commerce itself. The Court's opinion, after reviewing many of its prior decisions, and after citing in a note to its opinion its cases in which local incidents formed a sound basis for taxation by a State of a foreign corporation doing interstate business, affirmed the decision of the Supreme Court of Mississippi, and closed its opinion with these words: "The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 86 L. Ed. 1090, Chief Justice Stone, speaking for the Court, said: "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, . . . , or upon net income derived from within the state, citing numerous cases, is not prohibited by the commerce clause on which alone taxpayer relies. Many cases are cited." In a note to the opinion of the United States Supreme Court in the *Spector* case, it is said that "any suggestion in that opinion (the *Beeler* case) as to the possible validity of such a tax if applied to earnings derived *wholly* from interstate commerce is not essential to the decision in the case." (Emphasis ours). In the instant case the income taxes imposed on plaintiff were not on its *whole income* derived from interstate commerce, but only on that part of its net income earned within the State of North Carolina by reason of its interstate business, and reasonably attributable to its

interstate business done or performed within the borders of the State of North Carolina.

In *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565, 128 A. L. R. 876, the Court said: "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. Citing authority. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce."

Atlantic Coast Line R. Co. v. Daughton, Norfolk Southern R. Co. v. Daughton, Seaboard Air Line R. Co. v. Daughton, Southern R. Co. v. Daughton, 262 U. S. 413, 67 L. Ed. 1051, were appeals by complainants from decrees of the District Court of the United States for the Eastern District of North Carolina, dismissing the bills filed to enjoin the enforcement of an income tax by the State of North Carolina. The applicable income tax law in North Carolina at that time, as stated in the opinion, was as follows: "The Constitution of North Carolina (art. 5, sec. 3, as amended January 7, 1921) authorizes the general assembly to tax incomes at a rate not exceeding 6 per cent. The Income Tax Act of March 8, 1921 (Revenue Act, chap. 34, Schedule D, sections 100-904, as amended by chap. 35, Public Laws 1921), laid upon corporations a tax equal to 3 per cent of the entire net income as therein defined, and upon individuals a progressive tax not exceeding that percentage. For the purpose of ascertaining the taxable income the statute divides taxpayers into three classes,—individuals, ordinary corporations, and public service corporations (including railroads). The statute, in terms, taxes only net income. For railroads and other public service corporations required to keep accounts according to the method established by the Interstate Commerce Commission, it makes those accounts the basis for determining the 'net operating income' (Sec. 202, as amended); and it directs that, in order to ascertain the 'net income,' there shall be deducted from the net operating income, (a) uncollectable revenue; (b) taxes for the income year, other than income taxes and war profits and excess profits taxes; (c) amounts paid for car hire. Whether the statute is unconstitutional, because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision." The appellants conceded that taxation of the net income of an interstate carrier does not violate the Com-

merce Clause. The State conceded that taxation of gross receipts would be void as burdening interstate commerce. The decision of the District Court was affirmed. In its opinion the United States Supreme Court said: "Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce and that it shall not discriminate against interstate commerce. With these essentials the North Carolina Act complies. It is not assessed on gross receipts. Citing authority. It does not discriminate against interstate commerce. For the taxable net income of other public service corporations which are wholly intrastate is determined also without allowing capital charges as a deduction. That there is no basis for the claim that the commerce clause is violated by the burden resulting from the aggregate of the several North Carolina railroad taxes was settled in *Southern R. Co. v. Watts*, 260 U.S. 519, ante 375, 43 Sup. Ct. Rep. 192, (67 L. Ed. 375)." The third headnote in the case as reported in 67 L. Ed. 1051 is: "The imposition of a tax by a state upon the net income of an interstate railroad from operations within the state, without allowing deduction for payments of interest and rent, which are in fact capital charges, does not violate the interstate commerce provision of the Federal Constitution."

The Supreme Court of California, sitting in banc, in *West Pub. Co. v. McColgan*, 27 Cal. 2d 705, 166 P. 2d 861, upheld in a learned and convincing opinion the right of the State of California to collect an income tax from the West Publishing Company, which was engaged in interstate commerce, and had not qualified to do intrastate business in California, based on the West Publishing Company's net income derived within the State. The judgment of the California Supreme Court was affirmed by the Supreme Court of the United States on 10 June 1946, 328 U.S. 823, 90 L. Ed. 1603, and a rehearing was denied by it on 14 October 1946, 329 U. S. 822, 91 L. Ed. 699. To the same effect see the elaborate and scholarly opinions in *Fontenot v. John I. Hay Company*, 228 La. 1031, 84 So. 2d 810; and in *State v. Northwestern States Portland Cement Co.*, ...Minn....., 84 N.W. 2d 373. In the last case on 6 January 1958 probable jurisdiction was noted by the United State Supreme Court. 355 U.S. 911, 2 L. Ed. 2d 272. For a comment on the *West Publishing Company* case, the case of *Memphis Natural Gas Co. v. Stone*, and the *Spector* case in the United States Supreme Court, see Kraus, The Implications of the *Spector Motor Service* Case, 56 Dickinson Law Review 107-115.

There is no challenge here that the provisions of our Income Tax Act pertinent to the question before us are discriminatory against interstate commerce, nor are the *amounts* of the income taxes imposed on plaintiff assailed, nor the method of computation of such taxes.

In the light of the legislative intent, as well as the carefully re-

stricted impact of our Income Tax Act as it is applicable to plaintiff, and by virtue of the authorities above set forth, we can only conclude, that the North Carolina statutes, under which the income taxes were imposed on plaintiff in the instant case, do not constitute a burden on interstate commerce, and do not violate the Commerce Clause of the Federal Constitution.

Plaintiff's second and last contention is that the collection of the income taxes from plaintiff violates "the due process of law" phrase of the 14th amendment to the Federal Constitution, and "the law of the land" phrase of Art. I, Sec. 17, of the North Carolina Constitution.

"The term 'law of the land' (as used in Art. I, Sec. 17, of the State Constitution) is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states." *S. v. Ballance*, 229 N. C. 764, 51 S.E. 2d 731, 7 A. L. R. 2d 407.

On the question of due process of law the United States Supreme Court in upholding the assessment for local ad valorem taxes of vessels owned by a carrier engaged in interstate commerce and used within the taxing State, where such assessment is based on the ratio between the total number of miles of the carrier's lines in Louisiana and the total number of miles of the entire line, said in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L. Ed. 585: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' Citing authority. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. Citing authority. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State. There is such an apportionment under the formula of the *Pullman* Case. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing State, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders."

In *Miller Bros. Co. v. Maryland*, 347 U. S. 340, 98 L. Ed. 744, the Court said: ". . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

The agreed stipulation of facts shows that plaintiff engages in sub-

stantial income producing activities in North Carolina. Plaintiff rents and maintains freight terminals in various places in the State for its interstate operations, for which terminals it paid in rent for its fiscal year ending 30 June 1955 the sum of $21,911.00, and a similar rent for its fiscal year ending 30 June 1956. It owns and operates pickup and delivery trucks in North Carolina for use at its terminals, and owns furniture, fixtures and equipment in its terminals in North Carolina for use in its business in North Carolina. Its delivery trucks pick up interstate freight from its customers in North Carolina destined for or consigned to points or parties outside of North Carolina, and take such freight to its terminals in North Carolina. When freight is received at its various terminals in North Carolina, it is delivered to the consignees, either direct from the interstate vehicles, or in delivery trucks stationed at the respective terminals. Its terminals in North Carolina are manned by its employees, who usually live in North Carolina. The agreed stipulation of facts does not state the number of such employees in North Carolina, nor the total amount of their salaries, nor the number of plaintiff's terminals in North Carolina, nor the number of its delivery trucks at its terminals in North Carolina, nor the amount of money it receives in North Carolina for bringing in or carrying out freight. However, it would seem from a consideration of the entire agreed stipulation of facts that the number of plaintiff's employees at its terminals in North Carolina, their salaries, the number of its delivery trucks there stationed, and the money it collects in North Carolina in its business, are considerable. The State of North Carolina provides a place and opportunity for plaintiff's employees in North Carolina to solicit business, and make contracts for plaintiff in North Carolina to carry freight for its residents out of North Carolina, and they undoubtedly made such contracts for plaintiff, in competition with other interstate carriers by railroads, express, etc., operating in North Carolina. The State of North Carolina protects plaintiff's business transactions and property within its borders, for instance, against vandalism, larceny, etc., and maintains courts in which plaintiff can enforce payment for the transportation of articles it brings within this State to its customers here, and for the transportation of articles which it carries out of this State for residents here. The business of plaintiff carried on in North Carolina was neither irregular nor casual. It was systematic and continuous throughout the periods of time in question. There are incidents in the carrying on of plaintiff's business taking place in North Carolina, and only here, for which the State of North Carolina affords protection received from no other State, or the United States. Nor can any other State give that protection.

The activities of the International Shoe Company in the State of

Washington, as described in *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 95, 161 A. L. R. 1057, which served as the constitutional basis for the imposition of the tax there involved, were, it seems, in substance no more extensive than the activities of plaintiff in North Carolina.

In *Memphis Natural Gas Co. v. Stone, supra,* we have stated the facts of that case, as they appear in the United States Supreme Court Reports. Certainly the business acts of the Gas Company in Mississippi in that case are not greater than the business acts of plaintiff in North Carolina. In the *Gas Company* case the United States Supreme Court said: "There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred."

The activities of the West Publishing Company in California, where it had not qualified to do intrastate business, as set forth in *West Publishing Co. v. McColgan, supra,* do not seem to be more extensive than the activities of plaintiff in North Carolina. See also *Fontenot v. John I. Hay Company, supra.* See also *McGee v. International Life Ins. Co.,* 355 U.S....., 2 L. Ed. 2d 223, where the Court held that it is sufficient for purposes of due process that a suit against a nonresident not served with process within the forum State is based upon a contract which has substantial connection with that State.

In the collection of the income taxes from plaintiff in the instant case, we find no violation of "the due process of law" provision of the 14th amendment to the Federal Constitution, and of "the law of the land" provision of Art. I, Sec. 17, of the North Carolina Constitution.

Under our dual system of government, the exercise of the taxing power is equally essential to the United States and to the constituent States. Under the facts of this case we conclude that it is clearly manifest that the State of North Carolina has the right to collect the nondiscriminatory income taxes imposed on plaintiff, which taxes were imposed solely on that part of plaintiff's net income earned within the State of North Carolina in its interstate business, and reasonably attributable to its interstate business done or performed within the borders of this State.

The judgment of the trial court is

Affirmed.

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

BRYANT N. THOMPSON AND WIFE, MAE M. THOMPSON, v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 30 June, 1958.)

THOMPSON *v.* R. R.

1. Pleadings § 22—

The trial court may permit a pleading to be amended at any time provided the amendment does not modify or change the cause of action or deprive defendant of a fair opportunity to present his defense. G.S. 1-163.

2. Railroads § 15—

A railroad company has a right to change the elevation of different portions of its right of way to suit its convenience, and its acts in doing so cannot impose liability upon it to abutting land owners.

3. Municipal Corporations § 25b—

The right of the State to control public ways has been delegated in regard to streets to municipalities, G.S. 160-222, and when a city acts for public convenience under the authority granted it in raising or lowering the grade of a street, any diminution of access from abutting property is *damnum absque injuria*.

4. Same: Railroads § 15—

The fact that a street is established across railroad tracks subsequent to the location and construction of the railroad does not diminish the character of the street as a public way, and after the street is established the railroad has no more right to impair or prevent its use than any other property owner would have to change the grade or interfere with the use of the street.

5. Railroads § 15—

While a railroad company is given authority to construct its tracks across public ways, it may not construct its tracks or change the grade of the tracks unless it restores the street to a useful condition. G.S. 60-37(6), G.S. 60-43.

6. Same: Eminent Domain § 3—

If a railroad company, in the performance of its duty to restore a street to a useful condition after it has changed the elevation of its tracks at the street crossing, is required to go beyond the railroad right of way and change the grade of the street, and such change of grade impairs access to the street of an abutting property owner, the railroad company must pay compensation to such abutting owner for the resulting diminution in value of the land.

7. Municipal Corporations § 25b: Railroads § 15—

If a railroad company in changing the grade of a street beyond its right of way, incident to the restoration of the street after changing the elevation of its tracks at a grade crossing, asserts the municipality's governmental immunity in changing the grade of the street beyond its right of way, it must plead the facts which would relieve it of liability on this ground. G.S. 1-135.

8. Same: Pleadings § 22—

This action was instituted against a railroad company by an abutting property owner to recover compensation for the diminution in value of his property resulting from impairment of access to the street incident to the change in grade of the street beyond the right of way of the rail-

road company. Plaintiff alleged that the acts of the railroad company were unlawful. *Held:* An amendment charging that the change of grade was for the benefit of the railroad company is immaterial when the railroad company fails to allege or prove that its acts in changing the grade of the street were done under the governmental immunity of the city, and therefore the court had the power to allow the amendment during the trial.

9. Municipal Corporations § 25b: Railroads § 15— Evidence held insufficient to show that change of grade of street was made under *immunity of city.*

Evidence that a railroad company for its own purposes changed the elevation of its tracks at a grade crossing, that incident to its duty to restore the street to usefulness as a public way, it was required to change the grade of the street beyond its right of way, and that the municipality merely gave the railroad company permission to perform the work in accordance with the railroad company's plans and specifications, *is held* to disclose that the change in grade was for the benefit of the railroad and was not a function of the city nor done for the city's benefit, and, therefore, is insufficient to support the defense that the railroad company, in changing the grade, was clothed with the governmental immunity of the city.

HIGGINS, J., dissenting.

APPEAL by defendant from *McKeithen, S. J.*, October 7, 1957 Term of RICHMOND.

Plaintiffs are the owners of property abutting on what they designate in the complaint as Bridges Street and Railroad Street. This action was brought to recover damages done to that property by closing Railroad Street and changing the grade of Bridges Street.

Hamlet is an important junction point for defendant. Its main north-south line intersects its Wilmington-Charlotte line there. The intersection is at right angles. Defendant has a right of way 200 feet in width. Prior to 1955, interchange between the main line and the Wilmington line was by what the parties call "old wye."

Bridges Street runs southwardly through the town and crosses old wye and the main line at grade. The parties stipulated "that for many years prior to 1955, Bridges Street was and has at all times subsequent thereto been and now is a public street in Hamlet. . ." It was also stipulated that the railroad, including old wye, was laid out and in operation before Bridges Street was established.

Plaintiffs are the owners of two tracts of land fronting on Bridges Street. On the tract on the west side they had erected two buildings. This tract and the buildings erected thereon are partly within and partly outside defendant's right of way. Plaintiff's other tract lies on the east side of Bridges Street. Its southern boundary is the northern

line of defendant's right of way. A three-story brick building is situate on this tract.

In 1955 defendant concluded that it should relocate its wye so as to lengthen the arc and thereby reduce the acute curve existing in the old wye. To accomplish this it was necessary to make a fill on defendant's right of way. The elevation of the new wye necessitated raising Bridges Street at the new intersection. The fill also closed what plaintiffs designated in their complaint as Railroad Street. The answer denied there was any such street and asserted that the use of this area by the public was with the permission of the railroad. Defendant prepared detailed plans of the proposed changes which it transmitted to the governing authorities on 7 June 1955 with the request that the town issue "a permit to proceed with the construction of this connecting track across Bridges Street. . . upon the terms outlined herein." Permission to do the proposed work was granted on 22 June 1955.

The work was done in accordance with plans prepared and submitted by the railroad to the town. The point where the new wye crosses Bridges Street is 58 feet north along Bridges Street from the old wye crossing. Bridges Street was raised 3.48 feet at the new intersection. This put the new intersection .6 foot higher than the old intersection.

The northern line of defendant's right of way is approximately 50 feet north of the new wye. Plaintiffs' property is north of the right of way. The elevation of Bridges Street was raised at its intersection with the northern line of the right of way 3.69 feet. The fill was continued in Bridges Street beyond the right of way line. At a point 25 feet north of the right of way a fill of 2.95 feet was made, and 25 feet beyond that point a fill of 1.86 feet was made. The amount of fill continued to decrease and terminated at a point 96 feet north of the right of way line, or about 146 feet northwardly from the point where the new wye crosses Bridges Street. The point where the fill terminates is near the northern corners of plaintiffs' property. The railroad paved the area of the street in which it had placed the fill. It placed curb and gutter in accordance with the terms of its letter to the town requesting permission to make the change.

Sections 7 and 9 of the Complaint read:

"7. That about the month of ..... 1955, the defendant, its agents, servants and employees, entered in, onto and upon Railroad Street, filled the same with dirt to the extent of about three feet deep on the Hamlet Avenue end, and to the extent of about eight feet deep on the Bridges Street end fronting plaintiffs' property, laid a railroad track thereon and appropriated the entire street to its exclusive use and has been and still is using the same as a railroad track and has completely blocked the entrance to plaintiffs' property from Railroad Street. That in addition to filling in and blocking off Rail-

road Street the defendant, its agents, servants and employees, entered in and upon its intersection with Bridges Street to a depth of some 8 feet at the intersection, and defendant wrongfully extended said fill for some.....feet along Bridges Street towards the Northeast for a distance of practically the entire frontage of plaintiff's property thereby practically burying plaintiffs' brick buildings and cutting off access to the same from said street except by ladders or otherwise."

"9. That defendant's entry in, on, and upon said streets and its appropriation and use of the same as aforesaid, has been done wrongfully and unlawfully in violation of plaintiffs' right to have said streets left open, all without permission of plaintiffs, against their will, and over their protests, to their great hurt, injury and damage. That the aforesaid acts of the defendant herein complained of, are not only wrongful and unlawful and *for the use and benefit of the defendant,* but amounts to a taking of plaintiffs' property and appurtenances thereto by defendant, thereby practically destroying the value of plaintiffs' said property without any compensation or tender of compensation to plaintiffs therefor." (Italics added.) The italicized words were inserted by amendment after the evidence had concluded.

Defendant denied the allegations of sections 7 and 9. It supplemented its denial of the facts alleged in section 7 by asserting: "This defendant says in connection therewith that the filling referred to was wholly on its own right of way and within its property rights, and that it has not wrongfully trespassed upon the plaintiffs' property or their rights." It supplemented its denial of the facts alleged in section 9 by asserting: "it has not taken any of the property of the plaintiffs and has confined its construction efforts within its own right of way and in providing facilities for the public to cross its tracks."

The parties stipulated at the trial that the boundaries between the respective properties were as indicated on a map prepared by court-appointed surveyors, and that the plaintiffs were the owners of the lands claimed by them as so shown. They further stipulated: "The damages now sought in this action are limited to such as flowed from defendant's alleged changes of Bridges Street; and no claim is now made by the plaintiffs for any damages resulting from any alleged change that may have been made of any other street."

The court submitted issues which were answered by the jury as follows:

"1. Did the defendant, Seaboard Air Line Railroad Company, raise, or cause to be raised, the elevation of Bridges Street abutting the property of the plaintiff?

"Answer: Yes

"2. If so, was the property of the plaintiffs damaged as a result of said elevation?

"Answer: Yes

"3. If so, what amount of damages, if any, are the plaintiffs entitled to recover?

"Answer: $30,000.00."

The court instructed the jury to answer the first issue in the affirmative. Judgment was entered on the verdict in favor of plaintiffs and defendant appealed.

Douglass & McMillan and Jones & Jones for plaintiff, appellees.
Bynum & Bynum and Varser, McIntyre, Henry & Hedgepeth for defendant, appellant.

RODMAN, J. While defendant brings forward 130 assignments of error, we think the basic question involved is presented by three of these assignments: (1) Permitting the amendment to the complaint after the presentation of the evidence; (2) the motion to nonsuit; and (3) the court's instruction to the jury to answer the first issue in the affirmative.

A trial court may permit a pleading to be amended at any time unless the amendment in effect modifies or changes the cause of action and deprives defendant of a fair opportunity to assemble and present his evidence relative to the matters asserted in the amendment. G.S. 1-163.

To determine the materiality of the amendment we examine the pleadings without the amendment to ascertain what issues arise on the pleadings. If the issues raised by the amended pleadings assert a different right of action presenting different issues, then the amendment is material, and defendant is entitled to an opportunity to prepare its defense and offer evidence on the issue so raised. Did the phrase "and for the use and benefit of the defendant," inserted in section 9 of the complaint add anything to the invasion of plaintiffs' rights as originally asserted? The answer to the question is found in the law which determines the motion to nonsuit and the propriety of the instructions with respect to the first issue.

What wrongful act was charged in the complaint and what defense did defendant assert? The basis of asserted liability is found in section 7 of the complaint. It alleges defendant took possession of two public streets in Hamlet on which plaintiffs' property abutted and, by fills in these streets, denied plaintiffs access thereto. Defendant denied this allegation. The denial raised two questions: (a) were the areas public streets, and (b) did defendant make the fill? In addition and as an affirmative defense it asserted that the fill was made on its

right of way in the lawful use of its property and in providing facilities for the public to cross its tracks.

When the case came to trial the parties by stipulation eliminated issues originally raised (a) as to plaintiffs' title to the area for which plaintiffs assert a right to recover, (b) the location of the line separating the right of way from the land owned absolutely by plaintiffs, (c) the nature of the area which plaintiff designated as Bridges Street, defendant conceding that it was a public way although established after the railroad was constructed, (d) that no liability existed for work done in the area designated as Railroad Street (presumably for the reason that it was not a public street but a way used with the permission of the railroad which it could terminate at any time.) The stipulation which the parties made reduced the issues touching liability raised by the complaint as originally drafted to this fundamental question: Did defendant change the grade of the street abutting plaintiffs' property outside and beyond the right of way? Viewed in the light of the stipulation, plaintiffs' claim, and the court's charge, this was the issue submitted to and answered by the jury.

The fact that the grade of Bridges Street was changed from a point south of the new wye to a point northwardly and outside of the right of way and across the front of plaintiffs' property is not controverted; nor is it controverted that the work was done by a contractor secured and paid by defendant.

Defendant insists that these admitted facts do not establish liability because (1) it had the right to make such fills on its right of way as it deemed appropriate in the conduct of its business; (2) in the exercise of its rights it could change the grade at Bridges Street within the bounds of its right of way; (3) the change in the elevation of Bridges Street within the right of way necessitated a change in the elevation beyond the right of way if the public was not to be deprived of the use of Bridges Street where it crossed the right of way; (4) the town had the right to change the grade of the street for public benefit and as it authorized or permitted defendant to change the grade, the permission so granted immunized defendant from liability.

An analysis of defendant's position is necessary to pass on its assignments of error. Legal principles pertinent to the questions raised are, we think, well settled.

Defendant had a right to change the elevation of different portions of its right of way to suit its convenience. No liability exists for such changes. *Brinkley v. R.R.*, 135 N.C. 654. That right is not here controverted.

Control of public ways (highways, streets, and navigable waters) is vested in the sovereign, the State, and subject to constitutional limitations, the Legislature may regulate the location, width, eleva-

tion, and use of these ways. *Clayton v. Tobacco Co.*, 225 N.C. 563, 35 S.E. 2d 691; *Guano Co. v. Lumber Co.*, 168 N.C. 337, 84 S.E. 346; *Dalton v. Brown*, 159 N.C. 175, 75 S.E. 40; *Butler v Tobacco Co.*, 152 N.C. 416, 68 S.E. 12; *Elizabeth City v. Banks*, 150 N.C. 407, 64 S.E. 189; *S. v. Yopp*, 97 N.C. 477. The Legislature, in the exercise of its discretion, may delegate to a municipality or other agency its power to regulate and control for public use streets and highways. *Cab Co. v. Shaw*, 232 N.C. 138, 59 S.E. 2d 573; *Suddreth v. Charlotte*, 223 N.C. 630, 27 S.E. 2d 650. The Legislature has authorized municipalities to control streets with the right to "make such improvements thereon as it may deem best for public good . . . and regulate, control, license, prohibit, and prevent digging in said street. . ." G.S. 160-222.

When a city acts for public convenience under the authority granted it by the Legislature and raises or lowers the grade of a street, any diminution of access by an abutting property owner is *damnum absque injuria*. The abutting property owner can neither prevent the change by injunction nor recover damages for the diminished value of his property, when the work is done in conformity with plans designed to promote public convenience. *Sanders v. R.R.*, 216 N.C. 312, 4 S.E. 2d 902; *Jenkins v. Henderson*, 214 N.C. 244, 199 S.E. 37; *Calhoun v. Highway Com.*, 208 N.C. 424, 181 S.E. 271; *Wood v. Land Co.*, 165 N.C. 367, 81 S.E. 422; *Jones v. Henderson*, 147 N.C. 120; *Tate v. Greensboro*, 114 N.C. 392; *Wright v. Wilmington*, 92 N.C. 160; *Meares v. Wilmington*, 31 N.C. 73; 18 Am. Jur. 841, 842.

The fact that Bridges Street, where it crossed defendant's right of way, was established subsequent to the location and construction of the railroad did not diminish its character as a public way. The railroad, after the street was established had no more right to impair or prevent its use than any other property owner would have to change the grade or interfere with the use of a street constructed by a city over his land. Presumably the railroad was duly compensated for the impairment of its property rights when the street was established. *R.R. v. Goldsboro*, 155 N.C. 356, 71 S.E. 514.

Legislative sanction is necessary before a railroad may occupy a public way. *Edmonds v. B. & O. R.R. Co.*, 114 U.S. 453, 29 L. Ed. 216; *Butler v. Tobacco Co., supra; S. v. R.R.*, 153 N.C. 559, 69 S.E. 621; *Pedrick v. R.R.*, 143 N.C. 485; 44 Am. Jur. 301, 74 C.J.S. 512-513. Because of the benefit accruing to the public in the operation of railroads, the Legislature has granted to them the power to condemn private property, G.S. 60-37(2), and to construct their roads across public ways, but with the mandate to "restore the. . . street. . . thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness." G.S. 60-37(6). This provision is supplemented by G.S. 60-43 which again commands rail-

roads, when crossing established roads, to "so construct its works as not to impede the passage or transportation of persons or property along the same." This provision, inserted in the Act of 1852 incorporating the Western Railroad, was codified as a part of the public laws of the State in the Revised Code, c. 61, sec. 30. Similar provisions are to be found in the charters issued by the Legislature to railroads during the early part of the nineteenth century.

Notwithstanding the legislative authority and municipal approval for a public service corporation to use a street or highway if the use is such as to impose an additional burden or effect a taking of the property of an abutting owner, compensation must be paid.

Where a railroad accepts the benefits of statutory authorization and changes the grade of a street or highway it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right of way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access.

The rule has been repeatedly applied to situations factually similar to this case. *Powell v. R.R.*, 178 N.C. 243, 100 S.E. 424; *Bennett v. R.R.*, 170 N.C. 389, 87 S.E. 133; *Kirkpatrick v. Traction Co.*, 170 N.C. 477, 87 S.E. 232; *Brown v. Electric Co.*, 138 N.C. 533; *Moore v. Power Co.*, 163 N.C. 300, 79 S.E. 596; *Clayton v. Tobacco Co., supra; Pittsburgh C.C. & St. L. Ry. Co. v. Atkinson*, 97 N.E. 354; *Zehren v. Milwaukee Electric Railway & Light Co.*, 41 L.R.A. 575; *Williamette Iron Works v. Oregon Railway & Navigation Co.*, 29 L.R.A. 88; *Baltimore & O. R. Co. v. Kane*, L.R.A. 1916 C 433; *S. B. Penick & Co. v. New York Cent. R. Co.*, 111 F 2d 1006; *Cincinnati, N. O. & T. P. Ry. Co. v. City of Chattanooga*, 64 S.W. 2d 196 (Tenn.); *Chesapeake & O. Ry. Co. v. Wadsworth Electric Mfg. Co.*, 29 S.W. 2d 650 (Ky.); *Shrader v. Cleveland, C., C. & St. L. R. Co.*, 89 N.E. 997 (Ill.); *Jordan v. City of Benwood*, 26 S.E. 266 (W.Va.). Notes, 22 A.L.R. 171, 172; 1 Elliott Roads & Streets 4th Ed, sec. 554.

The complaint charged the defendant with changing the grade of Bridges Street with resulting damage to plaintiffs. Such a change by an individual or private corporation is unlawful. An answer which denies making the change puts only that question at issue. If defendant would justify his conduct with governmental immunity he must plead the facts which would relieve him of liability. G.S. 1-135; *Cohoon v. Swain*, 216 N.C. 317, 5 S.E. 2d 1; *Raynor v. R.R.*, 129 N.C. 195 (eviction from train for failure to comply with rules); *Burris v. Bush*, 170 N.C. 394, 87 S.E. 97 (slander); *Sigmon v. Shell*, 165 N.C. 582, 81 S.E. 739 (false arrest); *Lee v. Eure*, 82 N.C. 428 (discharge in

bankruptcy); *Smith v. Lumber Co.*, 140 N.C. 375 (estoppel by judgment); *Smith v. Newberry*, 140 N.C. 385 (accord and satisfaction); *Rountree v. Brinson*, 98 N.C. 107 (usury); *White v. Logan*, 240 N.C. 791, 83 S.E. 2d 892 (payment.)

It is manifest that the answer to section 7 of the complaint where the wrongful change of grade is alleged is nothing more than denial. It merely asserts that the filling was confined to the right of way and hence not unlawful. But plaintiffs were not complaining of that fill. It was the fill beyond the right of way which plaintiffs made the base for their claim for damages.

Apparently defendant recognized the necessity of pleading justification for the work it did. However, it merely said it "has confined its construction efforts within its own right of way and *in providing facilities for the public to cross its tracks.*" It may well be doubted whether this is sufficient allegation to be supported by evidence that in making the fill outside of the right of way defendant was acting not in its own behalf but only as agent of the town of Hamlet. If not sufficient, no issue was presented and certainly the amendment was immaterial.

The appeal ought not, however, to be determined by a technical question of pleading. We treat, therefore, the plea as sufficient. It is not enough, however, to plead facts constituting a defense. There must be evidence to support the plea and when the plea is a confession and avoidance or affirmative defense the burden of proof is on him who would relieve himself from liability. *White v. Logan, supra; Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16; *Joyce v. Sell*, 233 N.C. 585, 64 S.E. 2d 837; *Gibson v. Ins. Co.*, 232 N.C. 712, 62 S.E. 2d 320; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742; *Williams v. Ins. Co.*, 212 N.C. 516, 193 S.E. 728; *Wilson v. Casualty Co.*, 210 N.C. 585, 188 S.E. 102; *Rumbough v. Improvement Co.*, 109 N.C. 703.

Treating the plea of governmental immunity as adequately made, the only remaining question is: Was there any evidence to support that plea?

The evidence without contradiction establishes these, and only these facts:

(1) Defendant for its convenience wished to relocate its wye. To do so in conformity with its wishes would necessitate a fill on its right of way.

(2) The fill would terminate at the edge of the right of way in an embankment more than three and one-half feet above the street at that point. Such an embankment would at least prevent all vehicular traffic on Bridges Street in a southwardly direction.

(3) Not wishing to violate the statutes (G.S. 60-37 (6) and 60-43) prohibiting railroads crossing public ways from interfering with the

public right to use streets, the railroad planned a way for the public to mount the embankment it proposed to construct, thereby permitting the public to continue to use Bridges Street.

(4) The proposed method called for the construction of a fill outside of the right of way. This fill materially impaired plaintiffs' access to the street (a taking of their property. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129).

(5) The plans so prepared were submitted to the town by an official of the railroad in a letter reading: "I am enclosing herewith a blue print of our drawing No. 16084, which shows a proposed connection track to be constructed in the northeast angle of the Main track crossing at Hamlet. The construction of this connecting track will involve the crossing of Bridges Street with an additional track, also the relocation of an existing unpaved road on the Railroad's right of way. Our plans for constructing new concrete curb and gutter and paving this portion of Bridges Street in a manner satisfactory to the City of Hamlet and to relocate and surface with a mixture of sand and gravel the existing unpaved road also in a manner satisfactory to the city. Will you please let me have a permit to proceed with the construction of this connecting track across Bridges Street and the unpaved road upon the terms outlined herein. . . . " The town, replying to this letter, said: "Your letter of June 7, 1955, file No. 43850 Spl., asking the Town's permission to raise the grade on the northeast side of Bridges Street where the proposed track crosses Bridges Street and that you propose to construct curb and gutter this portion of Bridges Street and that you will relocate and surface with a mixture of sand and gravel this street in a satisfactory manner to the city. This letter will grant you permission to proceed with this work as outlined above."

(6) The work was done in a careful manner and in accord with the plans submitted to the town.

(7) The work was done by the railroad or its contractor and not by the town. The work was supervised by the engineers of the railroad and not by the town.

It is patent that the change in the grade in Bridges Street was for the benefit of the railroad. Manifestly, permission was sought to avoid a complaint and action by the town to prevent defendant from proceeding with its work in Bridges Street. Defendant was not clothed with governmental immunity in the work done outside of its right of way. It follows that no error exists with respect to the exceptions discussed.

We have examined each of the other assignments but find none which is deemed prejudicial or which requires discussion.

No Error.

HIGGINS, J., dissenting. It is conceded the changes in elevating the defendant's tracks were made as a matter of right upon the defendant's own property. it is likewise conceded the work done in elevating Bridges Street in the Town of Hamlet was within the limits of the town's right of way for street purposes. We may assume the Town compensated the owner of the land when it acquired the easement. An easement for street purposes contemplates and includes the right to make such changes in the grade as may be necessary to accommodate public travel so long as the boundaries of the easement are not enlarged.

The Railroad Company exercised its conceded right to elevate its tracks. It became the duty of the Town and the defendant to provide a suitable crossing. The Town had the right to elevate Bridges Street for that purpose and it could exercise the right by having the work done by its own employees or by letting the work to contract, or by authorizing the Railroad Company to do it. Whether the Town paid much or little, or nothing, to the Railroad Company to have the work done does not enlarge the liability, and certainly does not create liability when none previously existed. In the absence of allegation and proof the work of elevating the street was negligently done, there is no liability. I vote to reverse.

IN THE MATTER OF THE WILL OF JERRY M. THOMPSON, DECEASED.

(Filed 30 June, 1958.)

1. Wills § 22c—

Undue influence to render a will invalid must be of a kind which operates on the mind of the testator at the very time the will is made, and causes its execution.

2. Wills § 23c—

Since undue influence is frequently employed surreptitiously and is chiefly shown by its result, wide latitude must be allowed in the introduction of evidence upon the issue, and as a general rule any evidence which tends to show an opportunity and disposition to exert undue influence, the degree of susceptibility of the testator, or a result indicative of the exercise of undue influence, is competent unless proscribed by some rule of law.

3. Same—

Testimony of caveator that when she came to see her 84-year-old father less than two years prior to his execution of the paper writing, he did not recognize her, *is held* competent on the issue of undue influence as tending to establish the mental condition of testator and his susceptibility to influence, as well as on the issue of mental capacity.

4. Same: Evidence § 32—

The rule prohibiting an interested party from testifying as to a transaction with decedent does not preclude a caveator from testifying as to his opinion of the mental condition of testator.

5. Evidence § 42c: Wills § 23c—

Testimony of declarations by propounder, the sole party interested in sustaining the paper writing, tending to show that he procured an attorney to draw the will he wished testator to sign, that he objected to the other children of testator inquiring about the matter, and as to his financial transactions with testator, *is held* competent, regardless of when made, as declarations or admissions against interest on the issue of undue influence.

6. Appeal and Error § 41—

The refusal of the court to strike certain testimony, even though such testimony be technically incompetent, cannot justify a new trial when its admission is not sufficiently prejudicial as to have affected the result.

7. Same—

The admission of evidence cannot be held prejudicial when evidence of the same import is admitted without objection.

8. Wills § 23c—

Evidence to the effect that testator kept large sums of money on his person or in his possession as the result of influence exerted by propounder that banks were unsafe, *is held*, in view of the other facts and circumstances adduced by the evidence, properly admitted upon the issue of undue influence.

9. Wills §§ 23½, 23b—

Testimony of a disinterested party that some time after the execution of the will in suit testator stated that he had made no will, is competent upon the issue of mental capacity, but not upon the issue of undue influence. Nevertheless, when there is only a general objection to its admission and no request that it be restricted to the issue of testamentary capacity, its general admission will not be held for error.

10. Wills § 23c—

Testimony of a disinterested witness of a declaration made by testator, even though made a number of months after the execution of the writing, tending to show coolness in the relationship of testator and propounder, is competent upon the issue of undue influence when it tends to throw some light on the state of mind of testator at the time of executing the instrument, there being other independent and substantive evidence of undue influence.

11. Appeal and Error § 41—

The refusal to strike testimony ordinarily is not prejudicial when other testimony to the same import has theretofore been admitted without objection.

12. Appeal and Error § 40—

A new trial will not be awarded for mere technical error, the burden being upon appellant not only to show error but to show that the al-

leged error was prejudicial in amounting to the denial of some substantial right.

APPEAL by propounder Mack B. Thompson from *Williams, J.*, September 1957 Civil Term of ALAMANCE.

Issue of *devisavit vel non.*

Jerry M. Thompson, a citizen and resident of Alamance County, died in that county on 20 July 1956 at the age of 86 years, leaving him surviving twelve children, all of whom are adults.

On 25 July 1956 a paper writing, dated 19 October 1954, purporting to be the last will of Jerry M. Thompson, was admitted to probate in common form by the procurement of Mack B. Thompson, a son of Jerry M. Thompson, who was named therein as executor. On 26 July 1956 letters testamentary were issued to him.

The paper writing purported to bequeath to a daughter two dollars, to ten sons and daughters fifty dollars each, and to bequeath and devise all the remainder of the property, real, personal or mixed, to Mack B. Thompson in fee.

An issue of *devisavit vel non* was raised by a caveat to the alleged will filed on 27 July 1956 by ten of the sons and daughters of Jerry M. Thompson. A son, Kirk Thompson, did not join in filing the caveat, but testified in the trial, "I have aligned myself with my sisters in the caveat proceeding." Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

The issues submitted to the jury, with its answers thereto, are as follows:

"1. Was the paper writing offered for probate as the last will and testament of Jerry M. Thompson signed and executed according to law? Answer: YES.

"2. If so, did the said Jerry M. Thompson have the mental capacity sufficient to make a will? Answer: YES.

"3. If so, was the execution of said paper writing procured by undue influence? Answer: YES.

"4. Is the paper writing propounded by Mack Thompson and others and every part thereof the last will and testament of Jerry M. Thompson, deceased? Answer: NO."

From a judgment on the verdict the propounder appeals.

B. F. Wood, M. Glenn Pickard and Sanders & Holt for propounder, appellant.

Clarence Ross and P. W. Glidewell, Jr., for caveators, appellees.

PARKER, J. The propounder has 185 assignments of error. The

first assignments of error discussed in his brief are based upon his exception to the submission of the third issue to the jury, and upon his exception to the refusal of the court to give peremptory instructions in his favor on each issue. The court gave a peremptory instruction in his favor on the first issue. The jury answered the second issue, "Yes." The discussion in the propounder's brief is, therefore, restricted to the refusal of the court to give peremptory instructions in his favor on the third and fourth issues.

Caveators offered evidence tending to show the following facts: Jerry M. Thompson was 85 years old in December 1954. His wife died in 1935. From then until his death on 20 July 1956, he continued to live in his home in Burlington. When he died he had twelve living adult children. From 1943 to 1954 he had roomers in his home, and a daughter, Marcre Thompson Haith "was in and out living there." During the same time his daughter, Doretha Thompson Bahadur, who was then living in Burlington, saw her father two or three times a day, and frequently spent the night at his home. His daughters, Lovelia Thompson Cobb and Zonie Thompson Holt, who lived in New York, visited him several times a year. A son, Kirk Thompson, lived with him in his home from December 1953 until his death. A daughter, Cordell Thompson Clayton, who lived from 1950 to 1956 in Burlington and New York, stayed with her father several times in 1953 and 1954 for periods of two or three weeks to two months. His son, the propounder Mack B. Thompson, lives in Burlington. His other children live outside of North Carolina.

In early 1953 Jerry M. Thompson fell from his backdoor step to the basement twisting his spine, and there was a hole in his intestines. He was in a hospital from 16 to 24 February 1953. After his return home from the hospital, he moved around on two canes. In September 1954, he was very feeble and senile. He was forgetful, and didn't know people. His mental condition was bad. He would forget he had eaten, and where he was. He was highly nervous.

In October 1954 Jerry M. Thompson, Mack B. Thompson and Walter D. Barrett, a lawyer, came into the office of the Sheriff of Alamance County in the courthouse. When they came in, Mack B. Thompson had his father by the arm. Walter D. Barrett had a paper. The paper was put on a desk. A chair was pulled up, and Jerry M. Thompson sat down. In the Sheriff's office the paper was not read to Jerry M. Thompson. Mack B. Thompson said to his father, "here, sign this." Jerry M. Thompson was nervous and pretty feeble, and it took him a long time to sign his name. Mack B. Thompson took his father away. A Loy boy was there.

The purported will bears the names of Walter D. Barrett and John H. Loy as subscribing witnesses. The evidence of the subscrib-

ing witnesses, offered by the propounder, is to this effect: On 19 October 1954 Jerry M. Thompson, who was alone, saw Walter D. Barrett in the Alamance County Courthouse, and asked him to draft his will, telling him what he wanted put in it. The will was drafted by Barrett in the Patrol office in the courthouse in the presence of Jerry M. Thompson. The same day the will was signed in the Sheriff's office by Jerry M. Thompson, and by Walter D. Barrett and John H. Loy as subscribing witnesses.

Lovelia Thompson Cobb came from New York to visit her father during the Christmas Season 1954. He was upset, and she and her father tried, without success, to locate a paper he had signed. On that visit she saw Mack B. Thompson at her father's home, and asked him, "what was the paper papa was trying to get from him?" He replied: "Some papers. We destroyed the papers." She asked him, "what papers did you destroy?" He replied: "None of your business. . . . Mind your own g. d. business, this is between papa, me and Barrett. I got Barrett for papa and he is not a drunkard, and if he is a drunkard, he is a good lawyer and I know what I am doing. I will pay papa the $4,000.00 when I get it. . . . Barrett is a drunkard but he was a good lawyer and he does my dirty work."

Doretha Thompson Bahadur testified that the first time she knew of the paper her father signed in the courthouse was five days after his death, and that she asked Mack B. Thompson was that the same paper he had in the hospital. Mack B. Thompson replied: "You see what I done. Mind your own damned business, or I put the Justice of the Peace on you, Mr. Harden."

Cordell Thompson Clayton testified that in 1954 she asked Mack B. Thompson, what was the paper he tried to get their father to sign, and he replied: "None of your g. d. business. You all are too g. d. meddlesome. You got yours; ain't that enough?"

While Jerry M. Thompson was in the hospital in February 1953, Mack B. Thompson brought him beer to drink, and on two occasions had a paper in his hand, and was asking his father to sign it. Jerry M. Thompson made no answer because he was doped.

During 1953 and 1954 Mack B. Thompson brought whisky, wine or beer to his father once or twice a week. In the spring or summer of 1954 Doretha Thompson Bahadur found her father and Walter D. Barrett at Mack B. Thompson's place of business, where he sells beer, wine, groceries, gas, oil, etc. Mack B. Thompson was there. Barrett was drunk, and her father was weaving. Mack B. Thompson called her vile names. She carried her father away.

In passing upon the questions as to whether the trial court committed error in submitting the issue of undue influence, and committed

error in refusing to give a peremptory instruction on that issue in the propounder's favor, we have not deemed it necessary to state the propounder's evidence contra on that issue. Neither is it necessary to state all of the caveator's evidence.

The rationale of the doctrine of undue influence sufficient to avoid a will is that influence is exerted by various means of a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency, and to make him execute a will, which, although his, in outward form, is in reality not his will, but the will of another person, which is substituted for that of the testator. *In re Will of Kemp,* 234 N.C. 495, 67 S.E. 2d 672; *In re Will of Turnage,* 208 N.C. 130, 179 S.E. 332; *In re Mueller's Will,* 170 N.C. 28, 86 S.E. 719; *In re Abee's Will,* 146 N.C. 273, 59 S.E. 700; *Marshall v. Flinn,* 49 N.C. 199.

The undue influence which renders a will invalid must be of a kind which operates on the mind of the testator at the very time the will is made, and causes its execution. Page on Wills, Lifetime Ed., Vol. 1, sec. 191, where many cases are cited; 94 C.J.S., Wills, pp. 1071-1073. "It is not material when the undue influence was exercised, if it was present and operating on the mind of the testator at the time the will was executed." 57 Am. Jur., Wills, sec. 353.

Undue influence is frequently employed surreptitiously, and is chiefly shown by its results. When the issue of undue influence is raised, the question presented is usually one of the effect of a long course of conduct upon the mind of the testator at the time the will is made, and the evidence by which it is established is usually circumstantial. *In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388; *In re Stephens' Will,* 189 N.C. 267, 126 S.E. 738; *In re Will of Everett,* 153 N.C. 83, 68 S.E. 924.

In the *Lomax* case, speaking of evidence to show undue influence in a will case, the Court said: "Almost necessarily the proof must cover a multitude of facts or circumstances going into the pattern, in the making of which the evidence of many witnesses may have separate, but interrelated, parts, shading from light to heavy. We cannot judge of the importance of the bit of mosaic being laid at the time or the part of the pattern being woven except in connection with the whole design."

In Page on Wills, Lifetime Ed., Vol. 2, sec. 812, it is written: "Evidence which tends to prove or disprove the subordination of the will of testator to others must, except in extreme cases, take a very wide range. Evidence which shows an opportunity and disposition to exert undue influence, the degree of susceptibility of testator to undue influence, and a result which indicates that undue influence has been exerted, are all admissible."

Lovelia Thompson Cobb testified that she came home to see her father in 1953 after his fall in January or February 1953. He was then 84 years old. When she then saw him at his home, she gave this testimony as to his condition: "He stayed in bed a good deal after 1953, but he wasn't disabled so he couldn't get in and out. He was tired and he rested a great deal. When I came in, Papa didn't recognize me." Propounder assigns as error the refusal by the court, on his motion, to strike out this testimony. In his brief he objects to these words: "Papa didn't recognize me." This assignment of error is overruled. Because the strength or weakness of mind of a testator and his susceptibility to influence are important in determining whether undue influence was exerted, the mental and physical condition of Jerry M. Thompson, together with his age, less than two years prior to the signing by him of the challenged paper writing, is, under an issue of undue influence, a proper subject for consideration by the jury, and evidence tending to show such condition is admissible. *In re Will of Ball,* 225 N.C. 91, 33 S.E. 2d 619; *In re Stephens' Will, supra; In re Will of Hinton,* 180 N.C. 206, 104 S.E. 341; *McDonald v. McLendon,* 173 N.C. 172, 91 S.E. 1017; *Linebarger v. Linebarger,* 143 N.C. 229, 55 S.E. 709, 10 Ann. Cas. 596; 94 C.J.S., Wills, secs. 233 and 246; 57 Am. Jur. Wills, secs. 356 and 396. This evidence was also competent on the second issue of mental capacity to make a will, and it was not too remote in point of time. *In re Will of McDowell,* 230 N.C. 259, 52 S.E. 2d 807; *In re Will of Kestler,* 228 N.C. 215, 44 S.E. 2d 867; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192. The fact that Lovelia Thompson Cobb was prohibited by G.S. 8-51 from testifying as to any transactions and communications with her deceased father, did not make incompetent her testimony, based on her observations, as to his mental and physical condition, and her opinion "Papa didn't recognize me." Although she did not testify that her father was of unsound mind, this evidence was admissible for the jury to consider as a basis for the inference that Jerry M. Thompson on the day he signed the challenged paper writing was lacking in the testamentary capacity necessary to make a will, or on such day, if he did have testamentary capacity, he was in such mental and physical condition as to be susceptible to the influence of Mack B. Thompson. "Witnesses prohibited from testifying to personal transactions or communications with a decedent, by reason of their relation to the action or the interest which they may have in its outcome, are not thereby excluded from giving their opinion as to his mental condition." *In re Will of Brown,* 203 N.C. 347, 166 S.E. 72. See *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *Rakestraw v. Pratt,* 160 N.C. 436, 76 S.E. 259; *In*

re Will of Fowler, 159 N.C. 203 74 S.E. 117; *McLeary v. Norment,* 84 N.C. 235.

Lovelia Thompson Cobb testified that when she came home during Christmas 1954, she saw Mack B. Thompson, her brother, at her father's home, and asked him what paper her father was trying to get from him. He replied: "some papers. We destroyed the papers." She asked him, "what papers did you destroy?" He replied: "None of your business." She then added: "Why would you have your lawyer to take Papa's papers? Papa has a lawyer. Papa didn't want Mack's lawyer for a lawyer and he told Mack not to bring him there." She then testified Mack B. Thompson used these words when she asked him about getting this paper. "Mind your own g. d. business, this is between Papa, me and Barrett. I got Barrett for Papa and he is not a drunkard and if he is a drunkard, he is a good lawyer and I know what I am doing. I will pay Papa the $4,000.00 when I get it and none of you (a vile word omitted) can make me pay it before. All of you are a bunch of b——— and low-down cows. . . . Barrett is a drunkard, but he was a good lawyer and he does my dirty work." Plaintiff assigns as error the refusal of the court, on his motion, to strike out these words: "Why would you have your lawyer to take Papa's papers? Papa has a lawyer. Papa didn't want Mack's lawyer for a lawyer, and he told Mack not to bring him there," but in his brief he complains only of the last sentence quoted.

Mack B. Thompson is the sole beneficiary under the purported will for all practical purposes — his eleven brothers and sisters were given only nominal sums—and he is the only person interested in sustaining the paper writing as the will of his father. Such being the case, his declarations or admissions are binding as against interest, and admissible no matter when made, on the issues of undue influence and testamentary capacity. Anno. 167 A.L.R., p. 64 *et seq.;* 57 Am. Jur., sec. 426. "The admission of a legatee is evidence against the will where he is the sole beneficiary under it." *In re Will of Fowler,* 156 N.C. 340, 72 S.E. 357.

Even if we concede that the statement "Papa didn't want Mack's lawyer for a lawyer and he told Mack not to bring him there" is technically incompetent and should have been stricken out, it is our opinion that the failure to strike it out is not, under all the evidence before us, sufficiently prejudicial to require a new trial. The statement not to bring Barrett there patently refers to the home, and all the evidence is to the effect that the purported will was drafted by Barrett in the Alamance County Courthouse, and signed there by Jerry M. Thompson and the subscribing witnesses.

Propounder assigns as error the court's permitting Doretha Thomp-

son Bahadur to testify, over his objection and exception, that Barrett was drunk, when she saw him and her father, who was weaving, at Mack B. Thompson's place of business in the spring or summer of 1954. We cannot see how this evidence was prejudicial to the propounder, because his sister, Lovelia Thompson Cobb, testified that the propounder said, "Barrett is a drunkard."

Propounder has some thirty-eight assignments of error to the admission in evidence, over his objections and exceptions, of countings of Jerry M. Thompson's money, while he was alive, and after he was dead, or to the refusal of his motions to strike it out. That evidence is to this effect: When Jerry M. Thompson was carried to the hospital in February 1953 after his fall, Mack B. Thompson said in the hospital, "I will undress him." There was a wallet in Jerry M. Thompson's pocket, and Doretha Thompson Bahadur removed it. Mack B. Thompson grabbed it, saying "give it to me." She gave the wallet to Richard Moore, who was there. That in September 1954 Jerry M. Thompson had money in his closet, in his pocket, and in his money belt, and Lovelia Thompson Cobb, in the presence of her sister, Doretha Thompson Bahadur, counted the money in her father's bedroom, and it amounted to approximately $13,700.00. That during Christmas 1954 Lovelia Thompson Cobb, in Doretha Thompson Bahadur's presence, counted her father's money on the bed in his room, and it amounted to some $10,000. That in August 1954 his money was counted, when Jerry M. Thompson and two of his daughters were present. That after Jerry M. Thompson's death, his money on his person and under his mattress was counted in the presence of seven people, including Mack B. Thompson's wife and daughter, and it amounted to $3,427.62. In September 1954, after the money was counted, Doretha Thompson Bahadur told Mack B. Thompson: "You have Father all bluffed up like the banks are going busted like they were before and you will not let Papa put his money in the bank because you say the banks are going bankrupt and you are trying to get a-hold of some of it and say the Government would get him for income tax if he put the money in the bank." She then testified: "He struck at me and called me all kinds of w——, cows, and b——." That Mack B. Thompson further said: " Don't put in no bank, keep it right here."

Considering the principle of law that evidence which tends to prove or disprove the subordination of the will of a testator to others must, except in extreme cases, take a very wide range, we think that, in view of all the circumstances, together with the declarations or admissions of the propounder, the evidence of Jerry M. Thompson keeping large sums of money in his house or about his person, the amount of which was correctly ascertained by counting it, was properly ad-

mitted for the consideration of the jury in passing on the third issue, as tending to show the susceptibility of Jerry M. Thompson to the influence of the propounder.

Propounder assigns as error the admission in evidence, over his objections and exceptions, of statements made by Jerry M. Thompson about two weeks before his death to David Hunter, his first cousin and friend, who was 81 years old. David Hunter's testimony as to these statements by Jerry M. Thompson is substantially as follows: He, Jerry M. Thompson, had made no will. What little he had, he wanted divided up between his children, as they had helped him make it. That when he died, he didn't want any mess over what he had. That Mack B. Thompson had enough now: he hardly ever saw him. Propounder cites no authority to support his contention.

The declarations of Jerry M. Thompson made some 21 months after the execution of the challenged paper writing to David Hunter to the effect that he had made no will, and wanted what he had divided up between his children, were not too remote in point of time *(In re Will of Kestler, supra)*, and were competent and properly admitted in evidence for the consideration of the jury on the second issue as to testamentary capacity, but they were not competent, on the instant record, on the third issue of undue influence. *Ir re Will of Kestler, supra; In re Wellborn's Will*, 165 N.C. 636, 81 S.E. 1023; *Rakestraw v. Pratt, supra; In re Burns' Will*, 121 N.C. 336, 28 S.E. 519; *Barker v. Barker*, 36 N.J. Eq. 259; *Purser v. McNair*, 153 Ga. 405, 112 S.E. 648; *Houseman v. Voak*, 157 Ga. 122, 121 S.E. 119; 94 C.J.S., Wills, sec. 52; 57 Am. Jur., Wills, sec. 124; Anno. 107 Am. St. Rep. pp. 463-465, where many cases are cited. See also *Reel v. Reel*, 8 N.C. 248; *Howell v. Barden*, 14 N.C. 442; *Patterson v. Wilson*, 101 N.C. 584, 8 S.E. 229; *In re Shelton's Will*, 143 N.C. 218, 55 S.E. 705; *Linebarger v. Linebarger, supra; In re Will of Fowler*, 159 N.C. 203, 74 S.E. 117; *In re Bailey*, 180 N.C. 30, 103 S.E. 896; *In re Will of Ball, supra;* Stansbury's N. C. Evidence, sec. 163, Declarations of a Testator.

Propounder did not request the court to restrict this evidence to the second issue of testamentary capacity, but objected generally to its admission. *In re Will of Hinton, supra.*

The Court said in *In re Will of Yelverton*, 198 N. C. 746, 153 S.E. 319; "The mere fact that the alleged testator had expressed a desire, *when admittedly sane,* (emphasized here) to leave no will, because he thought the law would settle his estate fairly, could hardly be considered, on the present record, as evidence of mental incapacity at a later date, when a paper-writing, purporting to be a will, was executed in due form as such." This statement in no way conflicts with what we have said above.

The declaration of Jerry M. Thompson to David Hunter, made some 21 months after the signing of the challenged paper writing, that Mack B. Thompson had enough now: he hardly ever saw him, is competent for the consideration of the jury upon the issue of undue influence — there being in the record independent, substantive evidence tending to show undue influence exercised by Mack B. Thompson over his father in the execution of the purported will — as tending to show the relations and feelings between Jerry M. Thompson and his son, Mack B. Thompson, as bearing upon the state of Jerry M. Thompson's mind toward Mack B. Thompson at the time he signed the challenged paper writing bequeathing and devising all of his property to him, except nominal sums of money bequeathed to his other eleven children. Annotation 79 A.L.R. 1471 *et seq.*, where many cases are cited.

Propounder assigns as error the refusal of the court, on his motion, to strike out Doretha Thompson Bahadur's statement to Walter Barrett, "Mack owes Papa $4,000.00." As Lovelia Thompson Cobb had previously testified that Mack B. Thompson said to her, "I will pay Papa the $4,000.00 when I get it and none of you (a vile word omitted) can make me pay it before," it would seem that the refusal of the court to strike out this statement was not harmful to the propounder. If harmful, it certainly does not justify a new trial.

Mack B. Thompson did not testify as a witness in the case.

Upon the evidence in the case the four issues submitted were proper, and the trial court correctly refused to give peremptory instructions in propounder's favor on any issue, except the first issue.

While the court in the beginning of the charge gave a brief recital of the history of allowing the owner of property to dispose of it after death by will, it is not perceived how this harmed the propounder.

Propounder has not shown that any of the evidence objected to, or any of the evidence which the court refused to strike out on his motions, is sufficiently prejudicial to him to justify a new trial. Technical error is not sufficient to disturb the verdict and judgment. The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right; or to phrase it differently, to show that if the error had not occurred, there is a reasonable probability the trial might have been materially more favorable to him. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657; *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863; *In re Will of Craven*, 169 N.C. 561, 86 S.E. 587.

All of propounder's assignments of error brought forward in his brief have been carefully studied, and all are overruled.

No Error.

JONATHAN H. WOODY AND FIRST NATIONAL BANK & TRUST COMPANY IN ASHEVILLE v. MAUDE B. PICKELSIMER, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH H. PICKELSIMER, DECEASED; C. W. PICKELSIMER, LEILA J. ENGLISH, RUTH PICKELSIMER POWELL, R. JOHN PICKELSIMER, CHARLES J. PICKELSIMER, JAMES B. PICKELSIMER, LEWIS P. HAMLIN, JR., RACHEL HAMLIN FREEMAN, PERRY HAMLIN, ELIZABETH RAMSEUR BERTHOLD, FLORA DUCKWORTH WHITSETT, W. W. DUCKWORTH, CLARENCE E. DUCKWORTH, R. J. DUCKWORTH, J. FRANK DUCKWORTH, ROBERT H. DUCKWORTH, HELEN DUCKWORTH RUSSELL AND C. FEW LYDA.

(Filed 30 June, 1958.)

1. Pleadings § 19c—

A pleading must be liberally construed, giving the pleader the benefit of every reasonable intendment and presumption therefrom, and a pleading must be fatally defective before it will be rejected as insufficient.

2. Executors and Administrators § 12b—

Where an executrix sells stock in which she owns a life estate as beneficiary under the will, and the executrix has the power to sell the stock absolutely in her representative capacity, the sale of the stock will be referred to the power, and the purchaser will get absolute title when the purchase is made in good faith for full value, and where the pleadings and evidence are sufficient to raise the question as to whether the purchaser was dealing with the executrix in her representative capacity and acted in good faith, paying full value, the issue should be submitted to the jury in the purchaser's action to confirm the sale.

3. Same—

The duties and obligations of an administratrix continue until the administration is complete, and her private sale of choses in action of the estate is valid if made in good faith.

4. Appeal and Error § 46: Pleadings § 22—

Ordinarily, a motion to amend is addressed to the sound discretion of the trial court and its ruling thereon is not reviewable on appeal, but when the denial of the motion is based upon an erroneous holding as a matter of law as to the scope of the issues raised by the pleadings and as to the legal effect of the testimony, the denial of the motion is reviewable and must be held for error.

5. Executors and Administrators § 12b—

Where a corporation transfers the ownership of shares of stock upon its books upon an endorsement by an executrix, the corporation is fixed with knowledge of the will and its contents, and that the executrix, individually, owned only a life estate in the stock when this appears from the will, but since the executrix, in her representative capacity, has the power to sell the stock at private sale, the corporation may not be held liable by the owners of the remainder in the personalty when at the time the corporation had no reasonable ground to believe that the executrix intended to misapply the proceeds of sale.

APPEAL by plaintiffs and defendants, other than Maude B. Pickelsimer and R. J. Duckworth, from *Campbell, J.*, December 1957 Term, of TRANSYLVANIA.

Civil action originally instituted before the Clerk of Superior Court by Jonathan H. Woody and Transylvania Trust Company, plaintiffs, against Maude B. Pickelsimer, widow, and others, heirs of Joseph H. Pickelsimer, deceased, seeking, among other things, the confirmation of sale by Maude B. Pickelsimer to Jonathan H. Woody in October, 1946, of 62 shares of the capital stock of Transylvania Trust Company owned by J. H. Pickelsimer at the time of his death, as a valid and effective sale and transfer of all interest in said stock to said Woody.

The record discloses that question having arisen as to whether this was then a special proceeding before the Clerk, and the Clerk having disqualified himself on account of being related to some of the defendants, and the case appearing on the calendar for the April Term 1957 of Superior Court, and counsel for plaintiffs and for defendants having agreed that since the Clerk had disqualified himself the case is properly before the Superior Court, the presiding judge entered an order that the case be retained upon the Superior Court docket of Transylvania County for such action as may be deemed appropriate.

It is admitted in the pleadings: (1) That Joseph H. Pickelsimer died in November 1941, leaving a last will and testament which has been duly admitted to probate in Transylvania County, Item #3 of which provides as follows: "Item Three. I further give and bequeath unto my said beloved wife, Maud Bell Pickelsimer, all profits, rents, dividends, bonuses or other income or profits which may arise or be derived from any stock in, or bonds of, the Cascade Power Company and the Brevard Light and Power Company or any other corporation or co-partnership which I may have an interest in at the time of my death, for the term of her natural life. It being my desire and will that my said wife shall have the full right and power to vote any and all stock or share in any corporation or partnership in which I may be interested at the time of my death. And upon the death of my said wife, it is my will and desire that all my said stock in said corporations or co-partnerships be equally divided among all my heirs, per capita and not per stirpes."

(2) That the defendant Maude B. Pickelsimer is a citizen and resident of Transylvania County, North Carolina, and is the duly appointed qualified and acting Executrix of the Last Will and Testament of Joseph H. Pickelsimer, deceased.

(3) That the defendants named in the caption, other than Maude B. Pickelsimer, are the heirs at law of the said Joseph H. Pickelsimer.

deceased, of stated collateral relationships,—he having left no lineal descendants.

(4) That defendant Maude B. Pickelsimer is the widow of Joseph H. Pickelsimer, deceased, and is the legatee named in Item 3 of his said will,—and as such is entitled to a life estate in all stock in corporations owned by him at the time of his death.

(5) That at the time of his death Joseph H. Pickelsimer was the owner of 62 shares of the common stock of the plaintiff Transylvania Trust Company of the par value of $100 each.

And it is alleged in the complaint in pertinent part as follows:

1. "XI. That in the Fall of 1946 the plaintiff Jonathan H. Woody became interested in purchasing the controlling interest in the said Transylvania Trust Company and approached the defendant Maud B. Pickelsimer and offered to purchase the 62 shares of stock owned by the Estate of said Joseph H. Pickelsimer, deceased, which passed to the said defendant under the terms of Item Three of the will of said Joseph H. Pickelsimer as set forth in paragraph V hereinabove for the sum of $26,320; that the said sum offered by the plaintiff Jonathan H. Woody represented the par value of said stock plus accumulated earnings thereon and an extra value for said stock as the controlling interest in said corporation, and amounted to considerably more than the book value of said stock; that the defendant Maud B. Pickelsimer represented to the said plaintiff Jonathan H. Woody that she was the owner of said stock and had the right to sell the same, and accepted the offer of the plaintiff Jonathan H. Woody and assigned the said 62 shares of stock in the Transylvania Trust Company to said plaintiff Jonathan H. Woody and the same were transferred to his name on the books of the said corporation on or about the first day of November, 1946."

2. That "the sale which the said defendant Maude B. Pickelsimer made of said 62 shares of stock to said plaintiff Jonathan H. Woody was a most desirable and advantageous one, both for the life tenant and the remaindermen."

And plaintiff prays, inter alia:

"2. That the sale of the 62 shares of common stock in the Transylvania Trust Company made by the defendant Maud B. Pickelsimer to the plaintiff Jonathan H. Woody be ratified and confirmed.

"3. That the defendant Maud B. Pickelsimer, individually and as Executrix of the Last Will and Testament of Joseph H. Pickelsimer, deceased, be required to bring in to this Court the sum of $26,320.00 received from the sale of the stock as hereinabove set forth, and submit the same to the jurisdiction of this court for its orders concerning the reinvestment thereof in such securities and form as the court

may decree, to be held on like terms and conditions as the said stock which was sold."

Defendant Maude B. Pickelsimer and other defendants in separate answers deny the material aspects of these allegations of fact so alleged in the complaint, and do not admit matters of law alleged.

And upon the trial in Superior Court plaintiff offered evidence tending to show (1) that, while Mrs. Maude B. Pickelsimer claimed to own, and represented to plaintiff Woody that she did own, the 62 shares of stock in Transylvania Trust Company of which her deceased husband Joseph H. Pickelsimer died possessed, and the heirs had made no contention otherwise, she in fact only owned such interest therein as was bequeathed to her under Item 3 of the will; and that hence in order to pass to plaintiff Woody the whole of said stock, which he offered to purchase, it was necessary to the transfer thereof to sign, and she did sign the certificates in her capacity as executrix of the last will and testament of Joseph H. Pickelsimer; (2) that the administration of the estate of Joseph H. Pickelsimer has not been closed, and is still open and unsettled; (3) that the price paid by plaintiff Woody was more than book value, and is fair and reasonable; (4) that at the time the sale was made the stock certificates evidencing the stock out of which the said 62 shares were held, were in the name of either J. H. Pickelsimer, or J. H. Pickelsimer and his brother C. W. Pickelsimer, one of the defendants, and were deposited in safety deposit box in the bank, and that plaintiff Woody did not see them until some time after the transaction was closed, nor was he informed thereof.

Upon motion of defendants C. W. Pickelsimer and others, other than Maude B. Pickelsimer and R. J. Duckworth, for leave to amend their pleadings, they were allowed in the court's discretion to file a further answer and counterclaim, and to join First National Bank & Trust Company in Asheville as a party defendant to this action.

In said further answer and counterclaim said defendants, other than Maude B. Pickelsimer and R. J. Duckworth, "for the purpose of presenting facts arising since this action was commenced and to present issues necessary for a full determination of the action" it is alleged (1) that in 1957 the plaintiff Transylvania Trust Company merged into the First National Bank & Trust Company in Asheville, a national banking corporation; (2) that upon facts substantially as alleged in the complaint they, the said defendants, own the remainder in the 62 shares of stock in Transylvania Trust Company, here involved, after the life estate of Maude B. Pickelsimer; (3) that (a) as set forth in paragraph X, subsequent to the transfer of the 62 shares of said stock to Jonathan H. Woody, the plaintiff, Transylvania Trust

Company declared Stock dividends on three occasions of 100%, 50% and 33 1/3%, respectively, upon its outstanding stock, and 186 additional shares of stock were thus received as dividends upon the 62 shares originally transferred to the plaintiff Jonathan H. Woody, and said block of stock thereby increased to 248 shares; (b) that, as set forth in paragraph XI: "Defendants are informed and believe, and so allege, that on or about the first day of July, 1957, plaintiff Transylvania Trust Company underwent a merger or consolidation into the First National Bank and Trust Company in Asheville, a national banking corporation with its principal office located in Asheville, North Carolina, and in connection with such merger or consolidation the stock of Transylvania Trust Company was exchanged on the basis of 6¼ new shares for each old share, so that the block of 248 shares of stock referred to in the preceding paragraph has now been exchanged for 1550 shares of stock in the surviving corporation." (c) That, as set forth in paragraph XIII, "The block of stock heretofore described consists of negotiable instruments in which these defendants have a remainder interest, and the rights of these defendants might be permanently destroyed, and these defendants irreparably damaged, if such stock were negotiated to a bona fide purchaser without proper endorsement to protect the interests of the remaindermen."

At the close of all the evidence the record shows these proceedings were had:

1. The court requested counsel for plaintiff to state what, if any, issue there now remained in the case for presentation to the jury. The plaintiff, Jonathan H. Woody, thereupon in apt time tendered the following issue and requested that it be submitted to the jury: "Did the plaintiff Jonathan H. Woody purchase the 62 shares of stock of the Transylvania Trust Company described in the complaint from the defendant Maude B. Pickelsimer, individually and as executrix of the Estate of Joseph H. Pickelsimer, in good faith and for fair value, and without notice of any facts making the transfer of said stock wrongful?" The court refused to submit the issue tendered, and to the court's refusal thereof plaintiff Jonathan H. Woody objects and excepts.

2. Upon motion of the First National Bank & Trust Company of Asheville judgment as of nonsuit is sustained "without prejudice to the defendants at any time in the future to seek relief from the bank." The First National Bank & Trust Company objects and excepts to the qualification of the order of nonsuit in respect to said bank made a part of the order in the following words "without prejudice to the defendants in apt time in the future to seek relief from the bank," and

in open court gives notice of appeal to the Supreme Court for errors assigned and to be assigned.

And "The defendants, other than Maude B. Pickelsimer and R. J. Duckworth, object and except to the granting of the motion of nonsuit as to the First National Bank & Trust Company in Asheville, and give notice of appeal to Supreme Court.

At the conclusion of all the evidence: (1) Motion of defendant Maude B. Pickelsimer for judgment as of nonsuit was allowed, "With out prejudice to the plaintiffs to bring such appropriate action against her as they may be advised." "To the action of the court in sustaining said motion, the plaintiffs in apt time object and except, and likewise the defendant Maude B. Pickelsimer objects and excepts."

The court thereupon submitted to the jury this issue, which the jury answered as indicated:

"1. Are the heirs at law of Joseph H. Pickelsimer the owners of the remainder interest, following the death of Maude B. Pickelsimer, in the bank stock described in the complaint? Answer: Yes."

To the submission of this issue the plaintiffs in apt time object and except, etc. Thereupon the court entered the following judgment:

"This cause coming on for trial and being tried at the December 1957 Term of Superior Court for Transylvania County, North Carolina, before the Honorable Hugh B. Campbell, Judge Presiding, and a jury, upon the complaint and upon the counterclaim of the defendants other than Maude B. Pickelsimer and R. J. Duckworth, and motions for nonsuit having been allowed as appear of record as to the defendant Maude B. Pickelsimer and the plaintiff First National Bank & Trust Company in Asheville, and the following issue having been presented to the jury and answered by the jury as follows: (As above stated).

"It is now therefore ordered, adjudged and decreed as against the plaintiff Jonathan H. Woody:

"1. That the heirs of Joseph H. Pickelsimer are the owners of a remainder interest, following the death of Maude B. Pickelsimer, in 62 shares of the capital stock of Transylvania Trust Company and all increase thereof since November 1, 1946, by way of stock dividends of Transylvania Trust Company and by way of stock received in exchange therefor in the consolidation of Transylvania Trust Company into First National Bank and Trust Company in Asheville, now amounting to one thousand five hundred fifty (1,550) shares of the capital stock of First National Bank and Trust Company in Asheville, a national banking corporation, such shares to be distributed to the heirs of Joseph H. Pickelsimer in accordance with Item Three of the

will of Joseph H. Pickelsimer, following the death of Maude B. Pickelsimer.

"2. That the plaintiff Jonathan H. Woody be, and he is hereby mandatorily enjoined and required to endorse or cause to be endorsed upon certificates representing one thousand five hundred fifty (1,550) shares (to the extent he now has that number of shares) of the capital stock of First National Bank and Trust Company in Asheville, a national banking corporation, the following endorsement: 'This certificate represents an estate for the life of Maude B. Pickelsimer, remainder to the heirs of Joseph H. Pickelsimer as prescribed by the will of Joseph H. Pickelsimer.'

"3. That the plaintiff Jonathan H. Woody be, and he is hereby permanently enjoined from transferring any stock in First National Bank and Trust Company in Asheville standing in his name or beneficially owned by Jonathan H. Woody until the requirements of the foregoing paragraph 2 have been carried out.

"4. That the plaintiff Jonathan H. Woody report and account to this court and to the defendants in this action, other than Maude B. Pickelsimer and R. J. Duckworth, for the due performance of the requirements of this judgment.

"5. That the defendants have and recover of plaintiff Jonathan H. Woody their costs of suit to be taxed by the Clerk."

To the entering and signing of the judgment plaintiff Jonathan H. Woody objects and excepts, and in open court gives notice of appeal to the Supreme Court, and assigns error.

Defendants, other than Maude B. Pickelsimer, gave notice of appeal to Supreme Court from the judgment, and so much of the judgment as limits the relief granted these defendants to the stock in First National Bank & Trust Company in Asheville which Jonathan H. Woody now has.

Morgan, Ward & Brown, Ramsey & Hill for plaintiff, Jonathan H. Woody.

Adams & Adams for plaintiff, First National Bank & Trust Company in Asheville.

Lewis P. Hamlin, Jr., Thomas R. Eller, Jr., for defendant, heirs other than R. L. Duckworth.

Potts & Ramsey for Maude B. Pickelsimer.

WINBORNE, C. J.: *Appeal by plaintiff, Jonathan H. Woody.*

At the outset attention is again directed to Rules 19 (3) and 21 of the Rules of Practice in Supreme Court— Appendix 1 of Volume 4A of the General Statutes; also 221 N.C. 544, and see early case *Pruitt v.*

Wood, 199 N.C. 788, 156 S.E. 126, and late case *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d, 405, and many intervening cases. Many of the assignments of error in the main are deficient. However enough are preserved to present determinative questions.

Among the assignments of error presented on this appeal, appellant Jonathan H. Woody points to Woody's exception number 21 to the refusal of the trial judge to allow motion for leave to amend his complaint to allege that plaintiff, Jonathan H. Woody, purchased the stock in controversy from Maude B. Pickelsimer individually and also as Executrix of the will of Joseph H. Pickelsimer, in order that the pleadings might conform to the evidence introduced by the plaintiffs, and the evidence introduced by all the parties. The motion to so amend was refused "for that the court is of opinion that such amendment was contrary to the testimony of Jonathan H. Woody, and that the testimony of said plaintiff showed that he purchased the stock from Maude B. Pickelsimer, individually and not as executrix, even though the stock certificates were thereafter endorsed by Maude B. Pickelsimer in her capacity as executrix."

True the plaintiff said he was dealing with Mrs. Pickelsimer individually. But under the circumstances of this case, how he was negotiating with her is a conclusion of law. His evidence tends to show he was purchasing and paying approximately $27,000 for 62 shares of stock and not for a life estate therein of a person then about seventy years of age. To complete the full sale, it was necessary that Maude B. Pickelsimer execute the transfer in her capacity as Executrix of the will of Joseph H. Pickelsimer.

Hence in the ruling so made, this Court is constrained to hold there is error upon two grounds:

First: Considering the complaint: Both the statute, G.S. 1-151, and the decisions of this Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d, 369; *Dickensheets v. Taylor,* 223 N.C. 570, 27 S.E. 2d 618, and cases cited.

Applying this principle in testing the sufficiency of the complaint in present case, we are unable to say that in no view is a cause of action stated as against Maude B. Pickelsimer as Executrix of the will of Joseph H. Pickelsimer in respect to the validity of the sale of the stock in question.

"The rule is, that where one has both an estate in and a power over property, and does an act which may be referred either to the execution of the power or to the exercise of his rights as owner, it

will be presumed that the act is done by reason of his ownership; still if a conveyance is made which cannot have full effect except by referring it to an execution of the power, though some estate would pass by reason of the ownership, the conveyance will be referred to the power." *Matthews v. Griffin,* 187 N.C. 599, 122 S.E. 465. See also Annotation in 91 A.L.R. at page 472; also Anno. 127 A.L.R. at page 248.

And in the *Matthews* case, *supra,* Hoke, J., speaking for the Court, had this to say on the subject: "It is now very generally accepted that the question is largely one of intent, and the instrument will be upheld as a valid execution of the power where, on its entire perusal, the intent to exercise the power can be plainly inferred, and that pertinent facts *in pais* may be resorted to in aid of such interpretations."

In the light of this principle the allegations of the complaint are susceptible of the interpretation that in any event Maude B. Pickelsimer individually had an interest in the stock in question, and as executrix had the power to sell the interest of the estate therein.

The question then arises did Maude B. Pickelsimer, as Executrix of the will of Joseph H. Pickelsimer, have the power to sell, and assign the stock in question. In this respect, this Court held in *Felton v. Felton,* 213 N.C. 194, 195 S.E. 533, (1) that until the settlement and distribution of an estate, the administration is incomplete and the duties and obligations of the administratrix continue, and (2) that private sale of choses in action by executor or administrator, if made in good faith, is valid. Hence exception Number 24 to the granting of motion for judgment as of nonsuit as to Maude B. Pickelsimer appears to be well taken.

Secondly: Ordinarily motion to amend a pleading, under the circumstances here stated, is addressed to the sound discretion of the trial court, and his ruling thereon, made in the exercise of such discretion, is not reviewable on appeal; but it is error for the trial court to rule thereon as a matter of law without the exercise of discretion. See *Tickle v. Hobgood,* 212 N.C. 762, 194 S.E. 461, and cases cited.

However, since it is held that the complaint states a cause of action, as above set forth, this ruling becomes harmless.

The case should have been presented to a jury under appropriate instruction on pertinent issues as to validity of sale alleged in the complaint. For failure to do so, there must be a new trial on plaintiff's appeal.

Now as to the *Appeal by defendants, other than Maude B. Pickelsimer and R. J. Duckworth,* from judgment as of nonsuit as to First National Bank & Trust Company in Asheville:

Regardless of what the reason was for the nonsuit, this Court is of opinion and holds that the further answer and counterclaim of

these defendants fails to state a cause of action against the First National Bank & Trust Company in Asheville,— a defect upon the face of the record proper requiring dismissal in Supreme Court *ex mero motu* in the absence of an assignment of error. *Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E. 2d 774.

In this connection, this Court in *Wooten v. R.R.*, 128 N.C. 119, 38 S.E. 298, opinion by *Montgomery, J.*, had this to say: "After mature consideration of all the cases cited and the text in law books to which our attention has been called, our opinion is:

"First: That where a transfer of stock of a corporation is made on its books by an executor, the corporation is fixed with a knowledge that there is a will, and is chargeable with a knowledge of its contents to the same extent as if the officers had actually read it.

"Second: That, notwithstanding such knowledge of the contents of the will, the executor may, even with intent to convert to his own use the money, sell and transfer such stock to a purchaser under the corporation's supervision, and that even though the stock be specifically bequeathed in the will, without liability on the part of the corporation unless it has at the time of the transfer reasonable ground to believe that the executor intends to misapply the money, or is in the very transaction applying it to his own private use."

Hence the appeal by defendants name, in this respect will be dismissed *ex mero motu.*

Lastly the matter of *Appeal by First National Bank & Trust Company in Asheville* from ruling of the court limiting the effect of the judgment as of nonsuit becomes moot and will be dismissed since the counterclaim against the Bank is dismissed.

For reasons stated above (1) On plaintiff's appeal there will be a New Trial; (2) Appeal of defendants, other than Maude B. Pickelsimer and R. J. Duckworth, is dismissed, and (3) Appeal by First National Bank & Trust Company is dismissed as now moot.

Plaintiff Woody's Appeal—New Trial

Defendants' Appeal—Dismissed

Bank's Appeal—Moot

CHRISTOPHER J. THOMAS v. CATAWBA COLLEGE.

(Filed 30 June, 1958.)

1. Master and Servant § 6f—

The measure of damages for wrongful discharge is the actual damage sustained on account of breach of the contract of employment by such wrongful discharge, which is the difference between the agreed compensation and the amount the employee earns or by reasonable effort could earn during the contract period.

2. Same

Where the contract of employment provides for payment of salary for one year subsequent to discharge for cause, such employee is entitled to such terminal pay, and, in addition thereto, any amount he earns from other employment during that year.

3. Same—

Where the contract of employment provides for payment of salary for one year after dismissal for cause, a discharged employee must elect whether he will maintain that the discharge was in violation of the contract of employment and sue for the resulting damages, or whether he will treat the discharge as a termination of employment for cause under the contract, in which event he is entitled to the terminal pay thereunder, and when, with knowledge, he accepts his salary checks for the year after notification of dismissal, he acquiesces in the employer's contention that the dismissal was for cause under the contract and may not thereafter maintain an action for wrongful discharge.

4. Election of Remedies § 1—

Where there are inconsistent rights or remedies available to a party, his choice of the one is an election not to pursue the other.

APPEAL by plaintiff from *Williams, J.*, September Civil Term, 1957, of ORANGE.

Civil action to recover damages for alleged wrongful discharge.

On former appeal, *Thomas v. College Trustees*, 242 N.C. 504, 87 S.E. 2d 913, the decision related solely to a motion by plaintiff for leave to inspect certain documents.

Defendant is a nonprofit educational corporation. The Synod of the Evangelical and Reformed Church elects the members of the Board of Trustees, defendant's governing body. Defendant operates Catawba College, located in or near Salisbury, North Carolina, a coeducational college promoted and supported by said religious denomination.

Plaintiff's employment as a member of the faculty of Catawba College, to wit, Professor of Music, was terminated as of February 23, 1952, by action of the Board of Trustees. Plaintiff was first employed in this capacity for the academic year 1943-1944. Under successive annual contracts, he was so employed each academic year thereafter. At

the time his employment was terminated, his contract for the academic year 1951-1952 was in effect.

While the 1951-1952 contract related specifically to that academic year, plaintiff's status, in respect of his right to permanent or continuous employment, was defined in defendant's tenure policy.

Defendant's bylaws provided:

"Academic tenure of members of the faculty shall be governed by the principles outlined in the Statement of Tenure as drafted and adopted by the Association of American University Professors and subsequently approved by the Association of American Colleges."

The statement of tenure referred to in defendant's bylaws provided:

"(a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

"In the interpretation of this principle it is understood that the following represents acceptable academic practice:

". . .

"(4) Termination for cause of continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution."

Plaintiff's contract contained this provision:

"*ESPRIT DE CORPS.* Party of the second part (plaintiff) agrees to support the general objectives of Catawba College, to give primary consideration to the intellectual, moral, and spiritual development of the students; to support the administration; and together, faculty and students, to build an esprit de corps second to none."

The Board of Trustees by letter of January 25, 1952, notified

plaintiff that charges against him had been made to the Board of Trustees, wherein it was charged that plaintiff had breached his contract with Catawba College, particularly the paragraph quoted above, and specifically that plaintiff (a) had been disloyal to the administration of Catawba College, (b) had made slanderous statements to students, faculty members and others reflecting upon the institution itself and officials thereof, and (c) that he had made consistent efforts among students and faculty members to incite unrest, suspicion and lack of confidence in the institution, its Board of Trustees, and its administration, thereby damaging the college's good name and defaming the character of certain of its officers.

The said notice to plaintiff contained this paragraph:

"In accordance with the rule of tenure previously adopted by the Board of Trustees, a hearing has been set for Thursday, February 7, 1952, at 10:00 A.M. at the Yadkin Hotel, at which time evidence with respect to the above charges will be heard by a body composed of members of the trustees and faculty who will sit in judgment on your case and thereafter render their decision. In this session you will have the opportunity to testify in your own behalf and will be permitted to have with you an adviser of your own choosing who may act as your counsel. A full stenographic record of the entire proceedings will be kept."

A hearing committee of ten members was constituted. It consisted of the Chairman of the Board of Trustees, and four other Trustees and five faculty members, appointed by said Chairman.

The hearing on February 7, 1952, was conducted in accordance with the North Carolina practice and procedure in a judicial hearing. Judge Wilson Warlick, one of the members from the Board of Trustees, presided. Evidence was offered in support of the charges and by Dr. Thomas (plaintiff) in support of his denial thereof. Stahle Linn, Esq., as counsel for Catawba College, and Clarence Kluttz, Esq., as counsel for Dr. Thomas, examined and cross-examined the witnesses.

The committee's report is dated February 15, 1952. (Note: The committee, at said hearing, heard charges against Dr. Thomas, Mrs. Thomas and Dr. Hadley; and its report related to these three individuals.) After reciting the events preceding the hearing and the procedure followed, and after quoting the charges (set out above), the report contained these findings:

"After hearing all of the evidence and argument based thereon, your committee, following a full discussion, returns as their individual and collective findings of fact, 'That each charge is sustained against each individual named,' in that each individual named therein, John C. Hadley, Christopher J. Thomas and Mrs. Christopher J. Thomas.

"Severally breached the contract entered into with Catawba College as is embraced in the first charge.

"2. That each individual charged, likewise from the evidence, showed a disloyalty to the administration of Catawba College.

"3. That each individual charged made slanderous statements to students, faculty members, and others as appears in the evidence, reflecting upon the institution and the officials thereof.

"4. That each individual made many consistent efforts among students and faculty members to incite unrest, suspicion and lack of confidence in the institution, its Board of Trustees, and its administration, damaging thereby the good name of the College and defaming the character of certain of its officials, all of which is reflected by the vote of the individuals comprising the Hearing Commission."

Nine members of the committee, to wit, the five from the Board of Trustees and four of the members from the faculty, voted in favor of the report. One member from the faculty voted *contra.*

The committee attached to its report a stenographic report of the entire proceeding, including the evidence, as reported by the official court reporter for the United States District Court for the Western District of North Carolina.

A copy of the committee's said report, including a transcript of the proceeding, was forwarded to Dr. Thomas by the Secretary of the Board of Trustees with his letter of February 15, 1952, a copy of which was sent to Mr. Kluttz. This is an excerpt from said letter: "The original of this report will be duly filed with the Board of Trustees of Catawba College at its regular meeting on February 19, 1952, at the college. In the event that you should wish to be heard on this matter before the Board of Trustees, you should appear before said Board at 2:00 o'clock P.M. on February 19, 1952, at the time of its regular meeting."

Although notified of his right and opportunity to appear before the Board of Trustees and be heard in opposition to the charges and to the committee's report, plaintiff, after consultation with his counsel, did not appear either personally or by counsel.

By letter of February 20, 1952, the Board of Trustees advised Dr. Thomas of the action taken at its meeting on February 19, 1952, quoting this excerpt from the minutes: "The Board of Trustees of Catawba College received and thoroughly discussed the report of the Hearing Committee. A unanimous vote sustains the charges preferred against Christopher J. Thomas, Professor of Music, and hereby terminates his services with Catawba College as of February 23, 1952. *Further, as provided in the tenure policy of the college his salary shall be continued for one year from date of this notice. Payments*

thereunder are to be made in accordance with the standard pay schedule of the college." (Our italics)

Plaintiff's employment was terminated as of February 23, 1952. Thereafter, he had no connection with Catawba College.

Plaintiff instituted this action on July 16, 1954. Meanwhile, defendant issued to plaintiff, as directed by its Board of Trustees, and plaintiff received, endorsed and accepted, checks aggregating $4,175.00, plaintiff's salary for the year following notification of dismissal. The last of these salary payments, a check for $289.52, bearing the notation "FINAL PAYMENT," was issued February 21, 1953.

Plaintiff's allegations, apart from allegations referred to in the opinion, may be summarized as follows:

1. Prior to the hearing on February 7, 1952, Mr. Linn refused Mr. Kluttz's request that the charges be made more definite and specific; and plaintiff learned for the first time "the alleged conduct of the plaintiff relied upon as grounds for his dismissal" when evidence was introduced at the hearing.

2. The evidence offered at the hearing as to plaintiff's statements and conduct did not support the charges made against him, for that the statements attributed to him and relied upon as grounds for discharge (1) were true, (2) were privileged, whether true or false, and (3) were uttered in good faith upon information deemed reliable, whether true or false.

3. The academic members of the hearing committee "were biased against him and determined to vote for his dismissal regardless of his innocence because of fear of reprisals against them" by A. R. Keppel, President of Catawba College; the hearing committee refused to allow plaintiff an opportunity to show "their lack of impartiality"; and "the Trustee members of the Committee were motivated solely by one thought: to render a decision which would best serve the interests of the college and, rightly or wrongly, felt that as between the plaintiff and its President the welfare of the College required that the plaintiff be discharged, regardless of fault."

4. His discharge was without adequate cause, was not for age, and was not for financial exigencies, but was in breach of defendant's contract with plaintiff.

Plaintiff prayed (1) "that for purposes of this and subsequent suits between the parties for accrued salary, the discharge of the plaintiff be adjudged wrongful," (2) that he recover all unpaid salary to date of trial. (3) that he recover punitive damages in the amount of $50,000.00, and (4) that he recover costs.

Answering, defendant alleged, in summary, that plaintiff's discharge was for adequate cause, in good faith, and after hearings in

strict compliance with paragraph (a) (4) of the statement of tenure; and that plaintiff was estopped to maintain this action for alleged wrongful discharge by his acceptance of his salary for the year following his dismissal.

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit and dismissed the action. Plaintiff excepted and appealed, assigning errors.

Barnie P. Jones and W. R. Dalton, Jr., for plaintiff, appellant.

McLendon, Brim, Holderness & Brooks, C. T. Leonard, Jr., and Linn & Linn for defendant, appellee.

BOBBITT, J. No evidence was offered to support plaintiff's further allegations that defendant, after plaintiff's discharge, made statements, false, wilful, malicious or otherwise, to prospective employers of plaintiff, and thereby interfered with plaintiff's efforts to obtain other employment; and no evidence was offered to support plaintiff's allegations that the Board of Trustees acted "maliciously, tortiously and wilfully" to carry out a preconceived and deliberate scheme to ruin plaintiff. Indeed, a witness for plaintiff testified that each member of the Board of Trustees was "a man of outstanding reputation and character" and undertook to serve the college in the capacity of Trustee "with absolute faithfulness and honesty" and in obedience to what he conceived to be his conscientious duty. Without further comment we pass from these unsupported allegations of the complaint.

The Board of Trustees terminated plaintiff's employment as of February 23, 1952. Conceding the *power* of the Board of Trustees to discharge him, thus severing his connection with Catawba College, plaintiff denies the *right* of the Board of Trustees to discharge him otherwise than for "adequate cause." He contends that "adequate cause" for his discharge did not exist. Hence, he contends he was discharged wrongfully.

Consideration of the record leaves the impression that the proceedings before the hearing committee and Board of Trustees were in good faith and in substantial compliance with paragraph (a) (4) of the tenure policy. However, the basis of decision, stated below, renders unnecessary the discussion or decision of questions raised as to whether the action of the Board of Trustees *when rendered* was a final determination that plaintiff's dismissal was for "adequate cause."

Plaintiff had full notice and knowledge that his dismissal was based on the determination by the hearing committee and the Board of Trustees that "adequate cause" for his dismissal existed. Moreover, he had full notice and knowledge that the resolution of the Board of

Trustees, quoted in the notification of dismissal, contained this provision: "Further, as provided in the tenure policy of the college his salary shall be continued for one year from date of this notice. Payments thereunder are to be made in accordance with the standard pay schedule of the college." Thus, he was advised plainly that the $4,175.00 paid to him during the year following notification of dismissal was paid to him *as salary*.

Obviously, the provision in paragraph (a) (4) of the tenure policy, regarding payment of salary for one year following notification of dismissal, is applicable only when "adequate cause" for dismissal has been determined after proceedings conducted in accordance with its terms; and, in such case, the payment of the discharged employee's salary for one year is both the measure and *the limit* of defendant's obligation. It does not bear upon the respective rights of the parties in case of wrongful discharge in breach of contract. In the latter case the discharged employee's remedy is an action to recover damages for defendant's breach of contract.

The wrongful discharge of plaintiff by defendant, if such occurred, would constitute a breach of defendant's contract with plaintiff and give rise to a cause of action in favor of plaintiff and against defendant; but in such action the measure of the damages recoverable would be the actual loss or damage sustained on account of the breach. The maximum amount recoverable would be the difference, if any, between the agreed compensation and the amount plaintiff earned or by reasonable effort could earn during the contract period. *Smith v. Lumber Co.*, 142 N.C. 26, 54 S.E. 788; *Currier v. Lumber Co.*, 150 N.C. 694, 64 S.E. 763; *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735; *Construction Co. v. Wright*, 189 N.C. 456, 127 S.E. 580; *Hall v. Trust Co.*, 200 N.C. 734, 158 S.E. 388; *Robinson v. McAlhaney*, 216 N.C. 674, 6 S.E. 2d 517; 35 Am. Jur., Master and Servant Secs. 54 and 57; 56 C.J.S., Master and Servant Sec. 59.

Thus, if plaintiff elected to acquiesce in his dismissal by the Board of Trustees, as expressed in its resolution, he was entitled thereunder to salary payments aggregating $4,175.00 for the year following notification of his dismissal and, *in addition*, was entitled to whatever he earned from other employment during that year. On the other hand, if plaintiff elected to treat his dismissal as wrongful and sue for damages for breach of contract, and obtained other employment in which he earned compensation equal to or in excess of his compensation as a member of the faculty of Catawba College, his recovery would be limited to nominal damages.

If plaintiff were wrongfully discharged, he could elect to pursue either course but not both; for his rights and remedies under the al-

ternatives available to him were essentially different and inconsistent.

"The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other." Quoted by *Hoke, J.* (later C.J.), in *Machine Co. v. Owings*, 140 N.C. 503, 53 S.E. 345, this statement expresses succinctly the well established rule in this jurisdiction. *Surratt v. Insurance Agency*, 244 N.C. 121, 93 S.E. 2d 72, and cases cited.

Plaintiff made his election when he accepted, endorsed and collected the salary checks aggregating $4,175.00, paid as directed by the resolution of the Board of Trustees, for the year following notification of his dismissal. The law will not permit him now to assert different rights or pursue a different remedy. Perhaps, when he made his election, his impression was that he could and would earn equal or greater compensation in other employment. Be that as it may, having made his election, whether he earned more or less than $4,175.00 from other employment during the year following notification of his dismissal has no bearing upon his right to maintain this action for alleged wrongful discharge.

Having reached the conclusion that plaintiff's said election constitutes a complete bar to his right to maintain this action, the judgment of nonsuit is affirmed.

Affirmed.

WINNIFRED MacBRIDE THOMAS v. CATAWBA COLLEGE.

(Filed 30 June, 1958)

APPEAL by plaintiff from *Williams, J.*, September Civil Term, 1957, of ORANGE.

Barnie P. Jones and W. R. Dalton, Jr., for plaintiff, appellant.

McLendon, Brim, Holderness & Brooks, C. T. Leonard, Jr., and Linn & Linn for defendant, appellee.

PER CURIAM. Civil action to recover damages for alleged wrongful discharge, consolidated for trial, by consent, with similar action *by Christopher J. Thomas (plaintiff's husband) v. Catawba College, ante*, 609.

Plaintiff was a member of the faculty of Catawba College, to wit, a Teacher of Piano, with the academic rank of Associate Professor.

Under her contract for the academic year 1951-1952, her salary was $3,000.00.

The material facts are essentially the same as stated in the Christopher J. Thomas case. Plaintiff's employment was terminated by the Board of Trustees as of February 23, 1952. The resolution of the Board of Trustees, quoted in the notification of dismissal, contained this provision: "Further, as provided in the tenure policy of the college, her salary shall be continued for one year from date of this notice. Payments thereunder are to be made in accordance with the standard pay schedule of the college.

Thereafter, plaintiff received, endorsed and collected checks aggregating $3,000.00, paid to her, as directed by the Board of Trustees, *as salary* for the year following notification of dismissal. The notation, "FINAL PAYMENT," was on the last check, a check dated February 21, 1953, for $210.48.

For reasons stated in opinion in the *Christopher J. Thomas* case, the judgment of nonsuit, entered by the court below at the close of plaintiff's evidence, is affirmed.

Affirmed.

T. W. POE & SONS, INC. v. THE UNIVERSITY OF NORTH CAROLINA.

(Filed 30 June, 1958.)

1. Arbitration and Award § 1—

The requirement of an arbitration agreement that the arbitrator should render his decision not later than thirty days from the date of closing the hearings does not require the delivery of the award to the parties within the time specified, it being sufficient if the arbitrator signs his award and it is received by the arbitration tribunal within the time limited.

2. Same—

Ordinarily, any person who has a dispute with another person may submit the dispute to arbitration without the joinder of all the parties who have a joint interest in the matter.

3. Arbitration and Award § 4—

Arbitrators are not bound to decide according to law when acting within the scope of their authority, and may make an award according to their notion of justice without assigning any reason, and therefore in the arbitration of a construction contract upon controversy based on alleged defect in the materials or faulty workmanship resulting in the leakage of a number of showers, the actual number of showers involved

and when the defects were reported by the owner to the contractor are addressed solely to the arbitrator.

4. Arbitration and Award § 7—

Where controversy between the owner and the contractor as to the contractor's liability for leakage in showers in the building, allegedly due to defect in materials or faulty workmanship, is submitted to arbitration, the award of the arbitrator within the scope of the inquiry is conclusive on the parties, notwithstanding any errors on the part of the arbitrator in regard to the law or facts, and, the subcontractors not being parties, it will be assumed that the liability of the contractor alone was within the scope of the agreement, and the arbitrator properly omits any decision as to the liability of subcontractors.

APPEAL by plaintiff from *Hall, J.*, at October 1957 Regular Term, of DURHAM.

Civil action to vacate and set aside arbitration award.

It is admitted in the pleadings in this action (1) that the parties hereto entered into a contract for the construction of a men's dormitory on the campus of the University of North Carolina on the 5th day of June, 1950, and that the building was accepted by the defendant on or about the 17th day of May, 1952, subject to the guarantee set out in full in the agreement to arbitrate, hereinafter set forth; (2) that thereafter a controversy arose between the parties concerning certain alleged defects in the construction of said building; and (3) that thereafter on 8th day of February, 1957, the parties entered into a written contract whereby the controversy was submitted to arbitration, in manner and form following:

"AMERICAN ARBITRATION ASSOCIATION ADMINISTRATOR

Commercial Arbitration Tribunal

"IN THE MATTER OF THE ARBITRATION BETWEEN—	
THE UNIVERSITY OF NORTH CAROLINA, Owner, and	
T. W. Poe & Sons, Contractor	SUBMISSION
Men's Dormitory (Cobb Dormitory)	
Code 1620, Item 8	
Aetna Casualty & Surety S-29161	

"We, the undersigned parties," plaintiff and defendant, "hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association the following Controversy:

"To determine the responsibility for defective baths constructed under contract by T. W. Poe & Sons, Inc., of Durham, North Carolina, hereinafter referred to as contractor, for and on behalf of University

of North Carolina, Chapel Hill, North Carolina, hereinafter referred to as owner, and which party shall absorb the expense of rebuilding the same. Separate contracts were let by owner for plumbing, wiring, and heating. After the building had been completed, leakage appeared in a number of showers, and this controversy involves the question as to which of the contractors, if any, was responsible for said leakage. Owner has caused repairs to be made at total cost to it of $11,139.40. Owner contends that contractor failed to deliver building to second party in first-class operating condition in accordance with plans and specifications referred to in above contract, and contractor having thereby guaranteed materials and workmanship for a period of twenty-seven months after acceptance of the building and defects in some of said showers having been discovered prior to the expiration of said period, owner relies upon Addendum No. One, Article 58 of said contract, said Article reading as follows:

"'GUARANTEE. The Contractor shall deliver the building to the owner complete and in first-class operating condition in every respect, in accordance with the plans and specifications. He shall guarantee the materials and workmanship for a period of twenty-seven months after the acceptance of the building. If, during the period covered by the guarantee, any defects should show up due to defective materials or faulty workmanship or negligence or want of proper care on the part of the contractor, his subcontractors or employees, the contractor shall furnish such new materials as are necessary and repair any defects as required, at his own expense, upon notice from the Owner or the Architect of the existence or discovery of such defects or evidence of faulty workmanship.'

"We further agree that the above controversy be submitted to Arbitrator(s) selected from the Panels of Arbitrators of the American Arbitration Association.

"We further agree that we will faithfully observe this Agreement and the Rules and that we will abide by and perform any Award rendered pursuant to this Agreement, and that a judgment of the Court having jurisdiction may be entered upon the Award."

(Signatures Omitted)

"DIRECTIONS:

"1. This Submission, when signed by the parties, must be filed with the American Arbitration Association, and the administration fee paid, as provided in the Rules, in order to institute proceedings under the Rules.

"2. This Submission is generally applicable, but as the legal requirements for a valid submission vary under different arbitration laws

it is necessary for the parties to ascertain the provisions of the applicable law before using this Submission Form."

That thereafter the Arbitrator conducted a hearing on 19th day of March, 1957, and thereafter made an award as follows:

"AMERICAN ARBITRATION ASSOCIATION ADMINISTRATOR
COMMERCIAL ARBITRATION TRIBUNAL
RECEIVED
April 18, 1957
Charlotte, N. C. Tribunal

"In the Matter of the Arbitration
between—
University of North
Carolina, Chapel Hill, *AWARD OF ARBITRATOR*
N. C. and
T. W. Poe & Sons,
Durham, N. C.

"(I) The undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named Parties, and dated February 8, 1957, and having been duly sworn and having duly heard the proofs and allegations of the Parties, Award, as follows:

"1. I find that the University of North Carolina shall not be held liable for the expense and cost and repairing defective work in twelve (12) bathrooms in Cobb Dormitory at University of North Carolina, Chapel Hill, North Carolina.

"2. I further find that the General Contractor, T. W. Poe & Sons of Durham, North Carolina, who built Cobb Dormitory shall reimburse the University of North Carolina in the amount of $11,139.40 as detailed in letter dated June 24, 1956, to F. B. Turner, Engineer, Budget Bureau, Raleigh, North Carolina, by J. S. Bennett, Director of Operations, University of North Carolina.

"3. Each party shall pay one-half of the Administrative fee and expenses.

(s) LOUIS H. ASBURY, Jr.

"Dated: April 17, 1957."

The cause came on for hearing in Superior Court.

A jury trial was waived, and it was agreed between counsel for plaintiff and defendant to submit the matters in controversy to the presiding judge to hear the evidence, find the facts, make conclusions of law thereon and enter judgment in accordance therewith.

Thereafter, on 18 October, 1957, the matter was called for trial before Hall, Judge presiding, who, after evidence had been presented,

and argument of counsel, made findings of fact and conclusions of law, and entered judgment, all as follows:

"(1) That this is a civil action instituted by the plaintiff against the defendant for the purpose of setting aside and vacating an Award of an arbitrator rendered in favor of the defendant and against the plaintiff growing out of a controversy between the parties concerning certain alleged defects in the construction of a men's dormitory on the campus of the University of North Carolina at Chapel Hill;

"(2) That on the 8th day of February, 1957, the plaintiff and the defendant entered into a written contract whereby they agreed to submit said controversy to arbitration under the commercial arbitration rules of the American Arbitration Association; that said Agreement contains the following provision:

" 'We further agree that we will faithfully observe this Agreement and the Rules and that we will abide by and perform any Award rendered pursuant to this Agreement and that a judgment of jurisdiction of the court having jurisdiction may be entered upon the Award.'

"(3) That pursuant to notice in substantial compliance with the commercial arbitration rules of the American Arbitration Association, a hearing was held on March 19, 1957, in Chapel Hill, North Carolina, before Louis H. Asbury, Jr., one of the panel of arbitrators of said American Arbitration Association, at which hearing the plaintiff was represented by Mr. E. O. Poe and Mr. A. M. Sprague, and the defendant was represented by Mr. J. S. Bennett, Mr. M. J. Hakan, Mr. Giles Horney, and Mr. Frank B. Turner.

"(4) Based upon the evidence adduced at said hearing, the arbitrator rendered an Award in favor of the defendant and against the plaintiff in the amount of $11,139.40, which said Award is dated April 17, 1957, and was received in the Charlotte Office of the American Arbitration Association on April 18, 1957, and transmitted by mail to each of the parties hereto on the 24th day of April 1957, a copy of which was actually received by the plaintiff on the 26th day of April 1957.

"(5) That in said Agreement to submit the controversy to arbitration the question submitted to the arbitrator was to determine the responsibility as between the plaintiff and the defendant for defective baths constructed by the plaintiff for the defendant in the men's dormitory at Chapel Hill, hereinbefore referred to. That in said Agreement attention was called to Article 58 of said contract, which stipulated that the 'contractor shall guarantee the building to the owner complete and in first class operating condition in every respect, in accordance with the plans and specifications. He shall guarantee the

materials and workmanship for a period of 27 months after the acceptance of the building. If, during the period covered by the guarantee, any defects should show up due to defective materials for faulty workmanship or negligence or want of proper care on the part of the contractor, sub-contractors or employees, the contractor shall furnish such new materials as are necessary and repair any defects, as required, at his own expense upon notice from the owner or the architect of the existence or discovery of such defects or evidence of faulty workmanship.'

"(6) That said building was accepted by the defendant on the 17th day of May 1952, subject to the guarantee set out in full in the next preceding paragraph thereof. That plaintiff was advised orally and in writing long before the expiration of the 27 months guarantee period that certain of the baths in said dormitory were leaking, due to defective materials or faulty workmanship.

"(7) That the Award was rendered by the arbitrator within the time specified by the commercial arbitration rules of the American Arbitration Association; the award is within the terms of the question submitted to him for arbitration; the arbitrator did not exceed his authority in rendering the Award set out in the record, and the same is supported by sufficient evidence.

"From the foregoing findings of fact, the court concludes as a matter of law that the Award of the arbitrator should be in all respects approved and confirmed.

"It is, therefore, upon motion of George B. Patton, Attorney General of North Carolina and counsel for the defendant, Considered, Ordered, Adjudged and Decreed that the Award of Louis H. Asbury, Jr., arbitrator, dated April 17, 1957, to the effect that the plaintiff should pay to the defendant the sum of $11,139.40 be and the same is hereby in all respects approved and confirmed.

"It is further Ordered, Adjudged and Decreed that the defendant have and recover of the plaintiff the sum of $11,139.40, together with the costs of this action, to be taxed by the Clerk."

The plaintiff objects and excepts to the signing of the judgment, and to the findings of fact Nos. 1 through 7, and to the conclusions of law, and assigns other error.

C. Horton Poe, Jr., for plaintiff, appellant.

Malcolm B. Seawell, Attorney General; Claude L. Love, Assistant Attorney General; Charles D. Barham, Staff Attorney for defendant, appellee.

WINBORNE, C. J.: While the plaintiff appellant presents many assignments of error the determination of the appeal turns upon the

answer to two questions: (1) Was the award of the arbitrator timely rendered within the meaning of Section 40 of Rule VIII of the Commercial Arbitration Rules of the American Arbitration Association under which the controversy was submitted by the plaintiff and the defendant?

(2) Is the award within the terms of the submission of the controversy to arbitration?

As to the first question: It is not controverted that under applicable rules (1) "the arbitrator shall render his award promptly and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings"; (2) that in the present case the hearings before the arbitrator closed on March 19, 1957; and (3) that, consequently, the time for rendering the award expired April 18, 1957.

Moreover, the award shows on its face that it was signed by the arbitrator and "dated April 17, 1957," and "received April 18, 1957 by the Charlotte, N. C., Tribunal of the Commercial Arbitration Tribunal of the American Arbitration Association Administrator.

Upon these facts there arises the basic question as to whether the award was thereby "rendered" within the meaning of the rule specified. This Court is of opinion, and holds that it was so rendered.

It is contended by appellant that the delivery of the award to the parties, to which Section 44 relates, is a part of the "rendering" of the award, and that until it is so delivered the rendering of it is not complete. This position is untenable. Section 44 of the Rule specifies that the "parties shall accept as legal delivery of the award (a) the placing of the award or a true copy thereof in the mail by the tribunal clerk, addressed to such party at this (?) last known address * * * or (c) by the filing of the award in any manner which may be prescribed by law."

Thus the "rendering" and the "delivery" are provided for in separate sections of the rule. Time limit is specified as to "rendering", but there is no such limitation as to "delivery" of the award. If it had been intended that the time limit should apply to both it would have been natural and easy to say so in express language.

Indeed in this State, as corollary, the Uniform Arbitration Act treats the "making" of the award and the "delivery" of the award to the parties as two separate and distinct provisions. See G.S. 1-551 and G.S. 1-557.

As to the second question: Whether the award is within the terms of the submission of the controversy to arbitration, it is appropriate to look to applicable well established principles of law. In *Farmer v. Wilson,* 202 N.C. 775, 164 S.E. 356, opinion by *Brogden, J.,* this Court

declares that "All courts agree that the submission to an award is the foundation upon which the interpretation and validity of the arbitration and award is built. This prevailing idea was expressed by this Court in *Geiger v. Caldwell,* 184 N.C. 387, 114 S.E. 497, in these words: 'Turning to the authorities, we find it settled that the submission furnishes the source and prescribes the limits of the arbitrators' authority, without regard to the form of the submission. The award, both in substance and in form, must conform to the submission, and the arbitrators are inflexibly limited to a decision of the particular matters referred to them * * * A submission is in itself a contract, or agreement, or so far partakes of its nature as to be substantially within the principle applicable to contracts as 'the basis of the arbitration and award is the submission,'" citing cases. Indeed, the Court added: "The award must be interpreted in the light of the submission."

Moreover as to the parties involved it is generally held that any person who has a dispute with another person may submit to an arbitration, and it is not necessary to join all the parties who have a joint interest in the matter.

In this connection it is stated in 6 C.J.S. Arbitration and Award, Sec. 9, p. 157, that "One of several persons jointly interested in the subject matter of a controversy may submit the same to arbitration so as to bind himself without the joinder of the others, but he cannot bind the others not joining in the submission except by special authority."

While in the instant case the agreement to submit to arbitration states that separate contracts were let by the owner for plumbing, wiring, and heating, and that this controversy involves the question as to which of the contractors, if any, was responsible for the leakage— the plumbing contractor is not a party to the submission and cannot be bound by any award made. Therefore it will be assumed that plaintiff was acting for itself. It will not be assumed that the parties intended to do a vain thing.

Moreover, the agreement concedes that after the building had been completed leakage appeared in a number of showers. As to how many there were, and when they were reported by the owner to the contractor, are matters addressed solely to the arbitrator. Indeed it has been frequently said that arbitrators are not bound to decide according to law when acting within the scope of their authority, "being the chosen judges of the parties and a law unto themselves, they may award according to their notion of justice and without assigning any reason." See *Bryson v. Higdon,* 222 N.C. 17, 21 S.E. 2d 836; *Patton v. Garrett,* 116 N.C. 847, 21 S.E. 679.

In the *Patton* case it is said: " * * * If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of 'judges who are of the parties' own choosing.' An award is intended to settle the matter in controversy and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus * * * arbitration instead of ending would tend to increase litigation." See also *King v. Mfg. Co.*, 79 N.C. 360; *Keener v. Goodson*, 89 N.C. 273; *Reizenstein v. Hahn*, 107 N.C. 156, 12 S.E. 43; *Hurdle v. Stallings*, 109 N.C. 6, 13 S.E. 720; *Wyatt v. R.R.*, 110 N.C. 245, 14 S.E. 683; *Henry v. Hilliard*, 120 N.C. 479, 27 S.E. 130; *Mayberry v. Mayberry*, 121 N.C. 248, 28 S.E. 349; *Ezzell v. Lbr. Co.*, 130 N.C. 205, 41 S.E. 99; *Millinery Co. v. Ins. Co.*, 160 N.C. 130, 75 S.E. 944.

Under these authorities an award cannot be set aside for lack of evidence and the parties are bound by the award even though it might seem unjust to them.

Indeed "The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made." 3 Am. Jur. Arbitration and Award, Sec. 135, p. 958. Such is the situation in present case. There is no suggestion of fraud or wrong doing.

All assignments of error have been given due consideration and, in the light of the above, ground for disturbing the award as made is not made to appear. Hence the judgment from which appeal is taken is

Affirmed.

STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA UTILITIES COMMISSION, v. YOUNGBLOOD TRUCK LINES, INC., ET AL.

(Filed 30 June, 1958.)

1. Carriers § 2—

The basic distinction between a regular route common carrier and an irregular route common carrier is that the former is a carrier with scheduled operations over a restricted and defined route while the latter is a carrier with unscheduled operations within a designated territory but wholly unrestricted as to route.

2. Same—

An irregular route common carrier has no legal right to compel a regular route carrier to interchange intrastate freight, but such inter-

change of freight between them must be based on an agreement, and in the absence of such agreement voluntarily made by the carriers and submitted by them to the Utilities Commission, the Commission has no jurisdiction of the subject matter.

3. Same—

Where joint petition of an irregular route truck carrier and a regular route truck carrier for permission to interchange freight is denied except as to points of pickup and delivery not on the regular route of any other carrier, and only one of the petitioning carriers appeals from judgment of the Superior Court affirming the order of the Utilities Commission, the nonappealing carrier is bound by the decision, and therefore the decision must be affirmed on appeal of the other carrier, since it could not be given authority to interchange freight without violating the provisions of the order as to the nonappealing carrier.

APPEAL by Youngblood Truck Lines, Inc., from *Moore (Dan K.), J.*, November 15, 1957, Schedule B, Civil Term, of MECKLENBURG.

Proceeding before the North Carolina Utilities Commission commenced June 4, 1956, by joint petition of Youngblood Truck Lines, Inc., and Colonial Motor Freight Line, Inc., filed "as provided in Revised Rule 44 of the Rules of the North Carolina Utilities Commission."

Petitioners attached to their petition a copy of their agreement to interchange at Charlotte and Winston-Salem, North Carolina, freight having origin, destination and entire transportation within North Carolina, with provisions for joint rates and division of revenue. They alleged that the proposed interchanges were in the public interest, providing better service to shippers, and prayed that the Commission approve their interchange agreement.

The matter came on for hearing on September 20, 1956, upon said petition and answers filed in behalf of seven protesting regular route common carriers.

At said hearing, the Commission permitted petitioners to amend their original petition by adding two new paragraphs. In this amendment, petitioners alleged, in substance, that on and prior to January 1, 1947, Youngblood, at points within its franchise, regularly and freely, as expediency and service demanded, interchanged intrastate freight with Colonial, and that such free interchange continued until 1952 when the Commission promulgated original Rule 44 and ordered petitioners to cease and desist. Also, the Commission permitted petitioners to add to their original prayer for relief the following: "That if necessary and proper the certificate or franchise of Youngblood Truck Lines be amended to permit a continuance of free interchange which existed prior to the inception of the Truck Act."

After consideration of the evidence offered at said hearing, the Com-

mission filed its order, which sets forth its findings of fact, conclusions of law, general conclusions, and thereafter its specific order, all of which comprise 44 pages of the record.

The Commission's specific order provides:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND CONCLUDED by the Commission, as follows:

"(1) That Youngblood and Colonial be, and they are hereby allowed to interchange freight in intrastate commerce by establishing through routes and joint rates as to the regular route operations of Colonial, provided the traffic or freight interchanged between Youngblood and the regular route operations of Colonial originates at or is destined to points in North Carolina not on any route of a regular route carrier of general commodities; provided, further, that a copy of such interchange agreement with respect to these points is filed with the Commission.

"(2) That Youngblood and Colonial have no right to interchange freight because of any operational practices during the qualifying or critical period of the Grandfather Clause, such rights as well as their nature, extent and frequency having never been brought to the attention of the Commission until the petition of Youngblood filed on January 31, 1955, and long after the effective date of the Truck Act of 1947, or after October 1, 1947.

"(3) That Youngblood and Colonial having not asserted their rights under the Grandfather Clause within the time required by that clause, no rights of interchange can now be claimed under the Grandfather Clause.

"(4) That as to the irregular route operations of both Youngblood and Colonial, no authority of law exists which would permit these two common carriers of freight by motor vehicle to establish through routes and joint rates and interchange freight in intrastate commerce.

"(5) That as to the regular route operations of Colonial and the irregular route operations of Youngblood, there exists no need for such interchange of freight in intrastate commerce; such interchange would not be in the interest of the public, and the Commission does not approve such interchange except insofar as stated in paragraph (1) hereof.

"(6) That Youngblood having participated in the hearing in which Rule 44, as Revised, was established and not having appealed from the establishment of such Rule, it is estopped from now contesting the validity of Rule 44, as Revised.

"(7) That the Commission for good cause shown and in its discretion does not approve the interchange of freight in intrastate commerce sought in this proceeding.

"(8) That this petition, or application, on the part of both Youngblood and Colonial be, and the same is hereby dismissed."

Youngblood appealed from the Commission's order to the superior court, challenging many findings and statements therein and provisions of its specific order by 83 exceptions.

Colonial did not except to or appeal from the Commission's order.

After recitals the judgment of Judge Moore was as follows: "IT IS ORDERED, ADJUDGED AND DECREED that the exceptions of Youngblood Truck Lines, Inc., and each and every one of them, be, and the same are hereby overruled, and Order of the North Carolina Utilities Commission dated the 20th day of March, 1957, be, and the same is hereby affirmed."

Youngblood, but not Colonial, excepted and appealed. In addition to its exception to the judgment, Youngblood excepted separately to the action of the court in overruling each of the 83 exceptions it had filed to the Commission's order. On appeal, Youngblood sets forth 92 assignments of error.

Additional facts, relevant to this appeal, are stated in the opinion.

Williams & Williams for Youngblood Truck Lines, Inc., appellant.

Attorney General Patton and Assistant Attorney General Burns for the North Carolina Utilities Commission.

J. Ruffin Bailey for Fredrickson Motor Express Corp., Miller Motor Express, Inc., and Helms Motor Express, Inc.

Bunn & Bunn for Overnite Transportation Company and Thurston Motor Lines, Inc.

Allen & Hipp for Great Southern Trucking Company and Bottoms-Fiske Truck Lines, Inc.

BOBBITT, J. The franchises of both Youngblood and Colonial were issued pursuant to Sec. 7, Ch. 1008, Session Laws of 1947, codified as G.S. 62-121.11, the so-called Grandfather Clause of the Truck Act of 1947.

Under its franchise, Youngblood is an irregular route common carrier, with headquarters at Fletcher, North Carolina, having authority to transport general commodities, except those requiring special equipment, over irregular routes on and west of U. S. Highway No. 1.

Under its franchise, Colonial is both a regular route common carrier and an irregular route common carrier, with headquarters at High Point, North Carolina. As a regular route common carrier, it is authorized to transport general commodities, except those requiring special equipment, over a defined route, between Winston-Salem and Fayetteville. As an irregular route common carrier it has like authority over irregular routes in defined areas both east and west of U. S.

Highway No. 1. Its irregular route territory and that of Youngblood overlap in a large area, including what is generally regarded the Piedmont section of North Carolina.

Petitioners alleged that Colonial was a duly franchised "regular route common carrier of motor freight in interstate and intrastate commerce." They made no reference in their petition to Colonial's status as an irregular route common carrier. Even so, their petition prayed approval of an agreement providing for interchange between Youngblood and Colonial without limitation or restriction.

The basic distinction between a regular route common carrier and an irregular route common carrier is that the former is a scheduled operation over a restricted and defined route while the latter is an unscheduled operation within a designated territory but wholly unrestricted as to route. The rules and regulations of the Commission define these terms in detail. See *Utilities Commission v. Truck Lines,* 243 N.C. 442, 91 S.E. 2d 212.

Regular route common carriers and irregular route common carriers complement each other in serving the public interest. The service rendered by both is required to provide transportation service by truck to all shippers. If the petition were allowed, the result would be as follows: Youngblood and Colonial, in respect of irregular route operations, could provide transportation of intrastate freight by unscheduled operations and without restriction as to route over the greater part of North Carolina. Too, in handling by interchange with a regular route common carrier freight originating at or destined to points outside its territory, Youngblood could pick up and deliver shipments on the route of another regular route common carrier. Thus, if the petition were allowed, petitioners would be permitted to handle selectively shipments now available to a regular route common carrier in its required scheduled operations along its restricted route. In view of the basis of decision, stated below, we make no decision as to whether the evidence supports the Commission's finding of fact and conclusion that it would not be in the public interest to grant the authority sought by petitioners.

Original Rule 44, effective July 1, 1951, is quoted in full in *Utilities Com. v. Fox,* 236 N.C. 553, 73 S.E. 2d 464.

Revised Rule 44, promulgated April 30, 1953, is quoted in full in *Utilities Com. v. Truck Lines, supra.*

The ultimate question presented on second appeal in *Utilities Com. v. Fox,* 239 N.C. 253, 79 S.E. 2d 391, was whether Fox, an irregular route common carrier, could continue to interchange interstate freight as it had done prior to January 1, 1947. Apparently, the question as

to whether Fox had asserted rights based on the Grandfather Clause *in apt time* was not raised.

Sec. 24(2) of the Truck Act of 1947, codified as G.S. 62-121.28(2), in pertinent part, provides: "(2) That except under special conditions and for good cause shown every common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle, *and, with the approval of the Commission, may do so with irregular route common carriers by motor vehicle,* common carriers by railroad and/or express and/or water." (Our italics)

It is noted that Revised Rule 44, in substantial part, is in accord with Sec. 24(2) of the Truck Act of 1947. See also Sec. 25 of the Truck Act of 1947, codified as G.S. 62-121.29.

In *Utilities Com. v. Truck Lines, supra,* Youngblood filed a petition for authority to interchange freight with Helms Motor Express, Inc., a regular route common carrier. Allowing protestants' motion, the Commission dismissed the proceeding for want of jurisdiction of the subject matter on the ground that the following jurisdictional defects were disclosed by the pleadings and the record: (1) that Helms Motor Express, Inc., was not a petitioning party to the proceeding, and (2) that petitioner did not allege that Helms Motor Express, Inc., had made, or was desirous of making, an interchange agreement with the petitioner.

This Court affirmed the judgment of the superior court insofar as said judgment affirmed the Commission's order dismissing the proceeding for want of jurisdiction of the subject matter.

As indicated, the original petition was based squarely on Revised Rule 44; and therein the petitioners sought a determination that the proposed interchanges of intrastate traffic and joint rates would be in the public interest. The purport of their amendment, allowed and made at the hearing on September 20, 1956, is that, independent of the Commission's finding as to the public interest, they were entitled as of right, under the Grandfather Clause, to do what their original petition prayed that the Commission allow them to do.

On this appeal, for the reason stated below, it is unnecessary to determine whether Youngblood and Colonial, or either of them, had interchange rights under the Grandfather Clause as asserted in their amendment, or the nature and extent of such rights, if any; nor is it necessary to determine whether by delay in asserting such rights, if any, or by notice of and acquiescence in Revised Rule 44, they, or either of them, are precluded from asserting such rights.

We recognize *Utilities Com. v. Truck Lines, supra,* as authority for

these propositions: (1) an irregular route common carrier has no legal right to compel a regular route common carrier to interchange intrastate freight; (2) interchange between such carriers must be based on an agreement; and (3) in the absence of such interchange agreement, voluntarily made by such carriers and submitted by them to the Commission, the Commission has no jurisdiction of the subject matter.

We are confronted by this situation. The joint petition of Youngblood and Colonial, based on their agreement, was sufficient to invoke the jurisdiction of the Commission. The Commission did not approve the interchange of freight in intrastate commerce sought by petitioners. It dismissed their petition. However, the Commission, under Revised Rule 44(2), allowed Youngblood and Colonial to interchange freight in intrastate commerce to the extent set forth in paragraph (1) of the Commission's order, quoted in the statement of facts.

Colonial, which did not except or appeal, is bound by the Commission's order. The proceeding involves only rights of interchange between Youngblood and Colonial. Such rights are interdependent and must stand or fall together. Since Colonial cannot interchange with Youngblood except to the extent allowed in paragraph (1) of the Commission's order, it follows that Youngblood cannot interchange with Colonial otherwise than to this extent.

On the basis stated in the preceding paragraph, the judgment of *Judge Moore* is affirmed.

Neither the order of the Commission nor the judgment of the superior court, in respects challenged by Youngblood, may be considered as precluding Youngblood from asserting the positions taken by it on this appeal in other proceedings, if any, in which these questions arise.

Affirmed.

WILLARD ROBERT SLEDGE v. BRYCE WAGONER, P. E. HODGES AND J. BERNARD PARKER, T/A BUS TERMINAL RESTAURANT AND MODERN GRILL.

(Filed 30 June, 1958.)

1. Negligence § 4f—

A person entering a public restaurant to make a purchase is an invitee.

2. Negligence § 4e—

The proprietor of a restaurant or store is not an insurer of the safety of his customers entering upon direct or implied invitation, but is under the legal duty to his patrons to exercise ordinary care to keep his prem-

ises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers or unsafe conditions in so far as they can be ascertained by reasonable inspection and supervision.

3. Negligence § 5—

While foreseeability is an essential element of proximate cause, foreseeability does not import that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred, but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected.

4. Negligence § 4e— Evidence held sufficient for jury on issue of negligence causing fall of customer when his clothing caught on protruding rod of magazine rack.

The evidence tended to show that a customer of a restaurant entered same by a swinging door, that table and chairs prevented the door from being opened fully, so that the customer had to sidle through, and that the cuff of his trousers caught on a wire protruding some 4 inches from the floor and one-half inch from a wire rod magazine rack, which was standing against the wall not over 4 inches from the door facing, causing the customer to fall to his injury. There was testimony that immediately after the injury the manager stated that he ought to have moved the magazine rack before somebody got hurt. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence and did not disclose contributory negligence as a matter of law.

5. Negligence § 19c—

Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the plaintiff's evidence.

APPEAL by plaintiff from *Phillips, J.*, at November Term, 1957, of RANDOLPH.

Ottway Burton and Don Davis for plaintiff, appellant.
James B. Lovelace for defendants, appellees.

JOHNSON, J. This is a civil action to recover damages for personal injuries sustained by the plaintiff as a result of falling on the floor of the defendants' restaurant.

The case comes here on appeal from judgment as of nonsuit entered on motion of the defendants at the close of the plaintiff's evidence.

The defendants' restaurant is located in the Union Bus Terminal in the City of High Point. The plaintiff entered the restaurant for the purpose of making a purchase. He entered through a swinging door leading from the waiting room into the grill. An upright magazine rack was standing with back to the wall just inside the door on the plaintiff's right as he entered. The rack was made of wire rod material. It stood not more than four inches back from the door facing

where the door pushed open. A table and some chairs close behind the swinging door kept it from opening full width and required the plaintiff to enter by stepping sidewise through the small opening of the door. After doing this, and upon taking his first step forward toward the serving counter, a snag on the magazine rack caught in the plaintiff's trouser leg, causing him to trip and fall and sustain a painful, disabling injury to one of his knees. While lying on the floor the plaintiff discovered the snag which caused him to trip: it stuck out from the bottom of the rack about half an inch, and was only about four inches up from the floor.

This in material part is the plaintiff's narrative of the occurrence: "After getting off work, I went from the furniture shop to the bus terminal in High Point . . . and went into the bus terminal grill for a little lunch around 12:30. . . . There is a door from the waiting room into the restaurant which is on the east side of the restaurant. . . . The door . . . is a hinged door which swings both ways, i. e., if one is inside the grill pushes to enter the waiting room, and vice versa to enter the grill from the waiting room. . . . On the north jamb of the door along the wall north of the door there is a combination magazine and newspaper rack sitting along the wall. This . . . rack is made of a sort of heavy wire rod material with frames upright. The wire rods are about a quarter or three-sixteenths of an inch in diameter. In the newspaper rack on the day in question there were newspapers and magazines both located in the rack. I would estimate the magazine and newspaper rack to be 3 feet. *The magazine and newspaper rack was not over 4 inches at the most back from the door facing.* (Italics added.)

". . . I came into the grill from the east side, went in, ordered some coffee and drank a couple of swallows. I then asked the manager, Mr. Wood, if I might check my bus schedule. I went to check the bus schedule at the ticket office and about that time a bunch of buses came in and there was a crowd in the waiting room and I started to enter back into the grill, using the swinging hinge door. I opened the door, pushing in, . . . Something behind the door hit, I sidled around to get in and as I went to make my step that magazine and newspaper rack caught my trousers, tripped me, and throwed me on my right knee.

"The floor of the bus terminal grill is a concrete floor and my whole weight fell on my right knee on the concrete floor. What had caught my trousers was a snag on the magazine and newspaper rack. The little snag which caught my trousers was about one-half an inch down on the bottom of the magazine rack as I entered in, going into the grill. As I went to make my step, it caught me in the cuff of my overalls leg and tripped me over and caused the injury to my knee. I

fell, grabbed my leg, and turned over on my left hip; then I looked to see what had tripped me. . . . The magazine rack . . . was pulled into the path of the door. Mr. Wood then came out and wanted to know if I was hurt. I told him my leg was hurt, that my knee was hurting me pretty badly. *He told me he ought to have moved that magazine rack before somebody got hurt.* He then moved the magazine rack and carried it out—that is the last time I saw the magazine rack. Mr. Wood said he was going to dispose of the magazine rack." (Testimony as to nature and extent of the injury omitted as not being pertinent to decision.) (Italics added.)

Cross Examination: ". . . This is not the first occasion I had been in the restaurant; I have been in there every day. I went through both the doorway that leads from the hall as well as the doorway that leads from the waiting room; on different occasions. . . . I never noticed what type of lights there were in the Bus Terminal Restaurant; however, it was well lighted. . . . The rack located in the Bus Terminal Restaurant on September 3, 1955, had a snag on it on the end which caught my trouser leg. The table behind the door (hinged swinging door) which I used to enter the grill after checking on my bus schedule was a table fixed for two people but there were three chairs around it on that day. . . .

"I did notice the magazine and newspaper rack because I turned around as I grabbed my leg (after falling) and I turned on an angle and saw it. It was as far as from the witness chair to the jury box, which is about 8 feet. At the time I was sitting up at an angle on my elbows, and I could see the rack 8 feet away from me, and from that distance I saw a little snag. The snag extended beyond the upright, the main upright outside the frame and I saw it with the good eyes I have. . . . I did not notice any newspapers extending over the end of the rack, they were all inside the rack.

"After I had been to see the ticket agent, I pushed on the swinging hinged door, opening toward the restaurant. When I pushed on it, it opened just far enough for me to sidle in. . . . I could have used another door down the hallway, which I wouldn't have to sidle in and there was nothing obstructing it, if I chose to go around that way. . . . I did not stump my toe over the magazine and newspaper rack. I did not knock the rack down. It was pushed around in the doorway as I went by; not with my toe. I pulled the rack with my pants cuff. As I sidled in, I was noticing the door, not noticing the rack, but I knew the magazine rack was there. . . . I could open the door 24 inches from the door facing to the corner of the table. . . .

". . . The part of my trousers which caught in the rack was the cuff of my overalls. I had rolled my overalls up to make a cuff. That is

the manner in which I worked at my job at Tomlinson's. . . . My cuff was up because it was too long. . . . Q. When you went in there and got caught some way you were not watching how you got caught? A. No sir. I was watching the door I was going in but it caught my trousers leg just the same. . . . I estimate the snag on the newspaper rack which tripped me to be half an inch and I am pretty good in guessing measurements. I stated that the height of the snag above the floor was about four inches from the floor. . ."

The plaintiff was an invitee. *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33; *Coston v. Hotel*, 231 N.C. 546, 57 S.E. 2d 793; *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408.

The proprietor of a restaurant, like an occupant of any building used for ordinary business purposes, who directly or by implication invites others to enter his place of business, is not an insurer of the safety of customers while on the premises, but is under the legal duty to his patrons to exercise ordinary care to keep his premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision. *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652; *Lee v. Green & Co., supra; Watkins v. Taylor Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917. See also *Copeland v. Phthisic*, 245 N.C. 580, 96 S.E. 2d 697.

Those entering a restaurant, store, or other like business establishment during business hours for the purpose of making purchases or transacting business "do so at the implied invitation of the proprietor, upon whom the law imposes the duty of exercising ordinary care (1) to keep the aisles and passageways where customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose the customer to danger, and (2) to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know." *Lee v. Greene & Co., supra.*

In *Fanelty v. Jewelers*, 230 N.C. 694, 699, 55 S.E. 2d 493, 496, *Ervin, J.*, speaking for the Court, said: "It was undoubtedly the legal duty of the defendant in its capacity as a storekeeper to exercise ordinary care to keep the entryway to its shop in a reasonably safe condition for the use of customers entering or leaving the premises, and to warn them of hidden perils in the entryway known to it or ascertainable by it through reasonable inspection and supervision."

The evidence in this case when analyzed in the light of the controlling principles of law is sufficient, we think, to make out a *prima facie* case of actionable negligence for the jury.

The closest question in the case is the factor of foreseeability. The test of foreseeability as an element of proximate cause does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' " *Hart v. Curry,* 238 N.C. 448, 78 S.E. 2d 170. *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894. See also *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63; *Boone v. Railroad Co.,* 240 N.C. 152, 81 S.E. 2d 380.

Tested by the foregoing rule, it is manifest that the plaintiff's testimony justifies the inference that the defendants should have foreseen that consequences of a generally injurious nature would likely result from their conduct in leaving the magazine rack so near the door, in or near the edge of the obstructed passageway leading into the restaurant, with a snag of the type described by the plaintiff, in the nature of a hidden peril, sticking out from the side of the rack near the floor. The crucial evidence bearing on this phase of the case is the statement made by the manager of the restaurant to the effect that "he ought to have moved that magazine rack before somebody got hurt." This statement with other corroboratory evidence suffices to make the question of foreseeability one for the jury.

We find no substantial merit in the defendants' contention that they are entitled to nonsuit on the ground of contributory negligence as a matter of law. Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the plaintiff's evidence. *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Caughron v. Walker,* 243 N.C. 153, 90 S.E. 2d 305; *Mallette v. Cleaners,* 245 N.C. 652, 97 S.E. 2d 245; *Bridgers v. Wiggs,* 245 N.C. 663, 97 S.E. 2d 119. The evidence as to this phase of the case is too inconclusive to justify the inference that the plaintiff was contributorily negligent as a matter of law.

The judgment as of nonsuit entered below is

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1958

CITY OF WINSTON-SALEM v. SOUTHERN RAILWAY COMPANY.

(Filed 17 September, 1958)

1. Municipal Corporations § 36—

A statute authorizing the city to require a railroad company, at its own expense, to construct and repair overpasses and street crossings is a delegation to the city of a part of the State's sovereign police power.

2. Constitutional Law § 11—

The police power is inherent in sovereignty and is not dependent upon any constitutional grant.

3. Same—

The police power is subject to all constitutional limitations which protect basic property rights, and therefore must be exercised at all times in subordination to Federal and State constitutional limitations and guarantees.

4. Same—

The police power extends only to such measures as are reasonably calculated under the existing conditions and surrounding circumstances to accomplish a purpose falling within the legitimate scope of the police power, without burdening unduly, upon the particular facts of the case, the person or corporation affected.

5. Same—

The police power cannot be placed within fixed definitive limits, but its extent must be determined upon the facts and circumstances of each particular case by application of the principle that the regulation or

burden imposed must be reasonable in its operation as to the persons whom it affects and must not be unduly oppressive.

6. Same—

While the extent of the police power does not expand or contract, what is within the police power at one time may not be within that power at another time, and vice versa, when there is a change of conditions so that a different conclusion is impelled in applying the constant test of reasonableness to the changing factual situation.

7. Evidence § 5—

The courts will take judicial notice of the fact that passenger and freight traffic by motor vehicle has greatly increased in recent years, that aid to municipalities in financing the maintenance and construction of streets has been provided, and that the impact of motor vehicular transportation on the business of the rails has undergone a vast change since the expansion of the Federal and State systems of public highways.

8. Constitutional Law § 15: Railroads § 3—

Where no factor of public safety is involved, the police power may not be invoked to require a railroad company to rebuild an overpass over a street in furtherance of the public convenience where neither the location of the railroad nor its use for train operations is a reasonably related causative factor in producing the public inconvenience sought to be remedied.

9. Same: Municipal Corporations § 38½: Mandamus § 2a— Ordinance requiring railroad company to reconstruct overpass held unconstitutional.

This action was instituted for *mandamus* to compel a railroad company to reconstruct, at its own expense, its overpass over a municipal street in accordance with a municipal ordinance adopted pursuant to a statute delegating to the municipality the power to require a railroad company to construct and repair overpasses within the city. (Ch. 232, Sec. 54, Private Laws of 1927). The allegations and uncontroverted special facts shown in evidence disclosed that when a street of the city was originally constructed the railroad company, at its own expense, built an overpass for its tracks, that the abutments of the overpass were sufficiently wide to present no danger to the traveling public along the street, but that the city, largely for the purpose of relieving traffic congestion in other parts of the city, proposed to build a new intercity thoroughfare, which would make an X crossing with the old street under the overpass, necessitating a large increase in the span of the overpass. *Held:* The public safety is not involved, and the public convenience to be served was not brought about by any conditions at or along the railroad right of way, and therefore the ordinance as applied to the facts of this case amounts to an unreasonable exercise of the police power and an invasion of the railroad company's property rights in violation of Article I, Section 17, of the Constitution of North Carolina.

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

APPEAL by defendant from *Johnston,* Resident Judge of the Twenty-

first Judicial District of the Superior Court, in Chambers at the Courthouse in Winston-Salem, 24 July, 1957. From FORSYTH.

Joyner & Howison; William T. Joyner, Jr.; Deal, Hutchins & Minor and William C. Bennett, Jr. for defendant, appellant.

Ratcliff, Vaughn, Hudson, Ferrell & Carter; Ralph M. Stockton, Jr.; and Robert G. Stockton for plaintiff, appellee.

JOHNSON, J. This is a civil action by plaintiff, City of Winston-Salem, for writ of *mandamus* to compel the defendant, Southern Railway Company, to rebuild at its entire expense the overpass trestle where the railroad tracks cross over Northwest Boulevard, in accordance with an ordinance adopted by the City Board of Aldermen on 15 April, 1957.

Northwest Boulevard was established as a city street in 1922. It was laid out to pass under the tracks of the Southern Railway Company at a point where its roadbed was on top of an embankment some twenty feet high. It was thus necessary that an excavation be made through the embankment under the tracks. This required the erection of an overpass trestle to span the opening over the new street. The City requested the railway company to build the trestle, and it did so at its own expense, although the City paid for the excavation work.

The trestle has been in use since 1923. The City is now demanding that the railway company rebuild the trestle in extended length, to accommodate the opening of a new street, known as Broad Street Extension, laid out to intersect and cross Northwest Boulevard under the trestle, so as to make an X crossing under the trestle. The abutments of the present trestle are about 36 feet apart. The present street, 34 feet wide, passes between these abutments. The city ordinance sought to be enforced in this action requires a horizontal clearance of not less than 62.5 feet. To comply with the ordinance would require the complete rebuilding of the trestle at an expense to the railway company of approximately $57,000. Also, it would necessitate the appropriation of considerably more of the railway right of way.

The ordinance requiring the railway company to rebuild the trestle was enacted by the Board of Aldermen of the City in the exercise of power granted the City in its Charter, Ch. 232, Sec. 54, Private Laws of 1927, which provides that the City "shall have the power to require" any "railroad company . . . at its own expense, to construct, maintain and repair . . . crossings at grade, over or under its streets. . . ." By this charter provision the General Assembly delegated to the City a *quantum* of the State's sovereign police power. *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638; 11 Am. Jur., Constitutional Law, Sections 255 and 256.

The City alleges that dangerous traffic congestion exists "on West Fifth Street, on Broad Street from Fifth Street to West End Boulevard and Seventh Street, on West End Boulevard from Broad Street and Seventh Street to Reynolda Road, on Reynolda Road from West End Boulevard and extending some distance North of its intersection with Northwest Boulevard, on Northwest Boulevard for some distance westwardly from Reynolda Road, on Northwest Boulevard from Chatham Road to Reynolda Road"; that existing conditions "cause(s) serious delay in traffic flow and constitute(s) a hazard to the public safety and welfare of the citizens of Winston-Salem," and that it is necessary for the public safety and public welfare to extend Broad Street northwardly to join with Thurmond Street at Northwest Boulevard as proposed, so as to provide a north-south intercity thoroughfare extending from Corporation Parkway in the southern part of the City to Coliseum Drive in the northern part of the City, a distance of approximately 2.71 miles; that the present railroad trestle over Northwest Boulevard is inadequate to accommodate the increased flow of traffic that will be produced by the proposed extension of Broad Street; that, on the contrary, the present trestle will unreasonably and dangerously impede and obstruct traffic and will constitute a danger to the public, and that it is necessary in the interest of public safety and welfare that the trestle be rebuilt by the railway company in accordance with the demands of the City.

The defendant by answer denied that the plaintiff is entitled to the relief sought. Among other defenses set up by the defendant are these:

1. That the trestle is now completely adequate for the purposes of the railway company, and as it presently exists causes no danger to the public or to the defendant.

2. That there is no public necessity for a new overpass as contemplated by the ordinance. However, if public necessity be found, the need is not caused by any action of the defendant, but is caused solely by the increase in highway traffic and by the growth of the City of Winston-Salem.

3. Compliance with the ordinance will impose upon the defendant heavy, unjustified expense, and will be of no benefit to the defendant; that the benefits, if any, from the proposed project will accrue only to members of the vehicular traveling public, including the chief competitors of the defendant, the trucks and busses; and that the requirements of the ordinance will amount to the taking of the defendant's property without just compensation and without due process of law.

4. That the provision of the Charter of the City of Winston-Salem

quoted in the complaint and relied on by the plaintiff as authorizing its demand upon the railway company is arbitrary, unreasonable, and unconstitutional, in that it would deprive the defendant of its property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 17, of the North Carolina Constitution.

5. That the provisions of the ordinance likewise are arbitrary, unreasonable, and unconstitutional, in that they would deprive the defendant of its property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 17, of the North Carolina Constitution.

Voluminous evidence was offered by each side in support of its allegations and contentions.

Upon facts found by the trial court, substantially in accord with the plaintiff's allegations but with no reference being made to the special facts shown in evidence and relied upon by the defendant railway company, the court entered judgment allowing the City's request for *mandamus* and decreeing that the railway company be required "at its sole expense" to reconstruct the trestle over Northwest Boulevard as directed in the ordinance of 15 April, 1957, with direction that work begin within sixty days after the date of the judgment, and that the project be completed within 280 working days thereafter. From the judgment so entered, the defendant railway company appealed.

The railway company takes the position that the charter provision under which the ordinance was enacted does not grant unlimited power to the City, and that the attempt to require the company to bear the expense of rebuilding the trestle under the facts and circumstances of this case is an unreasonable and unconstitutional exercise of the power delegated to the City in the Charter. The defendant predicates its claim of unconstitutionality upon uncontroverted special facts shown in evidence or of which the courts may take judicial notice, which it contends factually distinguish the instant case from the decisions cited by the City, and take the case out of the principles relied upon by the City as authority to sustain the validity of its ordinance.

The railway company's contentions must be viewed in the light of the basic proposition that the police power is a reserve power, and not a grant derived from or under any constitution, which may be exercised for the promotion of the public safety, the general welfare, and the public convenience.

Nevertheless, the railway company is entitled to have its conten-

tions resolved in the light of these equally well-established general principles:

1. That the police power is subject to all the constitutional limitations which protect basic property rights, and therefore must be exercised at all times in subordination to Federal and State constitutional limitations and guarantees. *Clinard v. Winston-Salem,* 217 N.C. 119, 6 S.E. 2d 867; *Brewer v. Valk, supra* (204 N.C. 186); *Clinton v. Oil Co.,* 193 N.C. 432, 137 S.E. 183; *S. v. Whitlock,* 149 N.C. 542, 63 S.E. 123; *S. v. Williams,* 146 N.C. 618, 61 S.E. 61.

2. That the accepted standard by which the validity of all exercise of the police power is tested is that the power extends only to such measures as are reasonable under all existing conditions and surrounding circumstances. 11 Am. Jur., Constitutional Law, Sec. 302. See also *Austin v. Shaw,* 235 N.C. 722, 71 S.E. 2d 25; *Shuford v. Waynesville,* 214 N.C. 135, 198 S.E. 585; *Barger v. Smith,* 156 N.C. 323, 72 S.E. 376.

3. Therefore, when the exercise of the police power is challenged on constitutional grounds, the validity of the police regulation primarily depends on whether under all the surrounding circumstances and particular facts of the case the regulation is reasonable; that is, whether it is reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power, without burdening unduly the person or corporation affected. 11 Am. Jur., Constitutional Law, Sec 302. See also *Cab Co. v. Shaw,* 232 N.C. 138, 59 S.E. 2d 573; *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; *S. v. Bass,* 171 N.C. 780, 87 S.E. 972. In short, it must appear that the regulation or burden imposed is reasonable in its operation as to the persons whom it affects, and it must not be unduly oppressive. *East Side Levee & Sanitary Dist. v. East St. Louis & C. Ry.,* 279 Ill. 123, 116 N.E. 720; 11 Am. Jur., Constitutional Law, Sec. 302. What constitutes an unreasonable interference with or burden upon private property in the exercise of the police power is a matter for which there is no fixed formula or all-embracing test. It is a matter resting in human judgment, ordinarily to be determined on principles of natural justice in the light of all the relevant facts, circumstances, and conditions in each particular case. See *Bonnett v. Vallier, et al.,* 136 Wis. 193, 116 N.W. 885; 11 Am. Jur., Constitutional Law, Sec. 304. Necessarily, then, a police regulation valid in its application to one set of facts may be invalid as to another. *Nashville C. & St. L. R. Co. v. Walters,* 294 U.S. 405, 79 L. ed. 949.

4. Since the police power of the State has not been, and by its nature cannot be, placed within fixed definitive limits, it may be extended or restricted to meet changing conditions, economic as well as

social. Accordingly, a matter under specific regulation or burden imposed by exercise of the police power at a previous time does not necessarily operate as a fixed testing device for the exercise of the police power at a later date. *Miller v. Board of Public Works,* 195 Cal. 477, 234 P. 381; *Hall v. Johnson,* 87 Ore. 21, 169 P. 515. Therefore, what was at one time regarded as an improper exercise of the police power may now, because of changed conditions, be recognized as a legitimate exercise of that power. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *Miller v. Board of Public Works, supra;* 11 Am. Jur., Constitutional Law, Sec. 253. Similarly, a police regulation or measure, although valid when promulgated, may become unreasonable and confiscatory in operation as a result of later events or changed conditions. *Nashville C. & St. L. R. Co. v. Walters, supra.* As to this, the logic of the thing is, not that there is any expansion or any retraction of the basic principles underlying the police power, but rather that the changed conditions as they arise bring the subject matter in question within the operation of approved testing principles of reasonableness or remove it therefrom. See *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 68 L. ed. 841; *Abie State Bank v. Bryan,* 282 U.S. 765, 75 L. ed. 690; *Taylor v. Baltimore & O. R. Co.,* 138 W. Va. 313, 75 S.E. 2d 858; *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N.W. 20; *Realty Revenue Corp. v. Wilson,* 181 N.Y. Misc. 802, 44 N.Y.S. 2d 234; *Vigeant v. Postal Telegraph Cable Co.,* 260 Mass. 335, 157 N.E. 651; *Fort Worth & D. C. Ry. Co. v. Welch,* 147 Tex. Civ. App. 634, 183 S.W. 2d 730; *Atlantic Coast Line R. Co. v. Ivey,* 148 Fla. 680, 5 So. 2d 244.

In *Abie State Bank v. Bryan, supra,* it is stated that "a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation . . ." In *Realty Revenue Corp. v. Wilson, supra,* it is said: "Contrary to what perhaps may be a popular impression, the constitutionality of laws depends, not upon abstract theories of philosophy, but upon a very practical application of laws to facts, and a statute which is valid as to one set of facts may be invalid as to another, and one which is valid when enacted may become invalid by change in the conditions to which it is applied . . ." In *Vigeant v. Postal Telegraph Cable Co., supra,* it is said: "A change in economic conditions may render void a statute valid at its enactment . . ." In *Atlantic Coast Line R. Co. v. Ivey, supra,* it is stated: "It is well settled that a statute valid when enacted may become invalid by change in conditions to which it is applied. . . ."

The decisions cited by the City of Winston-Salem uphold State statutes and municipal ordinances which imposed upon railroads the

whole or a part of the expense of (1) improving, altering, and rebuilding crossings at grade; (2) eliminating grade crossings by means of underpasses or overhead bridges; and (3) altering and rebuilding existing underground and overhead crossing facilities.

A study and analysis of the decisions relied on by the City disclose that in most of the cases the factors justifying the financial burdens imposed on the railroads in making the crossing improvements were considerations of public safety and public convenience—the protection of the traveling public from the dangers of grade crossing accidents and the inconveniences caused by traffic interruptions at heavily traveled crossings—with greater emphasis being placed on the factor of public safety.

In *Durham v. R. R.* (1923), 185 N.C. 240, 117 S.E. 17, the City of Durham applied for a writ of *mandamus* to compel three railroad companies (Southern Railway Co., Norfolk & Western Railway Co., and Seaboard Air Line Railroad Co.) to eliminate an existing grade crossing on Chapel Hill Street in the industrial section of the City, by building a street underpass under the tracks of the three railroads. The lower court entered judgment allowing the writ and requiring the railroad companies to eliminate the grade crossing. On appeal to this Court the judgment below was affirmed. Decision turned primarily on considerations of public safety, with the factor of public convenience being treated as a subordinate matter: Chapel Hill Street is one of the main streets for traffic in the City of Durham, connecting the northern and southern portions of the City. At that time it was the main thoroughfare leading from Durham to Chapel Hill. The three defendant railroads had tracks crossing the street at grade, over which were operated both freight and passenger trains. Within a radius of approximately 800 yards of the grade crossing were located the freight depots of all three defendants, large tobacco plants and factories, ice and power plants, flour mills, and hosiery mills, all of which depots and industries were served with spur tracks over which were operated frequently, day and night, passenger trains, freight trains, and switching engines. The record of a traffic count, unchallenged by the railroads, showed the following volume of traffic passing over the grade crossing daily: An average of about 4,000 pedestrians and bicycles, over 500 horse-drawn vehicles, more than 2,000 passenger automobiles, more than 350 delivery wagons, over 100 heavy trucks, and over 200 street cars. It was alleged in the complaint and admitted in the answer that several accidents had occurred at the grade crossing in which people, animals, and vehicles had been injured, *and that the crossing was dangerous to the traveling public.* The City also alleged that street traffic was seriously interrupted and

impeded by numerous trains and switching engines blocking the crossing, both day and night. In speaking to the factor of public safety, the Court said (bot. p. 243): ". . . It is traversed by thousands of people daily, and the question whether or not the *public safety* demanded elimination of the grade crossing was one in the legislative power of the governing authorities of the city of Durham, and their decision is conclusive and final, unless it was shown that it is clearly oppressive or amounts to abuse of their discretion." (Italics added.) The Court said further (bot. p. 248): "The State, in the exercise of the police power, may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street crossings as may be necessary *for the safety and protection of the public.*" (Italics added.) In the case at hand, the City's proposed project which requires lengthening and rebuilding the overhead trestle is not a grade separation project, nor, as hereinafter explained, *is it one made necessary by considerations of public safety.* Moreover, it is significant that in the *Durham* case the railroads made no attempt to show that the ordinance requiring them to eliminate the grade crossing at their expense was unreasonable. In fact, the railroads offered no evidence at the hearing in Superior Court. Therefore, the *prima facie* presumption in favor of the validity of the city ordinance prevailed, entitling the City of Durham to the writ of *mandamus* to enforce the ordinance, and this Court so held. In the instant case, the record discloses voluminous evidence tending to show that the challenged ordinance is unreasonable and oppressive under all the facts and circumstances of the case.

In *R. R. v. Goldsboro* (1911), 155 N.C. 356, 71 S.E. 514, the railroad occupied with its tracks the chief street of the City of Goldsboro. The right of way, 65 feet on each side of the roadbed, embraced the whole of what is known as East and West Center Streets, which extend north and south the entire length of the City. The right of way was acquired originally about 1835, and the town built up on both sides, with the buildings facing the tracks. The City under charter authority instituted a system of grading its streets. In pursuance of this work the roadbed of the railroad on Center Street was left from 6 to 18 inches higher than the grade of the streets on each side of the tracks and of the streets which crossed East and West Center Streets at right angles. This condition seriously interrupted and menaced the safety of traffic crossing the tracks from one side of Center Street to the other. The City passed an ordinance requiring the railroad to lower its roadbed so as to make it level with the city streets on each side. The plaintiff railroad instituted an action to enjoin the enforcement of the ordinance, alleging it to be unconstitutional. The

lower court denied plaintiff's application for injunction, and plaintiff appealed. This Court treated the constitutional question as properly raised, resolved the question in favor of the City, and affirmed the judgment of the lower court. The decision upholding the validity of the ordinance was rested on interpretation of a provision of the Charter of the railroad granted by act of the General Assembly of 1833, which provided that whenever the tracks of the railroad company intersected and crossed "any public or private road" established by law, the railroad should "be so constructed as not to impede the passage of travelers" on such road. The Court construed this provision as applying not only to roads and streets laid out and existing when the railroad was built, but also to new roads and streets thereafter opened (Cf. *S. v. Wilmington & Weldon R. R. Co.*, 74 N.C. 143), and held that the ordinance requiring the railroad company to lower its tracks from 6 to 18 inches at the points where the cross streets passed over the railroad tracks was a lawful exercise of police power conferred on the City in its Charter. It thus appears that in the *Goldsboro* case the basic, controlling facts were entirely different from those in the instant case. In that case, in addition to the crucial provision in the railroad company's Charter, there was a direct relation between the necessity for lowering the tracks and the promotion of both the public safety and the public convenience. In the instant case, the element of public safety usually involved in railroad crossing cases is entirely missing; and the need for promoting the public convenience derives from the necessity for relieving traffic congestion, principally in other areas of the City, not caused in any manner by the location of the railroad tracks.

In *Shreveport v. Kansas City S. G. R. Co.* (1929), 167 La. 771, 120 So. 290, 62 A. L. R. 1512, suit was instituted to compel the railroad company to remove piers supporting an overhead bridge from the paved portion of the street. It there appeared that the piers rendered the street unsafe for travel, and the factor of public safety was the controlling consideration in upholding the lower court in requiring the railroad company to remove the piers.

In *Windsor v. Delaware & Hudson Canal Co.* (1895), 36 N.Y.S. 863, affirmed 155 N.Y. 645, 49 N.E. 1105, abutments on the highway supporting an overhead bridge for twenty years were required to be set back to a point where they would not be a traffic menace or impair the usefulness of the highway. The abutments were only 13 feet 2 inches apart. Manifestly, the factor of public safety was the controlling consideration in the decision.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. City of Minneapolis* (1914), 232 U.S. 430, 58 L. ed. 671, the railroad company was re-

quired to construct a bridge to carry its tracks across a canal dug by the City to connect two lakes, used by the public for boating and recreation. Here the controlling factor was that of public convenience. The opening of the canal through the railroad right of way for the accommodation of those traveling by small boats was treated on the same footing as if the opening had been for a new street.

In *Missouri Pac. Ry. Co. v. City of Omaha* (1914), 235 U.S. 121, 59 L. ed. 157, the railroad company was required to build a viaduct over its tracks at a street crossing at a cost of $80,000, to support street railway traffic as well as ordinary street traffic; whereas the cost of a bridge adequate for ordinary traffic would have been only $30,000. Decision of the lower court requiring the company to pay all the costs was upheld upon considerations of public safety, though it is stated in the opinion that "it may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct . . . but there is nothing in the statute requiring the municipality to divide the expense of such improvement. . . ."

In *Erie R. R. v. Board of Utility Commissioners* (1921) 254 U.S. 394, 65 L. ed. 322, the railroad company was required to separate 15 grade crossings in the City of Patterson, N. J., by carrying 14 of the crossings under and one over the railroad, at a cost of $2,000,000. The street railway company using three of the crossings was required to pay 10% of the costs of changing these three crossings. Considerations of public safety appear to have been the controlling factor in justifying the imposition upon the railroad company of the principal costs of these improvements, notwithstanding few accidents were shown to have occurred at the crossings. The Court dealt at some length with the element of potential dangers. We quote from the opinion: "If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone, we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*" (Italics added.)

In *Atchison, Topeka & Santa Fe Ry. Co. v. Public Utilities Commission of California* (1953), 346 U.S. 346, 98 L. ed. 51, there were two cases consolidated for hearing. In the first case, the State Public Utilities Commission required the enlargement of two existing rail-

road underpasses. These underpasses were constructed in 1914. When first constructed, their chief utility was to facilitate access to a garbage reduction plant. The street on which they are located is now one of the main thoroughfares of the City of Los Angeles, and the grade separations are in one of the principal industrial districts of the City. The street at the approaches to each underpass is 60 feet wide but narrows to 20 feet, with vertical clearance of less than 14 feet, at the underpass. The underpasses thus present traffic bottlenecks. The improvement project as required by the Commission calls for the enlargement of each to a width of 33 feet. "The Commission found that $569,355 of the costs was attributable to the presence of the railroad tracks and that the railroad should pay 50% of this amount and the city 50%." In the second case, the Commission's order required that a grade crossing be replaced by an underpass where considerable congestion was occurring when the crossing was blocked by trains. It was made to appear that when the crossing was blocked by trains, "38 or more vehicles may back up in each of three lanes, causing a 'backlash' on San Fernando Road, 820 feet distant." Minor accidents had occurred at the crossing. The total costs of the project were estimated at $1,493,200. The Commission ordered that 50% be borne by the railroad, 25% by Los Angeles County, and 12½% each by the cities of Los Angeles and Glendale. On appeal, the railroad company resisted the apportionment of any part of the costs of the projects, mainly upon the ground that it would derive no benefits from the improvements. The benefit theory was dismissed summarily by the Court, and it was held that since it was the presence of the railroad's tracks in the streets that created the necessity of constructing grade separations in the interest of the public safety and public convenience, the railroad company was not in position to complain because it would receive no special benefits from the improvements.

In *Burough of Sayreville v. Pennsylvania R. R. Co.* (1957), 44 N. J. *Super.* 172, 129 A. 2d 895, the railroad company was required to bear the expense of rebuilding a bridge where a city street crossed over the tracks, the old bridge being too narrow for large commercial vehicles, such as busses and trucks with substantial overhang, to pass one another on the bridge. It is manifest that the controlling considerations justifying imposition upon the railroad of the costs were factors of both public safety and public convenience.

In *Carolina & N. W. Ry. Co. v. Town of Lincolnton* (1929), 33 F. 2d 719, the railroad company was required, chiefly upon considerations of public safety, to replace a wooden bridge over the railroad tracks with a steel one, the old bridge being located within the town fire district.

The basic pattern of the foregoing decisions relied on by the City is that where impelling considerations of safety or convenience of the traveling public require alterations or improvements at a grade crossing, or that the grade crossing be eliminated entirely by carrying the tracks over a public way or the public way over the tracks by bridge, the duty of making the required alterations or improvements, or of providing the necessary bridge, ordinarily devolves upon the railroad company. The basis of this rule is the superior nature of the public's right to the safe and unimpeded use of streets and highways. *Erie R. R. v. Board of Utility Commissioners, supra* (254 U.S. 394, 65 L. ed. 322). The thread of decision seems to be that if the operation of the railroad, either at grade level or upon a particular type of elevated overhead support for its tracks, interferes materially with the public safety or with the public convenience in the exercise of the superior right of the public to use the public way, then the railroad company, being regarded in law as the agency causing the dangers or inconveniences, is charged with a legal duty to remedy the situation and may be required to make alterations and changes of its crossing facilities. *R. R. v. Minneapolis,* 115 Minn. 460, 133 N.W. 169, Ann. Cas. 1912D, 1029; *Erie R. R. v. Board of Utilitiy Commissioners, supra.* However, the legal duty imposed by law on railroad companies and enforced by exercise of the police power in most of these crossing cases relates to the elimination of dangers and inconveniences to the traveling public which may be said to be of the company's own making in the sense that the railroad is located so as to interfere with the superior right of the traveling public to the use of the public way. And, where the police power is invoked to require a railroad company to pay for a crossing improvement in furtherance of public safety, the exercise of the power usually relates to measures designed to eliminate specific dangers at the crossing, to prevent or minimize crossing accidents. Similarly, where the police power is invoked to promote the public convenience, the exercise of the power usually relates to measures providing for the removal of conditions which unduly interrupt and impede the free movement of traffic at the crossing.

In the instant case the need for rebuilding the trestle is not brought about by any existing dangerous condition at the crossing, nor by any conditions which unduly interrupt and impede the free movement of traffic at the crossing. This is not a grade separation case. There is not now and never has been a crossing at grade at the place where Northwest Boulevard and the tracks of the railroad intersect. As previously noted, Northwest Boulevard was opened in 1923. At that time the tracks of the railroad ran along its right of way atop an embankment about 20 feet high. The street was opened by exca-

vating through the embankment, thus necessitating the erection of the present railway trestle to span the opening over the street. There has never been and cannot now be any danger to the traveling public because of the existence of the tracks along the trestle over the present street. The trestle has never been and is not now an obstruction to vehicular traffic on Northwest Boulevard. As to this, the evidence nowhere discloses any element of danger. The record discloses no evidence of any accident at the trestle or anywhere in its vicinity. True, the City's evidence discloses that the present underpass is not wide enough to accommodate the full width of the proposed new street which is to intersect and cross the present street under the trestle at an oblique angle so as to make the proposed X crossing under the trestle. Therefore, unless the opening under the present trestle is widened, the new street will have to be reduced in width at the approaches to the present abutments. This would create on the new street a bottleneck at the approaches to the underpass and make for a hazardous situation for motorists approaching the underpass on the new street. But this situation of possible danger would be entirely of the City's making in its attempt to eliminate traffic congestion, originating principally in other areas of the City, by establishing a north-south intercity thoroughfare to accommodate traffic to be diverted and rerouted into it from outlying areas. Thus, in the case at hand the need for rebuilding the trestle is to promote the public convenience by providing a new street, and the need for opening the new street is to provide a necessary link in the proposed intercity thoroughfare, designed to relieve traffic congestion brought about by reason of the increase in motor vehicular traffic, and not by any conditions at or along the railroad right of way tending to interrupt or impede the free movement of traffic at the crossing. Hence the need for the new trestle is not brought about by the location of the railway roadbed or by the operation of trains thereon.

We do not apprehend the better reasoned decisions relied on by the City to stand for the proposition that where, as here, no factor of public safety is involved, the police power may be invoked to require a railroad company to rebuild a crossing facility in furtherance of the public convenience, where neither the location of the railroad nor its use for train operations is a reasonably related causative factor in producing the public inconvenience sought to be remedied, and where the project required of the railroad company is part of a program of extensive street improvements, designed to relieve traffic congestion in nowise caused by the location of the railroad. See *Nashville C. & St. L. R. Co. v. Walters, supra* (294 U.S. 405, 79 L. ed. 949) and cases there cited.

While numerous decisions hold that a railroad company may not

be relieved of the expense of making crossing improvements because it will derive no benefit from the improvement, nevertheless, in most of the cases cited by the City it is manifest that the company stood to benefit substantially from the overpass, underpass, or other improvement required to be constructed. The benefits accruing to the railroads came in the form of minimized crossing accidents and reduced tort liability of the companies. The improvements also facilitated faster movement of trains and shifting operations in congested areas. See *Durham v. R. R., supra* (185 N.C. 240); *Erie R. R. v. Board of Utilities Commissioners, supra* (254 U.S. 394, 65 L. ed. 322).

True, in some of the cases there was no direct benefit to the railroad from the crossing improvements, as in Cincinnati, *I. & W. R. Co. v. Connersville* (1910), 218 U.S. 336, 343, 344, 54 L. ed. 1060, 1064, 1065, 31 S. Ct. Rep. 93, where the railroad was required to build a trestle to accommodate the opening of a new street through its roadbed embankment. However, in this and other like cases decided or based on precedents established during the earlier days of railroading, before the development of our present State and Federal systems of improved highways, when vehicular traffic operated within short distance limits and served as important feeders for the railroad companies, the railroads shared substantially with the general public in the benefits of improved crossing facilities, in that the improved facilities tended to speed up the movement of vehicular traffic as feeders for the rails. Moreover, since practically all common carrier freight and passenger traffic moved by rail, the costs of these crossing improvements, under sanction of the regulatory agencies, were built into the rate structures and were passed on, first to the shipping public, and then to the ultimate consumers of the products moving by rail. And since these built-in costs were susceptible of being passed on to the ultimate consumers so effectively, the imposition upon the railroad companies of the financial burdens of making crossing improvements comported entirely with basic principles of fairness, and were conceived to impose no undue burdens upon the railroad companies.

But conditions have changed. The benefits and conveniences derived by the vehicular traveling public from improved crossing facilities are no longer shared to any appreciable extent by the railroads. The horse-drawn vehicles which in the early days of railroading served as great feeders and suppliers of business for the railroads have vanished from the scene. And, the impact of motor vehicular transportation on the business of the rails has undergone a vast change since the expansion in recent years of our State and Federal systems of public highways and the concurrent development of the processes of mass production of improved motor vehicles. These vehicles — passenger automobiles, long and short-haul busses, and large van type

motor trucks — are part of the country's fabulous motor transportation system which, operating both as private and public carriers of passengers and freight on our nationwide improved system of public highways, in recent years has taken from the railroads large volumes of their former business. These motor vehicles are now real competitors of the rails. No longer do they serve to any appreciable extent as feeders for the rails. They take their commodities and passengers to final destination. They are handling a large percentage of both short and long-haul freight that otherwise would move by rail.

Under the ordinary competitive conditions now prevailing between the rails and motor transport where, as here, the railroad company derives no direct benefit from the proposed crossing improvement, the imposition on the company of the costs of the project may not ordinarily be justified to any degree on the theory that the costs will be absorbed in the rate structure and passed on to the general public. This is so because rail rates, like other competitive price structures, are subject now in a real sense to the economic law of diminishing returns. And by reason of prevailing conditions under which the rails are in a losing competitive fight for business with other modes of transportation, the costs of crossing improvements may not be built into the rate structures and passed on effectively to the shipping public as in former times. Besides, and assuming *arguendo* that the costs of these improvements might still in some instances be absorbed in railroad rate structures and passed on to the ultimate consumers, even so, there would be an element of basic unfairness in such process where, as here, the company stands to receive no direct benefit from the project, since the costs would fall only on consumers of goods and on passengers moving by rail, in exoneration of the vast volume of commodities and passengers moving by motor and other competitive modes of transportation.

The competitive position of the defendant Southern Railway Company has not escaped the general impact of the rise and development of motor vehicular transportation. Since 1923, when the present trestle was built, the railway has lost the greater part of its passenger traffic to competitive modes of travel, principally to private automobiles and public busses. During the period mentioned, while the volume of freight of this particular railway company has not decreased, it has not kept pace with the tremendous industrial and commercial development of the areas of the South in which it operates. Obviously, this lag is due mainly to the great volumes of traffic moving by competitive motor transport in, out, and through the areas served by the defendant railway.

Thus, the situation here presented is one in which the railway company is being called upon to pay for a street improvement project

which will be of no benefit, direct or indirect, to it; whereas all the benefits will flow to its competitors, the owners and operators of all types of motor vehicles.

There are other changed conditions which bear upon the reasonableness of the proposition here presented:

1. Since 1928 there has been an increase in the number of registered motor vehicles in Forsyth County from 16,895 to 72,420. The population of the City of Winston-Salem in 1920 was 48,395. The present population of the City is approximately 110,000 persons.

2. In the year 1928 the amount of ad valorem taxes on automobiles and trucks collected by the City of Winston-Salem was $48,350.65. That amount has increased until in 1955 it was $230,661.03, and in 1956, $240,376.91.

3. In the year 1956 the City of Winston-Salem received as its portion of gasoline taxes imposed by the State of North Carolina and allotted to the City under the provisions of the statute commonly known as the Powell Act (Ch. 260, S. L. 1951, now codified as G.S. 136-41.2 and 136-41.3), the sum of over $300,000 for the construction and maintenance of public streets in the City of Winston-Salem other than State highways. Since 1956, the City has received comparable amounts of revenue from the same sources.

The more than one-half million dollars derived yearly by the City of Winston-Salem from these ad valorem and gasoline tax sources furnishes a lucrative source of revenue, logically subject to earmark for street improvement projects like this one, that was not available when the trestle was built in 1923. It is also noteworthy that these sources of revenue were not available to the cities and towns of the State when the decisions of this Court were rendered in *R. R. v. Goldsboro, supra* (1911), and in *Durham v. R. R., supra* (1923), wherein the Court recognized in dealing with the fact situations there presented the principle of requiring railroad companies to pay all the costs of crossing projects.

In *Austin v. Shaw* (1952) *supra,* (235 N.C. 722), the Court, in dealing with principles evolved from the early grade elimination cases, recognizes the need for flexible application of these principles to meet the exigencies of changed conditions. In the *Austin* case the question for decision was the validity of a contract between the City of Charlotte and the Southern Railway Company which provided a comprehensive plan for the elimination of a large number of grade crossings within the City and other incidental alterations and improvements, at an overall cost of five million dollars, one-half of which was to be contributed by the Federal Government, with the City and the railway company furnishing the other half in equal parts. The City's contribution of $1,250,000 was made available by bond issue approved

by the qualified voters of the City. The contract was challenged in a taxpayer's suit on the ground that the proposed contribution of the City toward the completion of the planned improvements would constitute an illegal expenditure of public funds of the City, for that the City had full power and authority to require the railway company to eliminate the grade crossings in the City at its own expense. The contract was upheld in the lower court. On appeal, this Court concluded, in an opinion written by Chief Justice Devin, that the principles applied in the cases cited by the plaintiff taxpayer (which included the cases chiefly relied on by the City of Winston-Salem in the instant case) were not so inflexible as to render invalid the action of the City of Charlotte in joining with the railway company in the proposed cooperative plan to separate grade crossings and make other improvements according to the terms of the contract. The judgment of the lower court upholding the contract was affirmed.

As bearing further on the factor of changed conditions, we take note of a growing legislative trend throughout the country to relieve the railroads of some or all of the costs of making crossing improvements. For example, see these decisions involving crossing improvements where the enabling legislation under challenge in each instance provided that a substantial portion of the costs be paid by the State agency or municipality requiring the improvement to be made: *Chicago, Burlington, and Quincey Railroad Co. v. Nebraska* (1898), 170 U.S. 57 42 L. ed. 948, 18 S. Ct. 513; *Chicago, Milwaukee & St. Paul Ry. Co. v. City of Minneapolis* (1914) *supra* (232 U.S. 430, 58 L. ed. 671;) *In re Elimination of Grade Crossing* (1931), 124 Ohio St. 406, 179 N.E. 139; *Nashville, Chattanooga & St. Louis Ry. Co. v. Walters* (1935), *supra* (294 U.S. 405, 79 L. ed. 949); *In re Elimination of Existing Highway-Railroad Crossing* (1938), 254 App. Div. 412, 5 N.Y.S. 2d 946; *Lyford v. New York* (1944), 140 F. 2d 840; *Chicago Junction Ry. Co. v. Illinois Commerce Comm.*, (1952), 412 Ill., 579, 107 N.E. 2d 758; *Atchison, Topeka & Santa Fe Ry. Co. v. Public Utilities Commission* (1953), *supra* (346 U.S. 346, 98 L. ed. 51); *Department of Highways v. Pennsylvania Public Utility Comm.* (1955), 179 P. Super. 376, 116 A. 2d 855.

It is noteworthy that in *Durham v. R. R., supra* (185 N.C. 240), wherein this Court upheld the lower court in requiring the defendant railways to pay all the costs of a grade separation in downtown Durham, while the case was pending on appeal in this Court the General Assembly ratified Chapter 160, Public Laws of 1923, which provided in section 19 that on grade separation projects on State highways the State Highway and Public Works Commission should pay one-half the costs of the project and the railroads the other half. This statute

as presently codified, G.S. 136-20 (b), retains the fifty-fifty allocation provision.

Also, under the Federal Aid Highway Act of 1944, 58 U.S. Statute at Large, 841, Ch. 626, Sec. 5 (b), railroads are required to pay for underpasses and overpasses where Federal money goes into the projects only in proportion to the benefits received, and in no case in excess of ten per cent. In view of the difficulty of determining benefits in each particular case, the Federal Bureau of Roads promulgated a regulation, defendant's Exhibit 21, which fixed the railroad's liability at ten per cent in all cases where an existing grade crossing is eliminated by the construction of an overpass or underpass, and relieving the railroad from all liability where an existing grade crossing is not eliminated. Manifestly this was done on the theory that where an existing grade crossing is eliminated, the railroad gets ten per cent of the benefit from such elimination and the vehicular traveling public ninety per cent, and where no existing grade crossing is eliminated but a new road or street opened, the railroad gets no benefit and the traveling public gets all the benefit. Therefore, if Federal money were being used in the Broad Street Extension project, the railway company would be required to pay nothing, since a new street is being opened and no grade crossing is being eliminated. As it is, the project is on neither the State nor the Federal system of highways. Hence, decision rests solely on the validity of the challenged city charter provision, as applied to this case.

The uncontroverted special facts shown in evidence or of which the courts may take judicial notice, as herein pointed out, disclose changed economic conditions bearing favorably on the financial condition of the City but unfavorably on that of the railway company, and factually distinguish the instant case from the decisions cited by the City and take the case out of the principles relied upon by it as authority to sustain the validity of its ordinance.

Upon consideration of these special facts and all the surrounding circumstances of the case, we conclude that the ordinance of the City of Winston-Salem requiring the defendant railway company to pay the entire expense of rebuilding the trestle amounts to an unreasonable exercise of the police power, amounting to an invasion of the company's property rights in violation of the constitutional guarantee provided by the "law of the land" or "due process" section of the Constitution of North Carolina. Article I, Section 17. See *Transportation Co. v. Currie, Comr. of Revenue,* 248 N.C. 560 (4th headnote), 104 S.E. 2d 403. See also *S. v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731, 7 A.L.R. 2d 407.

It necessarily follows that the section of the Charter of the City

of Winston-Salem (Section 54, Ch. 232, Private Laws of 1927) under which the ordinance here sought to be enforced was enacted, is unconstitutional and void, as applied to the facts of this case. The judgment allowing the City's request for *mandamus* is vacated, and the cause will be remanded to the court below for the entry of judgment in accord with this opinion.

Error and Remanded.

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

BYRON W. FRANKLIN AND MARIETTA G. FRANKLIN, AND KIRBY JONES AND GLADYS J. JONES v. THOMAS H. FAULKNER AND EVELYN O. FAULKNER.

(Filed 17 September, 1958.)

1. Boundaries § 1—

In construing the description in a deed, the intent of the parties as ascertained from the words employed, in accordance with the general rule for the construction of deeds, wills or contracts, must be given effect.

2. Same—

Settled rules of construction will be applied to the language of an instrument in ascertaining the intent of the parties.

3. Same—

In ascertaining the intent of the parties from the language of an instrument all the words used are presumed to have a meaning selected for the purpose of displaying the user's intent.

4. Same—

A general description will not enlarge a specific description when the latter is in fact sufficient to identify the land which it purports to convey, and a general description will prevail over a specific description only when the specific description is ambiguous and uncertain.

5. Boundaries § 2—

Where a conflict exists in the description of property between a call for a natural object and a course or a distance or course and distance, the call for the natural object will prevail.

6. Same—

A known line of another tract, or a ditch, or a road is a natural object which will control course and distance.

7. Same—

Where the call in a deed is specific as to distance, but a quadrant of the course is omitted, such specific description cannot be held void for uncertainty when the missing quadrant of the course is supplied with

certainty by a call to a natural object. In this case by calls from the northwestern corner of the lot along the northern line of the lot and from the eastern terminus of such northern line with an established lane.

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

Appeal by defendants from *Parker, J.*, February 1958 Term, of CRAVEN.

Plaintiffs alleged ownership of a parcel of land specifically described in the complaint and a claim of title thereto by defendants which constituted a cloud thereon.

The defendants denied plaintiffs' ownership. They alleged they were the owners of all of Lot 3 in Trent Acres as shown on a map made in February 1946, which lot was conveyed to them in July 1954.

The parties waived jury trial. They stipulated:

"1. That both plaintiffs and defendants claim from a common source, to wit, conveyances from and out of J. S. Miller and wife, Mattie S. Miller;

"2. That the eastern boundary of Lot #3 extends to Wilson's Creek as shown and designated on map made and prepared by Albert R. Bell, dated July 7, 1951, entitled 'Plan of Trent Acres, 3 miles South of New Bern, North Carolina,' recorded in Public Registry of Craven County in Map book #5 at page 28, and that the southern boundary of Lot #3 extends to Trent River, as shown on the aforesaid map, and that the aforesaid boundaries as shown on said map, dated July 7, 1951, are the identical boundaries as shown on a previous map prepared by Albert R. Bell, dated February, 1946, entitled 'Plan of Trent Acres, 3 miles South of New Bern, North Carolina,' and recorded in the Public Registry of Craven County in Map Book #2 at page 115;

"3. That all references in conveyances from and out of J. S. Miller and wife, Mattie S. Miller, a common source of title for both plaintiffs and defendants, shall be construed to apply to the road drawn and designated on map by Albert R. Bell, dated July 7, 1951, as aforesaid beginning at Point A in the northern portion of Lot #3 and extending southward, then eastward, to the west boundary of Lot #2A, as shown on said map prepared by Albert R. Bell, dated July 7, 1951, the courses and distances of which are set forth thereon under the following designation: 'Courses and Distances, A to B.'"

The deed from J. S. Miller and wife, Mattie S. Miller, to Mary E. Angell and husband, Nelson P. Angell, dated 15 February 1950, which is the basis of defendants' claim of title to the land in controversy, describes the property conveyed by this language: "A certain lot or parcel of land lying and being situated in Craven County, North Carolina, No. 8 Township, and in that certain subdivision known and

designated as Trent Acres, a plan of which was prepared by Albert R. Bell, February, 1946, and is duly recorded in office of the Register of Deeds of Craven County in Map Book II, page 117; and being a part of Lot No. 3 according to said plan; and being described as follows:

"Beginning at a stake at the Northwest corner of Lot No. 3 and running thence S 61 deg. 40' and with the Northern line of Lot No. 3, 141 feet to a stake; thence S 2 deg. 38', 30 feet to the Western line of the 20-foot lane on the edge of the highland; thence with the Western line of the said lane to the Western line of Lot No. 2; thence with the line of Lot No. 2 to the river; thence westwardly along the said river front to the southwest corner of Lot No. 3 as shown on said map; thence North 13 deg. 50', 374 feet to the point of beginning.

"The intention of this deed is to convey all of Lot No. 3 except the small corner at the northeastern corner, which is reserved by the parties of the first part for making a turn into the 20-foot lane heretofore referred to."

The map recorded in Book II referred to in the deed from Miller to Angell shows the main road leading from the subdivision to New Bern. This road is the northern boundary of Lots 5 and 6. Lot 4 is south of Lot 5, and Lot 3, south of Lot 4. Lot 2 is east of Lot 3, and Lot 1 is east of Lot 2. Wilson's Creek forms the eastern boundary of Lots 5, 4, and 3. The creek makes a turn to the east at the line dividing Lots 3 and 2, and then forms the northern boundary of Lots 2 and 1. Wilson's Creek is a tributary of Trent River, which forms the southern boundary of Lots 3, 2, and 1. The western boundary of Lots 5, 4, and 3, is a 20-foot lane extending from the main road southwardly to Trent River. This 20-foot lane is intersected at a point 400 feet southwardly from the main road by another 20-foot lane which separates Lots 4 and 3. The southern line of Lot 4 is shown as running south 61 deg., 40' east to Wilson's Creek. The southern line of the 20-foot lane separating Lots 4 and 3, which is the northern line of Lot 3, is shown as parallel with the southern line of Lot 4. The 20-foot lane separating Lots 3 and 4 extends eastwardly to a "20- . . . lane on edge of high ground." The intersection of the two lanes is shown as 170 feet eastwardly from the northwest corner of Lot 3. The lane along the highland is in proximity to but west of Wilson's Creek. It extends southwardly to the western line of Lot 2. The map recorded in Book II does not show the courses of the 20-foot lane which extends southwardly from Lot 4 to Lot 2. It merely shows that it is on the edge of the high ground.

On 7 July 1951 Bell, draftsman of the 1946 map, supplemented that

map by a map recorded in Map Book V at page 28. This is the map referred to in the stipulation. A note on the supplementary map reads: "Lots 1 & 2 have been subdivided into 4 parts as shown on this map. Access is provided by the 20-foot road, the courses & distances of which are shown above." Shown above that notation are the courses and distances of the 20-foot lane extending southwardly from the lane dividing Lots 4 and 3 to a point near the confluence of Trent River and Wilson's Creek.

The land claimed by plaintiffs lies between Wilson's Creek and the 20-foot lane, the courses and distances of which are stated on the map of 1951. Plaintiffs base their claim to the land on a deed from Miller to them dated 27 November 1954. This deed admittedly covers the land in controversy.

Upon the stipulations and exhibits the court adjudged plaintiffs the owners of the land in controversy. Defendants excepted and appealed.

Lee & Hancock for plaintiff, appellees.
H. P. Whitehurst and Warren S. Perry for defendants, appellants.

RODMAN, J. What property did Miller convey to Angell by the deed of 15 February 1950? The answer is determinative of the appeal and must be found by ascertaining the intent of the parties to that instrument.

When courts are called upon to interpret deeds or other writings, they seek to ascertain the intent of the parties, and, when ascertained, that intent becomes the deed, will, or contract. In determining the intent they call to their aid principles which have been so consistently applied as to be described as settled rules of construction. *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682; *Davis v. Brown,* 241 N.C. 116, 84 S.E. 2d 334; *Stephens Co. v. Lisk,* 240 N.C. 289, 82 S.E. 2d 99; *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391; *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695; *Credle v. Hays,* 88 N.C. 321.

It is a well-established rule that the intent of a party is to be ascertained by the words he chooses. All of the words used are presumed to have a meaning selected for the purpose of displaying the user's intent. *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *DeBruhl v. Highway Comm.,* 245 N.C. 139, 95 S.E. 2d 553; *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619; *Marks v. Thomas,* 238 N.C. 544, 78 S. E. 2d 340; *Hornaday v. Hornaday,* 229 N.C. 164, 47 S.E. 2d 857; *Sharpe v. Isley,* 219 N.C. 753, 14 S.E. 2d 814; *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *Dicks v. Young,* 181 N.C. 448, 107 S.E. 220; *R. R. v. R. R.,* 147 N.C. 368.

It is equally well settled that a general description will not enlarge a specific description when the latter is in fact sufficient to identify the land which it purports to convey. Only when the attempted specific description is ambiguous and uncertain will the general prevail. *Young v. Asheville*, 241 N.C. 618, 86 S.E. 2d 408; *Moore v. Whitley*, 234 N.C. 150, 66 S.E. 2d 785; *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E. 2d 101; *Lee v. McDonald*, 230 N.C. 517, 53 S.E. 2d 845; *Lewis v. Furr*, 228 N.C. 89, 44 S.E. 2d 604; *Von Herff v. Richardson*, 192 N.C. 595, 135 S.E. 533; *Potter v. Bonner*, 174 N.C. 20, 93 S.E. 370; *Carter v. White*, 101 N.C. 30.

Where a conflict exists in the description of property between a call for a natural object and a course or a distance or course and distance, the call for the natural object will prevail. *Trust Co. v. Miller*, 243 N.C. 1, 89 S.E. 2d 765; *Cherry v. Warehouse Co.*, 237 N.C. 362, 75 S.E. 2d 124; *Lance v. Cogdill*, 236 N.C. 134, 71 S.E. 2d 918; *Brown v. Hodges*, 233 N.C. 617, 65 S.E. 2d 144; *Lumber Co. v. Bernhardt*, 162 N.C. 460, 78 S.E. 485; *Sherrod v. Battle*, 154 N.C. 345, 70 S.E. 835; *Bowen v. Lumber Co.*, 153 N.C. 366, 69 S.E. 258; *Bowen v. Gaylord*, 122 N.C. 816; *Safret v. Hartman*, 52 N.C. 199; *Hough v. Horne*, 20 N.C. 369; *Slade v. Neal*, 19 N.C. 61; *Cherry v. Slade*, 7 N.C. 82; *Pollock v. Harris*, 2 N.C. 252; ..... *v. Beatty*, 2 N.C. 376.

A known line of another tract is a natural object which will control course or distance. A ditch or a road is a natural object. *Brown v. Hodges, supra; Hough v. Horne, supra.*

Appellants in their brief say they "rest their case on the fact that it is surely the intention of Miller and wife, grantors of Angel, to convey 'all of Lot No. 3.' It is so stated in uncontradictable terms that it was their intention so to do."

Contrary to appellants' assertion the deed itself negatives any idea that grantors intended to convey all of Lot 3. By express language they convey "parcel of land . . . being a *part of* Lot No. 3 according to said plan; and being described as follows:" (Italics added.) Then follows the specific description of the part of Lot 3 which is conveyed. Following this specific description grantors say: "The intention of this deed is to convey all of Lot No. 3 *except* . . ." (Italics added.)

Appellants arrive at their asserted uncontradictable intent to convey all of Lot 3 by this reasoning: One quadrant is missing in each of the first two calls. The absence of these compass points renders the specific description void. Hence, in effect, the specific description is stricken from the deed. It would then read: "The intention of this deed is to convey all of Lot No. 3 except the small corner at the northeast corner . . ." Next they say this exception is too indefinite to admit of identification and must therefore be disregarded. There would then

be left in the deed only this descriptive language: "The intention of this deed is to convey all of Lot No. 3."

It is apparent that the argument must fail unless the premise is well founded that the specific description is inadequate to identify the property conveyed. The answer to that inquiry is dependent on the factual situation. These admitted facts appear:

1. The northwest corner of Lot 3 is at the intersection of two 20-foot lanes.

2. The northern line of Lot 3 is the southern boundary of one of these 20-foot lanes.

3. The northern line of Lot 3 extends from its northwest corner south 61 deg. 40' east to Wilson's Creek, more than 200 feet distant from the northwest corner.

The call in the deed in controversy is: "Beginning at a stake at the Northwest corner of Lot No. 3 and running thence S. 61 deg. 40' *and with the Northern Line of Lot No. 3, 141 feet* to a stake . . ." (Italics added.) Since the call is with the northern line of the lot, it necessarily follows that the missing quadrant is east. The point where this line terminates is definitely fixed at 141 feet. Hence there is and can be no doubt as to the location of the first call in the description.

4. A 20-foot lane crosses the eastern portion of Lot 3, extending from Lot 3 to Lot 2. This lane or road is at the edge of the highland and was in existence when the deed was made to Angell. This road or lane runs in a southwardly direction. The stipulation is that the courses of this road as shown on the map made in 1951 were in fact the courses of the road as it existed in February 1950.

5. The western line of the road on the edge of the highland, the terminus of the second call in the description, is 170 feet S 61 deg. 40' east of the northwest corner of Lot 3.

6. A course south 2 deg. 38' *east* from the terminus of the first call intersects the western line of the 20-foot lane on the edge of the highland. This is the place called for in the description. The course given to a natural object is a mere pointer. The natural object called for, the road, is admitted. The course given accurately points to the designated place. The missing quadrant on the call S. 2 deg. 38' ..... is supplied. Turning at 141 instead of 170 would enlarge the intersection of the two lanes so that one traveling from the main road to Lot 2 would have a more convenient approach.

7. Having arrived at "the western line of the 20 foot lane on the edge of the highland" in accord with directions given in the deed, there is no difficulty in following the road called for in the Miller-Angell deed and the remaining courses there given.

Since that part of Lot 3 which Miller conveyed to Angell is, when considered in the light of stipulated facts, sufficiently described for

identification, it follows that effect must be given to the intent there declared. The land in controversy was not conveyed by the deed of February 1950 from Miller to Angell. Hence the judgment is

Affirmed.

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

VERNON WESLEY HILL v. RICHARD B. PARKER, TRADING AS PARKER MOTORS, AND LEON THOMAS.

(Filed 17 September, 1958.)

1. Pleadings § 28—

A motion for judgment on the pleadings is in the nature of a demurrer and presents the question whether the facts alleged in the adversary's pleading, together with all fair inferences of fact to be drawn therefrom, taken as true, are sufficient in law to constitute a cause of action or defense.

2. Same—

Defendant's motion for judgment on the pleadings is improperly granted if the complaint in any respect or to any extent is sufficient to state a cause of action.

3. Same: Sales § 27-Complaint held sufficient to state cause of action for breach of express warranty.

Plaintiff's allegations were to the effect that defendants represented that the car purchased by plaintiff was in first class condition and new except for slight use as a demonstrator, that in fact the car had been involved in a wreck resulting in permanent damage to the vehicle, that the representations as to the condition of the vehicle were false, made with knowledge of their falsity for the purpose of inducing the plaintiff to purchase the vehicle, and that plaintiff in fact relied upon the representations to his damage, and that the conditional sale contract, signed in blank by plaintiff, was filled in as to the purchase price and allowance for trade-in, in figures at variance with the oral agreement of the parties, etc. *Held:* The complaint is sufficient to state a cause of action for breach of express warranty, and therefore defendant's motion for judgment on the pleadings was erroneously allowed, irrespective of whether the complaint was sufficient to allege also a cause of action for false warranty, or for failure of consideration, or for rescission.

4. Same: Attorney and Client § 3—

Where a complaint is sufficient to allege one cause of action, the fact that plaintiff's attorney stated that the nature of the cause of action was for a relief not supported by the allegations, does not justify the granting of defendant's motion for judgment on the pleadings.

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

HILL *v.* PARKER.

APPEAL by plaintiff from *Parker, J.*, at March 10, 1958, Civil Term, of CARTERET.

Charles W. Stevens for plaintiff, appellant.
C. R. Wheatly, Jr., for defendants, appellees.

JOHNSON, J. Civil action to recover damages for alleged wrongs committed by the defendants in connection with the sale of an automobile to the plaintiff. After the jury was empaneled and the pleadings were read, the court upon inquiry was informed by the plaintiff's attorney that the action "is brought for rescission" of the conditional sale contract. Thereupon counsel for the defendants moved for judgment on the pleadings. The motion was allowed and the action was dismissed. The question for decision is whether this ruling was correct.

"A motion for judgment on the pleadings is in the nature of a demurrer. . . . Its function is to raise this issue of law: Whether the matters set up in the pleading of an opposing party are sufficient in law to constitute a cause of action or a defense. . . . When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary." *Erickson v. Starling,* 235 N.C. 643, 656, 71 S.E. 2d 384, 393. "Moreover, if good in any respect or to any extent, a plea will not be overthrown by motion for judgment on the pleadings." *Burton v. Reidsville,* 240 N.C. 577, 581, 83 S.E. 2d 651, 654.

Here, then, the defendants' motion for judgment on the pleadings has put to test the legal sufficiency of the complaint to state a cause of action.

These in pertinent part are the crucial facts alleged by the plaintiff:

"2. That the defendant Richard B. Parker . . . is now, and was at the times hereinafter alleged, trading and doing business under the name of Parker Motors.

"4. That on the 14th day of January 1956 the defendant Parker Motors, through its co-defendant Leon Thomas, who was duly authorized to and was acting as agent and salesman for Richard B. Parker, trading as Parker Motors, offered to sell and the plaintiff agreed to buy a new Ford 1956 Parklane Tudor Wagon . . . with all equipment and extras attached thereto at the time, at a stipulated and agreed price of $2797.53, with a credit thereon of $1249.15 for a 1956 Ford Truck . . . traded and delivered to the defendant Parker Motors by

the plaintiff as down payment on the purchase price of the Ford Parklane Tudor motor vehicle above referred to, and the balance of $1548.38 to be financed in equal monthly installments, and the plaintiff agreeing to pay the usual and customary costs of financing the balance due.

"5. That the defendants, prior to concluding the above stated transaction, and as a direct inducement for the plaintiff to buy, expressly stated to the plaintiff that the . . . Motor Vehicle above described was a new 1956 model and in A#1 condition, and had only been operated by the defendants as a demonstrator for a short time, and upon the further representation by the defendants that said . . . Motor Vehicle was fully warranted and guaranteed against defects in workmanship and material for a period of Ninety (90) days or 4,000 miles, the plaintiff accepted delivery of same and undertook to conclude the transaction as outlined in Paragraph 4 of this complaint.

"6. That the plaintiff, at the time of purchasing the Parklane Tudor Motor Vehicle (it being Saturday afternoon) advised the defendants he (plaintiff) was contemplating leaving the following Monday for a trip to New York, that he desired to drive the motor vehicle on the trip and would be out of the County, and away from home, for some little time, whereupon, the defendants, without filling out and completing the Conditional Sales Contract at the time and in accordance with the agreement enumerated in paragraph 4 of this complaint, requested the plaintiff to sign the . . . Contract in blank, the defendants assuring the plaintiff that the . . . Contract would be filled out in all respect to conform to the agreement as aforesaid, and that plaintiff would receive a copy of the transaction on his return to Carteret County, and relying on said assurances and representations of the defendants, the plaintiff signed the . . . Contract in blank and delivered same to the defendants.

"7. That while driving the said Parklane Tudor motor vehicle to New York and return the plaintiff noticed a swing or disalignment of the rear end thereof . . . nevertheless, plaintiff continued on his trip and shortly thereafter returned to his home in Carteret County; that the swing and disalignment of the rear end of the motor vehicle . . . was gradually becoming worse, and was causing the tires thereon to wear out beyond any usual and ordinary degree, and out of all proportion to that caused by ordinary and usual driving.

"8. That promptly after returning to Carteret County, the plaintiff drove the motor vehicle . . . to the garage owned and operated by the defendant Parker Motors and described in detail to Richard B. Parker the defects then apparent to plaintiff, whereupon the plaintiff was in-

formed by said Parker that all proper adjustments and alignments would be made to said motor vehicle and that everything would be all right.

"9. That the plaintiff continued to have trouble with the rear end of the motor vehicle in question, and after several trips to the garage of Parker Motors, and after several promises by Richard B. Parker that everything would be adjusted to plaintiff's entire satisfaction, the defects have gradually grown worse instead of better, and said . . . motor vehicle since delivery to plaintiff has never operated . . . as a new motor vehicle in A#1 condition should operate, and the plaintiff alleges that as a new motor vehicle it is now and has been worthless since its delivery to plaintiff.

"10. That later, after returning home from New York, the plaintiff, not having received copy of the transaction entered into on the 14th day of January 1956, made inquiry of Parker Motors (at its office) as to why plaintiff had not received copy of the transaction, and was given a 'Car Invoice' by Parker Motors showing the listings thereon to be wholly and totally at variance with the agreement made covering the transaction of January 14, 1956. . . .

"11. That having received the 'Car Invoice' aforesaid, the plaintiff became suspicious and upon further inquiry, discovered that the defendants, without the knowledge or consent of the plaintiff, had schemingly, wrongfully and fraudulently filled out the blank spaces of the Conditional Sales Contract, which the plaintiff had signed in blank on the 14th day of January 1956, to represent a sales price for said Ford Parklane Motor Vehicle of $3103.72, with a credit thereon of only $1092.84 for the Ford Truck traded in by plaintiff, which sum of $1092.84 was credited by defendants to the balance due on said Ford truck instead of a down payment, whereas, the total sales price as agreed upon at the time the transaction was consummated on January 14th 1956 was $2797.53, with a trade-in allowance on said Ford Truck of $1249.15, and plaintiff is advised, informed, believes and alleges that said . . . Contract, with the incorrect figures placed therein, was, on the 16th day of January 1956, or a few days thereafter, delivered and transferred by Parker Motors to the First-Citizens Bank & Trust Company, of Morehead City, who purchased the same, and as plaintiff is advised and believes the said Bank became a holder thereof in due course and for value.

"12. That immediately after plaintiff discovered that the Conditional Sales Contract had wrongfully been filled out by the defendants as aforesaid, at a whole and total variance with the original contract of purchase and sale of January 14, 1956, the plaintiff contacted

Richard B. Parker and asked for an explanation for the divergence and variance from the sales agreement as originally made, whereupon, plaintiff . . . was informed by Richard B. Parker that the Bank held the papers, but that the whole transaction would be properly adjusted with the plaintiff to his . . . entire satisfaction, which the defendant . . . Parker, or his co-defendant . . . Thomas, have failed to do.

"13. That the plaintiff having received notice from the First-Citizens Bank & Trust Company, Morehead City, that it held the Conditional Sales Contract, and fully relying on the defendants to adjust the matter to conform to the original contract, made payments to the said Bank totaling $437.00, but on account of the things hereinbefore and hereinafter alleged, the plaintiff refused to make any further payments on the . . . Contract, whereupon, the Bank demanded possession of the . . . Motor Vehicle under the terms of said . . . Contract, and the . . . vehicle described therein was delivered by the plaintiff to the Bank as holder in due course and for value, to forestall claim and delivery proceedings threatened by the Bank against the plaintiff for the possession of said motor vehicle.

"14. That the defendants, prior to the consummation of the contract of sale on January 14, 1956, falsely and fraudulently represented to the plaintiff that the Ford Parklane Tudor Motor Vehicle was a new 1956 model and in A#1 condition; that as a demonstrator it had been properly adjusted in all respects and only slightly and moderately used by the defendants as a demonstrator; that said representations were in fact false, and were made by both defendants with their full knowledge of their falsity, and for the express purpose of inducing the plaintiff to purchase said motor vehicle; that plaintiff in fact believed and relied upon the representations as aforesaid of the defendants and purchased said motor vehicle believing it to be new and in A#1 condition.

"15. That said Ford Parklane Tudor Motor Vehicle was not at the time of purchase by the plaintiff a new motor vehicle, nor was it in A#1 condition either materially or mechanically, as expressly represented by the defendants; that said motor vehicle while in the possession of the defendants, and prior to consummation of the sale to plaintiff on January 14, 1956 the said motor vehicle had been in a wreck or collision by being driven backward by one of Parker Motors salesmen or agents into a steel or iron post, causing serious and permanent damages to the rear end and side, pushing the lefthand rear fender into the body and buckling the body to the door, permanently damaging the left side of the body, knocking one of the rear lights off, also ruining the rear bumper requiring new bumper and rear lights. and causing inability to raise or lower the rear lefthand window glass.

and otherwise seriously and permanently damaging said motor vehicle, thereby necessitating the placing of said motor vehicle in a body repair and paint shop and garage by the defendants for extensive repairs and new paint job on the lefthand side, and thereafter forever taking said motor vehicle out of the new car class, all of which was peculiarly known to the defendants, and without any knowledge thereof on the part of the plaintiff until sometime after he had made the purchase, as said defects were latent, and not visible to any casual observer, but said defendants carefully and schemingly undertook to camouflage all the defects with the express purpose and desire to show off said motor vehicle as a new one.

"16. That on account of the acts, words and conduct of the defendants, . . . there has been a total failure of consideration on account of the plaintiff failing to receive a new motor vehicle in A#1 condition, and thereby the plaintiff has sustained actual damages in the sum of $1686.15; that on account of the acts, words and conduct of the defendants, . . . the plaintiff has sustained special damages for loss of time, inconvenience, vexation, embarrassment, humiliation, and otherwise in the sum of $1,000.00; . . . ."

It is manifest that the plaintiff has alleged a cause of action for damages for breach of express warranty. *Potter v. Supply Co.*, 230 N.C. 1, 51 S.E. 2d 908; *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375; *Hodges v. Smith*, 158 N.C. 256, 73 S.E. 807; *Wrenn v. Morgan*, 148 N.C. 101, 61 S.E. 641. This being so, we are not concerned with whether the complaint also superadds a cause of action for false warranty. See *Vaughan v. Exum*, 161 N.C. 492, 77 S.E. 679; *Machine Co. v. McKay*, 161 N.C. 584, 77 S.E. 848. See also *Wrenn v. Morgan, supra;* 46 Am. Jur., Sales, Sec. 734. Nor are we concerned with whether the complaint alleges other causes of action, including one based on total failure of consideration on the hypothesis that the automobile was worthless and unfit for the purpose for which it was sold. *Pool v. Pinehurst, Inc.*, 215 N.C. 667, 2 S.E. 2d 871; *Williams v. Chevrolet Co.*, 209 N.C. 29, 182 S.E. 719; *Swift & Co. v. Aydlett*, 192 N.C. 330, 135 S.E. 141.

It may be conceded that the complaint fails to state a cause of action for rescission. See *Machine Co. v. Bullock*, 161 N.C. 1, bot. p. 11, 76 S.E. 634, 638; *Machine Co. v. Feezer*, 152 N.C. 516, 67 S.E. 1004; *May v. Loomis*, 140 N.C. 350, bot. p. 358, 52 S.E. 728, 731. Even so, the fact that the plaintiff's attorney stated that the action is one "for rescission" does not on this record justify dismissal on motion for judgment on the pleadings. Where, as here, a good cause of action is alleged and the plaintiff has not been put to an election, an inexact designation by his attorney of the nature of the cause of action will

not be treated as ground for dismissal. *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860. See also *Newkirk v. Porter*, 240 N.C. 296, 82 S.E. 2d 74; *S. v. Barley*, 240 N.C. 253, 81 S.E. 2d 772.

The judgment below is

Reversed.

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

C. S. STRICKLAND, W. P. LONG AND RONALD THARRINGTON v. FRANKLIN COUNTY, B. W. YOUNG, N. E. FAULKNER, J. I. WELDON, R. B. MAY AND NORRIS COLLINS, COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 17 September, 1958.)

1. Statutes § 6—

A statute may be valid as to one set of facts and invalid as to another.

2. Taxation § 3— Bonds of spcial tax district held not obligations of county within constitutional provision relating to increase of county debt.

Provisions in an act authorizing the issuance of school bonds by a special bond tax district of a county that the county might pay from county funds any part of the principal and interest of said bonds (Chapter 1078, Session Laws of 1957) will be construed in *pari materia* with the general statute, G.S. 115-109, with the result that the bonds issued under the special act may not be paid in any part out of county funds unless and until payment be assumed by the county under the procedure outlined in the general statute and in conformity with the constitutional limitations, and therefore the special act is not unconstitutional *per se* nor unconstitutional in its application to the particular facts of the case in permitting an increase of indebtedness of the county in excess of two-thirds of the amount by which the county's outstanding indebtedness had been reduced during the preceding fiscal year. Constitution of North Carolina, Article V, Section 4.

3. Statutes § 5d—

In enacting a special act it will be presumed that the General Assembly was advertent to a former general act on the same subject and that the later statute was enacted in the light of and in reference to the former act, and the two statutes must be construed in *pari materia*.

Appeal by plaintiffs from *Clark, J.*, holding the courts of the Ninth Judicial District, at Chambers in Louisburg, 27 March, 1958. From FRANKLIN.

This is a taxpayers' suit to enjoin the issuance by the defendants

of proposed school building bonds in the amount of $350,000 for improvements and new buildings at Mills School in the Town of Louisburg, as approved by vote of the people in an election held in the special tax district in which the school is located.

The record discloses these facts:

1. The defendants propose to issue the bonds under the provisions of Ch. 1078, S. L. 1957, which applies to Franklin County only.

2. Pursuant to this statute and in reliance upon the procedure prescribed by it, the Board of Education of the County created a special bond tax district, designated as "The Louisburg Township Special Bond Tax District of Franklin County," the boundaries of which are coterminous with the boundaries of Louisburg Township.

3. On petition of the Board of Education, the Board of County Commissioners caused a special election to be held in the District, permitting the voters of the District to vote "For" or "Against" the proposed bond issue and the levying of a sufficient tax for the payment thereof.

4. At the special election so held a majority of the votes cast were in favor of the bond issue and the tax levy. The returns have been duly canvassed and declared.

5. The County Board of Education and the Board of County Commissioners have complied with the procedural requirements of Ch. 1078, S. L. of 1957, respecting all matters in connection with the creation of the special tax district and the election held on the question of the issuance of the bonds.

6. It is proposed to issue the bonds in the name of Franklin County, to seal them with the county seal, and to cause them to be signed by the Chairman of the Board of County Commissioners and attested by the Register of Deeds of the County.

It is proposed that the following provisions, among others, will be incorporated in the bonds: "The County of Franklin . . . hereby promises to pay . . . from the proceeds of taxes levied ad valorem on taxable property within The Louisburg Township Special Bond Tax District of Franklin County as now constituted, . . .

"This bond is issued by virtue of and in pursuance of Chapter 1078 of the Session Laws of 1957, for the purpose of acquiring, erecting, enlarging, altering and equipping school buildings, including a gymnasium, agricultural buildings, shop, cafeteria . . . and purchasing sites therefor at the Mills School situated in the Town of Louisburg in said District . . . . The issuance of this bond and the contracting of the indebtedness evidenced thereby have been authorized at an election duly held in The Louisburg Township Special Bond Tax District of Frank-

lin County and resolutions of the Board of Commissioners of Franklin County duly adopted. . . .

"This bond and the interest thereon are payable exclusively out of taxes to be levied in The Louisburg Township Special Bond Tax District of Franklin County and the full faith and credit of the said District and the taxing power of the said County as applicable to said District are hereby irrevocably pledged for the punctual payment thereof."

7. Ch. 1078, Sec. 6, S. L. 1957, provides that any bonds issued pursuant to it: "shall be made payable exclusively out of taxes to be levied in such district, *except the board of county commissioners may pay from county funds any part of the principal and interest of said bonds*, . . ." (Italics added.)

8. In the preceding fiscal year which began on 1 July, 1956, and ended on 30 June, 1957, the outstanding indebtedness of Franklin County was reduced from $128,000 to $122,000, and during the interval from 1 July, 1957, to the date of the hearing in March, 1958, the indebtedness of the county was further reduced $1,200; that the question of the issuance of the bonds has not been submitted to the voters of the entire county, and the defendants do not propose to submit it to them.

9. The plaintiffs are residents and taxpayers of Louisburg Township.

10. The gravamen of the complaint is (1) that by virtue of the clause in Sec. 6, Ch. 1078, S.L. 1957, which provides that the Board of County Commissioners "may pay from county funds any part of the principal and interest of the bonds," any bonds issued under the Act will pledge, or purport to pledge, the faith and credit of Franklin County and will be, or purport to be, debts of Franklin County, payable in such part and to such extent as the Board of Commissioners of Franklin County shall from time to time determine, from any and all funds of Franklin County, including funds other than taxes levied upon property in the Special Tax District; (2) that the proposal to issue the bonds has not been submitted to the voters of the entire county; and (3) since the proposed issue far exceeds the amount by which the outstanding indebtedness of the county was reduced during the preceding fiscal year, the issuance of the bonds as contemplated by the defendants is and would be in excess of their authority and would be contrary to the provisions of Article V, Section 4, of the Constitution of North Carolina and, further, that the bonds, if issued, would be illegal and invalid and the levy and the collection by the defendants of any tax upon the properties of the plaintiffs for the payment of the bonds would be unlawful and in excess of the authority of the defendants, and would constitute a taking of the property of the

plaintiffs, and others similarly situated, contrary to the law of the land, in violation of Article I, Section 17, of the Constitution of North Carolina, and without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

The court below upon facts agreed and facts found, substantially as hereinbefore set out, made conclusions of law in substance as follows: (1) that the Board of Commissioners of Franklin County, under authority of Ch. 1078, S. L. 1957, and the proceedings duly had pursuant to the Act, has the power and authority to issue the bonds for the purposes stated; (2) that the bonds will be issued by the Board of County Commissioners on behalf of the Louisburg Township Special Bond Tax District of Franklin County, to be payable exclusively out of taxes to be levied in such District; (3) that the Board of County Commissioners has the power to levy annually and collect a special tax, ad valorem, on all taxable property in the special bond tax district sufficient to pay the bonds, principal and interest, as same becomes due and payable; (4) that the bonds, when issued and sold, will not be debts of Franklin County but will be valid obligations of The Louisburg Township Special Bond Tax District of Franklin County only, and shall be payable exclusively out of taxes to be levied in such District; (5) that the issuance and sale of the bonds and the levy and collection of the special tax annually, ad valorem, on all taxable property in the special tax district sufficient to pay the principal and interest of the bonds as same shall become due and payable will not be unlawful and will not constitute a taking without due process of law or contrary to the law of the land of the property of the plaintiffs and others similarly situated.

Judgment was entered dissolving the temporary order of injunction and dismissing the action. From the judgment so entered, the plaintiffs appeal.

Fletcher & Lake for plaintiffs, appellants.
Edward F. Yarborough for defendants, appellees.

JOHNSON, J. The special act which authorizes the issuance of these bonds provides that "they shall be made payable exclusively out of taxes to be levied in such district, *except the board of county commissioners may pay from county funds any part of the principal and interest of said bonds, . . .*" (Sec. 6, Ch. 1078, S.L. 1957) (Italics added.)

The plaintiffs rest their appeal primarily upon the provision of the statute italicized above, and contend that the bonds will be debts of Franklin County by virtue of this provision. They urge that this provision when interpreted in context is valid and imports a mandatory

meaning, requiring that the bonds must be paid with general county revenue if tax collections in the special tax district prove to be insufficient, or that without such insufficiency the statute expressly authorizes the county commissioners to use general county funds on a permissive, discretionary basis for the payment of the bonds, and that in any or either event, the bonds, if issued, will be debts of the county. From this premise the plaintiffs reason: that since the proposal has not been submitted to a vote of the people of the entire county, and since the amount of the proposed bond issue exceeds two-thirds of the amount by which the outstanding indebtedness of the county was reduced during the preceding fiscal year, the defendants have no authority to issue the bonds, being prohibited from doing so by Article V, Section 4, of the state Constitution, which in material part is as follows:

> "The General Assembly shall have the power . . . to authorize counties and municipalities to contract debts and pledge their faith and credit for the following purposes: (The enumerated purposes do not include acquisition, construction, or alteration of school buildings.) . . . For any purpose other than these enumerated . . . the General Assembly shall have no power to authorize counties or municipalities to contract debts, and counties and municipalities shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality . . ."

The plaintiffs rely on the well-established doctrine that a statute may be valid as to one set of facts and invalid as to another. *Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405, 79 L. ed. 949. The gist of the plaintiffs' argument is that the statute is unconstitutional because of its application to the special facts of this case, which they assert are outside the purview of the statute.

A careful study of the case leaves the impression that the major premise upon which the plaintiffs' line of reasoning rests is erroneous. Therefore, we are unable to accept as valid the conclusions urged by them.

The plaintiffs have failed to give due consideration to the provisions of Article 12, Chapter 1372, Session Laws of 1955, which permits the assumption by counties of school district indebtedness. Article 12 of this statute is now codified as G.S. 115-109 to 115-111. The provisions of G.S. 115-109 pertinent to decision here read as follows:

"Method of Assumption; validation of proceedings. — The

county board of education, with the approval of the board of commissioners, and when the assumption of such indebtedness is approved at an election as hereinafter provided, if such election is required by the Constitution, may include in the debt service fund in the school budget all outstanding indebtedness for school purposes of every city, town, school district, school taxing district, township, city administrative unit or other political subdivision in the county (hereinafter collectively called 'local districts'), lawfully incurred in erecting and equipping school buildings necessary for the school term. The election on the question of assuming such indebtedness shall be called and held in accordance with the provisions of Article 9 of chapter 153 of the General Statutes, known as 'The County Finance Act', insofar as the same may be made applicable, and the returns of such election shall be canvassed and a statement of the result thereof prepared, filed and published as provided in the County Finance Act."

Since Article 12 of the general act of 1955 and Sec. 6 of the special act of 1957, under which the instant bonds are to be issued, deal with the same general subject, to wit: assumption by counties of school district indebtedness, these statutory provisions must be regarded as in *pari materia (Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *Carr v. Little,* 188 N.C. 100, 123 S.E. 625; 82 C.J.S., Statutes, Sec. 369), and it is presumed (1) that the earlier general act was known to the Legislature when it enacted the later special act, and (2) that the later statute was enacted in the light of and in reference to the former general statute on the same subject. 50 Am. Jur., Statutes, Sec. 354.

We conclude that when the provision which directs that the board of county commissioners "may pay" the bonds from county funds is considered in *pari materia* with the prior general act of 1955, which establishes a statewide policy with reference to assumption of school district indebtedness by counties, it must be treated as intended to fit into and be governed by the provisions of the earlier general statute. And when this provision is so considered in *pari materia* with the general statute, it may be given operative effect entirely within the purview of the general act and in complete harmony with the rest of the special act.

Accordingly, the statute of 1957 under which the instant bonds are to be issued is not unconstitutional or invalid *per se.* Nor is it unconstitutional or invalid in respect to its application to the particular facts of this case. The bonds when issued will be debts only of the special tax district, payable, as provided in the act, "exclusively out

of taxes to be levied" in the district. The bonds will not be debts of Franklin County and may not be paid in any part out of county funds, unless and until payment be assumed by the county under the procedure outlined in G.S. 115-109, and in conformity with applicable constitutional limitations.

The principle is well established that the County may act as agent for the Special Tax District in the issuance of the bonds as provided in the special act applicable to this case. See *Commissioners v. Boring*, 175 N.C. 105, 95 S.E. 43.

The judgment below is

Affirmed.

MRS. RAYMOND ADAMS, DR. C. T. JOHNSON, H. D. JONES AND MISS MARY McEACHERN, INDIVIDUALLY AND AS TRUSTEES OF FLORA MACDONALD COLLEGE, A CORPORATION, v. FLORA MACDONALD COLLEGE, A CORPORATION.

(Filed 17 September, 1958.)

1. Injunctions § 8—

Upon the hearing of a motion for continuance to the final hearing of the temporary restraining order issued in the cause, the court has no jurisdiction to adjudicate the merits of the controversy, and the facts found by the trial court will be vacated and set aside insofar as they relate to the merits and will be treated as having no binding effect except insofar as they support the court's ruling in denying injunctive relief *pendente lite*.

2. Appeal and Error § 1—

The jurisdiction of the Supreme Court is derivative, and where the court below has no jurisdiction, the Supreme Court can acquire none by appeal.

3. Appeal and Error § 6—

Where, pending appeal from order dissolving a temporary restraining order, the act sought to be restrained has been done, the appeal becomes academic and the Supreme Court will express no opinion as to the merits of the moot question presented by the appeal.

Appeal by plaintiffs from *Williams, J.*, assigned to and holding the Courts of the Sixteenth Judicial District, at Chambers in Sanford by consent, March 22, 1958. From ROBESON.

Civil action by plaintiffs for permanent injunction to restrain the defendant, Flora Macdonald College, its Trustees, officers, and agents from executing a proposed agreement merging and consolidating Flora Macdonald College, Presbyterian Junior College for Men, and Peace

College into a single new corporation which is to operate a four-year co-educational college at Laurinburg.

The plaintiffs are trustees of Flora Macdonald College. Most of the background facts set out in the complaint are substantially the same as those alleged by the plaintiffs in a former action between the same parties, summarized in the opinion on appeal in that case reported in 247 N.C. 648, 101 S.E. 2d 809.

The corporate status of Flora Macdonald College is alleged in the instant complaint substantially as in the former complaint. In gist, it is that the College is controlled by the Fayetteville, Wilmington, and Orange Presbyteries through a board of trustees elected by and responsible to those Presbyteries. It is further alleged in the instant complaint that on July 13, 1955, the Presbyterian Synod of North Carolina adopted a resolution looking to the establishment of a co-educational college in Eastern North Carolina, by the consolidation and merger of Flora Macdonald College, now operated at Red Springs, Presbyterian Junior College for Men, at Maxton, and Peace College, Raleigh; that thereafter the three Presbyteries which control Flora Macdonald College adopted a resolution approving and authorizing the three-college merger as proposed by the Synod of North Carolina. On June 26, 1957, the Synod by resolution called upon the three colleges to execute an agreement of consolidation which by its terms would consolidate the three colleges into a single corporation and co-educational college, to be located in Laurinburg, North Carolina.

The plaintiffs further allege:

"14. Peace College has now definitely refused to enter into the said proposed merger, and has refused to execute said proposed merger agreement, and said Peace College is now definitely out of the proposed merger of the said three colleges, and it will continue to operate in Raleigh as a separate entity; and with said Peace College out of the said proposed merger, which contemplated the merger of all three colleges — Peace, Flora Macdonald and Presbyterian Junior College for Men, the said Trustees of Flora Macdonald College are, nevertheless, threatening to and are about to and will, if not enjoined from so doing, wrongfully and unlawfully execute said proposed merger agreement and thereby will cause said Flora Macdonald College to suffer irreparable injury and damage with no adequate remedy at law."

"16. . . . the defendant has threatened, and it now threatens, to, and it is about to cause injury to the plaintiffs and the said Flora Macdonald College, and do irreparable damage by its threatened unlawful conduct of proceeding to execute said invalid merger agreement, in violation of the action of the three Presbyteries in providing for a merger of the three said colleges, whereby the present operation of Flora Macdonald College would be discontinued forthwith; and the

Chairman has called a meeting of the Board of Trustees of Flora Macdonald College for such unlawful purpose.

"17. Petitioning the Court that this Complaint be treated as an affidavit, the plaintiffs, through their attorneys, move the Court that the Court issue an Order forthwith restraining and enjoining the defendant and its trustees, officers, representatives, agents and employees from executing or undertaking to execute any merger or consolidation agreement or instrument as referred to hereinbefore and restraining and enjoining the defendant and its trustees, officers, representatives, agents and employees from performing or undertaking to perform any act that would transfer, impair or affect title to any of the defendant's property, . . . (or) in anywise interfere with or affect . . . Flora Macdonald College in its maintenance and operation or tend to do so or purport to do so, all in order that this matter may be kept in status quo until the final determination of this action, the Court notifying the defendant to appear before the Court on a date and at a time and place to be fixed by the Court, or as soon thereafter as the Court may hear the defendant, to show cause, if any, why the temporary restraining order should not be continued in full force and effect until the final determination of this action or in lieu of such restraining order why a temporary injunction should not be issued by the Court for the same purpose, the same to be in full force and effect until the final determination of this action."

The prayers for relief are for (1) a temporary restraining order as applied for in Paragraph 17 of the complaint; (2) that the temporary order of injunction be continued until the final determination of the action; (3) for permanent injunction, forever enjoining the defendant, its trustees and agents, from merging or consolidating Flora Macdonald College with any other college, or otherwise abandoning the College and its maintenance and operation; and (4) for general relief.

On February 10, 1958, the day the action was instituted, the plaintiffs obtained a temporary restraining order forbidding the defendant from executing the proposed consolidation agreement. The case came on for hearing before Judge Williams on March 1, 1958, upon (1) the plaintiffs' motion for continuance of the temporary order until final determination of the cause, and (2) the defendant's counter motion that the temporary order be dissolved. Upon consideration of the affidavits and documents submitted by the plaintiffs and the defendant, and the arguments of counsel, Judge Williams made extensive findings of fact and conclusions of law, and entered judgment not only denying the plaintiffs' motion for continuance of the restraining order, but also finally adjudging that the plaintiffs were not entitled to permanent injunctive relief, and dismissing the action. From the

judgment so entered, the plaintiffs appealed, and moved the trial court for supersedeas pending appeal. The motion was denied.

Varser, McIntyre, Henry & Hedgpeth and Douglass and McMillan for plaintiffs, appellants.

Smith, Leach, Anderson & Dorsett for defendant, appellee.

JOHNSON, J. The matter of determining finally whether the defendant, Flora Macdonald College, and its Board of Trustees were authorized to execute the consolidation agreement was not within the scope of the hearing below. The only question before the court was whether the temporary order restraining execution of the agreement should be continued so as to preserve the status quo until final adjudication of the case. It necessarily follows that the court erred in concluding and adjudging as matters of finality (1) that the defendant and its Board of Trustees were authorized to execute the consolidation agreement, (2) that the plaintiffs were not entitled to the permanent injunctive relief demanded, and (3) that the action should be dismissed. Therefore, the judgment appealed from, except as it denies the plaintiffs' motion for injunctive relief *pendente lite* and dissolves the temporary restraining order previously issued, will be vacated and set aside, and the facts found and conclusions made by the court will be deemed and treated as having no binding effect, except insofar as they support the court's ruling in denying injunctive relief *pendente lite*. See *Buchanan v. Vance*, 237 N.C. 381, 75 S.E. 2d 240; *Mosteller v. R. R.*, 220 N.C. 275, 17 S.E. 2d 133; 43 C.J.S., Injunctions, Sec. 253. Since the court at the hearing below was without jurisdictional authority to finally adjudicate the question whether the defendant and its Board of Trustees were empowered to execute the consolidation agreement (21 C.J.S., Courts, Sec. 15 (b)), this Court upon the record as presented is without jurisdiction to decide the question. The jurisdiction of the Supreme Court is derivative, and where the court below has no jurisdiction, the Supreme Court can acquire none by appeal. *Temple v. Temple*, 246 N.C. 334, 98 S.E. 2d 314; *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757; *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E. 2d 748.

We also take note of admissions made by counsel for both sides during the argument here to the effect that after the temporary restraining order was dissolved and pending appeal the defendant executed the consolidation agreement sought to be restrained. Thus, the act which the trial court refused to restrain *pendente lite* has been consummated. Therefore, since a court cannot restrain the doing of an act which has been consummated, the question presented by this appeal, namely, whether the trial court erred in denying injunctive

relief *pendente lite,* has become academic. In accord with many authoritative decisions of this Court, we express no opinion as to the merits of the moot question thus presented by the appeal. *Topping v. Board of Education,* post, 719, and cases there cited.

In Medlin v. Curran, 243 N.C. 691, 692, 91 S.E. 2d 713, it is said: "Decisions of this Court uniformly hold that where pending an appeal to this Court from an order dissolving a temporary restraining order, the act sought to be restrained has been consummated, question as to whether defendants should have been restrained pending final hearing becomes academic, and the appeal will be dismissed."

In *Austin v. Dare County,* 240 N.C. 662, 663, 83 S.E. 2d 702, it is said: "It is quite obvious that a court cannot restrain the doing of that which has been already consummated."

For the reasons previously indicated, we express no opinion respecting the validity of the consolidation agreement as executed by the defendant pending the appeal. Unless and until this question is presented by proper pleadings to the lower trial court and is ruled upon by it in this or another action wherein all necessary parties are before the court, it is not given for this Court to express an opinion one way or the other.

Error and Remanded.

J. W. GRIFFIN v. G. L. TURNER AND WIFE, AMELIA S. TURNER; WILLIE E. TURNER AND WIFE, ETHEL W. TURNER; E. R. TURNER (UNMARRIED); ODETTE T. WEBB AND HUSBAND, L. G. WEBB; H. D. TURNER AND WIFE, MAUDE B. TURNER; OLIA T. SPRUILL AND HUSBAND, PHILLIP SPRUILL; BESSIE T. HYATT AND HUSBAND, T. D. HYATT; C. P. TURNER AND WIFE, MAIDIE TURNER.

(Filed 17 September, 1958.)

1. Executors and Administrators § 8: Descent and Distribution § 1—

Upon the death of a person intestate, title to his lands vests in his heirs and not his administrators.

2. Executors and Administrators § 13a—

An administrator has no power as such to convey the lands of the estate.

3. Principal and Agent § 12a—

The rule that where a person purports to act as agent for another he impliedly warrants his authority to bind his principal, does not apply when the person dealing with the agent knows that the agent in fact has no authority to act in the premises.

4. Executors and Administrators § 30a—

Neither the administrators executing a written authorization to an agent to sell lands of the estate, nor the agent in executing a contract to sell pursuant to such authority, are liable to the purchaser on an implied warranty of authority when the instruments themselves disclose that they were acting in their representative capacities, since their want of authority is apparent upon the face of the instruments.

5. Executors and Administrators § 13a—

Administrators having an interest in the estate as heirs who contract in their representative capacity to sell lands of the estate are bound by the contract insofar as their individual interest in the lands is concerned.

APPEAL by plaintiff from *Stevens, J.*, May 1958 Term, of GATES.

Plaintiff filed his complaint to compel defendants, the children of E. F. Turner and their respective spouses, to convey thirty acres of land inherited from their father pursuant to an asserted authorization and a contract pursuant thereto as follows:

"To: Mr. L. G. Webb, Gatesville, N. C.

"You are hereby authorized and empowered to serve as agent of the undersigned, Administrators of the estate of E. F. Turner, deceased, in the matter of negotiation looking toward sale of the woodland of E. F. Turner Estate (description immaterial) containing thirty (30) acres, more or less.

"As such agent you are authorized to contract, confer with and to make contract with any person, firm or corporation whom you may think to be interested in purchasing said lands and, upon completion of such negotiation and upon indication by you of readiness to culminate such contract as you consider desirable and for the best interests of such estate we obligate to execute and deliver fee simple and warranty deed for the above described lands.

"This 6th day of April, 1956.
(s) W. E. Turner
(s) George L. Turner
Admrs. E. F. Turner Estate."

"$10.00

"Received of J. W. Griffin Ten and 00/100 ($10.00) Dollars as deposit and evidence of good faith on purchase of the E. F. Turner estate (description omitted), containing thirty (30) acres, more or less. Balance of said agreed purchase price of One Thousand and seventy five (1075.00) Dollars is to be paid in cash, or equivalent, upon tender of good and sufficient fee simple deed to said Griffin from the heirs at law of said E. F. Turner and their respective husbands and/or wives.

"This 11th day of April, 1956.

(s) L. G. Webb
Agent for G. L. Turner and
Willie E. Turner, Admrs.
E. F. Turner Estate."

"Witness:
(s) W. S. Privott"

Plaintiff alleged defendants refused to comply with the assertedly authorized contract.

L. G. Webb, husband of a child of E. F. Turner, answered and admitted the execution of the writings as set out in the complaint. He asserted he acted in good faith but only as agent for the administrators in dealing with plaintiff and offered so far as was in his power to comply.

Defendants W. E. Turner and G. L. Turner admitted the execution of the paper addressed to L. G. Webb dated 6 April 1956. They deny that they thereby became personally obligated or that L. G. Webb had authority to bind them personally. They admitted they refused to convey.

The remaining defendants representing six of the eight children of E. F. Turner denied the execution of the paper writings and denied any authority on the part of their codefendants to bind them.

Plaintiff was permitted to amend his complaint to allege that subsequent to the refusal to convey defendants had entered and cut and removed timber from the land described in the writings sued on, to the value of $20,077.20. The prayer of the complaint was amended to seek damages for the asserted value of the timber cut in addition to a decree for specific performance.

Defendants moved for nonsuit at the conclusion of the evidence. The motion was allowed. Plaintiff appealed.

LeRoy & Goodwin for plaintiff, appellant.
W. S. Privott for defendant appellee, L. G. Webb.
Worth & Horner for all defendants other than L. G. Webb.

RODMAN, J. Plaintiff offered evidence sufficient to establish the execution of the writings of 6 April and 11 April, a demand for performance, and defendants' refusal to convey. He likewise offered evidence tending to show that subsequent to the institution of the action defendants had cut and removed timber. No evidence was offered to show that the defendants other than L. G. Webb, W. E. Turner, and G. L. Turner, authorized the execution of the paper writings on which plaintiff relies.

Plaintiff, in his brief filed here, concedes that the judgment of non-

suit is correct as to the defendants other than the defendants Webb and W. E. and G. L. Turner. This concession, correctly made, leaves for decision these questions: (1) Are defendants Webb and Turner liable for breach of an implied warranty of authority to convey the interest of their codefendants, and (2) Is plaintiff entitled to enforce the contract as to the shares of defendants W. E. and G. L. Turner.

The answer to the first question is found by an examination of the writings on which plaintiff predicates his right to relief. These writings show that Webb was acting as agent for the administrators. It was the administrators who appointed Webb as their agent. In the writing of 6 April there is nothing which purports to assert authority to act for the heirs individually. Plaintiff knew that Webb was acting only as agent for the administrators. He knew that the paper which appointed Webb as agent came from the makers as administrators and not as agents for the heirs.

Title to real estate, upon the death of an owner, vests in the heirs and not in the administrators. The personal representative has no power as such to convey. *Parker v. Porter,* 208 N.C. 31, 179 S.E. 28; *Floyd v. Herring,* 64 N.C. 409. Plaintiff was aware of this fact when he paid his ten dollars to Webb. The receipt given by Webb calls for payment of the balance of the purchase price when good and sufficient deed was tendered by the heirs at law and not by the administrators for whom Webb acted.

Plaintiff does not assert that any express warranty of authority existed to bind the heirs. His position is that when one contracts as an agent to convey land, the law will imply a warranty of authority to act. The law does imply a warranty when the party with whom the contract is made does not know the true facts and does not know that in truth and in fact the person sought to be bound is lacking in authority. When, however, the person who claims to be protected knows that the person in whose name and behalf the contract is made in fact has no authority to act, the law will not imply a warranty to act. It would be palpably unjust to create a fiction for the benefit of one who acted with knowledge of facts which are at complete variance with the proposed fiction. Hence, we have heretofore held that when one contracts as administrator to convey land, who has no personal right therein, he is not liable on an implied warranty because the heirs at law are not bound by the contract. *Hedgecock v. Tate,* 168 N. C. 660, 85 S.E. 34, Ann. Cas. 1916D 449. For the same reason a guardian who contracts to convey the property of his ward is not liable on an implied warranty of authority. *Leroy v. Jacobosky,* 136 N.C. 443, 67 L.R.A. 977. These cases but illustrate the principle which finds full support in numerous other cases. *Joyner v. Crisp,* 158 N.C. 199, 73 S.E. 1004; *Love v. Harris,* 156 N.C. 88, 72 S.E. 150; *Hite v.*

Goodman, 21 N.C. 364; *Potts v. Lazarus,* 4 N.C. 180; *Fuller v. Melko,* 76 A 2d 683 (N.J.); 3 C.J.S. 117 and 118; 2 Am. Jur. 249.

Application of the law to the facts of this case brings a negative answer to the question propounded with respect to the liability of defendants on the asserted implied warranty to represent the heirs.

This leaves for determination the force and effect of the writings with respect to the shares of the defendants W. E. Turner and G. L. Turner.

As noted above, the reason for denying the implication of a warranty is knowledge that the contracting party has neither right nor the power to act, but the law is well settled that when one enters into a contract it will be presumed that he did so in good faith and will, so far as lies in his power, comply with his contract.

So when one purporting to act in a representative capacity contracts to convey, the law will imply that so far as his individual interest in the property is concerned he has authority to act in his representative capacity. *Woody v. Pickelsimer,* 248 N.C. 599, illustrates the rule. If he would exclude individual responsibility he should do so by clear and express language. *Bessire & Co. v. Ward,* 209 N.C. 266, 183 S.E. 534; *Banking Co. v. Morehead,* 116 N.C. 410; *Banking Co. v. Morehead,* 116 N.C. 413.

It is said in 24 C.J. 153: "In the absence of some power contained in the will, or of authority derived from statute or an order of court, neither an executor nor an administrator has any power whatever to sell the real estate of a decedent. An unauthorized conveyance may be enjoined at the suit of heirs or devisees, and *a deed made by the representative without authority is void, except as it may operate to pass his own interest in the land as heir or devisee,* and cannot effect the rights of other heirs or devisees who seasonably undertake to assert such rights." (Italics supplied) See also 33 C.J.S. 1286.

"The deeds to the railroad company, under which complainant claims, were executed by three executors and they contained covenants of warranty by them in their representative capacities. One of the executors was the widow of the deceased owner of the lands and under the will she took a half interest therein. The deeds were void as executors' conveyances because no authority to make them had been procured from the court having jurisdiction; but they nevertheless operated as conveyances of the widow's individual interest." *Rannels v. Rowe,* 145 F 296.

In *Parks v. Knox,* 130 S.W. 203 (Tex.), the court said: "But assuming that the conveyance of Boyd and Mrs. Parks, in which they undertook to transfer the land in controversy to Beard and Ezell, was void in so far as it operated upon any title held by them as executors of the estate of W. S. Parks, it does not follow that it was ineffectual

for any purpose. Mrs. Parks was not only an executrix, but a joint owner of the land described in her deed; and while she might not be able to transfer any title, acting in her fiduciary capacity, because she had none, her deed would nevertheless invest her grantees with such interest as she owned in her individual right."

Moffitt v. Rosencrans, 69 P 87 (Cal.), involved the validity of a lease and option executed by plaintiff as executrix. The court said: ". . . plaintiff's testator died seised of the land in question, leaving a will under which she is the sole beneficial owner of the land in question, and, as she was not empowered by the court to sell the land, her contract with the defendant was binding on her personally."

Dial v. Martin, 37 S.W. 2d 168; *Shaw v. Clements,* 1 Call (Va.), 429; *Phillips v. Hornsby,* 70 Ala. 414; *Millican v. McNeill,* 21 L.R.A. (N.S.) 60, furnish other illustrations of the application of this salutary rule.

On the facts developed at the trial defendants W. E. Turner and G. L. Turner are, as to their respective one-eighth interest, bound by their contract.

As to the defendants W. E. Turner and G. L. Turner: Reversed.

As to remaining defendants: Affirmed.

STATE OF NORTH CAROLINA AND CURRITUCK COUNTY BOARD OF COMMISSIONERS UPON RELATION OF MARY MAGDELINE WILLIAMS, A MINOR, BY HER NEXT FRIEND, MARY E. WILLIAMS v. LINDSEY L. DOWDY, DEPUTY SHERIFF; L. L. DOZIER, SR., SHERIFF; NATIONAL SURETY CORPORATION, A BODY CORPORATE; AND AMERICAN MOTORISTS INSURANCE COMPANY, A BODY CORPORATE.

(Filed 17 September, 1958.)

1. Assault and Battery §§ 2, 3—

In this action for assault through malice or gross negligence, defendant did not allege that he shot plaintiff through accident or misadventure, but alleged that plaintiff was injured at some other time and in some other manner than as set forth in the complaint, and that defendant had no connection with the injury whether it was brought about by accident or other means. *Held:* Defendant's allegations negatived the theory of injury by accident or misadventure as a defense in behalf of the defendant, and therefore an instruction presenting the defense of accident or misadventure is erroneous.

2. Same—

In this action instituted by a worker against defendant landlord to recover for assault through malice or gross negligence, defendant alleged that plaintiff was injured at some other time and in some other man-

ner than as set forth in the complaint, and further alleged that at the time in question, as some other workers approached him in a menacing manner, he fired one shot into the ground. Defendant's evidence was to the effect that the shot was recovered from the ground and identified as having been fired from his gun. *Held:* In the light of defendant's allegations, the plea of self-defense was not raised, and an instruction presenting this defense to the jury must be held prejudicial.

3. Trial § 31b—

It is error for the trial court to charge the jury as to material matters not raised by the pleadings or supported by the evidence and contained in the issues.

4. Appeal and Error § 21—

The failure of appellant to preserve exception to the refusal of the trial court to set aside the verdict and grant a new trial, or failure to except to the signing of the judgment, does not warrant dismissal of the appeal, since the appeal itself constitutes an exception to the judgment.

APPEAL by plaintiff from *Morris, J.*, January Civil Term, 1958 of CURRITUCK.

This is a civil action instituted to recover for personal injuries allegedly inflicted upon Mary M. Williams, a minor, by her duly appointed next friend, Mary E. Williams, against the defendants L. L. Dozier, Sr., Sheriff of Currituck County, Lindsey L. Dowdy, Deputy Sheriff in said County, and their respective bondsmen.

The plaintiff Mary M. Williams alleges that on 18 June 1957 she and sundry other laborers and workers were assembled in a potato field in Harbinger, near Granby, in Currituck County, North Carolina, and while in said field the defendant Lindsey L. Dowdy wilfully and maliciously, or through reckless and gross negligence and indifference, assaulted plaintiff with a deadly weapon, to wit, a pistol, and did then and there shoot plaintiff with said pistol, resulting in and inflicting upon plaintiff serious and permanent injuries.

It appears from the evidence and the answer of the defendant Dowdy that these workers were employed by him to pick up potatoes; that on the occasion involved, while plaintiff and the other workers were waiting to be paid, he discovered that they had stolen and were attempting to carry away on the truck used in transporting the workers, some seven fertilizer bags of potatoes; that notwithstanding his presence and removal of the potatoes from the truck, some of the workers made further attempts to remove some of said potatoes from the field. Dowdy's criticism of the conduct of the group, as alleged in his answer, "resulted in some of the group advancing toward the defendant Dowdy in a threatening manner, indicating an intention and intent to do him violence, whereupon the defendant Dowdy ordered the approaching persons to discontinue their advance, threats and in-

dication of violence, which they refused to do, whereupon, the defendant Dowdy drew the pistol which he was carrying and regularly carried as Deputy Sheriff and shot it one time into the ground near the defendant's feet for the purpose of preventing an assault upon himself. That thereupon those in the advancing group discontinued their attempt to do violence to the defendant and dispersed." As a further answer and defense the defendant Dowdy alleges that he remained in the field for some time; that there was no outcry by anyone, and nothing said about anyone being injured; he therefore alleges that plaintiff was injured at some other time and place than that alleged in the complaint. That said injury came about through the negligence or unlawful conduct of the plaintiff, or was brought about by forces with which these defendants are in no way connected and over which they had no control, and for which they are in no way responsible, or by accidental or other means with which these defendants were not connected.

The plaintiff's evidence tends to show that the defendant Dowdy fired his pistol into the truck and that Mary M. Williams was struck; that the bullet went through her left hand and her left thigh.

At the conclusion of the evidence for the plaintiff, counsel for the defendant Dozier and his surety moved for judgment as of nonsuit. The motion was allowed and the plaintiff entered no exception thereto. Counsel for the defendant National Surety Corporation, surety on defendant Dowdy's official bond as Deputy Sheriff, moved for judgment as of nonsuit and the motion was denied.

The defendants' evidence tends to show that the defendant Dowdy fired his pistol into the ground in the manner and for the purpose alleged in his pleadings.

At the conclusion of all the evidence, the defendant National Surety Corporation renewed its motion for judgment as of nonsuit. The motion was allowed. No exception.

Issues were submitted to and answered by the jury as follows:

"Was the plaintiff Mary M. Williams wilfully and maliciously assaulted and injured by the defendant Lindsey L. Dowdy, as alleged in the complaint? Answer: No.

"Was the plaintiff Mary M. Williams injured by the negligence of the defendant Lindsey L. Dowdy, as alleged in the complaint? Answer: No.

"What amount of damages, if any, is the plaintiff Mary M. Williams entitled to recover of the defendant Lindsey L. Dowdy? Answer: ....."

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

Romallus O. Murphy, Taylor & Mitchell for plaintiff, appellant.
LeRoy & Goodwin for defendant, Dowdy.

DENNY, J. It is apparent from the facts revealed on this record that the defendant Dowdy at the time of the alleged shooting was acting in the capacity of a landlord and not in the capacity of a deputy sheriff.

The plaintiff's assignments of error Nos. 11, 12, 13 and 14 are based on exceptions to the court's charge to the jury.

The foregoing assignments of error are directed to and embrace those portions of the charge pertaining to accident or injury by misadventure and self-defense. The plaintiff contends that such charge was not warranted by the pleadings, the issues, or supported by the evidence.

The defendant Dowdy's answer expressly alleges that the plaintiff was injured at some other time and in some other manner than that alleged in the complaint and that the defendants had no connection with it, or that the injury was brought about "by accident or other means with which these defendants were not connected." This would negative the theory of injury by accident or misadventure as a defense in behalf of the defendant Dowdy.

The plaintiff likewise excepted to the charge on self defense. The defendant Dowdy alleges in his answer that he fired one shot into the ground near his feet for the purpose of preventing an assault upon himself by certain members of the group of workers. It is not contended that the minor plaintiff was among the members of the group advancing on him. Moreover, the defendant Dowdy testified that the bullet which he fired into the ground was later taken from the ground and turned over to the State Bureau of Investigation, together with his pistol, and an agent of the State Bureau of Investigation testified that the bullet turned over to the Bureau by the defendant Dowdy had been fired from Dowdy's gun. Therefore, in our opinion, the pleading of the defendant Dowdy with respect to the circumstances under which he fired his gun, in light of the other allegations in his answer, may not be construed as one of confession and avoidance upon which the plea of self-defense with respect to the minor plaintiff's injuries may be based. Neither do we think the evidence of the defendant Dowdy would support such a plea if it had been alleged.

It is error for the trial court to charge the jury as to material matters not raised by the pleadings or supported by the evidence and contained in the issues. *Worley v. Motor Co.*, 246 N.C. 677, 100 S.E. 2d 70; *Bank v. Phillips*, 236 N.C. 470, 73 S.E. 2d 323; *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558; *Farrow v. White*, 212 N.C. 376, 193 S.E. 386.

In the instant case, the court instructed the jury to the effect that if it were satisfied from the evidence and by its greater weight that on the 18th day of June 1957 the defendant maliciously and wilfully, as those terms had been explained to be, and without justification fired his pistol in the direction of the plaintiff and others, and the plaintiff suffered injury as alleged, then it would answer the first issue yes, "unless you find from the evidence that the injuries which plaintiff sustained, if any you find she did sustain, was the result of an accident or misadventure, as those terms have been explained and defined to you to mean, or unless you find that the defendant would have been justified in firing the shot under the principle of self-defense, as that term has been defined to you * * *; likewise, if the plaintiff has failed to satisfy you from the evidence and by its greater weight that the defendant wilfully and maliciously assaulted her and injured her, then it would be your duty to answer the first issue NO."

In light of the pleadings, issues, and evidence involved on this record, we think the court committed error in its charge to the jury with respect to accident or misadventure and self defense. Hence, the plaintiff is entitled to a new trial and it is so ordered.

The motion of the defendant Dowdy to dismiss this appeal for that the plaintiff failed to preserve her exception to the refusal of the court below to set aside the verdict and grant a new trial, and upon the further ground that the plaintiff did not except to the signing of the judgment, is overruled.

This Court has repeatedly held that an appeal itself constitutes an exception to the judgment. *Bishop v. Bishop*, 245 N.C. 573, 96 S.E. 2d 721, and cited cases.

New Trial.

JOHNS-MANVILLE SALES CORPORATION (AND ANY OTHER CREDITORS OF TOWNSEND BUILDERS SUPPLY, INC., JOINING HEREIN, OR ON BEHALF OF ALL CREDITORS OF TOWNSEND BUILDERS SUPPLY, INC., AS THE COURT MAY REQUIRE) v. P. C. TOWNSEND, P. T. NEWTON AND ESTELLE McK. TOWNSEND, DEFENDANTS, AND W. ALLEN COBB, TRUSTEE, AS HE MAY ALIGN HIMSELF EITHER AS PARTY PLAINTIFF OR DEFENDANT.

(Filed 17 September, 1958.)

Bankruptcy § 2: Corporations § 13—

Where a corporation has been placed in bankruptcy, right to institute action under G.S. 55-56, (prior to the effective date of Ch. 1371, Session Laws of 1955) to recover from officers and stockholders for fraudulent withdrawal, depletion and appropriation of the assets of the corpora-

tion, vests in the trustee in bankruptcy, and creditors of the corporation may not maintain such action even after refusal of the trustee to institute suit, since the creditors' remedy is by petition to the court of bankruptcy for an order compelling the trustee to bring such suit. 11 U.S.C.A., Bankruptcy, Sec. 110.

On writ of certiorari to review order of *Hobgood, J.*, allowing motion to strike allegations of the complaint, entered at October Civil Term, 1957, of COLUMBUS.

Civil action brought by the plaintiff, creditor of Townsend Builders Supply, Inc., of Whiteville, North Carolina, now in bankruptcy, against P. C. Townsend, P. T. Newton and Estelle McK. Townsend to recover of them the amount of the plaintiff's claim against the bankrupt corporation, on the ground of alleged fraudulent withdrawal, depletion, and appropriation of the assets of the corporation by the defendants. The male defendants are officers and directors of the defunct corporation, and the feme defendant is a stockholder. The Trustee in Bankruptcy, W. Allen Cobb, is joined as a nominal party defendant.

These in summary are the pertinent allegations of the complaint: That during or about the months of April and August, 1955, the plaintiff sold and delivered to Townsend Builders Supply, Inc., merchandise of the sum and value of $1,210.79, no part of which has been paid; that claim for the full amount has been duly filed with the Referee in Bankruptcy, and it has been approved and allowed.

That during the months of March, April and May, 1956, and prior thereto, the defendants Newton and Townsend conspired together to defraud the creditors of the corporation and to misappropriate and wrongfully convert to their own use, and to the use of their respective wives, the assets of the corporation, and then place the corporation in bankruptcy; that in pursuance of the conspiracy so formed, the defendant P. C. Townsend, acting in concert and collaboration with the defendant Newton, misappropriated in excess of $30,000 in cash money belonging to the corporation and concealed same by depositing it under various assumed and fictitious names in banks located outside of his home county, and in various safe deposit boxes; that preparatory to filing a petition in bankruptcy, the defendants Newton and Townsend withdrew the best and most collectible accounts receivable belonging to the corporation, totalling more than $40,000, and misappropriated and concealed same, intending thereby to collect the accounts for themselves and to deprive the bankruptcy court of these assets; that the aforesaid assets, and others, were fraudulently omitted from the schedule of assets of the corporation in the bankruptcy petition filed in the District Court by the defendants P. C. Townsend and P. T. Newton; that several sizable assets were converted jointly

by P. C. Townsend and wife, Estelle Townsend, and placed in property owned jointly by them. (Reference to the allegations describing in detail the numerous wrongful acts of concealment and conversion complained of is omitted as not being pertinent to decision.)

That Townsend Builders Supply, Inc., has been adjudged a bankrupt in proceedings now pending in the United States District Court, Eastern Division of North Carolina; "that none of the assets of said bankrupt are available for the satisfaction of the indebtedness sued for herein; . . . that the Bankruptcy administration of the assets . . . will not result in full payment to the plaintiff of the amount owed to it. . . ."

"That plaintiff has made request upon W. Allen Cobb, Trustee, to institute suit on behalf of all creditors for the matters and things alleged herein, . . .; That the Trustee in Bankruptcy has reported that the assets of the corporation have been exhausted and liquidated and that the net proceeds in his hands available for general creditors is only approximately 50% of their claim. . . . That the said W. Allen Cobb, Trustee, has failed and declined to institute this suit on behalf of plaintiff or other creditors similarly situated."

The defendant moved to strike the allegations of paragraphs 4 through 35, which contain all the material allegations of the complaint, upon the ground that the right to bring the action is vested in the Trustee in Bankruptcy, and that the Superior Court of Columbus County is without jurisdiction to proceed in the cause. The trial court entered an order allowing the motion. The plaintiff excepted and filed a petition for *certiorari* pursuant to the provisions of Rule 4 (a), Rules of Practice in the Supreme Court, 242 N.C. 766. The petition was allowed.

Powell & Powell for plaintiff, appellant.

J. K. Burns and Varser, McIntyre, Henry & Hedgepeth for defendants P. C. Townsend and P. T. Newton, appellees.

Proctor & Proctor for defendant Estelle McK. Townsend, appellee.

JOHNSON, J. The action is brought under G.S. 55-56 as written prior to the effective date of Ch. 1371, Session Laws of 1955, known as the Business Corporation Act, which became operative 1 July, 1957, and is now codified as G.S. 55-1 through 55-175.

G.S. 55-56 of the old Corporation Code provided: "In case of fraud by the officers, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the officers, directors, managers, and stockholders who were concerned in the fraud."

It may be conceded that the provisions of the foregoing statute provide a right of action against the defendants, officers, directors and shareholders of the corporation, for their alleged fraudulent acts and conduct.

However, before the instant case was instituted, the United States District Court in bankruptcy proceedings had acquired jurisdiction of the assets of the corporation. And an action like the instant one under G.S. 55-56 against the defendants for the frauds alleged is a valuable asset of the bankruptcy estate. In effect, it is an action to recover assets of the corporation for the benefit of all its creditors. Necessarily, then, we take cognizance of 11 U. S. C. A., Bankruptcy, Sec. 110, by the terms of which the Trustee in Bankruptcy has the superior right, and is the proper party, to sue on behalf of the creditors. See *Dean v. Shingle,* (Cal.) 246 P. 1049; *Kahle v. Stephens,* (Cal.) 4 P. 2d 145. In 8 C. J. S., Bankruptcy, Sec. 337, p. 1092, it is said: "The right of suit for the liability of a breach of duty in the fiduciary relationship of the officers and directors of a corporation which inheres in the corporation, may be maintained by its trustee in bankruptcy, even though solely for the benefit of creditors; thus an action against the officers or directors for losses resulting from . . . fraud, or mismanagement must be brought by the trustee."

The failure or refusal of the trustee to bring suit does not, nothing else appearing, empower a creditor to do so. "The general rule is that the failure or refusal of the trustee to bring and prosecute an appropriate action to set aside a fraudulent transfer does not entitle a creditor to do so. Ample means are placed in the hands of creditors to enable them to inform the court of the necessity of any particular proceeding for the purpose of recovering property fraudulently transferred. A creditor is not without remedy where the trustee refuses to bring suit. He is entitled to petition the court of bankruptcy for an order compelling the trustee to bring suit. The trustee must then comply or suffer removal from office." 6 Am. Jur., Bankruptcy, Sec. 1169, p. 1253. See also Annotation, 158 A. L. R. 1274, 1276; *Glenny v. Langdon,* 98 U.S. 20, 25 L. ed. 43; *Trimble v. Woodhead,* 102 U.S. 647, 26 L. ed. 290.

It thus appears that the plaintiff's remedy after refusal of the Trustee to institute action was and is to petition the United States District Court for an order compelling the Trustee to bring suit. The plaintiff's failure to pursue its remedy in the District Court precludes maintenance of the instant action.

We intimate no opinion as to whether the plaintiff might re-institute and maintain an action if the bankruptcy court should refuse to require the Trustee to institute the suit. See, however, Annotation, 158 A. L. R. 1274, 1286, and 6 Am. Jur., Bankruptcy, Sec. 1169.

The decisions of this Court cited and relied on by the plaintiff are factually distinguishable.

The judgment of the court below is

Affirmed.

W. F. WALSTON AND WIFE, WILHELMINA P. WALSTON v. RUSSELL E. TWIFORD, SUBSTITUTE TRUSTEE, AND CHARLES BUXTON SMALL, ADMINISTRATOR OF THE ESTATE OF MATTIE A. PICOT, DECEASED.

(Filed 17 September, 1958.)

1. Mortgages § 1—

A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt.

2. Mortgages § 27—

A mortgage which purports to secure the payment of a debt has no validity if the debt has no existence.

3. Mortgages § 9—

A mortgage must identify the obligation secured, and nothing which is not therein stipulated will be included.

4. Same: Mortgages § 27— Stipulation in mortgage that debt should be extinguished upon death of mortgagee is valid.

The mortgage in question secured a note in a specified sum with provision that upon the death of the payee of the note, any amount remaining due thereon should be deemed a gift to mortgagors, and that thereupon the note and deed of trust should be marked paid and satisfied by the personal representative of the payee. *Held:* While the provision is not good as a gift or as a testamentary disposition of the balance, it is valid as a part of the contractual obligation agreed upon by the parties when the loan was negotiated, and therefore the mortgagors are entitled to restrain the trustee and the personal representative of the payee from foreclosing the instrument.

APPEAL by plaintiffs from *Stevens, J.*, May 1958 Term, of PASQUOTANK.

The facts are not in controversy. It appears from the stipulations of the parties and the findings of the court: On 27 March 1952 plaintiffs borrowed from Mattie A. Picot, mother of the feme plaintiff, the sum of $6,500. The debt thus created was evidenced by note and secured by deed of trust contemporaneously executed to W. C. Morse, Jr., conveying real estate in Pasquotank County. Mrs. Picot died 22 April 1957. Defendant Small has been duly appointed administrator of her estate and defendant Twiford has been duly substituted as trustee. The note and original deed of trust have been misplaced or

lost and cannot be discovered after diligent search. Mrs. Picot was the owner of the note at her death. Plaintiffs paid the interest on the note to 27 March 1953 but have made no other payments.

Plaintiff seeks to perpetually enjoin a threatened foreclosure, asserting that by the terms of the loan agreement the debt has been discharged and there is no longer a subsisting obligation secured by the deed of trust. Defendants assert that they are entitled to and ask for a judgment in the sum of $6,500 with interest from March 1953 and foreclosure of the deed of trust for the purpose of enforcing payment.

The first paragraph of the deed of trust gives its date and names the parties. Plaintiffs are there designated as grantors, Morse as trustee, Mrs. Picot as holder.

Following this paragraph the deed of trust provides:

"WITNESSETH: THAT WHEREAS, grantors herein called maker, is indebted to the holder in the sum of SIXTY FIVE HUNDRED AND 00/100 DOLLARS, which indebtedness is evidenced by note or notes of even date herewith, viz:

"AMOUNT—$6500.00

DATE DUE—Interest from January 20, 1952, at five per cent, payable every six months.

"said note bearing interest from Jan. 20, 1952 at the rate of five per cent per annum, payable semi-annually; and WHEREAS, the grantors desire to secure to the holder thereof the payment of the principal and interest of said note and of each and every note given in renewal or curtailment, thereof, and to secure the performance of the covenants and agreements herein contained, by a conveyance of the property hereinafter described:"

Then follows a paragraph granting and conveying the land in fee to Morse, the trustee. Following the description of the property conveyed is this provision: "It is specially agreed and understood by and between the grantors and the said Mattie A. Picot that any balance of either the principal or interest due on the amount herein secured at the time of the death of said Mattie A. Picot, such amount is herewith positively to be treated, deemed and considered a gift to said grantors by said Mattie A. Picot, or her estate and neither her personal representatives, heirs at law, next of kin or any other person or persons shall have any interest, right or title in such unpaid balance, and title shall vest in such balance immediately upon the death of the payee, in grantors herein, and the note secured by this deed of trust together with deed of trust shall be marked paid and satisfied by the personal representative of the payee."

Following the above-quoted provision are the usual provisions of a deed of trust, including the habendum, provision that if the makers, grantors, shall pay the debt and comply with their covenants the in-

strument shall be null and void, but upon failure to comply the trustee may foreclose and sell to pay the debt, including the cost of making sale. The deed of trust contains covenants to keep the buildings on the premises insured for the protection of the holder of the note and to keep the taxes thereon paid.

The court, being of the opinion that the quoted provisions were ineffectual and void, adjudged that plaintiffs were not entitled to enjoin a sale and that defendants recover the sum of $6,500 with interest and authorizing the substitute trustee to foreclose. Plaintiffs excepted and appealed.

J. W. Jennette for plaintiff, appellant.
Small & Small for defendant, appellees.

RODMAN, J. "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt." *Robinson v. Willoughby,* 65 N.C. 520; *Watkins v. Williams,* 123 N.C. 170; *Wilson v. Fisher,* 148 N.C. 535.

"A mortgage which purports to secure the payment of a debt has no validity if the debt has no existence." *Bradham v. Robinson,* 236 N.C. 589, 73 S.E. 2d 555; *Saleeby v. Brown,* 190 N.C. 138, 129 S.E. 424; *Stevens v. Turlington,* 186 N.C. 191, 119 S.E. 210; 36 Am. Jur. 717 and 718.

Since by definition a mortgage is a conveyance of property to secure the obligation of the mortgagor, it is necessary for the mortgage to identify the obligation secured. As said by *Stacy, J.* (later C.J.): "An agreement to secure one or more obligations must be confined to those intended to be secured by the parties to the contract, for nothing not within the contemplation of the parties will be included in any such agreement." *Belton v. Bank,* 186 N.C. 614, 120 S.E. 220; *Garrett v. Stadiem,* 220 N.C. 654, 18 S.E. 2d 178; *Harper v. Edwards,* 115 N.C. 246, citing Jones on Mortgages; 36 Am. Jur. 726 and 727; 59 C.J.S. 155.

The mortgage or deed of trust here in question adequately describes the obligation of the grantors. There is no intimation or suggestion that the note recited in the deed of trust was in any way at variance with the terms of the obligation as set out in the deed of trust.

Decisive of this case is the question: Is the provision of the contract valid which terminates liability of the mortgagors for any unpaid balance existing at Mrs. Picot's death. The question has, we think, heretofore been answered by this Court in *Moore v. Brinkley,* 200 N.C. 457, 157 S.E. 129. Reference to the record in that case discloses that the obligation which the Court was called upon to construe provided: "And the said Mrs. C. F. Bell covenants and agrees that at her

death all property owned by her of every kind and description, both real and personal property, shall become the absolute property of the said W. R. Brinkley and wife, Lillie M. Brinkley, their heirs and assigns, forever.

"And the said Mrs. C. F. Bell further covenants and agrees to release them absolutely from any and all indebtedness they may be under to her or her estate at the time of her death."

Speaking with reference to that contractual obligation, the Court, in a *per curiam* opinion, said: "This contract is valid and enforceable against the plaintiff." *Fawcett v. Fawcett,* 191 N.C. 679, 132 S.E. 796, cited by the Court, sustains the decision. Recognition of the validity of such a contractual provision is impliedly if not expressly given in *Jones v. Norris,* 147 N.C. 84.

The decisions of this Court upholding the provisions of contracts similar to the one involved in this case are in accord with the conclusions reached by the majority of the courts in other jurisdictions.

Miller v. Allen, 90 N.E. 2d 251 (Ill.), was an action in which plaintiff sought foreclosure of a purchase money mortgage given to Mary E. Miller. Plaintiff was the administrator of Mary Miller. There as here the parties were unable to find among the effects of the deceased the note which the defendants had executed. The deed of trust recited it secured the payment of a note in the sum of $5,975, payable at the rate of $40 per month. Incorporated therein was the following provision: "no interest is being charged. Should mortgagee die before such payments are completed, the said note of this mortgage shall be considered as fully paid on the death of the mortgagee." The trial court in that case, as here, held the provision invalid and of no force and effect because of "(a) lack of consideration; (b) that no valid gift *inter vivos* was made; and (c) that it was not a valid testamentary disposition. . ." The appellate court, in reversing the trial court, said: "In a review of the cases in other jurisdictions it appears that the weight of authority favors the validity of an agreement contemporaneous with a debt or legal obligation to the effect that the obligation be extinguished or terminated by the death of a creditor or obligee. This is fundamentally on the basis that the agreement constitutes a valid and enforceable contract as between the parties."

In *Hollis v. Hollis,* 24 A 581 (Maine), one of the provisions of the note and mortgage was: "Now, if the said Susan Rand should die before this note is paid, then this deed & note are null and void, and the said Susan Rand is never to transfer this deed." The court held that upon the death of Susan Rand "the mortgage then became void." *Kline v. McElroy,* 296 S.W. 2d 664 (Mo.); *DeLapp v. Anderson,* 203 S.W. 2d 389 (Ky.); *Farmer v. Farmer,* 77 S.E. 2d 415 (Va.); *Jones v. Darling,* 95 S.E. 2d 709 (Ga.); *In re Smith's Estate,* 58 N.W. 2d 378

(Iowa); *Brock v. Lueth*, 4 N.W. 2d 285 (Neb.); *Dillard v. Dillard*, 269 S.W. 2d 769 (Mo.)

We perceive no sound reason why we should overrule our prior decisions. The provision is good not as a gift, not as a testamentary disposition, but as a part of the contractual obligation agreed upon by the parties when the loan was negotiated. It appears from the evidence that Mrs. Picot went to live with her daughter and her husband, mortgagors, at or about the time the loan was negotiated. She remained with them until her death. Although she had the right to compel payment of interest or principal during her lifetime, only one payment of interest was made. By express language set out in mortgagors' contract the note and deed of trust were to be marked paid and satisfied upon Mrs. Picot's death.

Reversed.

STATE v. JACK FRANKLIN AND FRANK THOMAS KEITH.

(Filed 17 September, 1958.)

1. Criminal Law § 72—

Where prosecution of two defendants for the same offense are consolidated for trial, testimony of statements made by one of them tending to incriminate both defendants, is competent solely against the defendant making the declarations and should be excluded as to the other defendant upon his objection thereto.

2. Criminal Law § 90—

Testimony competent as against one defendant but incompetent for any purpose as against the other defendant should be excluded as to such other defendant upon his general objection even in the absence of a request at the time that its admission be restricted. The rule requiring that where evidence is competent for a restricted purpose the objecting party must request at the time that its purpose be restricted, applies when the evidence is competent for one purpose but not for all purposes against the objecting party, and does not apply when the evidence is incompetent for any purpose against the objecting party. Rule of Practice in the Supreme Court No. 21.

3. Criminal Law § 162—

Error in overruling appellant's objection to the admission of evidence is not cured by an instruction of the court in the charge that such evidence should not be considered against appellant, there being no reference in the charge to the prior ruling and no instruction that the jury should disabuse their minds of any and all prejudicial impressions lodged by the incompetent evidence.

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

APPEAL by defendant Jack Franklin from *Sharp*, Special Judge, March Criminal Term, 1958, of BUNCOMBE.

Criminal prosecution on bill of indictment containing two counts, (1) forgery of a check, and (2) uttering a forged check, violations of G.S. 14-119, and G.S. 14-120. Both counts relate to a check for $16.00.

The State offered plenary evidence tending to show that the signature, purporting to be that of the maker, was a forgery, and that Frank Thomas Keith, the payee, endorsed the check and cashed it at the bank on which it was drawn. The State's contention, as to appellant, was that he forged the name of the purported maker and delivered the check to Keith to be cashed.

Verdict: Guilty on both counts.

Judgment: On first count, a prison sentence of not less than five nor more than seven years; and on second count, a prison sentence of not less than five nor more than seven years, the sentence on second count to commence on expiration of sentence on first count.

Defendant Jack Franklin excepted and appealed, assigning errors.

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

John C. Cheesborough for defendant, appellant.

BOBBITT, J. Appellant is the only person charged in the bill of indictment appearing in the record; and the agreed case on appeal states that "defendant Jack Franklin and codefendant Frank Thomas Keith were charged, upon a bill of indictment, as appears in the record, . . ." As to Keith, no indictment appears in the record. However, counsel for appellant, with commendable candor, stated on oral argument that Frank Thomas Keith was indicted in a separate bill containing identical charges and that, each defendant having pleaded not guilty, the cases were consolidated and tried together.

In *S. v. Kerley,* 246 N.C. 157, 161, 97 S.E. 2d 876, the applicable rule is stated as follows: "Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when,* the trial judge instructs the jury that the confession so offered is admitted as evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s). *S. v. Bennett,* 237 N.C. 749, 753, 76 S.E. 2d 42, and cases cited. While the jury may find it difficult to put out of their minds the portions of such confessions that implicate the codefendant(s), this is the best the court can do; for such confession is clearly competent against the defendant who made it."

This occurred, according to the record, during the direct examination of Officer Holland:

"Q What did he (Keith) say about it? OBJECTION. OVERRULED. EXCEPTION (No. 1) BY DEFENDANT FRANKLIN. A He said that Jack Franklin gave him the check and told him to go get it cashed. Q Did he tell you who had written the check? OBJECTION. OVERRULED. EXCEPTION (No. 2) BY DEFENDANT FRANKLIN. A He said that Jack Franklin wrote the check at his home — at Keith's home." On cross-examination, Holland testified that Franklin was not present when Keith made these statements. Thereupon, Franklin's counsel moved that all of this evidence be stricken out as to Franklin. According to the record, the court's only response to the motion was: "COURT: There is nothing in the record as to Jack Franklin." Exception (No. 3) was taken to the court's failure to instruct the jury not to consider Holland's testimony as evidence against Franklin.

This occurred, according to the record, during direct examination of Officer Moffitt: "Q What, if anything, did Keith tell you? OBJECTION BY DEFENDANT FRANKLIN. SOLICITOR: That is as to Keith, admitted only as to Keith. A Keith said that Jack Franklin was sitting in their kitchen, that is in Keith's kitchen, and wrote this check for $16.00, and he took it to the First National Bank in West Asheville and had it cashed. OBJECTION. OVERRULED. EXCEPTION (No. 4) BY DEFENDANT FRANKLIN." (Note: There is no contention that Franklin was present when Keith made these statements.)

While the comments by the court and solicitor raise serious questions as to whether the record accurately reflects the court's rulings, the quoted excerpts from the record require the interpretation that Franklin's objections were overruled; and, according to the record, no instruction was given when this evidence was received or at any time during the reception of evidence to the effect that it was not admitted as to Franklin but was for consideration only as against Keith.

Patently the testimony of the officers *as to what Keith told them* concerning Franklin's actions and statements, was wholly incompetent as to Franklin; and Franklin's objections to this testimony should have been sustained. *S. v. Green*, 193 N.C. 302, 136 S.E. 729. The prejudicial impact of this testimony on Franklin's case is apparent. (Note: Neither Keith nor Franklin testified at the trial.)

The State contends that, since this testimony was competent against Keith, appellant's general objection is insufficient to support his exception. This contention is based on the portion of Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558, which reads: ". . . nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks,

at the time of admission, that its purpose shall be restricted."

We are constrained to hold that the quoted rule refers to a factual situation where the evidence is competent for some purpose, but not for all, *against the objecting defendant,* e.g., for the purpose of corroborating or contradicting the testimony of a witness. It was so applied in *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284; *S. v. Sutton,* 225 N.C. 332, 34 S.E. 2d 195; *S. v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863, cited by the State, and in numerous other cases. It has no application when, as in this case, the evidence is not competent for any purpose against the objecting defendant.

Frankness compels the admission that *S. v. Casey,* 212 N.C. 352, 193 S.E. 411, cited by the State, supports the State's contention. It is noted that *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557, the only case cited in *S. v. Casey, supra,* to support the ruling, involved a single defendant against whom the evidence in question was competent for the purpose of impeaching the defendant's testimony. No reference was made to *S. v. Green, supra,* where it was held that testimony as to statements made by his codefendant should, upon general objection, have been excluded as against appellant. In *S. v. Green, supra,* the State made, and the court rejected, the contention that appellant's general objection did not afford a sufficient basis for appellant's exception to the admission of evidence wholly incompetent as to him. On the particular point now considered, the rule adopted by this Court is in conformity with *S. v. Green, supra;* and *S. v. Casey, supra,* to the extent in conflict with *S. v. Green, supra,* and the present decision, is overruled.

Even so, the State contends that the error, if any, was cured by the instruction given in the charge. It appears that, after reviewing the testimony, including that of Officer Holland relating to what Keith had told him, the court, towards the end of the charge, gave this instruction: "Now, members of the jury, in considering the guilt or innocence of the defendant Franklin, you will not consider as against Franklin any statements made by the defendant Keith to the officers. Now, any statements which Keith made to the officers, you may consider as against the defendant Keith, but in passing upon the guilt or innocence of Franklin, you will consider only the evidence tending to show the statements which he made to Officer Moffitt himself." (Note: While Moffitt's testimony tended to show that Franklin had made incriminating statements, the prejudicial effect thereof fell far short of the prejudicial effect of the statements which, according to the officers, were made by Keith.)

If Franklin's objections had been sustained, this instruction would be entirely correct; but the record, which imports verity, confronts

us with the fact that Franklin's objections had been overruled and the testimony admitted without limitation or restriction.

It is quite plain that the learned trial judge was well aware that the officers' testimony as to what Keith said was wholly incompetent as against Franklin. Presumably, she was under the impression that Franklin's objections thereto had been sustained; but the record, by which we are bound, shows clearly that Franklin's objections had been overruled.

In the quoted instruction, no reference is made to the court's prior rulings on Franklin's objections. In this respect, it differs from a case where an erroneous ruling is subsequently and specifically reversed and the jurors instructed to disabuse their minds of any and all prejudicial impressions lodged by the incompetent evidence. Compare *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. Here the instruction as to the officers' testimony as to what Keith told them and the court's prior rulings on Franklin's objections thereto stand in irreconcilable conflict.

Conflicting instructions in a charge, if material and prejudicial, necessitate a new trial. *Owens v. Kelly,* 240 N.C. 770, 775, 84 S.E. 2d 163, and cases cited. The reasoning underlying these decisions supports equally the proposition that a new trial should be awarded when, in relation to material and prejudicial testimony, an irreconcilable conflict exists between the court's rulings whereby incompetent evidence is admitted and an instruction in the charge appropriate as incident to the sustaining of objections to such incompetent evidence.

If Franklin had been tried separately, the testimony of the officers as to what Keith said would not, under the rule then applicable, have come before the jury at all. The evidence, being competent against Keith, came before the jury trying Franklin's case solely because the two cases had been consolidated for trial. The incompetency of this evidence as to Franklin was not altered by the consolidation. He was entitled to have his objections sustained *and* an explicit instruction to the jury that such testimony was not to be considered by the jury in any way in determining the charges against him.

Defendant's assignment of error, directed to the refusal of the court to allow his motion for judgment of nonsuit, is without merit; but, for the reasons stated, defendant is entitled to a new trial

New trial.

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

AUDREY S. ROACH v. PYRAMID LIFE INSURANCE COMPANY.

(Filed 17 September, 1958.)

1. Insurance § 13a—

Where a provision in an insurance policy is susceptible of two interpretations, one imposing liability and the other excluding it upon the facts of the particular case, the provision will be construed against the insurer.

2. Insurance § 38—

Since gasoline in a jet plane is essential to its operation, where a jet plane crashes and insured is struck with gasoline from the plane and fatally injured as a result thereof, the injury results from being struck by a plane within the terms of the policy.

3. Trial § 29—

Where the evidence is not controverted and is sufficient to make out a case, a peremptory instruction that if the jury believes the evidence and finds the facts to be as all the evidence tends to show, to answer the issue in the affirmative, otherwise in the negative, will be upheld.

APPEAL by defendant from *Morris, J.*, January Term 1958, of PERQUIMANS.

This is an action instituted by the plaintiff, the widow of J. Van Roach, as beneficiary in an accident policy issued to him by the defendant.

There is no dispute as to the policy being in force at the time of the accident complained of, or as to the amount involved under the terms of the policy, to wit, $2,250.00. The sole question is whether Mr. Roach's death was caused by an injury within the meaning and intent of the following provisions of the policy: "If such injury shall be sustained * * * (c) by being struck, knocked down or run over by * * * airplane."

The evidence in sum and substance is as follows: Mr. Roach was the head mechanic for the Perquimans County Board of Education in the maintenance of school buses used in Perquimans County, in its garage located on the grounds of the Perquimans County High School near Hertford in said County.

Mr. Roach and his helper, Preston Morgan, were working in the garage on the morning of 21 February 1957. A Navy jet plane hit the ground about 200 yards or more from the school garage, it then bounced about six or seven feet above the ground and remained at that elevation until it crashed into the garage. When it hit the garage it exploded, and fuel and oil in the plane spread over everything and the building burst into flames. Mr. Roach and Mr. Morgan were the only persons in the garage. Mr. Morgan was horribly burned but survived. Mr. Roach, in addition to receiving second and third degree burns over eighty per cent of the area of his body, head and extremities, suffered a cut two or three inches long on the back of his head. The accident occurred about 10:00 o'clock a.m. on 21 February 1957 and Mr. Roach died about nine hours later.

The physician's certificate of death submitted to the defendant described the accident which caused the insured's death as follows: "Jet plane hit garage and exploded, hitting Mr. Roach with burning fuel."

The jury answered the issues in favor of the plaintiff. Judgment was accordingly entered for $2,250.00 with interest. The defendant appeals, assigning error.

John H. Hall for plaintiff, appellee.
Carroll R. Holmes for defendant, appellant.

DENNY, J. The appellant presents two questions for our consideration and determination. (1) Did the court below commit error in refusing to sustain the defendant's motion for judgment as of nonsuit, interposed at the conclusion of plaintiff's evidence and renewed at the close of all the evidence? (2) Did the court err in giving peremptory instruction to the jury?

Whether the court erred in refusing to grant the defendant's motion for judgment as of nonsuit depends upon whether or not the insured's death was the result of an accident covered by the terms of the policy and insured against.

The undisputed facts revealed by this record support the conclusion that the insured's death resulted from being hit or struck with burning fuel from an airplane which exploded when the plane hit the building in which the insured was at work.

It is the general rule that where a provision in a policy of insurance is susceptible of two interpretations, when considered in light of the facts in the case, one imposing liability, the other excluding it, the provision will be construed against the insurer. *Jones v. Casualty Co.*, 140 N.C. 262, 52 S.E. 578; *Manning v. Insurance Co.*, 227 N.C. 251, 41 S.E. 2d 767; *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295.

In the last cited case the defendant issued its policy to protect the plaintiff's cargo against loss or damage while in transit. Among other provisions, the policy insured the plaintiff "against loss or damage directly caused by fire, * * * collision of the conveyance on which the goods are carried * * * , derailment, overturning of trucks or collapse of bridges."

The cargo was packed on plaintiff's truck, with four crates of electric heaters protruding above the top of the truck. While in transit the truck was driven under an overhead concrete bridge and the four topmost crates of heaters were damaged to the extent of $215.48 when they collided with the underside of the bridge.

At the hearing in the trial court, the facts were stipulated and the

court held that the policy in suit did not cover the stipulated damages or loss and dismissed the action. Upon appeal to this Court the defendant relied solely upon the phrase in the policy, to wit, "collision of the conveyance on which the goods are carried," contending that the damage to the cargo was not the result of a collision of the vehicle on which the goods were being transported, hence the loss was not covered by the policy. We reversed and held that on the record submitted judgment should have been entered for the plaintiff. *Stacy, C. J.*, speaking for the Court, said: "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time."

In *Bolich v. Insurance Co.*, 205 N.C. 43, 169 S.E. 826, the policy covered the plaintiff against injury, among other things, from "the burning or explosion of an automobile." The automobile involved had been overheating. Plaintiff drove the car into a garage and requested a mechanic to examine the car and see what was wrong with it. The mechanic filled the radiator with water and got into the car; he stepped on the starter, and the exhaust in the motor blew up. There was a terrific combustion in the motor when the mechanic stepped on the starter, followed by a sudden emission of hot water from the radiator, which struck the plaintiff in the face, about the eyes, and caused bodily injury. The plaintiff recovered a verdict in the trial court and the defendant appealed from the failure of the trial court to sustain its motion for judgment as of nonsuit. Upon appeal, this Court held that the injury was compensable under the provisions of the policy.

In our opinion, since the gasoline in the jet plane was essential to its operation, and the insured was struck with the gasoline from the plane and fatally injured as a result thereof, such injury was within the risks against which the insured was covered by the provisions in his policy, and we so hold. This interpretation, in addition to our own decisions cited herein, finds support in *Barnes v. Great American Insurance Co.*, 60 Ohio App. 114, 19 N.E. 2d 903, *Industrial Casualty Co. v. Alspaugh* (Ind.), 44 N.E. 2d 321, and *Horne v. Life & Casualty Insurance Co. of Tenn.*, 62 Ga. App. 21, 7 S.E. 2d 407.

The facts in the cases cited and relied upon by the appellant are distinguishable from those in the present case.

The second assignment of error is based on the defendant's exception to the following instruction to the jury: "Gentlemen of the jury, I instruct you that if you believe the evidence in this case and all of it and find the facts to be as the evidence and all of it tends to show by its greater weight, the burden being upon the plaintiff to so satisfy you, you would answer this issue 'Yes'; in the second column or second line you would answer '$2,250.00, with interest.' "

In connection with the foregoing instruction, the court added, "Of course, if you do not believe the evidence and do not find the facts to be as the evidence and all of it tends to show by its greater weight, then you would not answer the issue YES, but would answer it NO."

The plaintiff's evidence in this case is not controverted, and where such evidence is sufficient to make out a case, as it is in the present action, a peremptory instruction will be upheld. *Stewart v. Jaggers*, 243 N.C. 166, 90 S.E. 2d 308; *Commercial Solvents, Inc. v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716.

In the trial below we find

No Error.

RICHARD CHARLES BELL v. MISS LUCY LACEY, LARRY CECIL CHRISTOPHER AND VINCENT WALTER CHRISTOPHER.

(Filed 17 September, 1958.)

1. Torts § 6—

Right of contribution between joint tort-feasors who are in *pari delicto* did not exist at common law but is purely statutory and is dependent upon the terms and conditions of the statute. G.S. 1-240.

2. Same—

A party injured as a result of negligence of joint tort-feasors may sue any one of them separately, or any or all of them together.

3. Same: Automobiles §§ 35, 48—

When a party elects to sue one joint tort-feasor but not others, those not joined are not necessary parties and plaintiff cannot be compelled to pursue them, but the original defendant may have them joined under G.S. 1-240 for the purpose of determining liability as between themselves and may file a cross-action against them, even though the plaintiff may be delayed thereby in securing his relief, but the original defendant may not rely upon any liability to plaintiff of an additional defendant he has brought into the action and must recover on his cross-action, if at all, upon the liability of such additional defendant to him.

4. Same—

Where plaintiff sues all joint tort-feasors and states a cause of action against all of them, the defendants may set up as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint, G.S. 1-137, G.S. 1-138, but they may not maintain cross-actions for damages as between themselves which involve affirmative relief not germane to plaintiff's action, even though the counterclaims arise out of the same transactions upon which plaintiff's action is bottomed.

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

APPEAL by the defendants Larry Cecil Christopher and Vincent Walter Christopher from *Craven,* Special Judge, July "A" Term 1958 of BUNCOMBE.

This action was instituted on 18 April 1958 by the plaintiff against Miss Lucy Lacey and the appellants as codefendants, in which the plaintiff is seeking damages for personal injuries from the defendants, as a result of an automobile collision between cars operated by Miss Lacey and the defendant Larry Cecil Christopher, which collision the plaintiff alleges caused the car owned by Vincent Walter Christopher and driven by Larry Cecil Christopher, to be propelled into the car driven by the plaintiff, resulting in damage to the car plaintiff was driving and serious personal injuries to him.

An examination of the record in this case reveals that the plaintiff's car was being driven in an easterly direction on U. S. Highway No. 19, which is a 4-lane highway, in the extreme southern lane thereof; that immediately prior to the collision the Christopher car was being operated in a westerly direction on said highway, in a northern lane thereof, and the Lacey car was being driven in a southerly direction, coming out of a private driveway from the Bennett & Felmet Service Station, located on the north side of U. S. Highway No. 19, in Buncombe County, North Carolina.

The defendant Miss Lacey filed a cross-action for contribution against her co-defendants, as provided in G.S. 1-240.

The appellants filed what is denominated a "reply to the answer of Miss Lucy Lacey," and set up a cross-action and counterclaim, seeking to recover property damages and for personal injuries against their co-defendant Miss Lacey. Miss Lacey moved to strike the cross-action and the counterclaim of her co-defendants, the appellants herein, and the motion was allowed. The defendants Christopher appeal, assigning error.

Harkins, Van Winkle, Walton & Buck for appellee.
Williams & Williams for appellants.

DENNY, J. This appeal presents for determination this question: May one or more of the original defendants in a tort action, growing out of an automobile collision, maintain a cross-action against an original co-defendant for damages arising out of the same collision? According to the decisions of this Court the answer must be in the negative.

At common law, no right of contribution existed between or among joint tort-feasors who were in *pari delicto.* The right is purely statutory with us and its use necessarily depends upon the terms and provisions of the statute. G.S. 1-240; *Potter v. Frosty Morn Meats, Inc.,*

242 N.C. 67, 86 S.E. 2d 780; *Tarkington v. Printing Co.*, 230 N.C. 354, 53 S.E. 2d 269; *Evans v. Johnson*, 225 N.C. 238, 34 S.E. 2d 73; *Wilson v. Massagee*, 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922; *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E. 2d 736, 149 A.L.R. 1183. The purpose and intent of the statute is to permit defendants in tort actions to litigate *mutual contingent liabilities* before they have accrued. *Evans v. Johnson, supra; Lackey v. R.R.*, 219 N.C. 195, 13 S.E. 2d 234; *Mangum v. R.R.*, 210 N.C. 134, 185 S.E. 644. The provision for this procedure was made so that all matters in contriversy growing out of the same subject of action may be settled in one action, *Read v. Roofing Co.*, 234 N.C. 273, 66 S.E. 2d 821; *Evans v. Johnson, supra; Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434, and such procedure is permissable, although a plaintiff in the action may be delayed in securing his remedy. *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397.

When negligence is joint and several, the injured party may elect to sue either of the joint tort-feasors separately, or any or all of them together. *Jones v. Elevator Co.*, 231 N.C. 285, 56 S.E. 2d 684; *Godfrey v. Tidewater Power Co., supra; Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; *Watts v. Lefler*, 194 N.C. 671, 140 S.E. 435; *Raulf v. Light Co.*, 176 N.C. 691, 97 S.E. 236; *Hipp v. Farrell*, 169 N.C. 551, 86 S.E. 570.

When a plaintiff elects to sue one or more joint tort-feasors, but not all of them, the others are not necessary parties and plaintiff cannot be compelled to pursue them. *Denny v. Coleman*, 245 N.C. 90, 95 S.E. 2d 352. Nor can an original defendant in such action use G.S. 1-240 to compel plaintiff to join issue with a defendant he has not elected to sue. In such case, if an original defendant avails himself of the provisions of the statute for contribution, he cannot rely upon any liability of the party he has brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. *Charnock v. Taylor, supra.*

This Court has uniformly held that where all the joint tort-feasors are brought in by a plaintiff and a cause of action is stated against all of them, such defendants under our statutes, G.S. 1-137 and G.S. 1-138, are permitted to set up in their respective answers as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint. However, they are not allowed to set up and maintain cross-actions as between themselves which involve affirmative relief not germane to the plaintiff's action. *Wrenn v. Graham*, 236 N.C. 719, 74 S.E. 2d 232. This is so, notwithstanding the fact that the defendants' claim for damages may have arisen out of the same set of circumstances upon which the plaintiff's action is bottomed.

The cross-action sought to be maintained by the appellants herein is not germane to the plaintiff's cause of action, and in no aspect is it essential to a complete determination of the plaintiff's cause of action.

In Montgomery v. Blades, supra, Devin, J. (later C.J.), in speaking for the Court, said: "The general rule seems to have been established by the decisions of this Court that one defendant, jointly sued with others, may not be permitted to set up in the answer a cross-action not germane to the plaintiff's action. 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 the plaintiff has instituted. In order that a cross-action between defendants may be properly considered as a part of the main action, it must be founded upon and connected with the subject matter in litigation between the plaintiff and the defendants (citing numerous authorities).

"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 questions of primary and secondary liability between joint tort-feasors, but it may not be understood to authorize the consideration of cross-actions between defendants as to matters not connected with the subject of the plaintiff's action."

The decision in *Montgomery v. Blades, supra,* with respect to cross-actions, has been upheld and cited with approval in many cases, among them being, *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555; *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655, 170 A.L.R. 147; *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734; *Fleming v. Light Co.,* 229 N.C. 397, 50 S.E. 2d 45; *Clothing Store v. Ellis Stone Co.,* 233 N.C. 126, 63 S.E. 2d 118; *Wrenn v. Graham, supra; White v. Keller,* 242 N.C. 97, 86 S.E. 2d 795; *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398; *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252.

On the other hand, where the plaintiff does not bring his action against all the joint tort-feasors, and an original defendant sets up a cross-action against a third party and has him brought in as an additional party defendant, under the provisions of G.S. 1-240, for contribution, such original defendant makes himself a plaintiff as to the additional party defendant. *Wrenn v. Graham, supra.*

Ordinarily, such additional party defendant has no cause of action stated against him except that asserted in the cross-action and set out in the cross-complaint. Hence, the additional party defendant is under no obligation to answer any allegations in the original com-

plaint, but only those alleged against him in the cross-complaint. Consequently, in answering such cross-complaint, the statutes give him the right to set up his defenses or to assert a counterclaim for affirmative relief against his co-defendant who filed the cross-complaint against him. The plaintiff in such an action runs the risk of having this method of procedure used whenever he elects to sue less than all the joint tort-feasors involved in the alleged tortuous act. *Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773; *Grant v. McGraw*, 228 N.C. 745, 46 S.E. 2d 849; *Powell v. Smith*, 216 N.C. 242, 4 S.E. 2d 524. Cf. *Morgan v. Brooks*, 241 N.C. 527, 85 S.E. 2d 869.

The ruling of the court below, striking out the appellants' cross-action, must be upheld. Even so, they may institute an independent action against their co-defendant, Miss Lacey, if so advised.

Affirmed.

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

MAURICE McCRATER, EMPLOYEE, *v.* STONE & WEBSTER ENGINEERING CORPORATION, EMPLOYER, AND ROYAL INDEMNITY COMPANY, CARRIER.

(Filed 17 September, 1958.)

1. Master and Servant § 43—

The requirement of the Workmen's Compensation Act that claim for injury compensable thereunder should be filed within one year of the accident, G.S. 97-24, is a condition annexed to and forming a part of the right to maintain a claim for compensation and not a statute of limitations, and therefore an amendment enlarging the time, Chapter 1026, Sec. 12, Session Laws of 1955, is not applicable to claims existent at the time of the enactment of the amendment.

2. Limitation of Actions § 3—

While amendments enlarging a statutory period of limitation are applicable to all causes of action not barred at the time of the enactment of the amendment, as to statutes prescribing a time limit annexed to and forming a part of the right to maintain an action or proceeding, an amendment enlarging the time can apply only to rights of action or claims arising after the enactment of the amendment.

APPEAL by plaintiff from *Paul, J.*, at 12 December, 1957, Civil Term, of HALIFAX.

Everett, Everett & Everett for plaintiff, appellant.

Smith, Moore, Smith, Schell & Hunter, and Stephen Milliken for defendants, appellees.

JOHNSON, J. This is a proceeding under the Workmen's Compensation Act to determine the liability, if any, of defendants on a claim filed by Maurice McCrater.

The plaintiff sustained a compensable injury on 7 April, 1955. At that time G.S. 97-24 provided:

"(a) The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident. . . ."

G.S. 97-24 was amended by Ch. 1026, Sec. 12, S. L. of 1955, whereby the time for filing claim was extended to two years. The amendatory act, ratified 17 May, 1955, became effective 1 July, 1955.

The plaintiff filed claim 30 July, 1956, which was more than one year but less than two years after the date of his injury. Thus the crucial question before the Industrial Commission was whether the 1955 amendment had the effect of extending to two years the time within which the plaintiff had the right to file claim. The Commission concluded that the amendatory act may not be given retroactive effect, and that therefore the one-year statute in effect at the time of the injury applies and has the effect of defeating the plaintiff's claim. From this ruling the plaintiff appealed to the Superior Court. There the decision of the Commission was affirmed. From judgment so decreeing, the plaintiff appeals to this Court.

The requirement that claim be filed within the time limited by G.S. 97-24 has been construed by this Court to be a condition annexed to and forming a part of the right to maintain a claim for compensation, and not a statute of limitations. *Winslow v. Carolina Conference Association*, 211 N.C. 571, 191 S.E. 403; *Lineberry v. Mebane*, 218 N.C. 737, 12 S.E. 2d 252.

It is noteworthy that the construction placed on the time limitation in the Workmen's Compensation statute (G.S. 97-24) harmonizes with this Court's construction of the time limitation in our wrongful death statute, G.S. 28-173, as it was written prior to the amendatory act of 1951, Ch. 246, Sec. 1, S. L. of 1951, now codified as G.S. 28-173 (rewritten); and Ch. 246, Sec. 2, S. L. of 1951, now codified as G.S. 1-53(4). Up to the time of these amendments, the Court had consistently held that the time limitation in the statute was not a statute of limitations, but rather a condition precedent to maintenance of an action. *Colyar v. Motor Lines*, 231 N.C. 318, 56 S.E. 2d 647, and cases therein cited. The effect of the amendments of 1951 was to remove from the wrongful death act the time limitation and make the act subject to the statute of limitations of two years, G.S. 1-53(4).

The distinction between a time limitation being a substantive right or a matter of procedure is discussed in 34 Am. Jur., Limitation of Actions, Section 7, as follows:

"A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."

See also this discussion of principles in 58 Am. Jur., Workmen's Compensation, Section 33:

"In harmony with the established principle that legislative enactments, in the absence of a clearly expressed intent to the contrary, will be deemed to be prospective, and not retrospective, workmen's compensation acts have been held not to apply to injuries which occurred before the law went into effect. On the same principle it is held that an amendment of the statute in respect of a matter of substantive right does not apply to existing injuries, . . ."

To like effect is the following statement of principles taken from the annotation in 82 A.L.R. 1244:

"As regards an injured employee, the time to be considered in determining whether a case is within the earlier or later provisions of the workmen's compensation act in relation to the compensation recoverable is the time of the injury. The right of the employee to compensation arises from the contractual relation between him and his employer existing at that time, and the statute then in force forms a part of the contract of employment and determines the substantive rights and obligations of the parties. No subsequent amendment in relation to the compensation recoverable can operate retrospectively to affect in any way the rights and obligations prior thereto fixed."

And so it is, under application of the principles discussed and applied in *Winslow v. Carolina Conference Association, supra* and *Lineberry v. Mebane, supra,* that the plaintiff's inchoate right to compensation arose by operation of law on the date of the accident. But his substantive right to compensation was not fixed by the simple fact of injury arising out of and in the course of his employment. The requirement of filing claim within the time limited by G.S. 97-24 was a condition precedent to his right to compensation. Necessarily, then, the element of filing claim within the time limited by the statute was of the very essence of the plaintiff's right to recover compensation. This time limit as fixed by the statute as it existed on the date of the accident, being a part of the plaintiff's substantive right of

recovery, could not be enlarged by subsequent statute. Any attempt to do so would be to deprive the defendants of vested rights.

The plaintiff cites and relies upon a line of decisions of this Court of which these are illustrative: *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E. 2d 263, and *Alpha Mills v. Engine Co.*, 116 N.C. 797, 21 S.E. 917. The cited cases stand for the proposition that where statutes prescribing time limitations within which particular rights may be enforced relate to remedies only, and not to substantive rights, ordinarily the legislature has the power to enlarge the time necessary to constitute the bar of limitation, and to make it applicable to existing causes of action, provided such change is made before the cause of action is barred under the pre-existing statute of limitations. In the decisions relied on by the plaintiff the Court was dealing with pure statutes of limitations and amendments thereto which did not act on the substantive rights of the parties, but only affected the remedies. In such cases it is well settled that the time within which an action may be brought may be enlarged as to pending causes not barred, and that such legislation is not deemed retroactive and does not impair vested rights. 34 Am. Jur., Limitation of Actions, Sec. 29. But the foregoing principle does not fit this case. Here, as we have seen, compliance with the time limitation fixed by G.S. 97-24 has been construed by this Court as a condition precedent to the right to recover compensation. It is an inseparable part of the plaintiff's substantive right of action. *Winslow v. Carolina Conference Association, supra.*

The *Winslow* case also distinguishes the workmen's compensation cases cited by the plaintiff from other jurisdictions. In practically all the cited cases the courts in construing statutes which fixed the time limitation for filing claim construed the statutes as regular statutes of limitations rather than as conditions precedent to the right to compensation. These decisions, being squarely at variance with our decisions in *Winslow v. Carolina Conference Association, supra,* and *Lineberry v. Mebane, supra,* are unauthoritative.

The judgment below is

Affirmed.

CLYDE O'NEAL GILLIKIN, BY HIS NEXT FRIEND, LOLA GILLIKIN, v. RICHARD GILLIKIN.

(Filed 17 September, 1958.)

1. Pleadings § 7½—

A plea in bar is one which denies plaintiff's right to maintain the action and, if established, will destroy that action, and ordinarily it

is for the trial judge to determine in its discretion whether in the circumstances of the particular case a plea in bar should be disposed of prior to trial on the merits.

2. Compromise and Settlement: Judgments § 32—

Whether a plea in bar is based upon a compromise and settlement or upon the doctrine of *res judicata*, the burden of establishing such plea is upon defendant, and defendant must establish all facts necessary to support the plea.

3. Same—

In this action instituted by a minor by his next friend, defendant set up as a plea in bar a consummated compromise and settlement pursuant to judgment entered in an *ex parte* proceeding. Defendant, without offering any evidence, moved to dismiss. *Held:* Judgment dismissing the action upon the plea in bar without evidence or findings of fact as to whether the settlement had been consummated by the payment of the sum stipulated, is erroneous, and the question of whether the judgment in the *ex parte* proceeding can be attacked collaterally by plaintiff is not presented.

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

APPEAL by plaintiff from *Parker, J.*, June Term, 1958, of CARTERET.

Plaintiff, by next friend, instituted this action on January 21, 1956, to recover damages for personal injuries sustained April 18, 1954, when plaintiff was 17 years old, allegedly caused by the negligence of defendant.

By answer, defendant denied negligence and pleaded plantiff's contributory negligence; and, *as a plea in bar,* alleged that all matters in controversy had been compromised and settled by defendant's payment of $7,000.00, which had been authorized and directed by a judgment of January 27, 1955, signed and entered by the resident superior court judge of the district.

By reply, plaintiff denied defendant's allegations as to the alleged compromise and settlement; and, as to the proceeding in which the purported judgment of January 27, 1955, was entered, plaintiff alleged (1) that the petition therein was filed without his knowledge or consent, and, *as he was advised and believed,* without the knowledge, consent or acquiescence of his next friend, Lola Gillikin, and (2) that the proceeding was instituted contrary to the course and practice of the courts, that it did not vest the court with jurisdiction over the plaintiff or subject matter, and that all orders and decrees entered therein, however designated, were void. (Note: The reply was verified by Lola Gillikin.)

When the case was called for trial, "defendant moved to dismiss the action for that the plaintiff is estopped by the judgment entered under date of the 27th day of January 1955, by A. H. James, Clerk,

Superior Court of Carteret County, approved by his Honor, J. Paul Frizzelle, Resident Judge, Fifth Judicial District, in a proceeding entitled, 'In the Matter of Clyde O'Neal Gillikin, by his Next Friend, Lola Gillikin.' "

After examining the original papers comprising the proceeding in which the judgment of January 27, 1955, was entered, the court, "being of the opinion and so finding that this action was an attempt to collaterally attack said judgment of January 27, 1955," entered judgment allowing defendant's said motion and dismissing the action. Plaintiff excepted and appealed.

Jones, Reed & Griffin for plaintiff, appellant.
R. E. Whitehurst and C. R. Wheatly, Jr., for defendant, appellee.

BOBBITT, J. "A plea in bar is one that denies the plaintiff's right to maintain the action, and which, if established, will destroy the action." McIntosh, N. C. Practice and Procedure, Sec. 523; *Bank v. Evans,* 191 N.C. 535, 132 S.E. 563.

If the alleged compromise and settlement is established, plaintiff's action is barred; but, it should be noted, defendant pleads in bar a *consummated* compromise and settlement.

Ordinarily, it is for the trial judge, in the exercise of his discretion, to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits of plaintiff's alleged cause of action. *McAuley v. Sloan,* 173 N.C. 80, 91 S.E. 701; *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419; *Bright v. Hood, Comr. of Banks,* 214 N.C. 410, 419, 199 S.E. 630.

The only question now presented for decision is whether the judgment of dismissal was warranted by what appears on the face of the proceeding in which the judgment of January 27, 1955, was entered.

Oates v. Texas Co., 203 N.C. 474, 166 S.E. 317, and cases therein cited, to which appellee calls attention, relate to compromise judgments entered in settlement of a minor's pending civil action. In such case, the court adjudges that the party plaintiff recover a specified amount from the party defendant.

Unlike *Oates v. Texas Co., supra,* and similar cases, the judgment of January 27, 1955, was not entered in a civil action, that is, "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right" or for "the redress or prevention of a wrong." G.S. 1-2; G.S. 1-6. It was entered in an *ex parte* special proceeding. G.S. 1-3. Defendant was not a party thereto. The judgment of January 27, 1955, does not purport to be a judgment against defendant.

In his petition in the special proceeding, petitioner set forth reasons

why "it would be well for him to accept the proposed settlement," and prayed "that judgment enter authorizing settlement of his claim on the basis of $7,000 over-all payment." The judgment of January 27, 1955, purports to confer authority for the proposed settlement. But, until it is first established that a compromise and settlement has been consummated in accordance with the provisions of the judgment of January 27, 1955, we do not reach questions relating to the validity of the judgment or to the legal procedure by which it may be attacked.

It follows that the judgment, standing alone, whatever its validity and however it may be attacked, does not constitute an estoppel. To establish his plea in bar, defendant must show a legally authorized and consummated compromise and settlement. Defendant's plea in bar, whether considered as a plea of estoppel by compromise and settlement, *Winkler v. Amusement Co.*, 238 N.C. 589, 598, 79 S.E. 2d 185, or as a plea of *res judicata*, *Reid v. Holden*, 242 N.C. 408, 411, 88 S.E. 2d 125, or a combination of both, is an affirmative defense. Hence, it is incumbent upon defendant to establish all facts necessary to support such plea.

True, defendant *alleged* that, subsequent to the entry of the judgment, he paid $7,000.00 into the office of the clerk of the superior court. But, in the hearing on defendant's motion to dismiss, defendant offered no evidence. Moreover, the record contains no stipulation or admission relating to what, if anything, transpired in relation to the consummation of the alleged compromise and settlement; and the court, in the judgment dismissing the action, made no findings of fact relative to these material matters.

It is noted that the special proceeding contains a supplemental order, bearing the same date as the judgment, providing for the payment of various items "from the aforesaid compromise settlement of $7,000 set out in the Judgment in this cause." Neither the judgment nor the supplemental order specifies who is to pay or who is to receive the said $7,000.00. The supplemental order does provide that, after the specified disbursements have been made, the balance is to be deposited in the office of the clerk "to the credit and for the use and benefit of the infant, Clyde O'Neal Gillikin, until such time as guardian may be appointed to take over said funds and otherwise represent the interest of the ward as by law provided and under statutes controlling."

Upon the present record, no decision is made or opinion expressed as to the validity of the judgment of January 27, 1955, or as to the legal procedure by which it may be attacked.

Upon the facts then before the court as disclosed by the record

before us, the judgment dismissing plaintiff's action was erroneous and should be vacated. It is so ordered.

Error and remanded.

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

MELROSE CONNER v. MARY CONNER RIDLEY, EXECUTRIX OF THE ESTATE OF MRS. LILLIE CONNER.

(Filed 17 September, 1958.)

1. Trusts § 2a—

A grantor may not engraft a trust upon his deed in fee simple by parol agreement entered into at the time of or prior to the execution of his deed.

2. Same: Deeds § 4: Frauds, Statute of, § 9—

The rule that the recited consideration in a deed is not contractual and may be rebutted by parol, cannot be extended to permit the conveyance or reservation of real property by parol.

3. Same—

The grantor may not show that his deed in fee simple absolute was made in consideration of grantee's promise not to dispose of the land or any part thereof by deed or by will so as to deprive grantor of his right of inheritance, since the effect of such parol agreement would be to limit the fee simple deed to a conveyance of only the beneficial or equitable title for life, with reservation of the remainder in grantor, or conveyance of the remainder to grantee as trustee for her children, in contradiction of the express provisions of the deed.

APPEAL by plaintiff from *Farthing, J.*, January Term, 1958, of RUTHERFORD.

Civil action wherein plaintiff seeks to recover $1,000.00 as damages for alleged breach of contract.

Plaintiff is one of the thirteen children of J. A. Conner and wife, Mrs. Lillie Conner. J. A. Conner, owning lands in Rutherford County, died intestate in 1936. In 1938, incident to a division of said lands, the children of J. A. Conner and their spouses, including plaintiff and his wife, executed and delivered a deed to Mrs. Lillie Conner whereby, for a recited consideration of "$10.00 and other valuable considerations," they conveyed to Mrs. Lillie Conner *in fee simple* a tract of 259.25 acres.

Mrs. Lillie Conner died June 8, 1956, "leaving a last will and testament, which has been adjudicated as such by the Superior Court of Rutherford County." It was stipulated that plaintiff is not a beneficiary under said will.

Plaintiff alleged that his mother, by executing said last will and testament, breached her contract with plaintiff, which contract, as alleged by plaintiff, was as follows:

"8. That . . . defendant's testate . . . contracted and agreed with the plaintiff that if he would sign and execute said deed of conveyance she would not convey said property or any part thereof by will or other conveyance during her lifetime, but would leave the same for division between plaintiff and his said brothers and sisters upon her death.

"9. That the plaintiff relied upon said contract and agreement on the part of the defendant's testate as herein alleged and signed and executed said deed on said express condition that defendant's testate would carry out said contract and agreement and otherwise plaintiff would not have signed and executed said deed of conveyance."

Testimony offered by plaintiff, tending to show that Mrs. Lillie Conner, prior to the execution and delivery of said deed, had agreed orally as alleged in the complaint, was excluded.

The admitted evidence related to the reasonable market value of the 259.25 acres on June 8, 1956, the date of Mrs. Lillie Conner's death.

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed, assigning errors.

Don C. Young for plaintiff, appellant.
Hamrick & Jones for defendant, appellee.

BOBBITT, J. We pass, without discussion or decision, appellee's contention that the excluded evidence was insufficient to support a finding that Mrs. Lillie Conner made an oral agreement with plaintiff as alleged; for, in our view, the testimony tending to show such oral agreement, being in direct conflict with plaintiff's deed, is incompetent.

A well established rule is stated by *Hoke, J.* (later C. J.), in this oft-quoted excerpt from his opinion in the case of *Gaylord v. Gaylord*, 150 N.C. 222, 227, 63 S.E. 1028: "Upon the creation of these estates (parol trusts), however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake or undue influence, a parol trust, *to arise by reason of the contract or agreement of the parties thereto*, will not be set up or engrafted *in favor of the grantor* upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass." (Italics added)

In *Loftin v. Kornegay*, 225 N.C. 490, 35 S.E. 2d 607, *Denny, J.*,

says: "A parol agreement in favor of a grantor, entered into at the time of or prior to the execution of a deed, and at variance with the written conveyance, is unenforceable in the absence of fraud, mistake or undue influence. (Citations) To permit the enforcement of such an agreement would be tantamount to engrafting a parol trust in favor of a grantor upon his deed, which purports to convey the absolute fee simple title to the grantee. A parol trust in favor of a grantor cannot be engrafted upon such a deed. (Citations)" Later cases in accord: *Vincent v. Corbett,* 244 N.C. 469, 94 S.E. 2d 329; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138; *Jones v. Brinson,* 231 N.C. 63, 55 S.E. 2d 808; *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48; *Poston v. Bowen,* 228 N.C. 202, 44 S.E. 2d 881.

Plaintiff's contention that the excluded evidence was competent as tending to show the true consideration for the execution of his deed is untenable. The applicable rule is stated by *Devin, J.* (later C. J.), in *Westmoreland v. Lowe,* 225 N.C. 553, 35 S.E. 2d 613, as follows: "While it frequently has been said that the recital of consideration in a deed is not contractual and like other receipts is *prima facie* only of payment, and may be rebutted by parol, *Barbee v. Barbee,* 108 N.C. 581, 13 S.E. 215; *Smith v. Arthur,* 110 N.C. 400, 15 S.E. 197; *Pate v. Gaitley,* 183 N.C. 262, 111 S.E. 339; *Bank v. Lewis,* 201 N.C. 148, 159 S.E. 312, this rule may not be extended to authorize the admission of parol evidence to contradict or modify the terms of a deed, or to permit the conveyance or reservation of real property by parol. *Campbell v. Sigmon,* 170 N.C. 348, 87 S.E. 116; *Price v. Harrington,* 171 N.C. 132, 87 S.E. 986; *Walters v. Walters,* 172 N.C. 328, 90 S.E. 304; *Whedbee v. Ruffin,* 189 N.C. 257, 126 S.E. 616."

Here the alleged oral agreement purports to modify and contradict the crucial contractual provisions of the deed, namely, the provisions whereby the plaintiff conveyed his interest in the 259.25 acres to Mrs. Lillie Conner in fee simple. The alleged oral agreement, by placing an absolute restriction upon Mrs. Conner's right to dispose of this land or any part thereof by deed or by will, is wholly inconsistent with fee simple ownership. The gist of the alleged oral agreement is that, in contradiction of the express provisions of the deed, the only beneficial or equitable title acquired by Mrs. Conner was a life estate, and that the remainder in fee was reserved by the grantors or that the legal title to such remainder vested in Mrs. Lillie Conner solely as trustee for her children.

Plaintiff, by his deed, having conveyed his interest in the land to Mrs. Lillie Conner in fee simple, cannot recover on an oral agreement to the effect that he did not do so.

In view of the stated basis of decision, we do not reach the question as to whether, under other factual situations, the statute of frauds,

G.S. 22-2, is applicable to an agreement not to deprive a person, by will or otherwise, of the portion of the promissor's estate or of the interest in a specific tract of land to which he would be entitled as heir.

Affirmed.

JAMES E. CURTIS v. WHITE CADILLAC-OLDS, INC.

(Filed 17 September, 1958.)

1. Contracts § 21—

Allegations and evidence to the effect that plaintiff delivered his old car to defendant dealer and received a credit memorandum to be applied on a new car to be delivered by defendant about February, that plaintiff waited until June, and upon failure of defendant to deliver the new car demanded payment of the credit memorandum, which defendant refused, tend to establish a contract, breach by failure to perform, and the right of plaintiff to rescind, entitling plaintiff to recover his consideration or its value, but no special damage, no special damage having been alleged.

2. Trial § 22b—

Upon motion to nonsuit, defendant's evidence at variance with or in contradiction of plaintiff's evidence will not be considered.

3. Contracts § 26—

Where plaintiff's allegations and evidence establish his right to rescind a contract for breach by defendant, evidence as to the value of the chose given defendant as consideration is competent, plaintiff being entitled to recover his consideration or its value.

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

Plaintiff's appeal from *Stevens, J.*, May, 1958 Term, PASQUOTANK Superior Court.

Civil action to recover $1,416.53, "or some other large amount," the value of plaintiff's equity in a 1955 Cadillac delivered to the defendant as a down payment on a new model, of a designated body type and color combination. The defendant gave the plaintiff a credit memorandum for the above amount to be applied on the new car "to be delivered around February, 1957."

The plaintiff offered evidence tending to show he waited for the new Cadillac until June, 1957 and upon failure of the defendant to deliver it, he demanded payment of the credit memorandum. This demand the defendant refused, except at a discount of $500.00. In the meantime, the plaintiff purchased another automobile. He brought this action upon the ground the defendant had failed to perform the contract and by retaining his old car it had become unjustly enriched at his expense in the amount of the credit memorandum or some other large amount. He offered evidence of the reasonable market value of

the old car at the time it was delivered to the defendant. This the court excluded.

The defendant, by answer, admitted the contract substantially as contended by the plaintiff, but alleged the failure to carry it out was entirely the plaintiff's fault; that the credit memorandum was for an amount greatly in excess of the actual value of the old car and was intended only as a trade-in allowance on the new one; that the defendant has been, and is now, willing to allow plaintiff or his assignee the full amount of the memorandum on a new 1957, or even a new 1958 Cadillac.

At the conclusion of all the evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed, assigning as error (1) the exclusion of evidence of the value of his car, and (2) the entry of judgment of compulsory nonsuit.

M. B. Simpson for plaintiff, appellant.

LeRoy & Goodwin, W. C. Morse, Jr., for defendant, appellee.

HIGGINS, J. The plaintiff alleged and offered evidence tending to show (1) a contract, (2) a breach by failure to perform, (3) the right of the plaintiff to rescind. *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210. In such event the plaintiff is entitled to recover his consideration or its value. *Brannon v. Wood,* 239 N.C. 112, 79 S.E. 2d 256. Under his pleadings he can only recover the consideration paid or its value, not having alleged other damages. *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592.

In passing on the allegations and evidence on the question of nonsuit, we do not consider defendant's side of the case for reasons fully stated by Justice Walker in the case of *Carter v. Carter,* 182 N.C. 186, 108 S.E. 2d 765: "We may add that when the allegations in the case are threshed out it may finally appear that the plaintiff's allegations are not sustained, and that she is rightly not entitled to any return, either legal or equitable. But as there was a peremptory dismissal of the case, we are not dealing with the actual facts, but with the plaintiff's allegations in her complaint."

In this case the plaintiff's allegations state a cause of action which the evidence offered tends to support. The evidence excluded was pertinent to the inquiry. The judgment of nonsuit entered in the court below is

Reversed.

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

COY SMITH v. ROCHESTER AMERICAN INSURANCE COMPANY.

TOPPING *v.* BOARD OF EDUCATION.

(Filed 17 September, 1958.)

Insurance § 19c—

The policy in suit covered loss by fire of tobacco, the property of others, while in the custody of insured warehouseman. Tobacco purchased by plaintiff at a regular sale for resale was destroyed by fire while on the warehouse floor. *Held:* The policy does not permit the technical construction that it covered tobacco held for sale but not for resale, and plaintiff is entitled to recover.

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

APPEAL by defendant from *Parker, J.*, February, 1958 Term, PITT Superior Court.

Civil action to recover on an insurance policy issued by the defendant to the Dixie Warehouse to cover loss by fire "on leaf, loose, scrap and stem tobacco, the property of others, while in the custody of the insured for auction and until sold at auction." The policy required the insured to keep records and to report all sales and resales. The premium was based on the gross receipts.

The evidence disclosed the plaintiff, a "pin hooker," purchased 1,500 pounds of leaf tobacco at a regular sale on October 20, 1956. He left the tobacco on the floor of the insured, intending to re-work it and resell it at the next regular auction on Monday, October 23. However, on the night of the 20th the warehouse and its contents burned.

The defendant moved for nonsuit on the ground the insurance covered the tobacco held for sale, but not for resale. The Judge, sitting as a small claims court, found appropriate issues for the plaintiff and rendered judgment for the value of the tobacco. The defendant appealed.

James & Speight for defendant, appellant.

M. E. Cavendish, L. W. Gaylord, Jr., for plaintiff, appellee.

PER CURIAM. The purpose of insurance is to insure. The language of the policy here involved does not require and does not permit the narrow and technical construction contended for by the defendant. The evidence was sufficient to warrant the Judge in finding the issues and rendering judgment for the plaintiff.

Affirmed.

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

EARL TOPPING v. HYDE COUNTY BOARD OF EDUCATION, CONSISTING OF GRATZ SPENCER, CHAIRMAN, WALTER LEE GIBBS AND CRAWFORD CAHOON, MEMBERS, AND TOMMIE GAYLORD, SECRETARY OF

THE SAID BOARD AND SUPERINTENDENT OF PUBLIC INSTRUCTION OF HYDE COUNTY.

(Filed 17 September, 1958.)

Appeal and Error § 6—

Where, pending appeal, the act which plaintiff sought to restrain has been done, the appeal from the denial of a temporary restraining order becomes academic, and the appeal will be dismissed.

APPEAL by plaintiff from *Paul*, Resident Judge of the Second Judicial District, in chambers at Washington, North Carolina, on 24 March 1958. From HYDE.

Civil action by plaintiff, a resident freeholder and taxpayer of Hyde County, to restrain the Hyde County Board of Education, its members, and Tommie Gaylord, Secretary of the Hyde County Board of Education and Superintendent of Public Instruction of the County, from entering into a contract for the erection of a consolidated High School building to be known as the Mattamuskeet High School, heard upon an order to appear and show cause why a temporary restraining order should not be issued.

After hearing the evidence Judge Paul denied plaintiff's motion for a temporary restraining order, and the plaintiff appeals.

LeRoy Scott for plaintiff, appellant.
O. L. Williams for defendants, appellees.

PER CURIAM. During the argument before us counsel for plaintiff and defendants admitted that pending the appeal the defendants have already entered into the contract, which the plaintiff seeks to enjoin. Since the contract has been made, a court cannot restrain the making of it. The question whether Judge Paul should have enjoined the making of the contract is now academic. Therefore, in accord with many decisions of this Court, the appeal will be dismissed. *Efird v. Comrs. of Forsyth*, 217 N.C. 691, 9 S.E. 2d 466; *Austin v. Dare County*, 240 N.C. 662, 83 S.E. 2d 702; *Medlin v. Curran*, 243 N.C. 691, 91 S.E. 2d 713; *Walker v. Moss*, 246 N.C. 196, 97 S.E. 2d 836; *Archer v. Cline*, 246 N.C. 545, 98 S.E. 2d 889.

Appeal Dismissed.

FLORENCE HUDSON, MOTHER AND JOE HUDSON, FATHER, NEXT-OF-KIN OF STANLEY HUDSON, DECEASED EMPLOYEE; PLAINTIFFS, v. WHITFORD MOTOR COMPANY, EMPLOYER AND GREAT AMERICAN INDEMNITY COMPANY, CARRIER; DEFENDANTS.

(Filed 17 September, 1958.)

APPEAL by defendants from *Parker, J.*, May Civil Term, 1958, of CRAVEN.

Defendants' appeal is from a judgment affirming the Industrial Commission's award of compensation in a proceeding under the Workmen's Compensation Act, G.S. Ch. 97, Art. 1.

Findings of fact and conclusions of law, made initially by the hearing Commissioner, together with award based thereon, were adopted, upon defendants' appeal, by the full Commission; and, upon defendants' further appeal, the court entered judgment affirming the award. Upon this appeal from said judgment, defendants assign as error the overruling of their exceptions to designated findings of fact and conclusions of law and the affirmance of the award.

Wilkinson & Ward for plaintiffs, appellees.

I. Weisner Farmer and White & Aycock by Harvey W. Marcus for defendants, appellants.

PER CURIAM. The only question presented by defendants' assignments of error is whether there is any competent evidence to support the full Commission's findings of fact and conclusions of law to the effect that Stanley Hudson's death on January 11, 1956, was by accident arising out of and in the course of his employment by Whitford Motor Company. After careful study of the record, we conclude that this question must be answered in the affirmative. Hence, the judgment must be and is affirmed. *Champion v. Tractor Co.*, 246 N.C. 691, 99 S.E. 2d 917; *Watson v. Clay Co.*, 242 N.C. 763, 89 S.E. 2d 465, and cases cited.

Affirmed.

HOWARD BOWEN v. HARRY CALVIN AYERS.

(Filed 17 September, 1958.)

APPEAL by defendant from *Moore, J.*, and a jury, at January Term, 1958, of MARTIN.

Civil action by plaintiff for alleged alienation of his wife's affections, tried upon the following issues, answered as indicated:

"1. Did the defendant, Harry Calvin Ayers, maliciously alienate the affections of the plaintiff's wife, as alleged in the complaint? Answer: YES.

"2. If so, was the wrongful act or acts of the defendant accompanied by fraud, actual malice, recklessness, oppression, or other wilful and wanton aggravation? Answer: YES.

"3. What actual damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000.00.

"4. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $500.00."

From judgment entered upon the verdict, the defendant appeals.

Pritchett & Cooke and Critcher & Gurganus for defendant, appellant.

Griffin & Martin and Peel & Peel for plaintiff, appellee.

PER CURIAM. The defendant'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. Neither reversible nor prejudicial error has been made to appear. The trial and judgment will be upheld.

No Error.

STATE v. JOE SPRUILL.

(Filed 17 September, 1958.)

APPEAL by defendant from *Stevens, J.*, March Term, 1958 of CHOWAN.

The defendant was tried upon a bill of indictment charging that he did unlawfully, wilfully, and feloniously receive certain stolen goods, to wit, a quantity of cigarettes of a value in excess of $100.00, knowing at the time that the cigarettes had been stolen.

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

Attorney General Seawell, Asst. Attorney General Bruton for the State.

Robert B. Lowry, McMullan, Aydlett & White for defendant.

PER CURIAM. The defendant's sole assignment of error is based on his exception to the refusal of the court below to sustain his motion for judgment as of nonsuit.

A review of the evidence leads us to the conclusion that it was sufficient to warrant its submission to the jury. Hence, the ruling of the court below is

Affirmed.

KATIE H. WHITE v. DICKERSON, INCORPORATED.

(Filed 24 September, 1958.)

1. Highways § 4—

A contractor removing an old bridge preparatory to constructing a new one is under positive legal duty to exercise that degree of care which a reasonably prudent man would use, considering all of the circumstances of the case, to warn the traveling public of the danger, notwithstanding that he is doing the work under a contract with the State Highway and Public Works Commission.

2. Negligence § 1—

Due care is that degree of care which a reasonably prudent man would exercise under the facts and circumstances of the particular case.

3. Highways § 4— Evidence held sufficient to be submitted to jury on issue of contractor's negligence in failing to warn of danger of highway under construction.

Plaintiff's evidence tended to show that defendant contractor had removed an old bridge over a canal pursuant to contract with the State Highway and Public Works Commission, that fog at this particular locality and at this time of year was to be expected, that the barricade across the road was only some three or four feet from the edge of the canal, had no reflector lights on it, and was unpainted except for the top plank, where the paint had faded, that only one flambeau was burning, five or six feet from the lip of the canal, that the amber blinker light on the far side of the canal could not be seen because obscured by the barricade, that defendant had permitted mud to spill on the highway, making it slick, and that when plaintiff, who had been looking out the side to aid her husband in driving, exclaimed, "there's a light," he put on his brakes and skidded into the canal, resulting in the injury. There was evidence that another motorist traveling in the same direction shortly prior to the accident had skidded into the barricade, and evidence that neither plaintiff nor her husband knew the bridge was out, and that they did not see the detour sign, barricade sign and a 10 mile speed limit sign placed, respectively, 750 feet, 420 feet, and 120 feet from the canal. *Held:* The evidence is sufficient to warrant submission of the issue of the negligence of the contractor to the jury.

4. Negligence § 7—

Whether the conduct of a third party or independent agency insulates the negligence of defendant is to be determined in accordance with whether the intervening conduct is a new and independent cause, breaking the sequence of events put in motion by the original negligence of defendant, and whether such intervening act and resulting injury is one that the author of the primary negligence could have reasonably foreseen and expected.

5. Negligence § 9—

Foreseeability as an element of proximate cause does not import that the particular injury should have been foreseeable, but only that consequences of a generally injurious nature might have been expected.

6. Highways § 4—

Evidence tending to show that the driver of the car in which plaintiff was riding had reduced his speed to some 10 or 15 miles per hour because of heavy fog, that both he and plaintiff were watching the road intently because of the fog, and that when they saw the burning flambeau some six feet from the lip of the canal, where the bridge was out, the driver applied his brakes but slid into the canal on wet mud defendant had permitted to accumulate on the highway, *is held* insufficient to show intervening negligence on the part of the driver insulating as a matter of law the negligence of defendant contractor.

7. Automobiles § 50—

The question of whether the negligence of the driver will be imputed to plaintiff passenger under the doctrine of joint enterprise is not presented when the defendant does not plead such defense.

8. Automobiles § 49—

Evidence that the driver had impaired eyesight because of a cataract of one eye, together with expert testimony that at the time the driver was capable of driving an automobile in a normal manner without serious difficulty as regards vision, does not require the submission of the issue of contributory negligence of the passenger in riding in the car with such driver.

9. Same—

Evidence that a passenger in an automobile was carefully watching and looking ahead to aid the driver of the car in going through heavy fog, that the car was traveling 10 to 15 miles per hour, and that when she saw a burning flambeau, she cried out and the driver immediately put on his brakes, but skidded into an open canal, where the bridge had been removed, *is held* insufficient to require submission of the issue of contributory negligence of the passenger in failing to exercise due care for her own safety and warn the driver of the unlighted warning signs erected by defendant, which she did not see because of the fog.

BOBBITT, J., dissenting.

RODMAN, J., concurs in dissent.

APPEAL by defendant from *Moore, J.*, February Term, 1958 of BEAUFORT.

Civil action to recover damages for personal injuries.

The jury found by its verdict that the plaintiff was injured by the negligence of the defendant, and awarded damages in a substantial amount.

From a judgment on the verdict, defendant appeals.

Wilkinson & Ward for plaintiff, appellee.

Rodman & Rodman for defendant, appellant.

PARKER, J. Defendant assigns as errors the denial of its motions for judgment of nonsuit made at the close of plaintiff's evidence, and renewed at the close of all the evidence.

On 16 December 1956, and prior thereto, defendant was engaged, under contract with the State Highway and Public Works Commission, in the construction of a bridge over a canal on State Highway #99 at a point in Washington County about one mile northwest of the Beaufort County line. This is a hard-surfaced highway running between the towns of Pantego and Plymouth. On 16 December 1956 defendant had removed the old bridge on the highway over the canal, and had constructed a temporary detour road and detour bridge over the canal for traffic. This detour was to the left of the highway, when one travels from Pantego to Plymouth. The canal was about 25 feet wide and about 12 feet deep, where the bridge on the highway was out. A highway running along the bank of the canal intersected Highway #99 at a 65 to 70 degree angle east of the bridge being constructed, which is on the side toward Pantego, at the identical spot where the temporary detour road leads off from the highway on the opposite side.

About 15 or 20 minutes before 7:00 o'clock on Sunday morning, 16 December 1956, plaintiff and her husband, W. T. White, left their home in Pantego in their 1949 Chevrolet to go to Plymouth on Highway #99 to visit their son. They did not know that the bridge over the canal on this highway was out. Their car was in good condition. Plaintiff was 67 years old, and her husband 73.

When they left home, there was no fog. As they approached the line between Beaufort and Washington Counties, they ran into fog on the road. As they approached the place where the bridge over the canal was out, it was so foggy one could not discern too much daylight. It is about 11 miles from Pantego to where the bridge was out. J. H. Williams, Safety Engineer for the defendant and one of its witnesses, testified on cross-examination: "I had seen prior to that (16 December 1956) that the area had a tendency to become foggy around those water-courses. The amber light is one of the best we can get, the best we have been able to obtain to shine through fog. We used the amber light on that side (the Plymouth side) because as fall progressed we realized that we would have fog." W. J. Starr, resident engineer of the State Highway and Public Works Commission, who had jurisdiction over the construction work of the bridge over the canal and was a witness for defendant, testified on cross-examination that he was familiar with the area where the bridge over the canal was out and that "it is especially likely to have fogs on account of the water-courses that run through it. Fog is anticipated by everybody."

Plaintiff's husband was driving their car, and she was riding on the front seat. She had good vision. Her husband testified: "My vision on the morning of the 16th of December 1956 was fairly good. I could

see well enough to drive an automobile, and drive it well." On 20 January 1955 he had successfully taken the examination for an operator's license.

Plaintiff testified on direct examination: "I was keeping a sharp lookout because of the fog. I did not see any light or any sign up the road any distance from the place that we later fell into the canal. I saw a light just seconds before the car which my husband was driving ran into the canal. I said, 'Oh, there's a light,' and he put on brakes and discerned it at the same time. . . . I could tell my husband applied the brakes to the car, because he stood right up in the car onto the brakes. I felt that the car was skidding with him on the brakes. No, I did not see the barricade as the car in which I was riding hit it. The next thing I knew I was in the canal, out of the car. I was thrown out of the car across a log." On cross-examination plaintiff testified: "I know we had to slow down to just a creep when the fog was thick, and we think we were not making over 10 to 15 miles an hour. . . . After we left Pantego and ran into this fog, we discussed together about driving slowly and carefully because of the restricted vision. I was watching and he was driving. We were discussing the fog and having to take our time to get through it. He had his lights on. The lights were good . . . I was not able to see anything ahead in the flow of the light; I was watching out the side. I could see out the side window the edge of the road and I was telling him, and we were driving slow. I was looking ahead too, as well as the side. . . . I was looking out ahead and also looking out my side down at the edge of the pavement to see that he did not go too far to the right or the left. . . . If these signs that are lined up here against the wall of the courthouse were in place along the side of the highway on my side of the automobile, I do not think that I could have seen them under the foggy conditions prevailing unless one of them had been where there was not a streak of fog, but not at that bridge or for nearly a mile before we reached the bridge."

As plaintiff's husband approached the canal, the ground fog began to cloud up his windshield. He testified on direct examination: "I run my windshield wipers and that gave me a view in front and a watch down the road. I could see down the road with that and fog on the side. I did not look for the sides because I knew it was foggy. . . . I was looking ahead. Before I got to this place that I later ran into, I did not see any signs at all; no lights until I got right close to the bridge. I suppose it would be about 40 feet from the bridge, when I saw a light on the side, and I knew there was a filling station ahead. The filling station was just beyond the bridge over on the right. It is on the south side of the highway. I heard my wife cry out to me; she says 'There is a light.' I put on brakes, and about the time I put on

brakes, I discerned a barricade ahead of me. Of course, I applied brakes heavier and locked the wheels so she just skidded right on up to the barricade, pushed it over, rolled down the barricade in the bottom of the ditch." After he got out of the canal, he saw two flares sitting on the right side of the road on the Pantego side. They were not burning. He testified on cross-examination: "I was driving about 30 to 35 miles per hour when I come in the fog, but when I got near the thick fog coming out of the canal, I had to slow my speed of course. I slacked up my speed, and when I saw the light, I saw the barricade, you might say, just an instant after I saw the light, and I put on my brakes sufficient to stop. I pushed the barricade into the canal. . . . My wife could see on her side and I could see on mine, only directly ahead; that is all. The windows were up. . . . I did not see a smudge pot that had been knocked over into the canal by my automobile. . . . when I discovered the barricade was just across the ditch, and I proceeded to stop and the roads were so slippery I could not make it. She skidded right on in it. . . . I could not see anything on the side on account of the fog."

Jack Ahearn is Assistant Chief of Police in Belhaven, and lives in Pantego. About 5:30 or 5:45 on Sunday morning 16 December 1956, he was driving his car on Highway #99 from Pantego to Plymouth, carrying three hunters from Massachusetts to take a plane at Edenton. Plaintiff and her husband about two hours later travelling on the same highway ran through the barricade into the canal. Ahearn did not know the bridge over the canal was out. This is his testimony on direct examination: "I was right on the bridge before I saw anything. I saw that one flare to the left of the barricade. That is the only thing I observed in approaching the barricade was the one flare. As I approached the barricade, it was kind of slick. There was mud and grass that had been packed there, and when I saw the light I applied my brakes, and I skidded into the barricade itself then. I don't think I knocked it completely down, but I tore it up and it was flimsy. I got out of the car after I hit it. I believe it was just plain lumber with plain boards just nailed up there. I believe there were three crossboards that were nailed up there. . . . They were not painted. There were not any signs on the boards. After I got out of the car I could see how close I had come to going into the canal. I would say I was about six inches from the end of the pavement where it dropped off there. I would say those boards I have described were erected about 3 or 4 feet from the edge of the canal. . . . We tried to put part — part of the barricade was down, and we tried to put it back up, and we just left there; done the best we could with it. There was not any light visible from that, blinker there which says 'Open Trench,' or one similar to it, as you approached this detour from the Pantego direc-

tion." He testified on cross-examination: "There was a pretty heavy fog . . . I would say I could see 35 to 50 feet in the fog, not clearly, but I could see enough to drive. . . . I did not knock it (the barricade) completely down; I believe I did break one board, the bottom board. . . . I said there was a light there to the left. It was burning when I left because we moved it over in the middle of the barricade when we left, and out to the front. . . . I thought the light should be in front of the place where it was broken. That was where the danger point was. . . . I would say I was there ten minutes fixing the barricade I ran into."

Roy Jackson and Eddie Jones in Jackson's car went over this road seven days a week going from Pantego to Plymouth to their work in a pulp mill in Plymouth. They passed over this road about 10:20 p. m. on Saturday, 15 December 1956, and again the next morning about 8:20. There was mud on the highway on the Pantego side, extending according to Jackson 30 or 40 feet, and according to Jones 50 or 60 feet, from the barricade at the canal where the bridge was out. This mud was not so deep, but where the trucks were driven hauling dirt it was wet, a lot of tracks. According to Jackson the barricade was about 8 to 10 feet from the edge of the canal, according to Jones 5 or 6 feet. There was no sign marked "Road Closed." There was a blinker light on the side of the canal facing Plymouth, which was not visible from the Pantego side, because of the way the boards were laid on the barricade. On the Saturday night they passed over the detour, according to Jones, only two lights were burning on the Pantego side of the canal: one right by the barricade at the canal and the other near the detour bridge sitting on some dirt. They were pot-type flares.

Raymond Keech was driving on the highway on Sunday morning, 16 December 1956, and came up to the canal when plaintiff's husband was getting out of it. He helped get plaintiff out of the canal. When Keech arrived there was only one light burning on the Pantego side. This light, which was a pot light, was to the left of the barricade at the edge of the hard-surfaced part of the highway. Someone was lighting up lights, after plaintiff was taken out of the canal. He saw no sign marked "Road Closed" with red reflectors on it. The blinking light on the Plymouth side could not be seen on the Pantego side.

Earl Swindell passed over the detour seven days a week going to work in the pulp mill in Plymouth. The blinker light on the side of the canal facing Plymouth could be seen as one approached the canal from the Plymouth side, but not from the Pantego side. According to his testimony the barricade was about 3 or 4 feet from the edge of the canal. He testified on cross-examination: "The detour sign did not have any light to it, and the '10 miles per hour' sign did not have, and the barricade had one. It was sitting right down there close to it."

Ruth Marie Tooley lives about 300 yards from where the bridge over the canal was out. According to her testimony the barricade at the canal on the Pantego side was made of three planks six or eight inches wide nailed on 2 x 4's. The top plank was painted with black and white stripes, but the paint had faded. There was no paint on the lower two planks. The painting on these planks was done after plaintiff's husband's car went into the canal.

Ernest Rose, who married plaintiff's sister, lives one-half a mile from the scene. He went there the morning plaintiff was injured, and looked to see what lights were burning on the Pantego side. He saw only one burning when he got there. This light was on the edge of the hard surface of the highway, between that and the detour sign, 5 or 6 feet from the lip of the canal. He saw dirt on the hard-surfaced part of the highway on the Pantego side out from the barricade at the canal. He testified: "When they cleaned out the canal where they were going to put the bridge, they loaded it on trucks with a dragline or clamshell right along there and they spilled a lot, of course, loading trucks. There was quite a bit of dirt there."

Plaintiff in an amendment to her complaint alleged that there were three signs and a barricade on the Pantego side of the canal: One sign marked "Detour Ahead" placed about 750 feet from the canal; another marked "Barricade Ahead" about 420 feet from the canal; and a third lettered "Speed 10 m. p. h." about 120 feet from the canal.

On the Plymouth side of the canal there was a filling station, and cars on the detour had to get very close to its tanks. For that reason, according to defendant's evidence, a blinker light was put there, which its evidence tends to show could be seen from both sides of the canal for at least a mile before plaintiff was injured.

Carl Gilchrist, a State Highway Patrolman and witness for the defendant, arrived at the scene between 8:00 and 8:30 a. m. the morning plaintiff was injured. When he arrived, he saw only one flambeau burning. That was on the Pantego side near where the pavement was broken. The others he saw were not burning.

Defendant's evidence as to the warning signs on the road, the burning of flambeaus or pot lights at the time of plaintiff's injury, as to the location of the barricade on the Pantego side of the canal and its condition with reflector lights and paint, and as to plaintiff's husband's statement as to the speed he was driving, are in sharp conflict with plaintiff's evidence.

Plaintiff suffered serious injuries by reason of the car in which she was riding running into the canal.

Though the old bridge over the canal on State Highway #99 was removed by defendant contractor under a contract with the State Highway and Public Works Commission, it is well settled law under

our decisions that the defendant was under a positive legal duty to exercise reasonable care to warn travellers on the highway of the fact that the bridge over the canal on the highway had been removed, creating a chasm in the highway, and to protect them against injury therefrom. Reasonable care is the degree of care demanded by the facts and circumstances of the particular case. It is the ordinary care which a reasonably prudent man would use, considering all the circumstances of the case, in the discharge of a duty owing to another. *Presley v. Allen & Co.*, 234 N.C. 181, 66 S.E. 2d 789; *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551; *Furlough v. Highway Commission*, 195 N.C. 365, 142 S.E. 230, rehearing denied 196 N.C. 160, 144 S.E. 693; *Evans v. Construction Co.*, 194 N.C. 31, 138 S.E. 411; *Hughes v. Lassiter*, 193 N.C. 651, 137 S.E. 806.

Defendant had actual knowledge prior to 16 December 1956—the day plaintiff was injured—that the area around the canal had a tendency to become foggy, and that as the fall progressed there would be fog around the canal. That is the testimony of J. H. Williams, its Safety Engineer and witness on cross-examination. W. J. Starr, resident engineer of the State Highway and Public Works Commission, and a witness for defendant, testified on cross-examination that he was familiar with the area where the bridge over the canal was, and that "it is especially likely to have fogs on account of the water-courses that run through it. Fog is anticipated by everybody." J. H. Williams further testified on cross-examination that the amber light is "the best we have been able to obtain to shine through fog. We used the amber light on that side (the Plymouth side) because as fall progressed we realized that we would have fog." Yet with this knowledge defendant did not put an amber light on the Pantego side of the canal, and, according to plaintiff's evidence, so constructed the barricade on the Plymouth side of the canal as to prevent the amber light there from being seen on the Pantego side. Plaintiff's evidence tends to show that on the morning she was injured defendant had only two lights, pot-type flares, burning on the Pantego side of the canal, one by the barricade at the canal and the other near the detour bridge sitting on some dirt. According to plaintiff's evidence the barricade on the Pantego side was placed about 3 or 4 feet from the edge of the canal, had no reflector lights on it, and was unpainted, except for the top plank, where the paint had faded. Defendant in clearing out the canal, where it was preparing to put the new bridge, loaded the dirt and mud from the canal on trucks with a dragline or clamshell, and spilled a lot of it on the highway on the Pantego side. This mud at the time of plaintiff's injury was wet, and extended from the barricade on the highway toward Pantego from 30 to 60 feet. Jack Ahern, a witness for plaintiff, who nearly ran into the canal on the Pantego side about two hours

before the car in which plaintiff was riding did run through the barricade into the canal, testified: "As I approached the barricade, it was kind of slick. There was mud and grass that had been packed there, and when I saw the light (a flare) I applied my brakes, and I skidded into the barricade itself then." Plaintiff and her husband did not know that the bridge over the canal on the highway was out, until the car in which they were riding ran into the canal.

Considering the evidence in the light most favorable to plaintiff, as we are required to do on defendant's motion for judgment of nonsuit, it is sufficient, in our opinion, to support a legitimate inference that defendant, because of the fog in the area of the canal which it knew existed, failed to exercise reasonable care to warn plaintiff and her husband by adequate lights of the danger ahead due to the removal of the bridge over the canal, so that they in the exercise of ordinary care could see the barricade at the canal and the detour road and avoid injury, in erecting an unpainted barricade, except for the faded and painted top plank only 3 or 4 feet from the edge of the canal, in permitting mud to accumulate by reason of its work at the canal and to extend 30 to 60 feet from the barricade on the Pantego side, that would cause cars to skid when the brakes were applied, and that the defendant in the exercise of ordinary care might have foreseen that because of its negligence some injury might result to people travelling on the highway in the fog.

Defendant further contends that if defendant was negligent in any way, its negligence was insulated by the intervening negligence of plaintiff's husband, the driver of the car in which she was a passenger.

The principle of intervening negligence is so well established, and so accurately stated in our decisions, that it would be supererogatory to rephrase it.

This Court said in *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808: "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury."

"The test laid down by all these writers, by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected." *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299.

"This doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another really belongs to the

definition of proximate cause." *Butner v. Spease, supra.* Foreseeability as an essential element of proximate cause does not mean that the defendant is required to have been able to foresee the injury in the exact form in which it occurred. *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' " *Hart v. Curry,* 238 N.C. 448, 78 S.E. 2d 170.

Considering the evidence in the light most favorable to plaintiff, it permits the fair inference that plaintiff's injuries were the natural and probable consequence of defendant's negligence, and that defendant might have foreseen in the exercise of reasonable care, in the light of the attending circumstances then and there existing, and particularly in the light of the fog around the canal which it knew existed on the morning plaintiff was injured, that consequences of a generally injurious nature might have been expected to persons travelling on the highway. The trial court very properly refused to hold that the negligent conduct of defendant was insulated as a matter of law by the independant act of another.

The court below was correct in overruling the motions for judgment of nonsuit.

Defendant next assigns as error the refusal of the trial court to submit to the jury the following issue: "Did the plaintiff by her own negligence contribute to her injuries, as alleged in the answer?"

Plaintiff's husband in his testimony stated three times that the car he was driving is my car. Plaintiff said on direct examination that the car was a 1949 Chevrolet, "which was mine and my husband's." This is the sole evidence in the Record as to any joint ownership of the car. The pleadings of the parties have no allegation, or even reference, as to the ownership of the car. Defendant does not allege as a defense that plaintiff and her husband were engaged in a joint enterprise, or that plaintiff controlled or had a right to control the operation of the car, or had authority over the driver, or was directing or controlling the operation of the car, and that the driver's negligence was imputed to her.

In *Matheny v. Motor Lines,* 233 N.C. 681, 65 S.E. 2d 368, the Record on file in the office of the Clerk of this Court shows that the defendant in its answer alleged as a defense that plaintiff and her husband were engaged in a joint enterprise, and her husband was driving a car in which plaintiff owned a one-half interest as her agent, and that the operation of the car was under the joint control of plaintiff. In *James v. R. R.,* 233 N.C. 591, 65 S.E. 2d 214, the defendant pleaded as one

of its defenses that plaintiff and the driver of the car in which he was injured had joint control of the car in carrying out a joint enterprise. In *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185, the defendant alleged as a defense that if he was negligent in any respect, his negligence was imputable to Mrs. Harper, the owner of the automobile, who was present, possessing the right to direct and control the operation of the automobile. In *Jernigan v. Jernigan,* 207 N.C. 831, 178 S.E. 587, defendant in its answer set up the defenses of sudden emergency, joint enterprise and contributory negligence, and an issue of whether the plaintiff and the defendant were engaged in a joint enterprise was submitted to the jury.

This Court said in *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312: "To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion."

"A plea or answer which seeks to avoid liability because of the negligence of a third person must allege facts which in law would allow such person's negligence to be imputed to plaintiff. Thus, in an action against a third person for injuries in a collision to a passenger in a vehicle driven by another, a plea of contributory negligence must allege that plaintiff owned or controlled the vehicle or had authority over the person driving it." 65 C. J. S., Negligence, p. 933.

Therefore, the question of whether the negligence of plaintiff's husband, if any, was imputable to plaintiff, because she testified the car "was mine and my husband's" and had an equal right to direct and control its movement and were engaged in a joint enterprise, is not presented for decision, for the simple reason that defendant has pleaded no such defense in its answer.

These are in substance the entire allegations of defendant's answer as to contributory negligence on the part of plaintiff: Plaintiff by her own negligence and want of care contributed to her injuries in that, one, she, with full knowledge of her husband's defective vision due to cataracts, voluntarily rode as a passenger in a car driven by him under weather conditions which greatly restricted visibility even for those with normal vision, and two, she failed to observe and to call her husband's attention to the various signs erected by defendant on her side of the highway, giving notice of the reduced speed required, the danger and detour ahead, and in failing to take any precaution for her own safety.

Dr. J. B. Hawes, a witness for plaintiff, testified that he examined plaintiff's husband 23 February 1956, and found that he had a cataract developing in his right eye and had no trouble with his left eye. Dr. Hawes next saw him in October 1956—plaintiff was injured 16 December 1956—and testified, "at the time of my October examination Mr. White (plaintiff's husband) was capable of driving an auto-

mobile in the normal manner and without serious difficulty as regards vision." Defendant offered no testimony as to Mr. White's eyes or vision. Defendant in its brief makes no contention that Mr. White's vision was impaired—the word cataracts is not mentioned.

In our opinion, there is no evidence in the Record before us tending to support defendant's allegations that plaintiff was guilty of contributory negligence in riding in a car driven by her husband, who had impaired sight because of cataracts, and we are fortified in our position by defendant's failure to make any such contention in its brief.

We have set forth the evidence in great detail as to what plaintiff did for her own safety as she and her husband travelled down the highway in the fog toward the canal. She was carefully watching and looking ahead, the car was slowed down as it entered the fog in the area of the canal, she saw the flare near the barricade, and called to her husband "Oh, there's a light," her husband heard her cry, and immediately put on his brakes. The car skidded on the mud defendant had permitted to accumulate in front of the barricade and through the barricade into the canal. It would seem that there is no evidence to show that plaintiff failed in any respect under all the facts and circumstances then and there existing to exercise ordinary care for her own safety. The trial court properly refused to submit the issue of contributory negligence tendered by defendant.

The other assignments of error, which have not been brought forward in defendant's brief, are formal.

In the trial below we find

No Error.

BOBBITT, J., dissenting: In pleading contributory negligence, defendant alleged:

"C. That if defendant was in any particular negligent, which is again emphatically denied, plaintiff by her own negligence and want of care caused or contributed to such injuries as she received in that, (1) . . . , and (2) she failed to observe and to call her husband's attention to the various and sundry signs erected by defendant on her side of the highway, giving notice of the reduced speed required, the danger and detour ahead, and in failing to take any precaution whatever for her own safety, which contributory negligence and want of care on plaintiff's part is expressly pleaded in bar of any recovery herein."

I agree that defendant's motion for judgment of involuntary nonsuit was properly overruled. However, in my view, when the evidence, including that offered by defendant as well as that offered by plaintiff, (1) as to the speed of the car, (2) as to warning signs along the approach to the detour, and (3) as to plaintiff's undertaking to observe for her husband conditions along her (right) side of the highway, is

considered in the light most favorable to defendant, an issue as to plaintiff's alleged contributory negligence should have been submitted. In my opinion, failure to submit the contributory negligence issue was prejudicial error for which a new trial should be awarded.

RODMAN, J., concurs in dissent.

ETHEL LITZ ROYALL, WILLIAM C. CARR AND FRANCES E. CARR v. CARR LUMBER COMPANY, INC.

(Filed 24 September, 1958.)

1. Corporations § 27—

The superior court has authority, in the exercise of its discretion, under G.S. 55-125(a) (4), to order the liquidation of a corporation upon application of a stockholder alleging that the corporation had been operating at a loss and that to allow it to continue operations would deplete its assets and seriously damage the shareholders.

2. Same—

Where, upon a hearing of an application for liquidation of a corporation upon grounds set forth in G.S. 55-125(a) (4), there is no request for findings of fact and the court orders the liquidation of the corporation without making specific findings, it will be presumed that the court accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership.

3. Appeal and Error § 49—

Where there is no request for findings of fact and the court makes no specific findings, it will be presumed that the court accepted as true for the purposes of its order the facts alleged in the pleading which support the order.

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

APPEAL by interveners from *Pless, J.*, Resident Judge of the Twenty-ninth Judicial District, at Chambers in Marion, June 21, 1958. From TRANSYLVANIA.

Civil action by minority group of shareholders to liquidate the defendant corporation, heard below on motion of intervening shareholders to vacate order appointing receivers.

The defendant is a solvent corporation, organized and existing under the laws of North Carolina. For many years it has been engaged in the lumber manufacturing business, with office and principal place of business in Transylvania County. The plaintiffs own 13.8% of the outstanding common stock and the interveners own 78.3% thereof.

The action was instituted May 19, 1958, on which day the defendant

was cited to appear before Judge Farthing and show cause why the court should not order liquidation and appoint a receiver to take over the assets of the corporation in accordance with the allegations and prayers of the complaint.

The show cause order came on for hearing June 3, 1958, in Hendersonville, when and where Judge Farthing entered an order containing these essential recitals and adjudications:". . . during the hearing the parties having announced that the motion (for liquidation and receivership) should be granted by consent, and that Ralph H. Ramsey, Jr. and Monroe M. Redden be appointed receivers, IT IS THEREFORE, BY CONSENT AND IN THE DISCRETION OF THE COURT, ORDERED, ADJUDGED AND DECREED that Ralph H. Ramsey, Jr. and Monroe M. Redden be, and they hereby are appointed permanent receivers of the defendant corporation with authority to take over the assets of the defendant and liquidate the same in the manner provided by law; . . ." The consent stipulation appearing below the Judge's signature was signed by Thomas R. Eller, Jr. and Redden, Redden & Redden, as attorneys for the plaintiffs, and by Ramsey & Hill and Anthony Redmond, as attorneys for the defendant.

Thereafter, Henry F. Carr and other shareholders filed petition and motion requesting leave to intervene in the cause, and moved the court to vacate and set aside the foregoing order entered by Judge Farthing, on the ground that the consenting parties had no authority to consent to the order on behalf of the defendant corporation.

The interveners' petition and motion were presented to Judge Farthing on June 6, 1958, and were continued by him with direction that the matter be heard before Judge Pless, Resident Judge. When the cause came on for hearing before Judge Pless on June 21, 1958, an order was entered permitting the petitioners to intervene. Following this, the motion to vacate the order of Judge Farthing was taken up for hearing and was heard upon the plaintiffs' complaint, the interveners' petition, and affidavits filed by both sides. At the conclusion of the hearing, an order was entered in essential part as follows: ". . . after reading the verified complaint and all the affidavits filed by the parties and giving due consideration thereto and to the arguments of counsel, the Court is of the opinion that the said order appointing Receivers should not be vacated or modified; It is, therefore, ORDERED, ADJUDGED AND DECREED that the motion of petitioners to vacate, set aside, or modify the order of Hon. James C. Farthing be, and the same is hereby denied."

From the order so entered, the interveners appeal.

Hamlin & Hayworth, Potts & Ramsey, and Ward & Bennett for petitioners, appellants.

Thomas R. Eller, Jr., and Cecil J. Hill, for the receivers.

JOHNSON, J. The only errors assigned by the appellants are (1) that the court erred in refusing to allow the motion to vacate the consent order on the ground that the consenting parties had no authority to consent, and (2) that the court erred in signing the judgment sustaining the consent order.

It is not necessary for us to decide whether the consenting parties had authority to consent to the order of Judge Farthing placing the corporation in receivership. This is so for the reason the order expressly recites it was entered in the discretion of the court, and under applicable statutes the court had full discretionary power and authority to enter the order. These are the applicable statutes:

1. "The superior court shall have power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that: . . . (4) Liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." Ch. 1371, s. 1, P. L. 1955, now codified as G.S. 55-125 (a) (4), 1957 Cumulative Supplement.

2. "When a corporation . . . is in imminent danger of insolvency, . . . a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; . . ." G.S. 1-507.1.

True, Judge Farthing's order contains no findings of fact in support of the decree placing the corporation in receivership. Nevertheless, where, as here, an order appointing receivers is made without specific findings of fact and without any request for findings, it will be presumed that the judge accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. See *Whitehead v. Hale,* 118 N.C. 601, 24 S.E. 360; McIntosh, North Carolina Practice and Procedure, Second Edition, Sec. 2258. Here, the complaint contains allegations that (1) ". . . the defendant has not sold any lumber acquired or manufactured by it in several years at an over-all profit; that all over-all operations have been at a substantial loss to the defendant and the operations now in progress continue to deplete the assets of the company in the sum of approximately $10,000 per month, and if allowed to continue will destroy the value of the assets and seriously damage the stockholders," (2) That in the year 1957 the corporation sustained a net operating loss of more than $96,900, and for the first four months of 1958 a like loss of more than $45,000; and (3) "That because of the manner in which the company has been operated by those now in charge it is in imminent danger of becoming insolvent; . . ." the foregoing allegations and others of like tenor suffice to uphold Judge Farthing's discretionary

order placing the corporation in receivership, and sustain Judge Pless' ruling in refusing to set the order aside.

The proceedings below, of course, are without prejudice to the rights of the interveners to petition the court, if so advised, to discontinue liquidation of the corporation under G.S. 55-128 (1957 Cumulative Supplement).

Affirmed.

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

CATHERINE RAINES PITTMAN; CALVIN T. PITTMAN AND WIFE, MARJORIE A. PITTMAN; ROBERT PITTMAN AND WIFE, DORIS B. PITTMAN; AND BERNICE PITTMAN PAINTER AND HUSBAND, ROBERT W. PAINTER v. NELLIE WOLFE COLE PITTMAN; WADE HALL, JR., ADMINISTRATOR OF THE ESTATE OF ARCHIE PITTMAN, DECEASED; J. GERALD COWAN, TRUSTEE; AND WACHOVIA BANK AND TRUST COMPANY.

(Filed 24 September, 1958.)

1. Abatement and Revival § 3—

The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction.

2. Abatement and Revival § 8—

Ordinarily, the test to determine whether an action should be abated on the ground of the pendency of a prior action is whether there is a substantial identity as to the parties, subject matter, issues involved, and relief demanded in both the actions.

3. Same—

The pendency of a proceeding before the clerk to remove an administratrix on the ground that the administratrix was not the true widow of the deceased is not ground for the abatement of a subsequent action involving title to land dependent upon whether the administratrix acquired title by survivorship in an estate by the entireties, since, even though one issue is common to both, the parties, the subject matter, and the relief demanded are not the same, and in one the facts are found by the clerk and in the other the facts must be found by a jury.

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

APPEAL by defendant Nellie Wolfe Cole Pittman from *Clarkson, J.*, March, 1958 "A" Conflict Civil Term, BUNCOMBE Superior Court.

The plaintiffs brought this civil action to recover certain specifically described land and to remove a cloud upon the title thereto. They allege that Archie Pittman died intestate on September 29, 1955, seized

and possessed of the described lands, and that they thus became the owners as his widow and heirs at law. They further allege that the defendant Nellie Wolfe Cole Pittman is claiming an interest in certain real estate, "to-wit the title thereto in fee simple, based upon survivorship as between husband and wife in an estate by the entireties, whereas in truth and fact no such estate ever existed."

The defendants are Nellie Wolfe Cole Pittman, Wade Hall, Administrator of the Estate of Archie Pittman; J. Gerald Cowan, Trustee; and Wachovia Bank & Trust Company, beneficiary in a deed of trust on record against the lands involved. The defendant Nellie Wolfe Cole Pittman entered "special appearance and answer" in which she denied the material allegations of the complaint; and as a further defense and plea in abatement alleged that at the time this action was instituted there was an action pending "between the same parties, or to which the additional secondary parties joined herein could be joined, which involves the subject-matter to be determined herein, to-wit: As to whether Nellie Wolfe Pittman is the lawful widow of Archie Pittman, Deceased, and the sole owner of the land . . ."

At the trial the defendant, in support of her plea, introduced the record of a proceeding before the clerk showing a motion and affidavit filed by the plaintiff Catherine Raines Pittman, challenging the right of Nellie Wolfe Cole Pittman to qualify and act as administratrix of the estate of Archie Pittman, and asking that she be removed on the ground that she had falsely claimed to be his widow. After hearing, the clerk found facts and entered an order canceling the letters of administration and appointing the defendant Wade Hall as administrator. On appeal to the superior court the judge remanded the cause to the clerk for further findings. The removal proceeding is still before the clerk.

At the hearing on the plea in abatement in this case Judge Clarkson entered an order that the plea "be and the same is hereby overruled and denied." The defendant Nellie Wolfe Cole Pittman excepted and appealed.

Sanford W. Brown for defendant, appellant.
W. Y. Wilkins and H. Kenneth Lee,
By: H. Kenneth Lee for plaintiffs, appellees.

HIGGINS, J. "The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction." *McDowell v. Blythe Bros.*, 236 N.C. 396, 72 S.E. 2d 860. "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action

is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. 82, 68 S.E. 2d 796.

The purpose of the proceeding before the clerk was to determine whether the administratrix should be removed. If it be determined there are parties, in the legal sense, to a removal proceeding, the children, heirs at law of the intestate, are not parties in any sense. The parties are not the same, the subject matter is not the same, the relief demanded is not the same. That one of the issues (even though a vital one) is common to both proceedings does not work an abatement of this action. In the removal proceeding the clerk finds the facts. Appeal from his findings must be heard "by the Presiding Judge . . . in his appellate capacity by review of the record . . ." *In Re Sams*, 236 N.C. 228, 72 S.E. 2d 421, (citing numerous cases); *In Re Estate of Johnson*, 232 N.C. 59, 59 S.E. 2d 223, and cases cited. In this case the jury finds the facts. The foregoing authorities fully sustain Judge Clarkson, and his order in the Superior Court is

Affirmed.

JOHNSON AND PARKER, JJ., took no part in the consideration or decision of this case.

HATTIE J. CARROW, HELEN J. TREMHOLM, MARY SIMMONS J. JENKINS, LATHAM J. CAPEHART, EVELYN J. HACKNEY, NORMA J. ROSS AND GRACE J. BOWEN v. SYLVESTER DAVIS.

(Filed 24 September, 1958.)

1. Adverse Possession § 17—

Adverse possession of lands for twenty years without color or for seven years under color of a deed or grant will ripen into title.

2. Adverse Possession § 15—

Color of title is a paper writing which purports to convey land but which fails to do so.

3. Same—

Where the description in a deed is insufficient to identify the land, the deed cannot operate as color.

4. Boundaries § 8—

What are the boundaries of a tract of land is a question of law. Where they are located on the ground is a question of fact.

5. Boundaries § 9—

A deed is void for vagueness of description unless it identifies the land sought to be conveyed complete within itself or by reference to some source from which the deficiency in the description may be supplied.

6. Adverse Possession § 23—

The burden is upon the party claiming title by adverse possession for seven years under color to fit the description in his deeds to the land he claims under them, and when the parties waive a jury trial and claimant's evidence fails to fit the description in his deeds to the land claimed, judgment against claimant will be affirmed.

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

APPEAL by defendant from *Moore, J.*, June, 1958 Civil Term, BEAUFORT Superior Court.

Civil action in which plaintiffs claim ownership and right to possession of three specifically described lots in Washington Heights, Beaufort County.

The defendant admitted possession and claimed ownership by virtue of seven years adverse possession under color of two deeds from E. H. Jefferson and wife, the first dated October 20, 1942, and the second dated January 14, 1943. The second deed was executed to correct the description in the first.

The parties waived a jury trial. They stipulated: (1) The plaintiffs have a good record title dating back to a grant from the Crown in 1719; (2) the defendant and his predecessor in title have been in adverse possession for more than seven years. Upon the stipulations and evidence introduced, the court found as a fact the descriptions in the defendant's deeds were insufficient to identify the land, and adjudged the plaintiffs to be the owners and entitled to possession. Defendant appealed.

J. D. Paul, Wilkinson and Ward for defendant, appellant.
Rodman & Rodman for plaintiffs, appellees.

HIGGINS, J. Adverse possession of lands, *Lindsay v. Carswell*, 240 N.C. 45, 81 S.E. 2d 168, for 20 years will ripen into title. *Everett v. Sanderson*, 238 N.C. 564, 78 S.E. 2d 408. The defendant offered no evidence of adverse possession for that period. Adverse possession *under color of a deed or grant* will ripen into title in seven years. *Trust Co. v. Miller*, 243 N.C. 1, 89 S.E. 2d 765. Defendant's adverse possession for that period is admitted. The question is: Did he hold under color of title?

Color of title is a paper writing which purports to convey land but fails to do so. *Trust Co. v. Parker*, 235 N.C. 326, 69 S.E. 2d 841. However, if the failure arises from the insufficiency of the description to identify the land, then the writing cannot operate as color. *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759; *Katz v. Daughtrey*, 198 N.C. 393, 151 S.E. 879; *Farmer v. Batts*, 83 N.C. 387.

What the boundaries of a tract of land are, is a question of law.

Where they are located on the ground is a question of fact. *Brooks v. Woodruff*, 185 N.C. 288, 116 S.E. 724; *Tatem v. Paine*, 11 N.C. 64. To give effect to his possession, the defendant must fit the description in his deeds to the land he claims under them. A deed is void for vagueness of description unless it identifies with certainty the land sought to be conveyed. The identification must be complete in the deed itself, or the deed must point to some source from which the deficiency in the description may be supplied. *Williams v. Robertson*, 235 N.C. 478, 70 S.E. 2d 692; *Cathey v. Lumber Co.*, 151 N.C. 592, 66 S.E. 580; *Edmundson v. Hooks*, 33 N.C. 373.

In his attempt to fit the description in his deeds to the lots claimed, the defendant offered the testimony of a surveyor. To repeat even in substance his evidence relating to the difficulties he encountered in attempting to follow the descriptions in either or both deeds, and to enclose a tract of land, would serve no useful purpose. The descriptions, taken separately or together, fail to enclose a tract of land. They refer to nothing which supplies the deficiency. The second deed recites: "This deed is intended to correct the description in (the first deed) . . . upon discovery that the description . . . is probably erroneous." Of the description in the second deed, the defendant has this to say in his brief: "The able judge below was steered off the correct line of reasoning by the confusion induced by the obvious errors in the so-called deed of correction . . ."

The stipulation of the parties placed upon the defendant the burden of showing his adverse possession under color of his deeds. *McPherson v. Williams*, 205 N.C. 177, 170 S.E. 662. The judge sitting as a court and jury found he had not carried that burden. The record as it comes to us fully justifies the finding.

Affirmed.

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

AIDA S. KOVACS v. GEORGE A. BREWER, SR.

(Filed 24 September, 1958.)

Infants §21: Constitutional Law § 28—

Where decision of the Supreme Court of North Carolina affirming judgment awarding to the resident paternal grandfather the custody of a minor child of parents divorced in another state, notwithstanding a former decree of the court of such other state, is vacated by the Supreme Court of the United States and the cause remanded for clarification of the question whether the decision was based on changed condi-

tions since the foreign decree or upon the ground that our Court was not bound to give the foreign decree full faith and credit, the cause must be remanded to the Superior Court for final judgment based on the facts as it may find them to be.

PARKER, J., not sitting.

On mandate from the Supreme Court of the United States, 356 U. S. ....., 2 L. ed. 2d 1008.

This proceeding was instituted on 23 February 1956, pursuant to G.S. 50-13, to determine a dispute concerning the custody of the minor child of parents who were divorced in the State of New York. The New York Court, on 17 January 1951, awarded custody of the minor child involved to her paternal grandfather, George A. Brewer, Sr., who lived in Gaston, Northampton County, North Carolina.

In November 1954 the petitioner applied to the Supreme Court of the State of New York for a modification of its former decree. The hearing was held and the New York Court entered a decree awarding custody to the petitioner.

In the proceeding instituted in this State, the petitioner based her right to custody on the modified decree entered in the New York Court in 1954. At the hearing in the Superior Court the judge found, among other things, that the condition of the health of the respondent had greatly improved within the past year; that general conditions in his home had also improved; and further found that the petitioner was unfit to have the custody of her child; that the respondent was a fit and suitable person to have the custody of the child; that it was for the best interest of the child to remain in the custody of the respondent. The court further concluded as a matter of law that the North Carolina court was not bound by or required to give effect to the modified decree of the New York Court, the minor child, Jane Elizabeth Brewer, having resided in North Carolina continuously since 1951. Judgment was entered awarding custody of the aforesaid child to the respondent. The petitioner appealed, assigning error.

The judgment of the lower court was upheld by this Court at the Spring Term 1957, reported in 245 N.C. 630, 97 S.E. 2d 96. The petitioner applied to the Supreme Court of the United States for writ of *certiorari*, which was granted on 14 October 1957. The Supreme Court of the United States vacated the judgment of this Court and remanded for clarification of the question as to whether decision was based on changed conditions since the New York decree was modified, or upon the ground that the North Carolina court was not bound to give full faith and credit to the modified New York decree awarding custody of the child to the petitioner.

Since this case was remanded by the Supreme Court of the United States, it has been suggested to the Court that the father of the minor

child, who had been providing support not only for his minor child but to a considerable extent for the respondent also, has died and that the child has been voluntarily surrendered by the respondent to the petitioner, and that she is now residing in the State of New York and that all matters involved in the proceeding are now academic.

Sylvester & Haimoff, of the New York Bar, Sanford, Phillips, McCoy & Weaver for petitioner.

Gay & Midyette and Eric Norfleet for respondent.

PER CURIAM. The judgment heretofore entered in this proceeding by this Court is vacated and set aside, and the cause is remanded to the Superior Court for final judgment based on the facts as it may find them to be.

Remanded.

PARKER, J., not sitting.

STATE v. RALPH DOUGLAS BYERS.

(Filed 24 September, 1958.)

Criminal Law § 131—

Upon *certiorari* to review sentences imposed upon defendant, it appearing that but a single sentence was imposed upon several consolidated indictments, that the sentence was in excess of the maximum for such offense, and that sentences upon other indictments were made to begin at the expiration of the first sentence, the cases are remanded for proper judgments under authority of *S. v. Austin*, 241 N.C. 548.

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

Certiorari upon petition of defendant Ralph Douglas Byers to review sentences imposed upon him in Superior Court of Davidson County at August Term 1955, contending only that the sentences were excessive.

The Attorney General of the State of North Carolina answering the above petition, sets forth these facts, supported by certified copies of warrants, bills of indictment, and judgments of the court, pertinent thereto, as follows:

1. That the defendant, Ralph Douglas Byers, was apprehended, indicted, brought to trial, convicted and sentenced by the Superior Court of Forsyth County, July Term 1955, to a term of not less than 15 nor more than 18 years in the State's Prison in cases Nos. 9938, 9939 and 9940, consolidated for judgment, upon a plea of guilty to

three charges of robbery with firearms, and to a term of not less than three nor more than 5 years in the State's Prison in cases Nos. 9941, 9942, 9943 and 9944, consolidated for judgment, to run consecutively with the sentence imposed in the consolidated cases of Nos. 9938, 9939 and 9940, upon a plea of guilty to three charges of larceny, receiving, and store breaking. And in accordance therewith commitments were issued by the Deputy Clerk of Superior Court of Forsyth County on the 29th day of July, 1955.

2. That the defendant, Ralph Douglas Byers, was further apprehended, indicted, brought to trial, convicted and sentenced by the Superior Court of Davidson County, August Term, 1955, to a term of not less than 10 nor more than 12 years in the State's Prison in cases Nos. 7491, 7492 and 7493, consolidated for judgment, upon a plea of guilty to three charges of auto theft at the expiration of the sentence in the cases Nos. 9941, 9942, 9943 and 9944, consolidated for judgment, in the Superior Court of Forsyth County as above set forth, and to a term of not less than 10 nor more than 12 years in the State's Prison in cases Nos. 7494 and 7495, consolidated for judgment, to begin at the expiration of the sentence imposed in cases Nos. 7491, 7492 and 7493 of the Superior Court of Davidson County, upon a plea of guilty to two charges of robbery with firearms. And commitments to the State's Prison were issued by the Assistant Clerk of the Superior Court of Davidson County on the 25th day of August, 1955.

3. The defendant is not questioning the legality of his trial and conviction upon any of the charges hereinabove set forth. But the contention is that the sentence of not less than 10 nor more than 12 years imposed in the consolidated cases of Nos. 7491, 7492 and 7493 of the Superior Court of Davidson County is excessive in that the maximum term of imprisonment on the charges of larceny of an automobile is 10 years. G.S. 14-70. And, hence, the beginning of the indeterminate sentence in the consolidated cases Nos. 7494 and 7495 of the Superior Court of Davidson County, is indefinite.

PER CURIAM. In the light of the above recitation of the record, the cases will be remanded to the Superior Court of Davidson County to the end that proper judgments in each of the two consolidated cases may be entered under the authority of, and in conformity with decision in *S. v. Austin*, 241 N.C. 548, 85 S.E. 2d, 924.

Remanded.

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

MRS. W. L. HUTCHISON, CHARLES L. HUTCHISON AND WIFE, GLADYS S. HUTCHISON, PLAINTIFFS, v. CAROLINA AND SOUTHERN PROCESSING COMPANY, DEFENDANT.

(Filed 24 September, 1958.)

Injunctions § 4b—

Order denying application for a temporary order restraining defendant from continuing to operate its plant on lands contiguous to lands owned by plaintiffs, demanded on the ground that such operation constituted a nuisance, affirmed on authority of *Huskins v. Hospital*, 238 N.C. 357.

PARKER, J., not sitting.

APPEAL by plaintiffs from *Dan K. Moore, J.*, April Term, 1958, of GASTON.

Civil action wherein plaintiffs allege that the operation of defendant's processing plant constitutes a nuisance; and plaintiffs seek (1) damages, and (2) a permanent injunction to abate the alleged nuisance.

After notice and hearing, the court signed an order denying plaintiffs' application for "a temporary order . . . restraining the defendant . . . from continuing to operate its plant and maintain such nuisance on the land contiguous to the land of these plaintiffs . . ."

Plaintiffs' appeal is based upon their exception to this interlocutory order.

Hugh W. Johnston, for plaintiffs, appellants.

Sidney J. Stern and Mullen, Holland & Cooke for defendant, appellee.

PER CURIAM. The affidavits offered and considered at the hearing afforded sufficient factual basis for the court, in its discretion, to deny plaintiffs' application that defendant be restrained pending final determination of the cause. Hence, the order is affirmed.

The applicable legal principles are fully stated in *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116.

Affirmed.

PARKER, J., not sitting.

RICHARD ROBINSON, KATIE FULTON AND MARGUERITE FITCHETT, v. ANDREW SAMPSON.

(Filed 24 September, 1958.)

APPEAL by plaintiffs from *Frizzelle, J.*, February, 1958 Civil Term, NEW HANOVER Superior Court.

ROBINSON *v.* SAMPSON.

Civil action to remove cloud from the title to specifically described lands. Plaintiffs allege (1) they, uncle and aunts, inherited the lands as heirs at law of Gertrude Green, deceased; (2) the defendant falsely claims he is the illegitimate son of Gertrude Green and that the land descended to him upon her death intestate; and (3) the defendant's false claim constitutes a cloud upon the plaintiffs' title which they ask the court to remove. The defendant denied plaintiffs' claim of title and asserted his sole ownership as the illegitimate son of Gertrude Green, deceased. The parties agreed upon the proper issue, the burden of proof, and the right to open and conclude the argument.

After hearing the evidence the jury rendered a verdict for the defendant. The court entered judgment declaring him the owner of the land and entitled to the immediate possession. From the judgment, the plaintiffs appealed.

Taylor & Mitchell, for plaintiffs, appellants.
Marsden Bellamy, George Rountree, Jr., for defendant, appellee.

PER CURIAM. The plaintiffs bring forward numerous assignments of error based on the admission of evidence and the court's charge. These we have examined and we find them without merit.

No Error.

APPENDIX

AMENDMENT TO THE CANONS OF ETHICS

Amend Article X-C appearing 221 N.C. Reports, 606, "C" by rewriting the same to read as follows:

> "It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting officer, or presiding Judge, or Recorder, or Vice-Recorder in any Court inferior to the Supreme Court, or in any Federal Court, to accept professional employment in any matter of a Civil or Criminal nature, growing out of any matter or thing which is, or has been in any way connected with the office of such prosecuting officer, Judge, or Recorder, or Vice-Recorder, during his incumbency."

NORTH CAROLINA—Wake County

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Canons of Ethics of the Rules and Regulations of The North Carolina State Bar is duly adopted by The North Carolina State Bar in that the said Council did by resolution at regular quarterly meeting adopt said amendment to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the first day of March, 1958.

(s) EDWARD L. CANNON, Secretary
The North Carolina State Bar

The Court is of the opinion that its approval is not required as a condition precedent to the promulgation of canons of ethics by the Council of The North Carolina State Bar. Let the foregoing amendment to the canons of ethics of The North Carolina State Bar, together with the certificate of Edward L. Cannon, Secretary, be published in the forthcoming volume of the Reports.

This 30th day of June, 1958.

RODMAN, J.
For the Court

AMENDMENTS TO RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS.

(1) Amend the Rules governing admission to the practice of law in the State of North Carolina appearing 243 N. C. Reports, 785 through and including 794, as follows:

(a) Amend Rule 4, page 786, line 8, by adding a comma after the word "Carolina" and deleting the remainder of the sentence after the word "Carolina" and substituting in lieu thereof the following: "and then upon his satisfying the Board that he has complied with these Rules, license shall be issued to him within six months of his examination."

(b) Amend Rule 8, page 788, line 12, by deleting the word "required".

(c) Amend Rule 8, page 788, lines 12 and 13, by deleting the words "and any five of the optional subjects and insert in lieu thereof the words "upon which he will be examined".

(d) Amend Rule 9, page 788, line 34, by deleting the word "required".

(e) Amend Rule 9, page 788, line 35, by deleting the words "and on five of the optional subjects".

(f) Amend Rule 12, page 790, beginning on line 9 after the period in said line and deleting all of the remainder of the said paragraph through the period after the word "Trusts", line 24.

(g) Amend Rule 12, page 790, beginning with line 25 and deleting all of lines 25, 26 and 27 beginning with the word "Applicants" and through the period, line 27.

(h) Amend Rule 12, page 790, line 28, by deleting the words "to be given in August, 1958, and thereafter" appearing between the word "examinations" and the word "will" on said line.

(i) Amend Rule 14, page 791, beginning on line 13 by deleting the following: "Affidavits and other material furnished by an applicant shall not be conclusive upon the Board as to the facts therein stated;" and insert in lieu thereof the following: "No certificates, affidavits or other material furnished by the applicant shall be conclusive upon the Board as to the facts stated therein or as to other representations made thereby; and".

(j) Amend Rule 16, page 792, line 5, by inserting after the word "examination," the words "in the discretion of the Board,".

(k) Amend Rule 16, page 792, line 10, by deleting the word "immediately" and insert in lieu thereof the words "within eight years".

(l) Amend Rule 16, page 792, line 27, by deleting the sentence beginning on said line and continuing through the period after the word "final" on line 31.

(m) Amend Rule 16, page 792, line 34, by adding the following sentence: "An applicant under this rule of admission by comity shall be bound by the actions and decisions of the Board, which actions shall be in the sole discretion of the Board and its actions on such applications shall be final."

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 1st day of March, 1958.

(s) EDWARD L. CANNON, Secretary,
The North Carolina State Bar.

After examining the foregoing Rules of The Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto—Chapter 84, General Statutes.

This 30th day of June, 1958.

(s) J. WALLACE WINBORNE,
Chief Justice of The Supreme Court
of North Carolina.

Upon the foregoing certificate, it is ordered that the foregoing Rules of The Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This 30th day of June, 1958.

(s) RODMAN, J.
For the Court.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 3. Pendency of Prior Action in General.

Where jurisdiction of the court has attached as to the parties and the subject matter in an action, which action remains pending for the purpose of granting relief thereafter sought by an independent action, the court will ordinarily dismiss the independent action *ex mero motu* in order to preserve orderly procedure and avoid multiplicity of suits and save costs. *Byerly v. Delk*, 553.

The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction. *Pittman v. Pittman*, 738.

§ 8. Pendency of Prior Action — Identity of Actions.

Ordinarily, the test to determine whether an action should be abated on the ground of the pendency of a prior action is whether there is a substantial identity as to the parties, subject matter, issues involved, and relief demanded in both the actions. *Pittman v. Pittman*, 738.

The pendency of a proceeding before the clerk to remove an administratrix on the ground that the administratrix was not the true widow of the deceased is not ground for the abatement of a subsequent action involving title to land dependent upon whether the administratrix acquired title by survivorship in an estate by the entireties, since, even though one issue is common to both, the parties, the subject matter, and the relief demanded are not the same, and in one the facts are found by the clerk and in the other the facts must be found by a jury. *Ibid.*

ABORTION.

§ 3. Causing Miscarriage of or Injury to Pregnant Woman.

Conflicting evidence in this prosecution for violation of G.S. 14-45 *held* sufficient to be submitted to the jury. *S. v. Lee*, 327.

ACTIONS.

§ 2. Right of Nonresidents to Maintain Action in this State.

Nonresidents have a right to institute an action in this State as one of the privileges guaranteed to citizens of the several states. *Thomas v. Thomas*, 269.

§ 3. Moot Questions.

Whenever in the course of litigation it becomes apparent that there is an absence of a genuine adversary issue between the parties, the court should withhold the exercise of jurisdiction and dismiss the action. *Bizzell v. Ins. Co.*, 294.

§ 5. Where Plaintiff's Own Wrong is Basis for Cause of Action.

The common law maxim that a person will not be allowed to take ad-

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vantage of his own wrong has been adopted as public policy in this State. *In re Estate of Ives*, 176.

Where settlement for wrongful death is made on basis of a distributee's negligence, such distributee will not be permitted to share therein. *Ibid.*

§ 8. Distinction Between Actions on Contract and in Tort.

An action for breach of duty imposed by law arising upon a given state of facts is *ex delicto* and in tort and not *ex contractu* for a debt. *Caldlaw, Inc. v. Caldwell*, 235.

ADOPTION.

§ 1. Nature, Construction and Operation of Statutes in General.

Statutes dealing with adoption and creating rights to succession in an adopted child ordinarily will be given prospective effect only under the general rule that statutes in derogation of the common law will be strictly construed, but where the statute expressly provides that its provisions shall apply to adoptions whether granted before or after the effective date of the act, there is no occasion for interpretation, and the act applies to the devolution of estates of those dying intestate after the passage of the act, regardless of the date of the decree of adoption. *Bennett v. Cain*, 428.

ADVERSE POSSESSION.

§ 14. Adverse Possession of Public Ways.

The rule that individuals may not acquire title to any part of a municipal street by encroaching upon or obstructing the same in any way, G.S. 1-45, does not apply when the evidence fails to show that the municipality had any title or rights in the *locus in quo*. *Hall v. Fayetteville*, 474.

§ 15. Color of Title.

A deed is color of title only for the land designated and described in it. *Shingleton v. Wildlife Comm.*, 89.

Color of title is a paper writing which purports to convey land but which fails to do so. *Carrow v. Davis*, 740.

Where the description in a deed is insufficient to identify the land, the deed cannot operate as color. *Ibid.*

§ 17. Period Necessary to Ripen Title by Adverse Possession.

Adverse possession of lands for twenty years without color or for seven years under color of a deed or grant will ripen into title. *Carrow v. Davis*, 740.

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The burden is upon the party claiming title by adverse possession for seven years under color to fit the description in his deeds to the land he claims under them, and when the parties waive a jury trial and claimant's evidence fails to fit the description in his deeds to the land claimed, judgment against claimant will be affirmed. *Carrow v. Davis*, 740.

AGRICULTURE.

§ 2. Lien for Supplies and Advancements.

Where a tenant procures and pays for a policy of hail storm insurance, nothing else appearing, the landlord's statutory crop lien for advancements, G.S. 42-15, does not extend to the fund paid by insurer under the policy after damage to the crop by the risk covered. *Peoples v. Ins. Co.*, 303.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction.

Where new trial is awarded upon one assignment of error, questions raised by other assignments of error relating to matters that may not recur on retrial, need not be decided. *Gouldin v. Ins. Co.*, 163.

Where appellant is given notice of a motion and appears at the time and place designated for the hearing of the case in its regular order at a regular term of court, and participates in the hearing and agrees that the judge might sign judgment after term, all without raising the question whether the motion was required to be in writing, he will not be heard on appeal to raise this question. *Peoples v. Ins. Co.*, 303.

The jurisdiction of the Supreme Court is derivative, and where the court below has no jurisdiction, the Supreme Court can acquire none by appeal. *Adams v. College*, 674.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

Where it appears on the face of the record proper that the complaint fails to state a cause of action, the Supreme Court will take cognizance of such defect *ex mero motu* and dismiss the action. *Caldlaw, Inc., v. Caldwell*, 235.

The Supreme Court will take judicial notice that a party defendant in the case under consideration is a party plaintiff in another case heard on appeal the same week. *Bizzell v. Ins. Co.*, 294.

While ordinarily questions not determinative of the appeal will not be decided, when a question of pure law is in controversy, the Supreme Court may, in the exercise of its supervisory jurisdiction, determine the question in order to avoid protraction of the litigation. *In re Davis*, 423.

§ 3. Right to Appeal and Judgments Appealable.

Upon special appearance by additional defendants joined under G.S. 1-240, and motion by them to dismiss for want of valid service, the court ordered new process to be served upon them. *Held:* The judgment did not attempt to adjudicate the validity of the previous service, nor was the efficacy of the new process then justiciable, and therefore the order affected no substantial right of the additional defendants and their appeal therefrom is dismissed. *Riddle v. Wilde*, 210.

§ 6. Moot Questions and Advisory Opinions.

Ordinarily, the courts will not pass upon the constitutionality of a statute in an action in which there is no actual antagonistic interest between the parties, or where it appears that the parties are as one in interest, and desire the same relief. *Bizzell v. Ins. Co.*, 294.

Where, pending appeal from order dissolving a temporary restraining order, the act sought to be restrained has been done, the appeal becomes

academic and the Supreme Court will express no opinion as to the merits of the moot question presented by the appeal. *Adams v. College*, 674; *Topping v. Board of Education*, 719.

A question which may become moot, depending upon the adjudication of another question involved, will be reserved for decision when necessary to the determination of the appeal. *Martin v. Brotherhood*, 409.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error.

An assignment of error must be based on an exception appearing of record, and when the record fails to show that a certain procedural step had been taken, a recitation that such step had been taken, appearing solely in the assignment of error, cannot be advanced as the basis for a legal conclusion. *In re Hardin*, 66.

The rules governing appellate procedure are mandatory, and when appellant fails to comply, the appeal may be dismissed. *Hunt v. Davis*, 69.

An assignment of error must show what question is intended to be presented without the necessity of paging through the record to find the asserted error, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Ibid.*

Exceptions which appear nowhere in the record except under the assignments of error are ineffectual, since an exception must be duly noted at the proper time. *In re McWhirter*, 324; *Bulman v. Baptist Convention*, 392.

§ 20. Parties Entitled to Object and Take Exception.

An additur to the amount of recovery by the trial court with the consent of defendant is not prejudicial to plaintiff, and he may not object thereto on the ground that the verdict should have been set aside for inadequate award. *Caudle v. Swanson*, 249.

§ 21. Exception and Assignment of Error to the Judgment.

An exception to the judgment presents the question whether the facts found support the judgment. *Peirson v. Ins. Co.*, 215; *Wagner v. Honbaier*, 363; *Bulman v. Baptist Convention*, 392.

The failure of appellant to preserve exception to the refusal of the trial court to set aside the verdict and grant a new trial, or failure to except to the signing of the judgment, does not warrant dismissal of the appeal, since the appeal itself constitutes an exception to the judgment. *Williams v. Dowdy*, 683.

§ 22. Objections, Exceptions and Assignments of Error to Findings of Fact.

A sole exception to the judgment and assignment of error that the court erred in signing the judgment and in his conclusions and findings of fact for that they were against the weight of, and not sustained by, the evidence, is a broadside assignment of error unsupported by exception, which does not present for review the competency or sufficiency of the evidence upon which the findings are based. *Caldwell v. Bradford*, 48.

Where no exceptions are taken to the admission of evidence or to the

APPEAL AND ERROR—*Continued.*

findings of fact, or, if taken, are not preserved, it will be presumed that the findings are supported by competent evidence and they are binding on appeal, and the appeal presents only whether the facts found and conclusions of law support the judgment and whether error appears on the face of the record. *In re McWhirter*, 324.

§ 38. Effect of Failure to Discuss Exceptions and Assignments of Error in the Brief.

A contention not supported by any argument in the brief is abandoned. *Beaty v. Asbestos Workers*, 170.

§ 39. Presumptions and Burden of Showing Error.

The burden is on appellant to make it appear not only that the ruling complained of is erroneous, but also that the error is material and prejudicial. *Glenn v. Raleigh*, 378.

§ 40. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere technical error, the burden being upon appellant not only to show error but to show that the alleged error was prejudicial in amounting to the denial of some substantial right. *In re Will of Thompson*, 588.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The introduction in evidence of two private acts which had not been pleaded, but which refer to two other private acts properly pleaded and introduced in evidence, will not be held for prejudicial error when it appears that the adverse parties were not taken by surprise by the introduction of the unpleaded acts and that the failure to plead them was not material. *Hall v. Fayetteville*, 474.

The refusal of the court to strike certain testimony, even though such testimony be technically incompetent, cannot justify a new trial when its admission is not sufficiently prejudicial as to have affected the result. *In re Will of Thompson*, 588.

The admission of evidence cannot be held prejudicial when evidence of the same import is admitted without objection. *Ibid.*

The refusal to strike testimony ordinarily is not prejudicial when other testimony to the same import has theretofore been admitted without objection. *Ibid.*

§ 45. Error Cured by Verdict.

Where it is determined that the asserted agent was not negligent, nonsuit as to the party sought to be held liable upon the doctrine of *respondeat superior* cannot be harmful. *Hunt v. Davis*, 69.

§ 46. Review of Discretionary Matters.

The discretionary ruling of the trial judge in setting aside the verdict as being contrary to the weight of the evidence is not reviewable on appeal in the absence of abuse of discretion. *Ahrens v. Robey*, 98.

The exercise of discretion implies conscientious judgment and not arbi-

trary action. *S. v. Robinson*, 282.

Ordinarily, a motion to amend is addressed to the sound discretion of the trial court and its ruling thereon is not reviewable on appeal, but when the denial of the motion is based upon an erroneous holding as a matter of law as to the scope of the issues raised by the pleadings and as to the legal effect of the testimony, the denial of the motion is reviewable and must be held for error. *Woody v. Pickelsimer*, 599.

§ 47. Review of Orders Relating to Pleadings.

The denial of a motion to strike, even though the motion is made in apt time, will not be disturbed on appeal unless the matter objected to is irrelevant or redundant and unless its retention in the pleading will cause harm or injustice to the moving party, but when the matter is irrelevant and prejudicial, the denial of motion to strike will be reversed. *Batts v. Batts*, 243.

§ 49. Review of Findings or Judgment on Findings.

In the absence of an exception to any finding of fact, the facts set forth in the court's findings must be accepted as established. *In re Hardin*, 66.

Where there is no request for findings of fact and the court makes no specific findings, it will be presumed that the court accepted as true for the purposes of its order the facts alleged in the pleading which support the order. *Royall v. Lumber Co.*, 735.

Findings of fact of the trial court are conclusive on appeal when supported by evidence. *Beaty v. Asbestos Workers*, 170.

Where the facts before the court are insufficient to sustain the judgment, the cause must be remanded. *Smith v. Smith*, 194; *Peirson v. Ins. Co.*, 215.

Where, in the submission of a controversy to determine whether certain of plaintiff's properties are exempt from taxation (G.S. 105-296 (4), there is conflict between the agreed statement and an exhibit attached as to the nature and use of certain of the properties and the relationship of the occupant to plaintiff, and as to other properties, the facts agreed are insufficient to determine with definiteness the taxable status of such properties the cause must be remanded for further proceedings. *Seminary v. Wake County, Forest*, 420.

The findings of fact of the referee, supported by competent evidence and approved by the trial judge, as well as additional findings made by the judge upon the hearing and supported by evidence, are binding on appeal. *Hall v. Fayetteville*, 474.

Where the crucial findings of fact made by the referee and approved and confirmed by the judge are supported by competent legal evidence and support the conclusions of law made by the referee and confirmed by the judge, the judgment supported by such findings and conclusions of law will be upheld. *Ibid.*

§ 50. Review of Injunction Proceedings.

In injunction proceedings the Supreme Court is not bound by the findings of fact of the trial court, but nevertheless the presumption is in favor of such findings, and appellant must assign and show error. *Coffee Co. v. Thompson*, 207.

APPEAL AND ERROR—*Continued.*

§ 51. Review of Judgment on Motions for Nonsuit.

The evidence must be taken in its entirety in determining its sufficiency to overrule motion for nonsuit entered at the close of all the evidence. *High v. R. R.*, 414.

The fact that plaintiff's evidence relates to an inapplicable theory of liability does not justify nonsuit, since plaintiff is entitled to have an opportunity to produce, if he can, evidence establishing liability upon the correct theory. *Williford v. Ins. Co.*, 549.

Both competent and incompetent evidence must be considered on appeal in determining the sufficiency of the evidence to overrule nonsuit. *Frazier v. Gas Co.*, 559.

§ 60. Law of the Case and Subsequent Proceedings.

A decision on a former appeal constitutes the law of the case in respect to the questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal upon substantially the same evidence. *Glenn v. Raleigh*, 378.

ARBITRATION AND AWARD.

§ 1. Arbitration Agreements.

The requirement of an arbitration agreement that the arbitrator should render his decision not later than thirty days from the date of closing the hearings does not require the delivery of the award to the parties within the time specified, it being sufficient if the arbitrator signs his award and it is received by the arbitration tribunal within the time limited. *Poe & Sons v. University*, 617.

Ordinarily, any person who has a dispute with another person may submit the dispute to arbitration without the joinder of all the parties who have a joint interest in the matter. *Ibid.*

§ 4. Proceedings by Arbitrators.

Arbitrators are not bound to decide according to law when acting within the scope of their authority, and may make an award according to their notion of justice without assigning any reason, and therefore in the arbitration of a construction contract upon controversy based on alleged defect in the materials or faulty workmanship resulting in the leakage of a number of showers, the actual number of showers involved and when the defects were reported by the owner to the contractor are addressed solely to the arbitrator. *Poe & Sons v. University*, 617.

§ 7. Conclusiveness and Effect of Award.

Where controversy between the owner and the contractor as to the contractor's liability for leakage in showers in the building, allegedly due to defect in materials or faulty workmanship, is submitted to arbitration, the award of the arbitrator within the scope of the inquiry is conclusive on the parties, notwithstanding any errors on the part of the arbitrator in regard to the law of facts, and, the subcontractors not being parties, it will be assumed that the liability of the contractor alone was within the scope of the agreement, and the arbitrator properly omits any decision as to the liability of subcontractors. *Poe & Sons v. University*, 617.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant.

When the victim of an assault and robbery points out defendant to an officer as being one of his assailants, the officer has the duty to arrest defendant without a warrant and search his person, notwithstanding that defendant is later convicted only of the misdemeanor. *S. v. Grant*, 341.

ASSAULT AND BATTERY

§ 3. Civil Actions for Assault.

A civil action for assault and battery incident to an unlawful arrest is, apart from the false imprisonment, barred by the lapse of one year from the alleged assault. *Mobley v. Broome*, 54.

In this action for assault through malice or gross negligence, defendant did not allege that he shot plaintiff through accident or misadventure, but alleged that plaintiff was injured at some other time and in some other manner than as set forth in the complaint, and that defendant had no connection with the injury whether it was brought about by accident or other means. *Held:* Defendant's allegations negatived the theory of injury by accident or misadventure as a defense in behalf of the defendant, and therefore an instruction presenting the defense of accident or misadventure is erroneous. *Williams v. Dowdy*, 683.

In this action instituted by a worker against defendant landlord to recover for assault through malice or gross negligence, defendant alleged that plaintiff was injured at some other time and in some other manner than as set forth in the complaint, and further alleged that at the time in question, as some other workers approached him in a menacing manner, he fired one shot into the ground. Defendant's evidence was to the effect that the shot was recovered from the ground and identified as having been fired from his gun. *Held:* In the light of defendant's allegations, the plea of self-defense was not raised, and an instruction presenting this defense to the jury must be held prejudicial. *Ibid.*

§ 4. Criminal Assault in General.

No words, however violent or insulting, justify a blow. *Goldberg v. Ins. Co.*, 86.

G.S. 14-33 relates only to punishment and creates no new offense. *S. v. Courtney*, 447.

§ 7. Assault on Female by Man or Boy over Eighteen.

In a prosecution of a male person for assault upon a female, the presumption is that the defendant is over 18 years of age, with the burden upon defendant to show as a matter of defense, relevant solely to punishment, that he was not over 18 years of age at the time the offense was committed, if this be the case. *S. v. Courtney*, 447.

§ 11. Indictment and Warrant.

An indictment for assault upon a female need not charge that defendant was over 18 years of age at the time of the alleged assault in order to support punishment as for a general misdemeanor, since the age of the de-

ASSAULT AND BATTERY—*Continued.*

fendant is no part of the offense but relates solely to punishment. *S. v. Courtney*, 447.

§ 12. Presumptions and Burden of Proof.

Where the indictment contains no averment that defendant was over 18 years of age at the time of the alleged assault, defendant's plea of not guilty, without more, does not put in issue whether he was over 18 years of age at the time the offense was committed. *S. v. Courtney*, 447.

§ 17. Verdict and Punishment.

Ordinarily, whether a defendant was over 18 years of age at the time the offense was committed, so as to warrant punishment as for a general misdemeanor upon conviction of defendant of assault upon a female, is for the determination of the jury and not the court, and may be appropriately determined upon a separate issue, with presumption that defendant was over 18 years of age being evidence for the consideration of the jury upon the question. *S. v. Courtney*, 447.

When a male defendant, during the progress of his trial on an indictment charging an assault on a female or a more serious crime embracing the charge of assault on a female, testifies that he was more than 18 years of age at the time of the assault, and there is no evidence or contention to the contrary, the collateral issue as to defendant's age need not be submitted to or answered by the jury in order for the verdict of guilty of assault upon a female to warrant punishment as for a general misdemeanor. *S. v. Grimes*, 226 N.C. 523, modified to this extent. *Ibid.*

A verdict of guilty of assault on a female is a permissible verdict on an indictment for rape. *Ibid.*

ASSIGNMENTS

§ 1. Rights and Interests Assignable and Transactions Constituting Assignment.

A conditional sale of raw materials to be used by the manufacturer in its business, with provision that the manufacturer might sell the manufactured goods, in which event the seller should be entitled to a proportionate part of the accounts receivable, or in the event of a cash sale, to the cash paid, constitutes an equitable assignment of accounts receivable and cash realized by the manufacturer pursuant to the contract. *Lumber Co. v. Banking Co.*, 308.

§ 3. Priorities.

A factor taking an assignment of accounts receivable from the manufacturer has priority over an equitable assignee of such accounts in a registered instrument when at the time of the registration of the equitable assignment there was no statutory provision authorizing its registration. *Lumber Co. v. Banking Co.*, 308.

ASSOCIATIONS

§ 5. Right to Sue and Be Sued.

An unincorporated labor union may be sued in this State and process

ASSOCIATIONS—*Continued.*

served on it by service on the Secretary of State when it is doing business in this State. *Beaty v. Asbestos Workers*, 170; *Martin v. Brotherhood*, 409.

ATTACHMENT

§ 11. Liabilities on Defendant's Bond.

Where plaintiffs recover judgment against defendant in the main action, in which the garnishees are served, G.S. 1-440.22, and there is no attack upon the validity of the attachment nor demand for a jury trial for dissolution of the attachment, G.S. 1-440.36, plaintiffs are entitled to summary judgment on the undertaking signed by defendant and one of the garnishees for the release of the property from the attachment, the property having been sold and being incapable of delivery in kind to plaintiffs. *Hill v. Dawson*, 95.

ATTORNEY AND CLIENT

§ 3. Scope of Authority of Attorney.

Where a complaint is sufficient to allege one cause of action, the fact that plaintiff's attorney stated that the nature of the cause of action was for a relief not supported by the allegations, does not justify the granting of defendant's motion for judgment on the pleadings. *Hill v. Parker*, 662.

§ 9. Disbarment Procedure.

There are two methods by which an attorney may be disbarred, the one judicial and the other legislative. *In re Gilliland*, 517.

Disbarment proceedings are in the nature of a civil action rather than a criminal prosecution. *Ibid.*

The 1937 amendment to G.S. 84-28 providing that the Council of the North Carolina State Bar should have power to formulate rules of procedure governing disbarment proceedings which shall conform as near as may be to the procedure provided by law for hearings before referees in compulsory references, relates to the formulation of rules of procedure incident to hearings before the Council or the Trial Committee and not to procedure upon appeal to the Superior Court. *Ibid.*

Failure of respondent in disbarment proceedings to demand jury trial and tender issues incident to his appeal from the Trial Committee to the Council and from the Council to the Superior Court does not waive his right to trial by jury in the Superior Court of the issues of fact raised by the pleadings, since neither G.S. 84-28 nor the rules and regulations of the North Carolina State Bar contain any provisions sufficient to deprive the respondent of the right to trial by jury in the Superior Court expressly granted by the statute. *Ibid.*

The refusal of respondent's motion upon appeal to the State Bar Council to have the proceedings remanded to the Trial Committee for the consideration of additional evidence cannot be prejudicial when the trial in the Superior Court is by jury upon the written evidence in the cause, which includes the additional evidence introduced in the hearing before the Council. *Ibid.*

AUTOMOBILES

§ 6. Safety Statutes and Ordinances in General.

The violation of statutory rules of the road designed to provide for human safety is negligence *per se* unless the statute provides that its violation shall not constitute negligence as a matter of law. *Funeral Service v. Coach Lines*, 146.

§ 7. Attention to Road, Look-Out and Due Care in General.

Fundamental to the right to operate any motor vehicle is the rule of the prudent man declared in G.S. 20-140, requiring a motorist to operate his vehicle with due care and circumspection so as not to endanger others. *Funeral Service v. Coach Lines*, 146.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

A motorist driving on his right side of the highway may assume that vehicles approaching from the opposite direction will observe the rules of the road and remain on their right side of the center line, and while the right to rely upon such assumption is not absolute, it does obtain unless there is something to put him on notice that the driver of an approaching car is in a helpless condition or for some cause will not remain on his right side of the highway. *Lucas v. White*, 38.

An instruction on the right of a motorist to assume that an approaching vehicle would yield one-half the highway in passing *held* not objectionable in limiting such right to a motorist himself observing the requirements of the statute, when such instruction, considered in context, is to the effect that a motorist is not entitled to rely on such assumption if such motorist was himself then driving on his left side of the highway and was thereby contributing to the hazard and emergency that existed immediately prior to the collision. *Blackwell v. Lee*, 354.

§ 17. Right of Way at Intersections.

It is unlawful for the driver of a vehicle along a servient highway to fail to stop and yield the right of way as required by stop signs duly erected, but such failure is not contributory negligence *per se*, but is only evidence upon the issue to be considered with other facts adduced by the evidence. G.S. 20-158(a). *Williams v. Randall*, 20.

The operator of a vehicle along the dominant highway is under no duty to anticipate that the operator of a vehicle along the servient highway will fail to stop as required by statute, and in the absence of anything which gives or should give him notice to the contrary, he is entitled to assume and act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will stop before entering the intersection. *Ibid.*

The driver of a vehicle along the dominant highway does not have the absolute right of way in the sense that he is not bound to exercise ordinary care in regard to vehicles traveling along the servient highway. *Ibid.*

G.S. 20-158(c) deals only with red and green lights at intersections outside of municipal corporate limits and is inapplicable to a traffic light within a municipality having red, green and amber lights. *Wilson v. Kennedy*, 74.

A motorist is guilty of negligence as a matter of law if he fails to stop in obedience to a red traffic light as required by municipal ordinance, G.S.

AUTOMOBILES — *Continued*

20-169, and such negligence is actionable if it proximately causes the death or injury of another. *Currin v. Williams*, 32.

The fact that a motorist enters an intersection facing a green traffic control signal does not relieve him of the duty to maintain a proper lookout, keep his vehicle under reasonable control, and operate it at a speed and in such manner as not to endanger or be likely to endanger others upon the highway, but nevertheless, he may assume and act upon the assumption that motorists facing the red light will observe the rules of the road and stop in obedience to the traffic signal. *Ibid.*

Whether a motorist entering an intersection faced with a green traffic control signal is guilty of contributory negligence as a matter of law in failing to look for traffic on the intersecting street depends upon whether such failure was a proximate cause of the collision with a car entering the intersection against the red traffic light, and nonsuit for such failure is proper only if he could or should have seen that the other car would not stop in obedience to the red light in time to have avoided the collision. *Ibid.*

Where the municipal ordinance governing traffic control signals having red, green and amber lights is not introduced in evidence, the different signals will be given that interpretation which a reasonably prudent operator of a motor vehicle should and would understand and apply; when a motorist is faced with the red traffic light, he is required to stop, when faced by the amber light, he is warned that red is about to appear and that it is hazardous to enter, the amber light being for the purpose of affording a motorist who has entered on the green light an opportunity to clear the intersection before the cross traffic is invited to enter. *Wilson v. Kennedy*, 74; *Funeral Home v. Coach Lines*, 146; *Williams v. Funeral Home*, 524.

A green traffic signal does not guarantee safe passage through an intersection, but the driver entering an intersection while faced with the green light must nevertheless exercise the care of a reasonably prudent person under similar conditions. *Wilson v. Kennedy*, 74.

Even though the municipal ordinance governing the use of intersections controlled by traffic control signals is not introduced in evidence, the use of traffic lights at intersections is general and the meaning of the lights well understood, and such signals will be obeyed by a reasonably prudent person; the red light gives warning of danger, and a green light or "go" signal is not a command to go, but is a qualified permission to proceed lawfully and carefully in the direction indicated. *Funeral Home v. Coach Lines*, 146.

The statute giving ambulances on emergency duty the right of way at intersections does not relieve the operator of a private or public ambulance of the duty to exercise due care, and does not require a motorist to yield such ambulance the right of way until the motorist hears and comprehends its siren or warning sound, or should have heard and understood its meaning in the exercise of the care of a reasonably prudent person. *Ibid.*; *Williams v. Funeral Home*, 524.

G.S. 20-158(c), prescribing the right of way at intersections controlled by traffic control lights, applies only to such lights outside of towns and cities but cities are not denied the authority to regulate the movement of traffic at street intersections. G.S. 20-158(b). *Ibid.*

If the driver of an ambulance believes *bona fide* that he is operating the vehicle on an emergency trip and gives the warning required by statute, he is accorded the statutory privilege and is entitled to rely on the assumption

AUTOMOBILES — *Continued*

that other motorists hearing and understanding the sound of his siren will yield the right of way. *Williams v. Funeral Home*, 524.

Notwithstanding the unequivocal testimony of certain witnesses that they heard the siren of the ambulance operated by defendant for a distance of some several blocks, the testimony of other witnesses equally unequivocal, that they did not hear the siren until the ambulance was within a few feet of the intersection, is some evidence that the siren was not in fact sounded in time to provide a warning to plaintiff motorist approaching along the intersecting street. *Ibid.*

Provision of an ordinance permitting ambulances on emergency duty, giving proper warning, to proceed past red or stop signals after slowing down as may be necessary for operation, grants the privilege only when the ambulance can proceed with safety to others who have a legal invitation to use the intersection. *Ibid.*

The duty of a motorist, even though entering an intersection while faced with the green traffic light, to use ordinary care and maintain a proper lookout, is not to be measured by the duty of a motorist traversing a railroad crossing, and although a motorist traversing an intersection must be vigilant and is charged with the duty of noting traffic along the intersecting street which a reasonably prudent man would see under the circumstances, he is not required to anticipate negligence on the part of other drivers. *Ibid.*

§ 19. Sudden Emergency.

One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made. *Lockman v. Powers*, 403.

One cannot escape liability for acts otherwise negligent because done under the stress of an emergency if such emergency was caused, wholly or in material part, by his own negligent or wrongful act. *Ibid.*

§ 35. Pleadings and Parties.

Where plaintiff sues both joint tort-feasors, neither may maintain cross-action against the other for affirmative relief not germane to plaintiff's action. *Bell v. Lacey*, 703.

§ 36. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact of an accident. *Williamson v. Randall*, 20.

§ 37. Relevancy and Competency of Evidence in General.

Testimony that there were no obstructions on the highway at the scene of the accident except a sign post at the south shoulder is competent when it refers solely to the presence or absence of any physical object or condition that might have a tendency to obstruct the driver's view, and is, therefore, a statement of fact by the witness. Principles of law relating to the competency of opinion evidence as whether an identified object was sufficient to obstruct the driver's view are inapposite. *Blackwell v. Lee*, 354.

§ 39. Physical Facts at Scene.

The physical facts at the scene of a collision may speak louder than testimony of witnesses. *S. v. Hancock*, 436.

While physical facts at the scene of the accident may tend to indicate excessive speed in proper instances, when plaintiff relies upon the physical

AUTOMOBILES — *Continued*

facts and other evidence of a circumstantial nature, he must establish attendant facts and circumstances which reasonably warrant the legitimate inference of actionable negligence from the facts established and not such as merely raise a conjecture or speculation. *Williamson v. Randall*, 20.

§ 40. Relevancy and Competency of Declarations and Admissions.

A statement by defendant driver to plaintiff upon his visit to her in the hospital after the accident that "he felt like it was partly his fault," *is held* a legal conclusion, determinable alone by the facts. *Lucas v. White*, 38.

Testimony of a statement made by one plaintiff tending to substantiate one defendant's version of the accident is competent as substantive evidence in favor of such defendant, but is properly excluded as to the other plaintiff and the other defendant. *Blackwell v. Lee*, 354.

§ 41c. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Failing to Stay on Right Side of Highway.

Plaintiff's allegation and evidence were to the effect that she was riding as a passenger in a car driven by the appealing defendant on its right side of the highway, and that a car approaching from the opposite direction suddenly swerved to its left over the center of the highway and collided with the car in which plaintiff was riding. There was evidence that the approaching car had been wobbling from one side of the highway to the other prior to the collision, but plaintiff's allegations were to the effect that it had proceeded in an unswerving line in its lane of travel until halted by the collision. *Held:* Disregarding the evidence at variance with the allegations, there was no evidence of anything to put the defendant on notice that the driver of the other car would not observe the rules of the road until it was too late for defendant to have avoided the collision, and nonsuit was proper. *Lucas v. White*, 38.

§ 41g. Sufficiency of Evidence of Negligence in Failing to Yield Right of Way at Intersection.

Where evidence does not show that driver heard or should have heard warning siren, it fails to show negligence in failing to yield right of way to ambulance. *Funeral Home v. Coach Lines*, 146; *Williams v. Funeral Home*, 524.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence tending to show that the driver of a tractor-trailer on a four-lane highway, separated into two east-bound and two west-bound lanes, was traveling west and, in attempting to turn around on the west-bound lanes, had driven the tractor so that it was headed east in the south lane for west-bound traffic, with the trailer completely blocking both west-bound lanes, and that plaintiff, traveling at a lawful speed and blinded by the lights of the tractor, struck the side of the trailer, *is held* not to show contributory negligence as a matter of law on the part of plaintiff. *Hutchins v. Corbett*, 422.

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence held to disclose contributory negligence as matter of law on part of motorist entering intersection from servient highway. *Williamson v. Randall*, 20.

AUTOMOBILES—*Continued.*

Evidence held not to show contributory negligence as a matter of law on part of motorist in failing to see that motorist facing red light would not stop. *Currin v. Williams*, 32.

Evidence held not to show contributory negligence as a matter of law on part of motorist, entering intersection with green light, in failing to yield right of way to ambulance. *Williams v. Funeral Home*, 524.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

In this action by a passenger in one car against the drivers of both cars involved in a collision at an intersection, the evidence *is held* sufficient to be submitted to the jury on the theory of the concurrent negligence of both drivers, and motion to nonsuit made by one of them on the ground that any negligence on his part was insulated by the negligence of the other, was properly refused. *Woody v. Massey*, 329.

§ 44. Sufficiency of Evidence to Require Submission of Contributory Negligence to Jury.

Evidence of plaintiff driver's negligence in entering intersection held sufficient to take the issue of contributory negligence to the jury and present right to contribution in defendant driver's cross-action in plaintiff passenger's action. *Wilson v. Kennedy*, 74.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Where the evidence discloses that defendant, traveling along the dominant highway, immediately put on his brakes upon seeing the car of plaintiff's intestate enter the intersection from the servient highway, the evidence is insufficient to present the issue of last clear chance, since it does not disclose that defendant, after he saw or by the exercise of due care should have seen that intestate was not going to yield the right of way, then had sufficient time to have avoided the collision. *Williamson v. Randall*, 20.

§ 47. Liability of Driver to Guest or Passenger.

Plaintiff's evidence tended to show that she called defendant late at night after her husband had gone to work on the night shift and insisted that defendant come to her home to talk with her in regard to reemploying her in his plant, that defendant drove up in the driveway and she came out and sat on the edge of the back seat with her feet in the open door, and that while they were talking plaintiff's husband suddenly arrived, jerked plaintiff's arm, that she jerked back and fell in the car, that plaintiff's husband, cursing and threatening defendant, threw something at him and started around the car toward defendant, and that while plaintiff's husband was thus subjecting him to physical and verbal attack defendant started the car and backed out of the driveway, that in some manner plaintiff caught in the door of the car and was dragged to her injury. *Held:* The evidence discloses that defendant was required to act in a sudden emergency, and upon plaintiff's evidence, was without fault in causing the emergency, and therefore the evidence fails to disclose negligence on his part under the circumstances. *Cockman v. Powers*, 403.

§ 48. Actions by Guests or Passengers, Parties and Contribution.

On defendant driver's claim against plaintiff's driver for contribution in

the event of recovery by plaintiff passenger, defendant is entitled to have the evidence tending to support the claim reviewed in the light most favorable to him in passing on plaintiff driver's motion to nonsuit, and nonsuit should not be allowed thereon if defendant's evidence, when so viewed, supports the allegations for contribution. *Wilson v. Kennedy*, 74.

Where plaintiff sues both joint tort-feasors, neither may maintain cross-action against the other for affirmative relief not germane to plaintiff's action. *Bell v. Lacey*, 703.

§ 49. Contributory Negligence of Guest or Passenger.

Evidence that the driver had impaired eyesight because of cataract of one eye, together with expert testimony that at the time the driver was capable of driving an automobile in a normal manner without serious difficulty as regards vision, does not require the submission of the issue of contributory negligence of the passenger in riding in the car with such driver. *White v. Dickerson, Inc.*, 723.

Evidence that a passenger in an automobile was carefully watching and looking ahead to aid the driver of the car in going through heavy fog, that the car was traveling 10 to 15 miles per hour, and that when she saw a burning flambeau, she cried out and the driver immediately put on his brakes, but skidded into an open canal, where the bridge had been removed, *is held* insufficient to require submission of the issue of contributory negligence of the passenger in failing to exercise due care for her own safety and warn the driver of the unlighted warning signs erected by defendant, which she did not see because of the fog. *Ibid.*

§ 50. Negligence of Driver Imputed to Guest or Passenger.

The question of whether the negligence of the driver will be imputed to plaintiff passenger under the doctrine of joint enterprise is not presented when the defendant does not plead such defense. *White v. Dickerson, Inc.*, 723.

§ 54a. Who Are Employees within Doctrine of Respondeat Superior.

Under the terms of the contract in question, lessor was to provide personnel and equipment for trips authorized by lessee's franchise, the drivers to be under complete control of the lessee's supervisor and the vehicles to be marked with lessee's identification on such trips. Plaintiff, an employee of lessee, was injured on a trip under lessee's franchise. The driver was paid by lessor, but lessee was required by the contract to reimburse lessor for his wages. *Held:* The driver, on the trip in question, was an employee of lessee, and plaintiff, having recovered compensation of lessee under the Workmen's Compensation Act, may not maintain an action against lessor at common law as a third person tort feasor. *Peterson v. Trucking Co.*, 439.

§ 56. Assault and Homicide—Culpable Negligence.

The wilful, wanton, or intentional violation of a safety statute, or the inadvertent or unintentional violation of such statute when accompanied by recklessness amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, constitutes culpable negligence, but the inadvertent or unintentional violation of a safety statute, standing alone, does not constitute culpable negligence. *S. v. Hancock*, 436.

AUTOMOBILES—*Continued.*

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Evidence of culpable negligence held insufficient to be submitted to the jury in this prosecution for manslaughter. *S. v. Hancock*, 432.

§ 75. Punishment for Drunken Driving.

Warrant must properly charge that offense was second offense in order to support heavier sentence. *S. v. Wilkins*, 340.

BANKRUPTCY

§ 2. Title and Rights of Trustee.

Where a corporation has been placed in bankruptcy, right to institute action under G.S. 55-56, (prior to the effective date of Ch. 1371, Session Laws of 1955) to recover from officers and stockholders for fraudulent withdrawal, depletion and appropriation of the assets of the corporation, vests in the trustee in bankruptcy, and creditors of the corporation may not maintain such action even after refusal of the trustee to institute suit, since the creditors' remedy is by petition to the court of bankruptcy for an order compelling the trustee to bring such suit. 11 U.S.C.A., Bankruptcy, Sec. 110. *Sales Corp. v. Townsend*, 687.

BASTARDS

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions for Willful Failure to Support.

The evidence in this prosecution of defendant for willful failure to provide support for his illegitimate child *is held* sufficient to take the case to the jury, and testimony of the mother of the prosecutrix was admissible for the purpose of corroboration. *S. v. Key*, 246.

§ 7. Instructions.

In this prosecution of defendant for willful failure to support his illegitimate child, an instruction that the jury might take judicial notice that the normal period of gestation is seven, eight, nine, nine and one-half, or ten months, *is held* not prejudicial in view of the evidence in this case. *S. v. Key*, 246.

§ 9. Judgment and Sentence.

A domestic relations court has authority to suspend sentence upon condition that defendant pay a stipulated sum per week into court for the support of his illegitimate child. *S. v. Robinson*, 282.

BILLS AND NOTES

§ 18½. Instructions, Issues and Verdict.

In this action on a note, defendant set up the affirmative defense of material alteration. The case was submitted to the jury on the two issues of execution of the note and the amount of recovery. *Held:* An instruction that the burden of proof on the first issue was on plaintiff to prove due execution of the instrument and on defendant to prove his defense of material altera-

BILLS AND NOTES—*Continued.*

tion must be held prejudicial as tending to confuse the jury. *Nagle v. Bosworth*, 93.

§ 19. Elements and Essentials of Offense of Issuing Worthless Check.

The signing of a blank check form does not constitute the instrument a check, and where, in a prosecution under G.S. 14-107, defendant testifies that he signed a blank check, that he did not authorize anyone to fill it out in any amount, and that he did not know by whom or when it was filled out, an instruction to the effect that it was immaterial whether there was any writing on the check other than the signature at the time of delivery, must be held for prejudicial error as depriving defendant of the defense that what he signed was not a check. *S. v. Ivey*, 316.

BOATING

A person operating a boat in waters frequented by bathers or other boats is under duty to maintain such lookout as a reasonably prudent person would maintain to discover and avoid injury to others lawfully using the waters, and is chargeable with the knowledge which such lookout would disclose, but in the absence of some warning to the contrary, the duty of lookout is limited to objects on or above the surface of navigable waters. *Williams v. McSwain*, 13.

Evidence held insufficient to show negligence on part of owners of beach in failing to warn bather of danger from boats. *Williams v. McSwain*, 13. Evidence held insufficient to show negligence on part of boat master causing injury to bather. *Ibid.*

BOUNDARIES

§ 1. General Rules — General and Specific Descriptions.

In construing the description in a deed, the intent of the parties as ascertained from the words employed, in accordance with the general rule for the construction of deeds, wills or contracts, must be given effect. *Franklin v. Faulkner*, 656.

Settled rules of construction will be applied to the language of an instrument in ascertaining the intent of the parties. *Ibid.*

In ascertaining the intent of the parties from the language of an instrument all the words used are presumed to have a meaning selected for the purpose of displaying the user's intent. *Ibid.*

A general description will not enlarge a specific description when the latter is in fact sufficient to identify the land which it purports to convey, and a general description will prevail over a specific description only when the specific description is ambiguous and uncertain. *Ibid.*

§ 2. Course and Distance and Calls to Natural Objects.

Where a conflict exists in the description of property between a call for a natural object and a course or a distance or course and distance, the call for the natural object will prevail. *Franklin v. Faulkner*, 656.

A known line of another tract, or a ditch, or a road is a natural object which will control course and distance. *Ibid.*

Where the call in a deed is specific as to distance, but a quadrant of the course is omitted, such specific description cannot be held void for uncer-

BOUNDARIES—*Continued.*

tainty when the missing quadrant of the course is supplied with certainty by a call to a natural object. *Ibid.*

§ 7. Nature and Scope of Processioning Proceedings.

Plaintiff may not take a voluntary nonsuit in a processioning proceeding. *McKinney v. Morton*, 101.

§ 8. Processioning Proceedings — Questions of Law and of Fact.

What are the boundaries of a tract of land is a question of law. Where they are are located on the ground is a question of fact. *Carrow v. Davis*, 740.

§ 9. Sufficiency of Description and Admissibility of Parol Evidence.

A deed is void for vagueness of description unless it identifies the land sought to be conveyed complete within itself or by reference to some source from which the deficiency in the description may be supplied. *Carrow v. Davis*, 740.

BROKERS AND FACTORS

cessors. G. S. 44-74. *Lumber Co. v. Banking Co.*, 308.

By statutory definition a factor advances money to manufacturers or processors. G.S. 44-70. *Lumber Co. v. Banking Co.*, 308.

CARRIERS

§ 2. State Regulation and Control.

The basic distinction between a regular route common carrier and an irregular route common carrier is that the former is a carrier with scheduled operations over a restricted and defined route while the latter is a carrier with unscheduled operations within a designated territory but wholly unrestricted as to route. *Utilities Com. v. Truck Lines*, 625.

An irregular route common carrier has no legal right to compel a regular route carrier to interchange intrastate freight, but such interchange of freight between them must be based on an agreement, and in the absence of such agreement voluntarily made by the carriers and submitted by them to the Utilities Commission, the Commission has no jurisdiction of the subject matter. *Ibid.*

Where joint petition of an irregular route truck carrier and a regular route truck carrier for permission to interchange freight is denied except as to points of pickup and delivery not on the regular route of any other carrier, and only one of the petitioning carriers appeals from judgment of the Superior Court affirming the order of the Utilities Commission, the nonappealing carrier is bound by the decision, and therefore the decision must be affirmed on appeal of the other carrier, since it could not be given authority to interchange freight without violating the provisions of the order as to the nonappealing carrier. *Ibid.*

§ 3. Lease of Vehicle of Another Carrier.

An interstate carrier is liable in damages for injuries to third persons caused by the negligent operation of equipment leased by it under a lease agreement for a trip in interstate commerce under lessee's franchise. *Employment Security Com. v. Freight Lines*, 496.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 1. Form, Requisites and Construction in General.

A contract under which the vendor retains title to raw materials to be used by the purchaser in the manufacture of articles, with provision that the purchaser should sell the articles manufactured and that upon sale the vendor should own the proportionate part of the accounts receivable or cash realized from the sale, is a conditional sale and does not create a partnership. *Lumber Co. v. Banking Co.*, 308.

§ 11. Agency of Mortgagor to Sell and Estoppel of Mortgagee to Assert Lein.

Where a registered contract for the sale of raw materials to be used in the manufacture of articles provides for retention of title in the seller, but that the manufacturer might sell the finished goods, in which event the seller should be entitled to a proportionate part of the accounts receivable or cash realized from such sale, *held*, upon sale by the manufacturer the seller's lien on the specific goods is immediately terminated, and the equitable assignment of the accounts receivable is not within the protective provisions of G.S. 47-20 nor 47-23, and the contract being registered prior to the enactment of Ch. 504, Session Laws of 1957, its provisions are not applicable, and therefore the registration of the contract does not constitute notice of the equitable assignment. *Lumber Co. v. Banking Co.*, 308.

COMPROMISE AND SETTLEMENT

When defendant pleads a compromise and settlement, the burden is on him to show a consummated settlement, and when he introduces no evidence, judgment sustaining the plea without a finding that the settlement had been consummated by the payment of the sum stipulated, is error. *Gillikin v. Gillikin*, 710.

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution and Decisions.

Motion to set aside the verdict in a prosecution of Negroes for trespass on the ground that it had been established by a Federal Court in a civil action in which defendants and the corporate owner of the property were parties, that defendants had a legal right to enter upon the land, *held* properly refused when the judgment role in the Federal action was not introduced in evidence. *S. v. Cooke*, 484.

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

Parties who collect from their customers and transmit certain funds to a specified agency in compliance with statutory requirement rather than risk the heavy penalties prescribed by the statute for failure to do so, and who allege irreparable injury in that the statute contains no provision for the recovery of such funds in the event the statute should be declared unconstitutional, and in that some of their competitors were refusing to comply with the statute, thus putting plaintiffs at a competitive disadvantage, etc., may maintain an action attacking the constitutionality of the statute. *Assurance Co. v. Gold*, 288.

In this action attacking the constitutionality of a statute, demurrer of certain defendants was allowed, and it appeared that the remaining defendant was a party plaintiff in another action in which such party attacked the constitutionality of the statute for like reasons asserted by plaintiff in the instant case. *Held:* It appearing that no actual antagonistic interest exists between the parties and that both parties desire the same relief, the action is dismissed. *Bizzell v. Ins. Co.*, 294.

§ 3. Amendments.

Where a constitutional amendment stipulates that its provisions should be indivisible and that the whole of the amendment should stand or fall together, the adoption of a subsequent amendment, predicated upon the original amendment as amended, substituting one new section and containing language implicity recognizing the other sections of the article as then written, has the effect of incorporating and adopting anew the other sections and provisions of the articles as then appeared, freed of the indivisibility clause of the original amendment. *Lassiter v. Board of Elections*, 102.

§ 6. Legislative Powers in General.

Our State Constitution is a limitation and not a grant of power, and the General Assembly has all political power not prohibited it by the Constitution. *Lassiter v. Board of Elections*, 102.

§ 11. Police Power in General.

The General Assembly, in the exercise of the police power, may enact local statutes proscribing public drunkenness. *S. v. Dew*, 188.

The police power is inherent in sovereignty and is not dependent upon any constitutional grant. *Winston-Salem v. R. R.*, 637.

The police power is subject to all constitutional limitations which protect basic property rights, and therefore must be exercised at all times in subordination to Federal and State constitutional limitations and guarantees. *Ibid.*

The police power extends only to such measures as are reasonably calculated under the existing conditions and surrounding circumstances to accomplish a purpose falling within the legitimate scope of the police power, without burdening unduly, upon the particular facts of the case, the person or corporation affected. *Ibid.*

The police power cannot be placed within fixed definitive limits, but its extent must be determined upon the facts and circumstances of each particular case by application of the principle that the regulation or burden imposed must be reasonable in its operation as to the persons whom it affects and must not be unduly oppressive. *Ibid.*

While the extent of the police power does not expand or contract, what is within the police power at one time may not be within that power at another time, and vice versa, when there is a change of conditions so that a different conclusion is impelled in applying the constant test of reasonableness to the changing factual situation. *Ibid.*

§ 12. Police Power—Regulation of Trades and Professions.

The General Assembly, in the exercise of the police power of the State, may regulate the practice of pharmacy. *Board of Pharmacy v. Lane*, 134.

§ 13. Police Power — Public Convenience.

Where no factor of public safety is involved, the police power may not

be invoked to require a railroad company to rebuild an overpass over a street in furtherance of the public convenience where neither the location of the railroad nor its use for train operations is a reasonably related causative factor in producing the public inconvenience sought to be remedied. *Winston-Salem v. R. R.*, 637.

§ 17. Personal and Civil Rights in General.

Freedom to contract is both a personal and a property right within the protection of the Constitution, and although the General Assembly may impose restraints thereon for the public good, freedom of contract is the general rule and restraint the exception. *Alford v. Ins. Co.*, 224.

Nonresidents have the right to bring an action in our courts as one of the privileges guaranteed to citizens of the several states. Article IV, Section 2, of the Constitution of the United States. *Thomas v. Thomas*, 269.

§ 20. Equal Protection, Application and Enforcement of Laws and Discrimination.

The provision of G.S. 163-28 requiring all persons applying for registration to be able to read and write any section of the Constitution as an educational qualification to the right to vote, is authorized by Article VI of the State Constitution, and, since it applies alike to all persons who present themselves for registration to vote, it makes no discrimination based on race, creed or color, and therefore does not conflict with the 14th, 15th or 17th Amendments to the Constitution of the United States. *Lassiter v. Board of Elections*, 102.

The General Assembly, in the exercise of its police power, may enact local statutes making proscribed acts, such as public drunkenness, criminal offenses in the localities stipulated, provided the local statutes apply alike to all persons within each locality specified. The distinction is noted between local statutes in derogation of the general law applicable to the entire State and exemptions of particular localities from the general law. *S. v. Dew*, 188.

Where the operator of a golf course is charged with making a public or semipublic use of the property, it cannot deny the use of the property to Negro citizens solely because of race. *S. v. Cooke*, 484.

§ 24. What Constitutes Due Process.

G.S. 1-97(6) permitting service of process on unincorporated associations by service on the Secretary of State is constitutional and meets the requirements of due process. *Beaty v. Asbestos Workers*, 170.

Due process of law is secured against state action by the Fourteenth Amendment to the United States Constitution. *S. v. Perry*, 334.

The term "law of the land" as used in Art. I, sec. 17, of the State Constitution, is synonymous with "due process of law" as used in the Federal Constitution. *Transportation Co. v. Currie*, 560.

Imposition of income tax on corporation engaged in interstate transportation in ratio which its business in this State bears to its total business does not violate due process, there being no discrimination in the imposition of the tax. *Ibid.*

§ 26. Full Faith and Credit to Foreign Judgments.

While a valid decree of divorce entered in another state must be given full faith and credit and is conclusive as to all matters therein adjudicated, in-

cluding its provisions for the custody and support of minor children of the marriage, the full faith and credit clause does not require that it be more conclusive in the state of the forum than in the jurisdiction where rendered, and therefore where the state rendering the decree has power to modify its provisions for support for change of condition, such modification by the state of the forum is not precluded. Article IV, Section 1, of the Constitution of the United States. *Thomas v. Thomas*, 269.

Where decision of this Court affirming judgment awarding to the resident paternal grandfather the custody of a minor child of parents divorced in another state, notwithstanding a former decree of the court of such other state, is vacated by the Supreme Court of the United States and the cause remanded for clarification of the question whether the decision was based on changed conditions since the foreign decree or upon the ground that our Court was not bound to give the foreign decree full faith and credit, the cause must be remanded to the Superior Court for final judgment based on the facts as it may find them to be. *Kovacs v. Brewer*, 742.

§ 27. Burden on Interstate Commerce.

An income tax imposed on a corporation engaged in interstate transportation is not a direct burden on commerce. *Transportation Co. v. Currie*, 560.

§ 29. Constitutional Rights of Persons Accused of Crime — Right to Jury Trial.

The systematic exclusion of persons of defendant's race from the grand jury is a denial of defendant's constitutional right to the equal protection of the laws, and the deprivation of an opportunity to procure evidence of such discrimination requires reversal. *S. v. Perry*, 334.

§ 32. Constitutional Rights of Persons Accused of Crime — Right to Counsel.

There is no statutory requirement that indigent defendants charged with a crime less than a capital felony must have court appointed counsel, and in the absence of a request for counsel and in the absence of any showing that counsel is essential to a fair trial, the appointment of counsel rests in the sound discretion of the trial judge. *S. v. Davis*, 318.

CONTEMPT OF COURT

§ 3. Civil Contempt.

Where the husband introduces evidence that his failure to pay sums for the support of his minor child in accordance with decree of court was due to his financial inability, judgment confining the husband for wilful failure to comply with the order without any finding in respect to his ability to pay during the time of his alleged delinquency, must be set aside and the cause remanded, since in such instance the finding that the husband's failure to make the payments was wilful and deliberate is not supported by the record. *Smith v. Smith*, 298.

§ 7. Punishment for Contempt.

Wilful failure and refusal of a party to make payments for the support of his child in accordance with decree of court is civil contempt, and the court may order him into custody until he shows compliance or is otherwise

CONTEMPT OF COURT—*Continued.*

discharged according to law, G.S. 5-8, G.S. 5-4, limiting sentence of confinement for a period not exceeding thirty days, is not applicable. *Smith v. Smith*, 298.

CONTRACTS

§ 12. Construction and Operation of Contracts in General.

The parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful. *S. v. Cooke*, 484.

§ 21. Performance, Substantial Performance and Breach.

Allegations and evidence to the effect that plaintiff delivered his old car to defendant dealer and received a credit memorandum to be applied on a new car to be delivered by defendant about February, that plaintiff waited until June, and upon failure of defendant to deliver the new car demanded payment of the credit memorandum, which defendant refused, tend to establish a contract, breach by failure to perform, and the right of plaintiff to rescind, entitling plaintiff to recover his consideration or its value, but no special damage, no special damage having been alleged. *Curtis v. Cadillac-Olds, Inc.*, 717.

§ 26. Competency and Relevancy of Evidence.

Where plaintiff's allegations and evidence establish his right to rescind a contract for breach by defendant, evidence as to the value of the chose given defendant as consideration is competent, plaintiff being entitled to recover his consideration or its value. *Curtis v. Cadillac-Olds, Inc.*, 717.

CONTROVERSY WITHOUT ACTION

§ 2. Statement of Facts, Hearings and Judgment.

Where the parties submit an action to the court upon an agreed statement of facts, the facts agreed constitute the sole basis for decision. *Board of Pharmacy v. Lane*, 134.

Where the parties stipulate the facts upon which the court should render judgment, the stipulated facts constitute the sole basis for decision, and the court is not permitted to infer other or additional facts. *Smith v. Smith*, 194.

CORPORATIONS

§ 13. Liability of Officers to Corporation for Wrongful Depletion of Assets.

Where a corporation has been placed in bankruptcy, right to institute action under G.S. 55-56, (prior to the effective date of Ch. 1371, Session Laws of 1955) to recover from officers and stockholders for fraudulent withdrawal, depletion and appropriation of the assets of the corporation, vests in the trustee in bankruptcy, and creditors of the corporation may not maintain such action even after refusal of the trustee to institute suit, since the creditors' remedy is by petition to the court of bankruptcy for an order compelling the trustee to bring such suit. 11 U.S.C.A., Bankruptcy, Sec. 110. *Sales Corp. v. Townsend*, 687.

CORPORATIONS—*Continued.*

§ 19. Dividends.

Plaintiff's evidence *held* insufficient to sustain her allegations that the individual defendants, who held controlling interest in defendant close corporation, conspired together and paid themselves unreasonable and unconscionable salaries, thereby diminishing the amount available for dividends, and that defendant corporation had failed to distribute its earned surplus to the stockholders, thereby depriving plaintiff of dividends, there being no evidence as to the salary paid any individual officer or tending to show what services such officers performed, or that the corporation had retained assets in excess of those needed to continue operations. *Iseley v. Iseley & Co.*, 417.

§ 25. Actions.

A judgment creditor of a corporation whose judgment is unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation, G.S. 55-143, and an unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises *ex delicto* and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer. *Caldlaw, Inc. v. Caldwell*, 235.

§ 27. Dissolution.

The superior court has authority, in the exercise of its discretion, under G.S. 55-125(a) (4), to order the liquidation of a corporation upon application of a stockholder alleging that the corporation had been operating at a loss and that to allow it to continue operations would deplete its assets and seriously damage the stockholders. *Royall v. Lumber Co.*, 735.

Where, upon a hearing of an application for liquidation of a corporation upon grounds set forth in G.S. 55-125(a) (4), there is no request for findings of fact and the court orders the liquidation of the corporation without making specific findings, it will be presumed that the court accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. *Ibid.*

COSTS

§ 2. Recovery as Matter of Right by Successful Party.

Where plaintiff recovers a part of the claim asserted in the action, the costs should be taxed against defendant. *Alford v. Ins. Co.*, 224.

COURTS

§ 1. Nature and Functions in General.

Where a motion for a bill of *quia timet* is made to enjoin defendant from litigating the matter in another court, an adjudication solely that plaintiff would not be bound by any order which such other court might render in the premises constitutes a mere advisory opinion and is erroneous, it being no part of the function of the courts to give advisory opinions or to answer moot questions. *In re Davis*, 423.

§ 2. Jurisdiction of Courts in General.

Once the jurisdiction of a court attaches it exists for all time until the

COURTS—*Continued.*

cause is fully and completely determined. *Kinross-Wright v. Kinross-Wright*, 1.

Whenever in the course of litigation it becomes apparent that there is an absence of a genuine adversary issue between the parties, the court should withhold the exercise of jurisdiction and dismiss the action. *Bizzell v. Ins. Co.*, 294.

If a court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect, and stay, quash or dismiss the suit. *In re Davis*, 423.

CRIMINAL LAW

§ 9. Aiders and Abettors.

When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty irrespective of any previous confederation or design. *S. v. Horner*, 342.

Mere presence, even with the intention of assisting, cannot be said to be aiding and abetting unless the intention to assist, if necessary, is in some way communicated to the actual perpetrator of the crime. *Ibid.*

§ 16. Jurisdiction — Degree of Crime.

In those counties excepted from the statute, the Superior Court does not have original, concurrent jurisdiction of misdemeanors. *S. v. Cooke*, 485.

§ 18. Jurisdiction on Appeal to Superior Court.

The warrant may not be amended in the Superior Court to charge that offense was a second offense, and where it is not clear from the record whether the warrant was so amended before or after trial in the inferior court the cause must be remanded. *S. v. Wilkins*, 340.

§ 26. Plea of Former Jeopardy.

Conviction by a court without jurisdiction to hear and determine the question of guilt or innocence of defendants is a nullity and will not support a plea of former jeopardy in a subsequent trial upon a valid charge in a court having jurisdiction. *S. v. Cooke*, 485.

The question of former jeopardy cannot be raised by motion to quash when the facts constituting double jeopardy do not appear on the face of the indictment. *Ibid.*

§ 31. Judicial Notice.

A court cannot take judicial knowledge of facts found at another time by another court in another action, the judgment roll in such former action not being introduced in evidence. *S. v. Cooke*, 485.

§ 32. Burden of Proof and Presumptions.

A plea of not guilty puts in issue every essential element of the crime charged. *S. v. Courtney*, 447.

§ 72. Admission and Declarations.

In the absence of a charge of conspiracy, incriminating statements made by each defendant not in the presence of the other are competent, respectively, only against the defendant making the statements. *S. v. Horner*, 342.

CRIMINAL LAW—*Continued.*

Where prosecution of two defendants for the same offense are consolidated for trial, testimony of statements made by one of them tending to incriminate both defendants, is competent solely against the defendant making the declarations and should be excluded as to the other defendant upon his objection thereto. *S. v. Franklin*, 695.

§ 79. Evidence Obtained by Unlawful Means.

Where arrest is made by officer without warrant on reasonable grounds to believe defendant had committed a felony, narcotics found on defendant's person are competent in evidence. *S. v. Grant*, 341.

§ 80. Evidence of Character of Defendant.

The fact that a witness testifying as to a competent admission of defendant identifies himself as a probation officer does not in itself render the testimony incompetent on the ground that the jury might infer from the position of the witness that defendant had been convicted of a criminal offense in some other case. *S. v. Pitt*, 57.

§ 90. Admission of Evidence Competent for Restricted Purpose.

Testimony competent as against one defendant but incompetent for any purpose as against the other defendant should be excluded as to such other defendant upon his general objection even in the absence of a request at the time that its admission be restricted. The rule requiring that where evidence is competent for a restricted purpose the objecting party must request at the time that its purpose be restricted, applies when the evidence is competent for one purpose but not for all purposes against the objecting party, and does not apply when the evidence is incompetent for any purpose against the objecting party. *S. v. Franklin*, 695.

§ 97. Argument and Conduct of Counsel and Solicitor.

Argument of the solicitor, in contradiction of the testimony of defendant's witnesses as to his good character, that the solicitor could have gotten at least one hundred people to come and testify as to defendant's bad character, is improper as permitting the solicitor to impeach defendant's credibility and defendant's substantive evidence of good character by witnesses the solicitor could have called but did not. *S. v. Roach*, 63.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving it every reasonable inference fairly to be drawn therefrom. *S. v. Horner*, 342.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury. *S. v. Horner*, 342.

When the State's evidence is conflicting, some tending to incriminate and some tending to exculpate the defendant, it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury. *Ibid.*

The fact that a confession introduced in evidence by the State contains exculpatory statements does not justify nonsuit, since the jury is not com-

pelled to believe the whole of the confession, but may, in their sound discretion, believe a part and reject a part. *Ibid.*

Circumstantial evidence is an accepted instrumentality in the ascertainment of truth and is sufficient to take the issue of guilt to the jury if it tends to prove the fact in issue or reasonably conduces to that conclusion as a fairly logical and legitimate deduction, and thus raises more than a mere suspicion or conjecture. *Ibid.*

§ 106. Instructions on Burden of Proof and Presumptions.

Failure of the court to define "reasonable doubt" will not be held for error in the absence of special request. *S. v. Lee*, 327.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

The failure of the court to charge on a subordinate, as distinguished from a substantive, feature of the case will not be held for prejudicial error in the absence of request for such instruction. *S. v. Pitt*, 57.

Where corroborative evidence is properly restricted upon its admission, the failure of the court in its charge to explain the difference between substantive evidence and corroborative evidence will not be held for error in the absence of special request. *S. v. Lee*, 327.

§ 109. Instructions on Less Degrees of Crime.

If there is any evidence or any inference can be fairly deduced therefrom tending to show defendant's guilt of a less degree of the crime charged, it is the duty of the court, under appropriate instructions, to submit that view to the jury. *S. v. Knight*, 384.

§ 118. Sufficiency and Effect of Verdict.

In a prosecution under an indictment charging unlawful possession of intoxicating liquors contrary to the form of the statute, a verdict of "guilty of possession" without reference to the indictment is not sufficient to support judgment, and upon defendant's appeal from judgment imposed, a *venire de novo* must be ordered. *S. v. Brown*, 311.

A verdict of "guilty of transporting and illegal possession." without reference to the bill of indictment, is insufficient to support judgment for illegal possession of intoxicating liquor. *S. v. Brown*, 314.

§ 123. Motions in Trial Court to Set Aside Verdict or for New Trial for Error of Law.

Defendants in this prosecution for trespass moved to set aside the verdict on the ground that it had been established by a Federal court in a civil action in which defendants and the corporate owner of the property were parties, that defendants had a legal right to enter upon the land. The judgment roll in the Federal action was not introduced in evidence. *Held:* The State court cannot take judicial notice that the particular facts constituting the basis of this prosecution for trespass were the basis of the adjudication in the Federal court, and therefore defendants were not, as a matter of right, entitled to have the verdict set aside. *S. v. Cooke*, 484.

§ 131. Severity of Sentence.

Upon *certiorari* to review sentences imposed upon defendant, it appearing

that but a single sentence was imposed upon several consolidated indictments, that the sentence was in excess of the maximum for such offense, and that sentences upon other indictments were made to begin at the expiration of the first sentence, the cases are remanded for proper judgments under authority of *S. v. Austin*, 241 N.C. 548. *S. v. Byers*, 744.

§ 134. Sentence for Repeated Offenses.

Where defendant is tried on appeal to the Superior Court upon the original warrant, and it is not clear from the record whether the warrant was amended before or after trial in the inferior court so as to charge that the prosecution was for a second offense, the Supreme Court, *ex mero motu*, will set aside the judgment and remand the cause. *S. v. Wilkins*, 340.

§ 135. Suspended Sentences and Executions.

A domestic relations court has authority, upon conviction of a defendant for wilful refusal to support her illegitimate child to suspend sentence upon condition that defendant pay a stipulated sum per week into court for the support of the child. *S. v. Robinson*, 282.

§ 136. Revocation of Suspension of Sentence.

A defendant has the right to appeal from a domestic relations court to the superior court from a judgment putting a suspended sentence into effect, and upon such appeal the matter should be heard *de novo*, but solely upon the question of whether there has been a violation of the terms of suspension. *S. v. Robinson*, 282.

Whether defendant has violated conditions of suspension of sentence is not an issue of fact for the jury but is a question of fact for the judge to be determined in the exercise of his sound discretion. *S. v. Robinson*, 282.

In order for the judge to put into effect a suspended sentence, it is not required that violation of the terms of suspension be proven beyond a reasonable doubt but only that the evidence be such as to reasonably satisfy the judge, in the exercise of his sound discretion, that defendant had violated a condition of suspension, without lawful excuse, the credibility of the witnesses and the evaluation and the weight of their testimony being for the judge. *Ibid.*

The court need not find that defendant's violation of a condition of suspension of execution was wilful, all that is required being that the court find that defendant had violated a valid condition of suspension and that such violation was without lawful excuse, but when the court fails to find specific facts supporting the conclusion that the violation was without lawful excuse, there is insufficient predicate for the order putting the suspended sentence into effect. *Ibid.*

§ 147. Case on Appeal.

A Superior Court judge does not have the power to enlarge the time for service of case on appeal upon the hearing of a writ of *habeas corpus*. *S. v. Davis*, 318.

§ 149. Certiorari.

The strict enforcement of the Rules of Court governing appeals does not preclude the right to petition for *certiorari* to review orders entered in *habeas corpus*. *S. v. Davis*, 318.

CRIMINAL LAW—*Continued.*

§ 154. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

On appeal from conviction of a capital felony, the Supreme Court will take cognizance *ex mero motu* of prejudicial error appearing on the record even though such error is not assigned by defendant. *S. v. Knight*, 384.

§ 161. Harmless and Prejudicial Error in Instructions.

Where the court submits the question of defendant's guilt on one theory supported by the evidence and also on another theory which is not supported by the evidence, and it is impossible to ascertain whether the verdict of the jury rested on the unsupported theory, a new trial must be awarded. *S. v. Knight*, 384.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Error in overruling appellant's objection to the admission of evidence is not cured by an instruction of the court in the charge that such evidence should not be considered against appellant, there being no reference in the charge to the prior ruling and no instruction that the jury should disabuse their minds of any and all prejudicial impressions lodged by the incompetent evidence. *S. v. Franklin*, 695.

§ 163. Harmless and Prejudicial Error in Argument of Counsel and Solicitor.

When a grossly prejudicial argument is the subject of timely objection, even in a prosecution for a misdemeanor, it should appear with reasonable certainty that its harmful effect has been removed, and in this case mere instruction of the court for the jury not to consider the improper argument *is held* not to render it harmless in view of its grossly improper character and the subsequent argument of the solicitor. *S. v. Roach*, 64.

§ 167. Review of Findings and Discretionary Orders.

While the findings of fact and judgment upon the hearing of whether a suspended sentence should be put into effect are to be determined in the sound discretion of the court, and the exercise of such discretion is not reviewable in the absence of gross abuse, the exercise of such discretion implies conscientious judgment and not arbitrary action. *S. v. Robinson*, 282.

§ 169. Determination and Disposition of Cause.

When the findings of fact of the court are insufficient to support its order putting into effect a suspended sentence, the cause must be remanded for specific findings. *S. v. Robinson*, 282.

Upon *certiorari* to review sentences imposed upon defendant, it appearing that but a single sentence was imposed upon several consolidated indictments, that the sentence was in excess of the maximum for such offense, and that sentences upon other indictments were made to begin at the expiration of the first sentence, the cases are remanded for proper judgments under authority of *S. v. Austin*, 241 N.C. 548. *S. v. Byers*, 744.

§ 173. Post Conviction Hearing Act.

The strict enforcement of the rules governing appeals does not preclude rights under the Post Conviction Hearing Act. *S. v. Davis*, 318.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death.

Action for wrongful death exists in this State solely by virtue of statute. *In re Estate of Ives*, 176.

§ 6. Expectancy of Life and Damages — Compromise.

An administrator, provided he acts in good faith and exercises the care of an ordinarily prudent man, has the right to compromise the statutory right of action for wrongful death with the person liable, either before or after the action is brought, and the money received in settlement stands on the same basis as if it had been recovered by action. *In re Estate of Ives*, 176.

§ 8. Distribution of Recovery for Wrongful Death.

While only the personal representative may maintain an action for wrongful death, the recovery is not an asset of the estate in the usual acceptation of the term, but the personal representative holds the recovery as trustee for the distributees of the estate who are the real parties in interest. *In re Estate of Ives*, 176.

The right of a distributee to share in the recovery for wrongful death on a settlement of a claim therefor will be denied where the action or the settlement is based upon negligence of such distributee as a proximate cause of the death. *Ibid.*

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy.

Insurance companies collecting and transmitting to the Commissioner of Insurance funds under the provisions of the Firemen's Pension Fund Act (Chapter 1420, Session Laws of 1957), and alleging irreparable injury in that no procedure is provided for the recovery of funds paid under the Act in the event it should be determined that the Act is unconstitutional and in that some of their competitors were refusing to collect and account for such additional premiums, thus putting plaintiffs at a competitive disadvantage, etc., are authorized to maintain an action under the Declaratory Judgment Act to test the constitutionality of the statute. *Assurance Co. v. Gold*, 288.

DEDICATION

§ 1. Acts Constituting Dedication.

Intent is essential to the dedication of land to the public by the owner, and while such intent may be inferred from the circumstances without a formal act of dedication, such circumstances must be unmistakable in their purpose and decisive in their character, and mere use by the public of the land for ingress and egress has no tendency to establish a dedication. *Nichols v. Furniture Co.*, 462.

Evidence in this case held insufficient to show dedication of alley to the public. *Ibid.*

DEEDS

§ 8. Consideration.

The rule that the recited consideration in a deed is not contractual and

DEEDS—*Continued.*

may be rebutted by parol, cannot be extended to permit the conveyance or reservation of real property by parol. *Conner v. Ridley*, 714.

§ 19. Restrictive Covenants.

Where the owners of contiguous lots sign an agreement making the lots subject to residential restrictions, and thereafter, because of the change in character of the neighborhood, the owners of 85 per cent of the property subject to the restrictions execute a release from and revocation of such restrictions, a court of equity may refuse to enjoin the violation of the residential restrictions on the ground that the enforcement of the restrictions would be unjust and inequitable. *Caldwell v. Bradford*, 48.

DESCENT AND DISTRIBUTION

§ 1. Nature of Descent and Distribution in General.

The General Assembly has power to prescribe who shall take property of a person dying intestate subsequent to the enactment of the statute. *Bennett v. Cain*, 428.

Upon death of person intestate, his lands descend to his heirs at law. *Griffin v. Turner*, 678.

§ 5. Adopted Children.

Under the provisions of sec. 6, Chapter 813, Session Laws of 1955, an adopted child is entitled to inherit property from the brother of the adopting parent, notwithstanding that the decree of adoption was entered prior to the passage of the statute. *Bennett v. Cain*, 428.

DISORDERLY CONDUCT AND DRUNKENNESS

There is no general law in this State making public drunkenness a crime. That part of G.S. 18-51 relating to public drunkenness pertains, under the doctrine of *ejusdem generis*, to public drunkenness at athletic contests and other similar places; G.S. 14-334 relates to conduct which is both drunken and disorderly; G.S. 14-275 relates to disturbing religious congregations; and G.S. 14-335 is, in effect, seventeen different local statutes, each pertaining to a relatively small group of counties. *S. v. Dew*, 188.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce.

Where, in an action for alimony without divorce, there are allegations of indignities and cruel treatment in a chain of connected events for a period of some eleven years subsequent to the marriage and again from the period beginning some thirty-five years subsequent to the marriage and lasting for the three years prior to the institution of the action, motion to strike the allegations relating to the prior period should be allowed as being too remote in point of time to be material or relevant to the controversy, and further the cause is remanded with direction that plaintiff be granted reasonable time to redraft the complaint to state the cause of action in a plain and concise manner. *Batts v. Batts*, 243.

DIVORCE AND ALIMONY—*Continued.*

§ 18. Alimony Pendente Lite.

Where, in an action for alimony without divorce under G.S. 50-16, the complaint contains allegations of indignities, cruelty or abandonment sufficient to sustain an order for subsistence *pendente lite*, demurrer entered upon the hearing of plaintiff's application for reasonable subsistence and counsel fees pending the trial, is properly overruled. *Batts v. Batts*, 243.

The resident judge of the district has the jurisdiction to hear and determine motion for reasonable subsistence and counsel fees *pendente lite* in an action for alimony without divorce. *Herndon v. Herndon*, 248.

§ 19. Modification of Decrees for Alimony.

A judgment in an action for divorce allowing alimony, or a judgment in an action for alimony without divorce, does not terminate the action, but such action remains pending for motions for modification or enforcement of the provisions for alimony, and the jurisdiction of the court over the parties continues for the purpose of such motions upon notice without service of new process, even though neither party is a resident of this State at the time of service of such notice. *Kinross-Wright v. Kinross-Wright*, 1.

A decree for alimony which provides that the husband should pay, in addition to a stipulated sum per month, a designated percentage of his gross income above a certain sum, is not affected by the fact that the husband thereafter moves to a state having a community property law under which half of his earnings belong to his wife, and remarries, since such decree is governed by and must be interpreted in accordance with the laws of the state rendering it. *Ibid.*

§ 20. Decree of Divorce as Affecting Rights to Alimony.

The amendment to G.S. 50-11 by the 1955 Session Laws is not applicable to decrees for alimony rendered prior to the effective date of the statute. *Kinross-Wright v. Kinross-Wright*, 1.

§ 22. Jurisdiction to Decree Custody and Support of Minors.

No agreement or contract between husband and wife will serve to deprive the court of its inherent and statutory authority to protect the interests and provide for the welfare of the minor children of the marriage. *Thomas v. Thomas*, 269.

Where the statute of the state rendering a divorce decree provides that order for the support of the minor children of the marriage might thereafter be modified for change of conditions, such court has power to modify the order on such ground regardless of whether the decree itself so provides. *Ibid.*

Where the laws of the state rendering decree of divorce with provision for support of the minor children of the marriage permit modification of the provision for support for change of condition, a petition filed for the minor nonresident children by the divorced wife, as their next friend, against the resident father for increase in the amount of allowance upon allegations of change of condition, states a cause of action, and our courts have jurisdiction of the action upon personal service of the resident father. *Ibid.*

§ 23. Support of Minors — Enforcing Decrees.

Where the husband introduces evidence that his failure to pay sums for the support of his minor child in accordance with decree of court was due to his financial inability, judgment confining the husband for wilful failure

DIVORCE AND ALIMONY—*Continued.*

to comply with the order without any finding in respect to his ability to pay during the time of his alleged delinquency, must be set aside and the cause remanded, since in such instance the finding that the husband's failure to make the payments was wilful and deliberate is not supported by the record. *Smith v. Smith*, 298.

DOWER

§ 1. Nature and Incidents.

At common law a widow had no right to possession of the land of her husband until her dower was assigned, and courts of law did not permit her to recover the rental value of the land assigned as dower prior to assignment, although in equity when the property was rented, she was allowed a proportionate part of the rents received. *In re Will of Stimpson*, 262.

§ 8. Allotment by Agreement Between Widow and Heirs.

Where the widow and heirs enter into a family agreement for the sale of the realty and the payment to the widow of the cash value of her dower, the widow is obligated to pay her proportionate part of the cost of subdividing and selling the land, and is not entitled to rents or interest in the absence of any evidence to show that sale was delayed in order that rents might accrue or that rents collected were retained by the heirs. *In re Will of Stimpson*, 262.

EASEMENTS

§ 4. Creation by Prescription.

A party asserting an easement by prescription has the burden of proving all the elements essential to its acquisition, including that his use of the easement was continuous and uninterrupted for twenty years and was adverse or under claim of right, and a permissive use of another's land cannot ripen into an easement by prescription regardless of length of time. *Nichols v. Furniture Co.*, 462.

Use of another's land will be presumed permissive until the contrary is shown. *Ibid.*

Defendant's evidence tended to show the open and notorious use of an alleyway for a period of more than thirty years except for a short time when a sewer was laid, that such use was begun prior to the appointment of a receiver for plaintiff's predecessor in title and had been continuous up until the institution of this action to remove the cloud on title, in which plaintiff averred that defendant claimed an estate or interest in the land adverse to plaintiff. *Held:* The evidence is sufficient to be submitted to the jury on the question whether defendant acquired a right of way over the land by prescription. *Ibid.*

EJECTMENT

§ 7. Pleadings and Burden of Proof.

In an action for recovery of land and for trespass, plaintiff has the burden, upon defendant's denial, of proving both his title and the trespass of defendants. *Shingleton v. Wildlife Comm.*, 89.

EJECTMENT—*Continued.*

In an action for the recovery of land, plaintiff must rely upon the strength of his own title and prove same by one of the methods recognized by law. *Ibid.*

When the State is not a party, title is conclusively presumed to be out of the State, G.S. 1-36, but there is no presumption in favor of either party to the action, and plaintiff remains under burden of showing title in himself. *Ibid.*

§ 10. Sufficiency of Evidence and Nonsuit.

Where, in an action to recover land, plaintiff relies, as a link in his chain of title, upon a commissioner's deed in tax foreclosure, but fails to offer in evidence the judgment roll in such foreclosure proceeding, there is a *hiatus* in plaintiff's chain of title, and nonsuit is proper. *Shingleton v. Wildlife Comm.*, 89.

ELECTION OF REMEDIES

§ 4. Acts Constituting Election and Effect of Election.

Where there are inconsistent rights or remedies available to a party, his choice of the one is an election not to pursue the other. *Thomas v. College*, 609.

ELECTIONS

§ 2. Qualification of Electors — Education.

The provisions of G.S. 163-28 requiring all persons applying for registration to be able to read and write any section of the Constitution as an educational qualification to the right to vote, is authorized by Article VI of the State Constitution, and, since it applies alike to all persons who present themselves for registration to vote, it makes no discrimination based on race, creed or color, and therefore does not conflict with the 14th, 15th or 17th Amendments to the Constitution of the United States. *Lassiter v. Board of Elections*, 102.

ELECTRICITY

§ 5. Condition of Wires, Poles and Equipment.

The National Electrical Safety Code, which has not been approved by the General Assembly and thus does not have the force of law in this State, is incompetent as evidence, and is properly excluded when offered as proof of safety clearance requirements between a power line and a telephone line. *Sloan v. Light Co.*, 125.

In the absence of evidence to the contrary, it will be presumed that defendant electric company maintained proper clearance between its wires and those of a telephone company. *Ibid.*

Evidence held insufficient to support allegation that defendant was negligent in failing to maintain proper clearance between telephone line and its power lines. *Ibid.*

EMINENT DOMAIN

§ 2. Acts Constituting "Taking" of Property.

If a railroad company, in the performance of its duty to restore a street

EMINENT DOMAIN—*Continued.*

to a useful condition after it has changed the elevation of its tracks at the street crossing, is required to go beyond the railroad right of way and change the grade of the street, and such change of grade impairs access to the street of an abutting property owner, the railroad company must pay compensation to such abutting owner for the resulting diminution in value of the land. *Thompson v. R. R.*, 577.

ESTATES

§ 4. Allotment of Income Between Life Tenant and Remaindermen.

Where the guardian of the life tenant executes a rental agreement for the land upon a share-crop basis, and the life tenant dies prior to the time the rent for the year accrues under the terms of the agreement, the rent due thereunder becomes the property of the remainderman. *Phillips v. Gilbert*, 183.

EVIDENCE

§ 1. Judicial Notice of Statutes and Ordinances.

The courts will not take judicial notice of municipal ordinances. *Funeral Service v. Coach Lines*, 146.

§ 3. Judicial Notice of Matters Within Common Knowledge.

It is a matter of common knowledge in the business and commercial world and among people at large that the letters "DBA" mean "doing business as." *Peirson v. Ins. Co.*, 215.

The courts will take judicial notice of the fact that passenger and freight traffic by motor vehicle has greatly increased in recent years, that aid to municipalities in financing the maintenance and construction of streets has been provided, and that the impact of motor vehicular transportation on the business of the rails has undergone a vast change since the expansion of the Federal and State systems of public highways. *Winston-Salem v. R. R.*, 637.

§ 4. Presumptions and Statutory Exceptions.

A party must establish that he belongs to the privileged class in order to be entitled to rely upon a statutory privilege. *Williams v. Funeral Home*, 524.

§ 11. Communications or Transactions with Decedent.

The rule prohibiting an interested party from testifying as to a transaction with a decedent does not preclude a caveator from testifying as to his opinion of the mental capacity of testator. *In re Will of Thompson*, 588.

§ 20. Competency of Pleadings in Evidence.

Insurer, after filing answer denying liability on the ground that the injuries sued on resulted from insured's attempted suicide and were not within the coverage of the policies, made affidavit-motion to be allowed to file an amended answer on the ground that it had just discovered misrepresentations in the applications for the policies warranting forfeiture. Insured's guardian asserted waiver of the forfeiture provisions. *Held:* The affidavit-motion was a collateral pleading containing self-serving declarations of a conclusory nature on the crucial question of insurer's knowledge, based in large part on hearsay and presented in a form that deprived plaintiff of his

EVIDENCE—*Continued.*

right of cross-examination, and the collateral pleading was incompetent as evidence and its admission was prejudicial. *Gouldin v. Ins. Co.*, 162.

§ 22. Photographs.

The use of photographs in cross-examining a witness in regard to his testimony as to the width of the shoulders of the road *held* not objectionable as in effect admitting the photographs as substantive evidence, and under the circumstances of this case was not prejudicial. *Blackwell v. Lee*, 354.

§ 25. Accounts, Ledgers and Private Writings.

The National Electrical Safety Code, which has not been approved by the General Assembly and thus does not have the force of law in this State, is incompetent as evidence, and is properly excluded when offered as proof of safety clearance requirements between a power line and a telephone line. *Sloan v. Light Co.*, 125.

§ 29. Admissions by Parties or Attorneys.

A statement by defendant driver to plaintiff upon his visit to her in the hospital after the accident that "he felt like it was partly his fault," is *held* a legal conclusion, determinable alone by the facts. *Lucas v. White*, 38.

Admissions by the sole propounder tending to show undue influence on his part are competent regardless of when made as declarations against interest. *In re Will of Thompson*, 588.

Testimony of a statement made by one plaintiff tending to substantiate one defendant's version of the accident is competent as substantive evidence in favor of such defendant, but is properly excluded as to the other plaintiff and the other defendant. *Blackwell v. Lee*, 354.

A statement of an attorney that the nature of the action was for a relief not supported by the allegations is not binding on the party. *Hill v. Parker*, 662.

§ 35. Opinion Testimony in General.

Testimony that there were no obstructions on the highway at the scene of the accident except a sign post at the south shoulder is competent when it refers solely to the presence or absence of any physical object or condition that might have a tendency to obstruct the driver's view, and is, therefore, a statement of fact by the witness. Principles of law relating to the competency of opinion evidence as whether an identified object was sufficient to obstruct the driver's view are inapposite. *Blackwell v. Lee*, 354.

§ 39. Opinion Evidence of Value and Cost.

Witnesses with special practical knowledge of the cost of materials and labor in the construction of houses of like value and who had seen and are familiar with the house constructed for defendants by plaintiff, may testify, upon the court's finding that they are experts, as to their opinion of the reasonable cost of the construction of defendants house, their testimony being based on facts known and observed by them and not upon hypothetical questions. *Caudle v. Swanson*, 249.

§ 42. Expert Testimony — Invasion of Province of Jury.

Testimony of experts will not be admitted except in case of necessity where the proper understanding of the facts in issue requires scientific or specialized knowledge or experience, but when such testimony is necessary and is prop-

EVIDENCE—*Continued.*

erly admitted, objection thereto on the ground that it invades the province of the jury is untenable. The distinction is noted in cases of opinion evidence by nonexpert witnesses. *Caudle v. Swanson*, 249.

§ 54. Rule that Party May Not Impeach Own Witness.

On cross-examination of plaintiffs' witness, he testified as to a statement made by one plaintiff, and on redirect examination plaintiffs' counsel were permitted to ask leading questions for the purpose of eliciting testimony that the witness had told plaintiffs' counsel a somewhat different version of the admission. *Held:* It was within the discretion of the trial court to permit the leading questions on redirect examination of their adverse witness for the purpose of refreshing the recollection of the witness without offending the rule that a party may not impeach his own witness, and further in the instant case the witness's response to the leading questions did not impair his prior testimony on that particular subject. *Blackwell v. Lee*, 354.

EXECUTORS AND ADMINISTRATORS

§ 6. Title To and Control of Assets.

Upon the death of a person intestate, title to the lands vests in his heirs and not his administrators. *Griffin v. Turner*, 678.

§ 8. Collection of Assets.

An administrator, provided he acts in good faith and exercises the care of an ordinarily prudent man, has the right to compromise the statutory right of action for wrongful death with the person liable, either before or after the action is brought, and the money received in settlement stands on the same basis as if it had been recovered by action. *In re Estate of Ives*, 176.

§ 11. Sale of Assets of Estate.

Where an executrix sells stock in which she owns a life estate as beneficiary under the will, and the executrix has the power to sell the stock absolutely in her representative capacity, the sale of the stock will be referred to the power, and the purchaser will get absolute title when the purchase is made in good faith for full value, and where the pleadings and evidence are sufficient to raise the question as to whether the purchaser was dealing with the executrix in her representative capacity and acted in good faith, paying full value, the issue should be submitted to the jury in the purchaser's action to confirm the sale. *Woody v. Pickelsimer*, 599.

The duties and obligations of an administratrix continue until the administration is complete, and her private sale of choses in action of the estate is valid if made in good faith. *Ibid.*

Where a corporation transfers the ownership of shares of stock upon its books upon an endorsement by an executrix, the corporation is fixed with knowledge of the will and its contents, and that the executrix, individually, owned only a life estate in the stock when this appears from the will, but since the executrix, in her representative capacity, has the power to sell the stock at private sale, the corporation may not be held liable by the owners of the remainder in the personalty when at the time the corporation had no reasonable ground to believe that the executrix intended to misapply the proceeds of sale. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

An administrator has no power as such to convey the lands of the estate. *Griffin v. Turner*, 678.

Administrators having an interest in the estate as heirs who contract in their representative capacity to sell lands of the estate are bound by the contract insofar as their individual interest in the lands is concerned. *Ibid.*

§ 24a. Claims for Personal Services Rendered Deceased.

Where plaintiff declares on a special contract to pay for personal services rendered and also alleges in detail the services which were accepted and that they were reasonably worth a stipulated amount, the allegations are sufficient, upon failure to establish the special contract alleged, to go to the jury on *quantum meruit*. *Allen v. Seay*, 321.

The presumption that personal services rendered one kinsman by another are gratuitous does not extend to personal services rendered a first cousin once removed when the persons are not of the same household so that the person rendering the services has to move to the recipient's residence for the purpose of ministering to her. *Ibid.*

§ 29. Distribution of Estate — Actions to Obtain Advice of Court.

Where there is dispute as to the proper distribution of funds in the hands of the administrator, he may properly petition the court, upon notice to the interested parties, for the advice and instruction of the court in the matter. *In re Estate of Ives*, 176.

§ 31. Distribution of Estate — Family Agreements.

A family agreement for the settlement and distribution of an estate, approved and confirmed by the court, becomes a contract between the parties and is to be interpreted, in accordance with rules governing contracts generally, to ascertain the intent of the parties as gathered from the entire instrument with regard to the situation of the parties at the time the consent judgment was entered and the motives and the results sought to be accomplished. *In re Will of Stimpson*, 262.

The widow filed her dissent to the probated will. Thereafter, caveat proceedings were instituted, and though the widow was a party by citation, she disclaimed any interest in the litigation, since it could not in any way impair her rights. Later, the parties entered into a consent judgment for the distribution of the estate in accordance with a family agreement. *Held:* Provision in the agreement that the widow assented to the payment of the value of her dower as contemplated by the agreement and accepted said settlement in relinquishment of all further claim in and to the estate referred solely to her right of dower and did not relinquish her right to share in the personalty, it being apparent that the widow signed the agreement solely for the purpose of permitting the lands to be sold, and that there was no intent that she should surrender the rights accruing to her under her dissent from the will. *Ibid.*

Family agreements for the settlement of an estate to adjust family differences and controversies are favored by the law and are valid and binding when approved by the court, but nevertheless family agreements will not be allowed to amend or revoke a will solely because of dissatisfaction of the devisees with its provisions. *Wagner v. Honbaier*, 364.

EXECUTORS AND ADMINISTRATORS—*Continued.*

The rule that the law looks with favor upon family agreements does not prevail if the rights of infants are unfavorably affected. *Ibid.*

Family agreement for settlement of estate approved in this case. *Ibid.*

§ 35. Personal Liabilities of Personal Representative.

Neither the administrators executing a written authorization to an agent to sell lands of the estate, nor the agent in executing a contract to sell pursuant to such authority, are liable to the purchaser on an implied warranty of authority when the instruments themselves disclose that they were acting in their representative capacities, since their want of authority is apparent upon the face of the instruments. *Griffin v. Turner*, 678.

FALSE IMPRISONMENT

§ 2. Limitations.

A cause of action for false imprisonment is barred after the expiration of one year from plaintiff's release from custody by the giving of bond, notwithstanding that the criminal prosecution in which the arrest took place is not terminated until less than one year before the institution of the action. *Mobley v. Broome*, 54.

FRAUDS, STATUTE OF

§ 6a. Contracts Affecting Realty in General.

The grantor may not show that his deed in fee simple absolute was made in consideration of grantee's promise not to dispose of the land or any part thereof by deed or by will so as to deprive grantor of his right of inheritance, since the effect of such parol agreement would be to limit the fee simple deed to a conveyance of only the beneficial or equitable title, or to vest the remainder in the grantee as trustee for her children, in contradiction of the express provisions of the deed. *Conner v. Ridley*, 714.

GRAND JURY

§ 1. Qualification and Selection of Grand Jurors.

The systematic exclusion of persons of defendant's race from the grand jury returning the indictment against defendant is a denial of defendant's right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution and also "the law of the land" clause of the State Constitution, Art. I, Sec. 17. *S. v. Perry*, 334.

Upon defendant's motion to quash for discrimination in selection of grand jury, defendant is entitled to opportunity to procure evidence in support of motion. *Ibid.*

HABEAS CORPUS

§ 2. To Obtain Freedom from Unlawful Restraint.

Where defendant does not request appointment of counsel and does not serve case on appeal or cause his appeal to be docketed in order that it might be heard on the record proper, or apply for a writ of *certiorari* to preserve the right of review at the next succeeding term of the Supreme

Court, a judge of the Superior Court is thereafter without power to enlarge the time for service of case on appeal, and an order doing so upon a petition for *habeas corpus* is ineffective. *S. v. Davis*, 318.

An order entered in a *habeas corpus* proceeding appointing counsel for defendant and allowing him time therefrom to perfect his appeal after time for perfecting appeal had expired, and purporting to arrest the judgment, will be reversed upon review by *certiorari*, no prejudicial error appearing upon the face of the record proper, and the original sentence remains in effect, although defendant should be given credit for time spent in confinement since the entry of the order purporting to arrest the judgment. *Ibid.*

§ 4. Appeal and Review.

The strict enforcement of the rules governing appeals does not preclude rights under the Post Conviction Hearing Act, G.S. 15-217, nor the right to petition for a writ of *certiorari* to review orders entered in a *habeas corpus* proceeding. *S. v. Davis*, 318.

HIGHWAYS

§ 7. Highways Under Construction, Signs and Warnings.

A contractor removing an old bridge preparatory to constructing a new one is under positive legal duty to exercise that degree of care which a reasonably prudent man would use, considering all of the circumstances of the case, to warn the traveling public of the danger, notwithstanding that he is doing the work under a contract with the State Highway and Public Works Commission. *White v. Dickerson, Inc.*, 723.

Evidence held sufficient to be submitted to jury on issue of negligence of contractor in failing to maintain proper signs and warnings of fact that bridge was out. *Ibid.*

Evidence tending to show that the driver of the car in which plaintiff was riding had reduced his speed to some 10 or 15 miles per hour because of heavy fog, that both he and plaintiff was watching the road intently because of the fog, and that when they saw the burning flambeau some six feet from the lip of the canal, where the bridge was out, the driver applied his brakes but slid into the canal on wet mud, *is held* insufficient to show intervening negligence on the part of the driver insulating as a matter of law the negligence of defendant contractor. *Ibid.*

§ 12. Nature and Grounds of Right to Establish Cartway.

G.S. 136-69 merely gives to the owner of property who is without reasonable access to a public road the right to establish a cartway across the lands of others upon payment of compensation, but imposes no duty upon him to exercise that right, and therefore the owner of land adjacent the public highway cannot maintain a proceeding to establish a cartway across his own lands and thus force owners of lands, away from the highway to acquire such right. *Kanupp v. Land*, 203.

The right to establish a cartway to a public road under the provisions of G.S. 136-69 obtains only at the instance of owners of property without reasonable access to a public road, and if reasonable access exists, there is no right to establish a cartway under the statute. *Ibid.*

A judicial determination that a road to a public highway abutting the

HIGHWAYS—*Continued.*

lands of all the parties should be kept open is binding on the parties and precludes subsequent proceedings among the same parties or their privies to establish a cartway under G.S. 136-69, since it establishes that a way of ingress and egress subsists. *Ibid.*

HOMICIDE

§ 1. Homicide in General.

Where one person voluntarily and unlawfully strikes another, and the person so struck falls and hits his head, resulting in a fatal concussion, the death is a homicide. *Goldberg v. Ins. Co.*, 86.

A person is legally accountable if the direct cause of a person's death is the natural result of his criminal act. *S. v. Horner*, 342.

§ 6. Manslaughter.

Manslaughter is generally divided into voluntary and involuntary manslaughter; involuntary manslaughter is 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, the killing being without malice. *S. v. Horner*, 342.

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice, but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner, and where fatal consequences of the negligent act were not improbable under all the facts existent at the time. *S. v. Neal*, 544.

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

§ 20. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's guilt of homicide held sufficient to be submitted to the jury. *S. v. Horner*, 342.

The evidence in this case tending to show that defendant brutally assaulted his victim in an attempt to commit the crime of rape, inflicting wounds causing death, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the first degree. *S. v. Knight*, 384.

Evidence held sufficient to support conviction of involuntary manslaughter. *S. v. Neal*, 544.

Evidence that defendant intentionally shot the deceased with a deadly weapon, thereby proximately causing his death, raises the presumption that the killing was unlawful and was with malice, and is sufficient to warrant and support a verdict of guilty of murder in the second degree. *S. v. Barton*, 559.

§ 24. Instructions on Murder in First Degree.

Where the evidence is sufficient to be submitted to the jury on the theory of defendant's guilt of murdering his victim in an attempt to commit the crime of rape, but is insufficient to show defendant's guilt of the crime of kidnapping, an instruction that defendant would be guilty of murder in the first degree if the jury should find that the murder was perpetrated in the

attempt to commit the crime of rape or in the commission of the felony of kidnapping, must be held prejudicial as permitting the jury to rest its verdict on a theory not supported by the evidence. *S. v. Knight*, 384.

§ 28. Instructions on Less Degrees of Crime.

The State's evidence tended to show that defendant, who was deaf and dumb, entered a house in which a woman was alone, wrote a proposal of sexual intercourse on a note, that she became scared, tried to make him leave and hit him, and that thereupon he brutally and fatally assaulted her, but did not try to have intercourse with her. *Held:* While the evidence is sufficient to support the theory of murder committed in the attempted perpetration of the felony of rape, it also supports the inference that defendant did not intend to commit rape but sought to have intercourse with his victim on a voluntary basis, and that his assault upon her was precipitated when she struck at him while she was trying to drive him from the house, and therefore it is the duty of the court upon such evidence to submit the question of defendant's guilt of murder in the second degree, in addition to the question of defendant's guilt of murder in the first degree, or not guilty. *S. v. Knight*, 384.

HUSBAND AND WIFE

§ 14. Creation of Estates by Entireties.

Deeds executed by tenants in common for the purpose of effecting a voluntary partition, convey no title, and therefore if a deed from one tenant to the other is executed pursuant to a plan for partition, the wife of the grantee tenant would take no interest by virtue of the deed, even though she is also named as grantee and even though the deed states that it creates an estate by the entirety in the grantees. *Smith v. Smith*, 194.

INDICTMENT AND WARRANT

§ 9. Charge of Crime.

An indictment must allege every essential element of the offense it purports to charge. *S. v. Courtney*, 447.

§ 14. Time of Making Motion to Quash.

An objection to an indictment based on defects and irregularities in the drawing or organization of the grand jury must be taken by motion to quash the indictment made before the jury is sworn and impaneled to try the issue, and if not so taken, is deemed waived. *S. v. Perry*, 334.

Upon motion to quash the indictment on the ground of racial discrimination in selecting the grand jury, the defendant must be given reasonable time and opportunity to investigate the matter of racial discrimination, since due process of law requires that he be given his day in court, and what is a reasonable time and opportunity must be determined from the facts in each particular case. *Ibid.*

§ 15. Nature and Grounds of Motion to Quash.

The burden of proof is upon the defendant to establish the racial discrimination alleged in his motion to quash the indictment. *S. v. Perry*, 334.

But such discrimination is ground for quashal. *Ibid.*

When facts constituting double jeopardy do not appear from the allegations of the bill or warrant, the defense may not be taken advantage of by motion to quash. *S. v. Cooke*, 484.

A motion to quash on the ground that the court was under duty to take judicial notice of a Federal decision establishing a defense to prosecution, is properly denied, since a motion to quash may not rest upon matters *aliunde* the record. *Ibid.*

§ 16. Effect of Quashal or Dismissal.

If the court, upon supporting evidence and proper finding, should quash the indictment on the ground of racial discrimination in the grand jury panel, defendant would not be entitled to his discharge, but should be held until an indictment against him can be found by a properly constituted grand jury. *S. v. Perry*, 334.

§ 17. Proof of Guilt of Crime Charged.

Defendant cannot be convicted of illegal transportation of intoxicating liquor unless such charge is contained in the bill of indictment under which he is tried. *S. v. Brown*, 314.

INFANTS

§ 8. Jurisdiction to Determine Custody.

Where decision of this Court affirming judgment awarding to the resident paternal grandfather the custody of a minor child of parents divorced in another state, notwithstanding a former decree of the court of such other state, is vacated by the Supreme Court of the United States and the cause remanded for clarification of the question whether the decision was based on changed conditions since the foreign decree or upon the ground that our Court was not bound to give the foreign decree full faith and credit, the cause must be remanded to the Superior Court for final judgment based on the facts as it may find them to be. *Kovacs v. Brewer*, 742.

§ 9. Right to Custody.

Upon petition of the father for the custody of his daughter, findings of fact to the effect that petitioner had made no concrete attempt to visit his daughter for a period of approximately six years and that his only attention to her during this period was the payment of the monthly sums stipulated by order of court upon conviction of abandonment, that respondent had been given custody of the child by its mother after the separation of petitioner and the child's mother, that the child's mother had named respondent guardian of the child and willed her property in trust for the child, and that the best interests of the child clearly required that she be allowed to remain in the home of respondent, support judgment of the court awarding custody of the child to respondent. *In re McWhirter*, 324.

INJUNCTIONS

§ 3. Nature of Remedy — Adequate Remedy at Law and Irreparable Injury in General.

Ordinarily, an injunction will not be granted where there is a full, ade-

quate and complete remedy at law, which is as practical and efficient as is the equitable remedy. *In re Davis*, 423.

Injunction will lie to prevent a municipality from taking possession of plaintiffs' land for the purpose of paving the same as a street, since if the municipality has no right or title thereto, no judgment could restore to plaintiffs the strip of land with its buildings on it in its original character, and therefore plaintiffs would suffer irreparable injury if the threatened seizure of the property were not enjoined. *Hall v. Fayetteville*, 474.

§ 4. Enjoining Violation of Statute or Ordinance.

Ordinarily, injunction will not lie to prevent the perpetration of a crime. *Board of Pharmacy v. Lane*, 134.

Where a statute expressly provides that the violation of its provisions should constitute a misdemeanor and also provides that the acts therein proscribed might be enjoined, the contention that the violation of an injunction issued under the statute would subject the offender to punishment for a criminal offense without the constitutional safeguards of indictment, trial by jury, etc., is untenable, since the punishment for violation of the injunction would be for violating an order of the court and not punishment for a crime. Constitution of North Carolina, Art. I, Secs. 12 and 13. *Ibid.*

§ 11. Enjoining Institution or Prosecution of Civil Action.

Order was issued in the Superior Court of one county adjudicating the right to custody of the children of the parties. Thereafter, defendant instituted proceedings in the domestic relations court in another county for modification or change of the decree. Plaintiff moved in the first action for a bill of *quia timet* to restrain defendant from prosecuting the action in the domestic relations court. *Held:* An adequate legal remedy is available to plaintiff by motion in the domestic relations court to dismiss the proceeding if that court is without jurisdiction, and therefore the remedy of injunction will not lie. Neither a bill of peace nor a bill of *quia timet* applies to the factual situation in this case. *In re Davis*, 423.

§ 13. Continuance, Modification and Dissolution of Temporary Orders.

The court has the sound discretion to dissolve a temporary restraining order when plaintiff's whole equity is denied in the answer, certainly when it does not affirmatively appear that plaintiff is threatened with irreparable injury or that he does not have an adequate remedy at law. *Coffee Co. v. Thompson*, 207.

Where the findings of fact of the court establishing the primary equity are supported by evidence, and defendants are fully protected by the provisions of the order continuing the injunction, and harm might result to plaintiffs from dissolution, order continuing the temporary restraining order to the final hearing will be affirmed. *Mariakakis v. Jennings*, 556.

Upon the hearing of a motion for continuance to the final hearing of the temporary restraining order issued in the cause, the court has no jurisdiction to adjudicate the merits of the controversy, and the facts found by the trial court will be vacated and set aside insofar as they relate to the merits and will be treated as having no binding effect except insofar as they support the court's ruling in denying injunctive relief *pendente lite*. *Adams v. College*, 674.

INJUNCTIONS—*Continued.*

Order denying application for a temporary order restraining defendant from continuing to operate its plant on lands contiguous to lands owned by plaintiffs, demanded on the ground that such operation constituted a nuisance, affirmed on authority of *Huskins v. Hospital*, 238 N.C. 357. *Hutchinson v. Processing Co.*, 746.

INSURANCE

§ 13a. Construction and Operation of Policy in General.

Where insured declares upon the policy as written without seeking reformation, the rights of the parties must be determined in accordance with its terms, and parol evidence is incompetent to vary its terms as to the parties insured or the risks covered. *Peirson v. Ins. Co.*, 215.

Where a policy of insurance sets forth the manner of computing loss covered thereby, such procedure must be followed in computing the loss. *Williford v. Ins. Co.*, 549.

Where a provision in an insurance policy is susceptible of two interpretations, one imposing liability and the other excluding it upon the facts of the particular case, the provision will be construed against the insurer. *Roach v. Ins. Co.*, 699.

§ 13c. Waiver of Forfeiture.

Insurer waives a forfeiture provision of the policy when it, with knowledge of the pertinent facts upon which insurer might declare forfeiture, engages in acts, declarations or a course of dealing inconsistent with intention to enforce the forfeiture and leads insured honestly to believe that it will not insist upon forfeiture and that the insurance is still in force. *Gouldin v. Ins. Co.*, 161.

While knowledge is a prerequisite to waiver, an insurer is charged with knowledge not only of the facts disclosed, but also of such other facts as would have been discovered by reasonable inquiry which an ordinarily prudent person would have made upon the facts disclosed. *Ibid.*

Insurer is presumed to be cognizant of data in the official files of the company received in formal dealings with insured. *Ibid.*

Ordinarily, where insurer denies liability for a loss on one ground, with knowledge of another ground of forfeiture, insurer is estopped to assert such other ground if insured has acted upon the reasonable belief that such other ground would not be asserted. *Ibid.*

§ 19c. Construction of Fire Policies as to Property Insured.

The policy in suit covered loss by fire of tobacco, the property of others, while in the custody of insured warehouseman. Tobacco purchased by plaintiff at a regular sale for resale was destroyed by fire while on the warehouse floor. *Held:* The policy does not permit the technical construction that it covered tobacco held for sale but not for resale, and plaintiff is entitled to recover. *Smith v. Ins. Co.*, 718.

§ 38. Accident Insurance — Construction of Policy as to Risks Covered.

Since gasoline in a jet plane is essential to its operation, where a jet plane crashes and insured is struck with gasoline from the plane and fatally

injured as a result thereof, the injury results from being struck by a plane within the terms of the policy. *Roach v. Ins. Co.*, 699.

§ 39. Accident and Health Insurance — Conditions, Exclusions and Forfeitures.

Plaintiff's evidence tended to show that insured was voluntarily and unlawfully struck by another, causing insured to fall and hit his head upon the floor, resulting in fatal hemorrhage. *Held:* Plaintiff's evidence discloses death from homicide within the exclusion provision of the double indemnity clause sued on, and therefore nonsuit was correctly entered in her action to recover double indemnity. *Goldberg v. Ins. Co.*, 86.

Evidence of insurer's waiver of right to declare forfeiture for misrepresentation in application held sufficient to be submitted to jury. *Ibid.*

Evidence held to show that operation was for pre-existing condition within exclusion clause of hospital insurance. *Hincher v. Hospital Care Asso.*, 397.

§ 43d. Auto Insurance — Persons Covered.

There is a distinction between a garage liability policy which does not specify any particular vehicle insured and an ordinary liability policy covering loss or damage resulting from the operation of a specified vehicle, but under a group liability policy it would seem essential that insurer know the identity of insured so as to determine the nature and extent of its risks and the premiums to be charged. *Peirson v. Ins. Co.*, 215.

Where a garage liability policy states that the insured is a partnership, evidence tending to show that insured in addition to the partnership was also an individual business of which one of the partners was the sole proprietor, is properly excluded, since the written policy is conclusively presumed to express the contract it purports to contain. *Ibid.*

In a suit to recover medical payments under a garage liability policy naming the insured as "Peirson-Neville Co. and S. Peirson and Co.," a partnership, it is error for the court to exclude evidence that at the time of the accident in suit the vehicle was used principally in the business of "S. Peirson and Co." *Ibid.*

§ 48. Rights of Third Persons Against Insurer.

Provision in a liability policy that insurer might negotiate and settle any claim or suit was not proscribed or rendered void under the 1947 statute, G.S. 20-227; further, the 1953 act, G.S. 20-279.21, does not indicate that prior to that date liability insurers were prohibited from settling claims. *Alford v. Ins. Co.*, 224.

A liability insurance carrier may settle part of multiple claims arising from the negligence of its insured, even though such settlements result in preference by exhausting the fund to which an injured party whose claim has not been settled might otherwise look for payment, provided the insurer acts in good faith and not arbitrarily, and the burden is upon a claimant whose claim is not paid in full because of prior payment made by insurer in settlements of other claims, to allege and prove bad faith on the part of insurer. *Ibid.*

A liability insurance carrier is liable for interest for that amount of the recovery which is within the limits of liability of the policy from the date

INSURANCE—*Continued.*

the judgment is rendered against insured until payment of its liability by insurer. *Ibid.*

§ 52. Construction and Operation of Hail and Windstorm Insurance.

Where a policy of crop-hail insurance provides that the amount recoverable should not exceed a stipulated sum per acre without regard to the value of the crop, the procedure provided in the policy for figuring loss thereunder must be followed, and an instruction charging that the measure of damages would be the difference between the market value of the crop immediately before and immediately after damage by the risk covered, must be held for error. *Williford v. Ins. Co.*, 549.

INTOXICATING LIQUOR

§ 9a. Indictment and Warrant.

Under G.S. 18-2 the warrant or indictment should charge the unlawful possession or sale of intoxicating liquors; under G.S. 18-48 it should charge the unlawful possession of alcoholic beverages upon which the taxes imposed by law have not been paid; under G.S. 18-50 it should charge the unlawful possession for sale, or sale, of illicit liquors. *S. v. May*, 60.

§ 9b. Presumptions and Burden of Proof.

Upon defendant's plea of not guilty to an indictment under G.S. 18-48, the State has the burden of proving beyond a reasonable doubt defendant's possession of alcoholic beverages upon which the Federal or State tax had not been paid, and that the beverages contained alcohol exceeding 14 per cent by volume. *S. v. Pitt*, 57.

§ 9c. Competency and Relevancy of Evidence.

It is competent for a witness who has testified that he has had experience in examining whisky and that he could tell the difference between ABC whisky and whisky not sold in ABC stores, to testify that the whisky in question was not ABC whisky, the weight of the testimony being for the jury. *S. v. Pitt*, 57.

Testimony based on taste, sight, and smell is admissible to show alcoholic content of a liquid. *S. v. May*, 60.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence that whisky belonging to defendant was found on defendant's premises, that the whisky was not ABC whisky, together with stipulations that the containers bore no stamps, is sufficient to be submitted to the jury in a prosecution under G.S. 18-48. *S. v. Pitt*, 57.

Testimony that the beverage found in defendant's possession was whisky is sufficient to show that the alcoholic content of the beverage was more than 14 per cent by volume. *Ibid.*

Testimony of witnesses that 21 pint bottles containing "whisky" were found on defendant's premises is sufficient to be submitted to the jury and support a finding that the alcoholic content of the liquid was in excess of 14 per cent by volume within the purview of G.S. 18-60, since whisky means an alcoholic beverage distilled from grain with an alcoholic content of from 50 to 58 per cent by volume. *S. v. May*, 60.

Even though the quantity of intoxicating liquor found upon search of defendant's apartment was less than one gallon and therefore not sufficient to make a *prima facie* case of possession for sale, evidence that varieties of beverage were available in the apartment, that a number of different bottles had been opened and the contents of a number of them partially consumed, together with evidence that a number of persons were present at the apartment late at night, and that a number of two-ounce glasses were found in a pan of water in the sink, etc., *is held* sufficient to take the case to the jury upon the charge of possession of liquor for the purpose of sale. *S. v. Hairston*, 213.

§ 9f. Instructions.

While the beverage must contain alcohol exceeding 14 per cent by volume in order to warrant conviction under G.S. 18-48, an instruction in one instance that the alcoholic content must be 14 per cent or more will not be held for prejudicial error when all the evidence is to the effect that the beverage contained more than 14 per cent of alcohol by volume, it being apparent that the instruction could have neither misled nor confused the jury. *S. v. Pitt*, 57.

The failure of the court to define the term "*prima facie* evidence" in charging upon the presumption arising when containers of alcoholic beverage do not bear the State or Federal stamps, *held* not prejudicial in the absence of request. *Ibid.*

§ 9g. Verdict and Judgment.

In a prosecution under an indictment charging unlawful possession of intoxicating liquors contrary to the form of the statute, a verdict of "guilty of possession" without reference to the indictment is not sufficient to support judgment, and upon defendant's appeal from judgment imposed a *venire de novo* must be ordered. *S. v. Brown*, 311.

A verdict of "guilty of transporting and illegal possession," without reference to the bill of indictment, is insufficient to support judgment for illegal possession of intoxicating liquor. *S. v. Brown*, 314.

Defendant cannot be convicted of illegal transportation of intoxicating liquor unless such charge is contained in the bill of indictment under which he is tried. *Ibid.*

JUDGES

§ 2a. Powers and Jurisdiction of Resident Judges.

The resident judge of the district has the jurisdiction to hear and determine motion for reasonable subsistence and counsel fees *pendente lite* in an action for alimony without divorce. *Herndon v. Herndon*, 248.

JUDGMENTS

§ 3½. Construction and Operation of Consent Judgments.

A family agreement for the settlement and distribution of an estate, approved and confirmed by the court, becomes a contract between the parties and is to be interpreted, in accordance with rules governing contracts generally, to ascertain the intent of the parties as gathered from the entire

JUDGMENTS—*Continued.*

instrument with regard to the situation of the parties at the time the consent judgment was entered and the motives and the results sought to be accomplished. *In re Will of Stimpson*, 262.

A consent judgment must be interpreted in the light of the matters in controversy in the proceeding and the purposes the parties thereto intended to accomplish by it. *Ijames v. Swaim*, 443.

§ 17b. Conformity to Verdict, Proof and Pleadings.

Where an action is instituted to enjoin definite acts proscribed by statute, the injunction issued in the action should be limited to the acts defined, and further provision enjoining defendants from doing any act in violation of the statute is too broad and should be stricken therefrom. *Board of Pharmacy v. Lane*, 134.

While the judgment must ordinarily follow the verdict, the trial court has the power, with the consent of defendant, to increase the amount of the verdict. *Caudle v. Swanson*, 249.

Where the tenant, upon the uncontroverted facts, is entitled, as a matter of law, to the proceeds of a crop insurance policy paid into court by insurer, free from the landlord's crop lien for advancements, the court has authority to order that such fund be delivered to the tenant. G.S. 1-508. *Peoples v. Ins. Co.*, 303.

§ 18. Process, Notice and Jurisdiction.

A court rendering a judgment for alimony has jurisdiction to modify its decree for change of condition or to entertain a petition for clarification without service of new process, even though neither party is a resident at the time of service of notice of petition. *Kinross-Wright v. Kinross-Wright*, 1.

§ 20a. Jurisdiction of Trial Court to Modify or Correct Judgment.

All judgments are *in fieri* during the term, and, except as to consent judgments, the trial court may open, modify or vacate of its own motion any judgment rendered during the term. *Shaver v. Shaver*, 113.

The trial court has the inherent power at any time, upon motion or *ex mero motu*, to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth, but after the term, such power must be exercised with great caution and may not be extended to the correction of judicial errors so as to make the judgment different from that which was actually rendered. *Ibid.*

The trial court is without power, statutory or inherent, to initiate on its own motion proceedings to vacate an irregular voidable judgment after the lapse of the term at which it was rendered. *Ibid.*

§ 25. Procedure to Attack and Set Aside Judgment.

Where the proceeding foreclosing a street assessment lien upon service by publication is in all respects regular on its face, and the municipality purchases at the foreclosure, and thereafter conveys the property, motion in the cause to set aside the judgment on the ground of defective service should not be heard without the joinder of the purchasers of the land, who are the real parties in interest, since the ultimate relief must depend upon the recovery of the land from the purchasers, who would have no recourse against the city if their title should prove invalid. *Hendersonville v. Salvation Army*, 52.

JUDGMENTS—*Continued.*

A judgment, which upon its face is void, may be vacated by the court *ex mero motu* at any time. *Shaver v. Shaver*, 113.

A judgment which is regular upon the face of the record but irregular in fact requires evidence *aliunde* for impeachment and is voidable and not void, and ordinarily may be attacked only by motion in the cause made by a party to the action or persons in privity with a party, and strangers to the judgment or intermeddlers who have no justiciable grievance should not be permitted to assail the judgment. *Ibid.*

A judgment regular upon the face of the record is presumed to be valid until the contrary is shown in a proper proceeding. *Ibid.*

§ 32. Judgment as Bar to Subsequent Action in General.

A judicial determination that a road to a public highway abutting the lands of all the parties should be kept open is binding on the parties and precludes subsequent proceedings among the same parties or their privies to establish a cartway under G.S. 136-69, since it establishes that a way of ingress and egress subsists. *Kanupp v. Land*, 203.

Since the defendants in this prosecution for trespass did not introduce in evidence the judgment roll in a civil action between defendants and the corporate owner of the property, the question of whether the Federal decision precluded prosecution under the doctrine of collateral estoppel was not presented. Whether the doctrine of collateral estoppel would have applied had the judgment roll been introduced in evidence, *quaere? S. v. Cooke*, 484.

The burden of establishing a plea of *res judicata* as a bar to the action is on defendant, and when the plea is not established by the pleadings, order dismissing the action without hearing evidence or finding the facts, is error. *Gillikin v. Gillikin*, 710.

JUDICIAL SALES

§ 7. Title, Rights and Obligations of Purchaser.

The remedy to compel the purchaser at a judicial sale to comply with his bid is by motion in the cause, and ordinarily the court will dismiss *ex mero motu* an independent action brought by the commissioner to compel the purchaser to comply with his bid. *Byerly v. Delk*, 553.

JURY

§ 7. Waiver and Enforcement of Right to Jury Trial.

Where the right to trial by jury of issues of fact arising on the pleadings is given by statute, waiver of such right will not be presumed or inferred. *In re Gilliland*, 517.

KIDNAPPING

§ 1. Nature and Elements of the Offense.

Evidence tending to show that after defendant had brutally assaulted his victim, he removed her from her home while she was in a dying condition and hid her body in a wood, in an attempt to cover up and blot out the evidence of his crime, is insufficient to show a taking and carrying away of

KIDNAPPING—*Continued.*

the deceased as an element of the crime of kidnapping, even though she was still alive when left in the wood. *S. v. Knight*, 384.

LIMITATION OF ACTIONS

§ 3. Statutory Changes in Period of Limitation.

While amendments enlarging a statutory period of limitation are applicable to all causes of action not barred at the time of the enactment of the amendment, as to statutes prescribing a time limit annexed to and forming a part of the right to maintain an action or proceeding, an amendment enlarging the time can apply only to rights of action or claims arising after the enactment of the amendment. *McCrater v. Engineering Corp.*, 707.

§ 7. Disabilities.

When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. *Nichols v. Furniture Co.*, 462.

When a receiver has full authority to institute suit, his appointment will not suspend the running of limitations against the estate. *Ibid.*

§ 15. Pleadings.

A plea of the statute of limitations is ineffectual in the absence of factual allegation showing the lapse of time between the date the cause of action accrued and the date on which it was instituted. *Allen v. Seay*, 321.

§ 18. Questions of Law and Fact, Nonsuit and Directed Verdict.

While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where the bar is properly pleaded and all the facts with reference thereto are admitted, the question of limitation becomes a matter of law. *Mobley v. Broome*, 54.

MANDAMUS

§ 2a. Ministerial or Legal Duty.

Railroad held not under duty to reconstruct overpass in compliance with ordinance and *mandamus* would not lie. *Winston-Salem v. R. R.*, 637.

MASTER AND SERVANT

§ 6f. Actions for Wrongful Discharge.

The measure of damages for wrongful discharge is the actual damage sustained on account of breach of the contract of employment by such wrongful discharge, which is the difference between the agreed compensation and the amount the employee earns or by reasonable effort could earn during the contract period. *Thomas v. College*, 609.

Where the contract of employment provides for payment of salary for one year subsequent to discharge for cause, such employee is entitled to such terminal pay, and, in addition thereto, any amount he earns from other employment during that year. *Ibid.*

Where the contract of employment provides for payment of salary for

MASTER AND SERVANT—*Continued.*

one year after dismissal for cause, a discharged employee must elect whether he will maintain that the discharge was in violation of the contract of employment and sue for the resulting damages, or whether he will treat the discharge as a termination of employment for cause under the contract, in which event he is entitled to the terminal pay thereunder, and when, with knowledge, he accepts his salary checks for the year after notification of dismissal, he acquiesces in the employer's contention that the dismissal was for cause under the contract and may not thereafter maintain an action for wrongful discharge. *Ibid.*

§ 25a. Construction and Operation of Federal Employers' Liability Act in General.

An employee injured while engaged in his duties in interstate commerce cannot sue the railroad employer and a third person tort feasor in the same action, nor may the railroad employer file a cross-action against such third person tort feasor upon allegations of indemnity and primary and secondary liability, since there is no common legal right in the action under the Federal Employers' Liability Act and the right of action against the third person tort feasor. *Bryant v. R. R.*, 43.

§ 37. Construction of Compensation Act in General.

The Workmen's Compensation Act must be liberally construed to the end that its benefits shall not be denied upon technical, narrow and restricted interpretation. *Kellams v. Metal Products*, 199.

§ 39a. "Employees" Within Coverage of Act in General.

Action to recover for the wrongful death of a prisoner assigned to work under the supervision of the State Highway and Public Works Commission may be maintained under the State Tort Claims Act, G.S. 143-291, the sole remedy not being under the Workmen's Compensation Act. G.S. 97-10, G.S. 97-13(c). *Lawson v. Highway Com.*, 276.

§ 41. Compensation Act — Right of Action Against Third Person Tort-Feasor.

Under the terms of the contract in question, lessor was to provide personnel and equipment for trips authorized by lessee's franchise, the drivers to be under complete control of the lessee's supervisor and the vehicles to be marked with lessee's identification on such trips. Plaintiff, an employee of lessee, was injured on a trip under lessee's franchise. The driver was paid by lessor, but lessee was required by the contract to reimburse lessor for his wages. *Held:* The driver, on the trip in question, was an employee of lessee, and plaintiff, having recovered compensation of lessee under the Workmen's Compensation Act, may not maintain an action against lessor at common law as a third person tort feasor. *Peterson v. Trucking Co.*, 439.

§ 43. Compensation Act — Notice and Filing of Claim.

The requirement of the Workmen's Compensation Act that claim for injury compensable thereunder should be filed within one year of the accident, G.S. 97-24, is a condition annexed to and forming a part of the right to maintain a claim for compensation and not a statute of limitations, and therefore an amendment enlarging the time, Chapter 1026, Sec. 12, Session Laws of 1955,

MASTER AND SERVANT—*Continued.*

is not applicable to claims existent at the time of the enactment of the amendment. *McCrater v. Engineering Corp.*, 707.

§ 53b(1). Compensation Act — Amount of Recovery for Injury.

In figuring the maximum award under the Compensation Act, the award must be calculated in the ascending scale until the maximum is reached, and then the maximum controls rather than the calculation; in figuring the minimum award the rule for calculating the award is observed in the descending scale until the minimum is reached, and there the award stops and the minimum controls rather than the calculation. *Kellams v. Metal Products*, 199.

Under the provisions of G.S. 97-31(u), awards for partial disability are subject to the minimum fixed in G.S. 97-29 in like manner as awards for total disability, and therefore the weekly payments of an award for partial disability should not be less than the $8 minimum fixed by the statute. *Ibid.*

Prior to the amendment of G.S. 97-31(t) by Ch. 1396, Session Laws of 1957, an award for partial disability must be based on a percentage of the weekly wage for the entire period of 200 weeks rather than a percentage of the number of weekly payments. *Ibid.*

§ 58. Employees Within Coverage of Employment Security Act.

Whether a person is an employee or an independent contractor within the meaning of the N. C. Employment Security Law must be determined, by direction of the statute, according to the rules of the common law. *Employment Security Com. v. Freight Lines*, 496.

Whether the lessor driver, or an employee of the lessor driver, is an employee of the lessee under a trip-lease agreement in interstate commerce is to be determined by the provisions of the lease agreement and is a question of law. *Ibid.*

In determining who are "employees" within the N. C. Employment Security Act, consideration is to be given to the interpretation placed upon the federal statute by the Supreme Court of the United States. *Ibid.*

Where an interstate carrier leases a motor vehicle for a trip under its franchise by agreement stipulating that lessor should furnish the equipment and pay the driver's salary and fully maintain and service the equipment, in consideration of a lump sum payment, the driver of such leased vehicle, whether he be the lessor owner or an employee of the lessor owner, is not an employee of the lessee within the meaning of the N. C. Employment Security Act. *Ibid.*

§ 62. Appeals from Employment Security Commission.

Findings of fact of the Employment Security Commission are conclusive on the courts when the findings are supported by competent evidence. G.S. 96-4(m), but findings of the Commission to the extent that they are not supported by competent evidence are not conclusive. *Employment Security Com. v. Freight Lines*, 496.

MORTGAGES

§ 1. Nature and Requisites of Instrument in General.

A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. *Walston v. Twiford*, 691.

MORTGAGES—*Continued.*

§ 9. Parties and Debts Secured.

A mortgage must identify the obligation secured, and nothing which is not therein stipulated will be included. *Walston v. Twiford*, 691.

§ 27. Payment and Satisfaction.

A mortgage which purports to secure the payment of a debt has no validity if the debt has no existence. *Walston v. Twiford*, 691.

The mortgage in question secured a note in a specified sum with provision that upon the death of the payee of the note, any amount remaining due thereon should be deemed a gift to mortgagors, and that thereupon the note and deed of trust should be marked paid and satisfied by the personal representative of the payee. *Held:* While the provision is not good as a gift or as a testamentary disposition of the balance, it is valid as a part of the contractual obligation agreed upon by the parties when the loan was negotiated, and therefore the mortgagors are entitled to restrain the trustee and the personal representative of the payee from foreclosing the instrument. *Ibid.*

§ 33b. Upset Bids and Resales.

The discretionary power of the clerk to refuse to accept an upset bid unless the bidder also gave a compliance bond is not properly presented by allegations setting up equitable grounds for enjoining foreclosure or confirmation. *In re Hardin*, 66.

MUNICIPAL CORPORATIONS

§ 3. Annexation of Territory.

Where it appears from the evidence that some of the signers of a petition for a referendum on the question of annexation of territory by a municipality also affixed the names of their spouses to the petition, but that each spouse did and does regard and adopt such signature as his or her own, such signatures should be counted, and when the petition, including such names, contains the names of more than 15 per cent of the qualified voters of the territory sought to be annexed, attempted annexation of such territory by the municipality without a referendum is ineffective. *Barrett v. Fayetteville*, 436.

§ 12. Torts — Governmental Immunity.

Where a city receives a net income in a substantial amount from the operation of one of its parks maintained as a part of its recreational and amusement program, the fact that its overall budget requirements for its entire recreational programs shows a deficit does not alter the fact that the operation of the park imports a pecuniary advantage to the city so as to exclude the application of governmental immunity in its operation. *Glenn v. Raleigh*, 378.

Where part of a municipal park is used for revenue-producing concessions and attractions, the fact that another part of the park contains a picnic-recreational area opened to the public free of charge does not affect the doctrine of governmental immunity, and a person injured in the picnic area through the negligence of a municipal employee while acting in the discharge of his duties is not precluded from recovery by the governmental immunity doctrine, it being inferable from the record that the picnicking facilities of the park were substantial factors in drawing patrons for the revenue-pro-

MUNICIPAL CORPORATIONS—*Continued.*

ducing concessions and that the several areas of the park were merely parts of a composite whole. *Ibid.*

Where all of the evidence on the question of governmental immunity raises but the single inference that the doctrine is inapplicable to the facts, the court may instruct the jury to find in support of such inference if the evidence is found to be true. *Ibid.*

§ 25b. Control and Authority over Streets.

A deed to property adjacent to a street, executed between private corporations, containing a recital that for the purpose of the description the street is 100 feet wide, is insufficient as a description showing the location of the street, and in reference proceedings to locate the boundaries of the street, the introduction of such deed in evidence does not affect the referee's finding that there was no map, plan or description introduced in evidence showing the location of the street. *Hall v. Fayetteville*, 474.

In a reference proceeding to establish the boundaries of a municipal street, a finding as to the width of the street, which finding relates to the actual width of the street as then in use, and a finding that the municipality had not occupied or used the *locus in quo* for street purposes, which findings are in accord with the evidence as to the width of the street in actual use at that time, cannot be held for error. *Ibid.*

The private act in question provided that the principal streets in the municipality should be 100 feet wide, and appointed commissioners to lay out streets. *Held:* The presumption that the public officers performed their duty will not of itself supply proof that a disputed strip of land along one of the principal streets was actually located within the 100 feet boundary of the street as surveyed and laid out by the commissioners. *Ibid.*

The fact that a street is established across railroad tracks subsequent to the location and construction of the railroad does not diminish the character of the street as a public way, and after the street is established the railroad has no more right to impair or prevent its use than any other property owner would have to change the grade or interfere with the use of the street. *Thompson v. R. R.*, 577.

While a railroad company is given authority to construct its tracks across public ways, it may not construct its tracks or change the grade of the tracks unless it restores the street to a useful condition. *Ibid.*

The mere fact that a city gives a railroad company permission to change the grade of its tracks at a street crossing does not entitle the railroad to plead the city's governmental immunity against damage to contiguous property resulting in the change in grade of the street necessary in the restoration of the street to useful condition. *Ibid.*

§ 36. Police Regulations in General.

The rules applicable to statutes apply equally to the construction and interpretation of municipal ordinances, and when the language of an ordinance is clear and unmistakable, there is no room for construction, and the plain language of the ordinance must be given effect. *Perrell v. Service Co.*, 153.

A statute authorizing the city to require a railroad company, at its own expense, to construct and repair overpasses and street crossings is a delegation to the city of a part of the State's sovereign police power. *Winston-Salem v. R. R.*, 637.

MUNICIPAL CORPORATIONS—*Continued.*

§ 38½. Police Power — Public Convenience.

Ordinance requiring railroad company to reconstruct railroad overpass to relieve traffic congestion originating largely from other sections of city held unconstitutional as applied to the facts of the case. *Winston-Salem v. R. R.*, 637.

§ 39. Police Power — Regulation of Taxicabs.

Chapter 406. Session Laws of 1951, (G.S. 20-280) does not apply to a judgment based on injuries sustained prior to the effective date of the statute. *Perrell v. Service Co.*, 153.

Chapter 279, Public Laws of 1935, (G.S. 160-200(35)) is an enabling act which authorizes, but does not compel, municipalities to require, as a condition precedent to the operation of taxicabs over the streets of the city, that each operator furnish policy of insurance or surety bonds conditioned upon such operator responding in damages on account of any injury to persons or damage to property resulting from the operation of such cabs. *Ibid.*

A deposit of cash or securities by one person in compliance with an ordinance making such deposit a prerequisite to the right to operate taxicabs under a specified trade name over the streets of the city, imposes liability in regard to the operation of a cab under such trade name by any driver to the same extent as though the driver had made the deposit. *Ibid.*

The municipal ordinance in question, passed under the enabling act of 1935, G.S. 160-200(35), requires each taxicab operator to deposit insurance, surety bonds, or cash or securities, conditioned upon the payment of a final judgment in favor of any person injured by the operation of a cab over the municipal streets. *Held:* Cash or securities deposited for the operation of cabs under a stipulated trade name, filed with the municipality under an agreement pursuant to the ordinance, does not cover a final judgment for injuries to a garage mechanic from the negligent operation of the cab while on private garage premises. *Ibid.*

§ 34. Attachment of Lien for Public Improvements, Priorities and Enforcement.

Where the proceeding foreclosing a street assessment lien upon service by publication is in all respects regular on its face, and the municipality purchases at the foreclosure, and thereafter conveys the property, motion in the cause to set aside the judgment on the ground of defective service should not be heard without the joinder of the purchasers of the land, who are the real parties in interest, since the ultimate relief must depend upon the recovery of the land from the purchasers, who would have no recourse against the city if their title should prove invalid. *Hendersonville v. Salvation Army*, 52.

NARCOTICS

§ 2. Prosecutions.

Where the victim of an assault and robbery points out defendant to an officer as being one of his assailants, the officer has the duty to arrest defendant, G.S. 15-40, G.S. 15-41, and to search his person, and upon a separate prosecution of defendant for possession of a narcotic drug, G.S. 90-88, based upon marijuana cigarettes discovered on the person of defendant upon

NARCOTICS—*Continued.*

the search, the evidence thus obtained is competent upon the court's finding that the officer had reasonable ground to believe that a felony had been committed, notwithstanding defendant's conviction of the lesser offense in the prior prosecution for assault and robbery. *S. v. Grant*, 341.

NEGLIGENCE

§ 1. Acts or Omissions Constituting Negligence in General.

The operator of a bulldozer in grading land and clearing it of stumps and brush is under legal duty to exercise that degree of care which a reasonably prudent person would exercise to avoid injuring persons having a legal right to be near the machine. *Griffin v. Blankenship*, 81.

Due care is that degree of care which a reasonably prudent man would exercise under the facts and circumstances of the particular case. *White v. Dickerson, Inc.*, 723.

§ 4f. Injuries to Invitees.

The owner of property is liable to an invitee for injuries caused by dangerous conditions which are known, or which should have been known, by the property owner and which are unknown and not to be anticipated by the invitee. *Williams v. McSwain*, 13.

An invitee is not a mere licensee but is one who goes upon the property of another by express or implied invitation. *Ibid.*

A person entering a public restaurant to make a purchase is an invitee. *Sledge v. Wagoner*, 631.

The proprietor of a restaurant or store is not an insurer of the safety of his customers entering upon direct or implied invitation, but is under the legal duty to his patrons to exercise ordinary care to keep his premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision. *Ibid.*

Evidence held sufficient for jury on issue of negligence causing fall of customer when his clothing caught on protruding rod of magazine rack. *Ibid.*

§ 5. Proximate Cause in General.

Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed. *Adams v. Board of Education*, 506.

§ 7. Intervening Negligence.

Whether the conduct of a third party or independent agency insulates the negligence of defendant is to be determined in accordance with whether the intervening conduct is a new and independent cause, breaking the sequence of events put in motion by the original negligence of defendant, and whether such intervening act and resulting injury is one that the author of the primary negligence could have reasonably foreseen and expected. *White v. Dickerson*, 723.

NEGLIGENCE—*Continued.*

§ 9. Anticipation of Injury.

Foreseeability is an integral factor of proximate cause. *Griffin v. Blankenship*, 81.

While foreseeability is an essential element of proximate cause, it is not required that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred, but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected. *Sledge v. Wagoner*, 631; *White v. Dickerson, Inc.*, 723.

§ 11. Contributory Negligence of Persons Injured in General.

Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care which concurs with some negligent act or omission on the part of the defendant so as to constitute the act or omission of the plaintiff a proximate cause of the injury complained of. *Adams v. Board of Education*, 506.

§ 12. Contributory Negligence of Minors.

An infant between the ages of seven and fourteen is presumed incapable of contributory negligence, but the presumption is rebuttable. *Adams v. Board of Education*, 506.

The test for determining contributory negligence of a minor is whether the child acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances. *Ibid.*

§ 14½. Sudden Peril or Emergency.

A person is not held to the wisest choice of conduct in a sudden emergency, but this doctrine does not apply if the emergency is caused in whole or in part by defendant's own negligence or wrongful act. *Cockman v. Powers*, 403.

§ 17. Presumptions and Burden of Proof.

Plaintiff has the burden of proving negligence and proximate cause by the greater weight of the evidence. *Griffin v. Blankenship*, 81.

Negligence is not presumed, but in the absence of evidence to the contrary, it will be presumed that defendant exercised due care. *Sloan v. Light Co.*, 125.

In order for contributory negligence to bar plaintiff's recovery, defendant has the burden of proving not only that plaintiff was guilty of contributory negligence but also that such contributory negligence was a proximate cause of the injury. *Adams v. Board of Education*, 506.

§ 19b(1). Sufficiency of Evidence of Negligence and Nonsuit in General.

Upon motion for nonsuit in an action to recover for personal injuries negligently inflicted, the evidence must be considered in the light most favorable to plaintiff to determine its sufficiency to carry the case to the jury on the question of actionable negligence. *Griffin v. Blankenship*, 81.

Plaintiff's evidence was to the effect that he had contracted for the use of a bulldozer and operator to grade and clear a street of stumps and brush, the street being partially on his land, and that while he was standing some 10 feet off the right of way, a sapling, which was being pushed along by the bulldozer with a pile of other saplings, brush and rubbish, hit a stump and was thrown against plaintiff's leg. There was no evidence that the bulldozer was operated negligently or in an unusual or improper manner, or facts or

NEGLIGENCE—*Continued.*

circumstances from which such negligence could be legitimately inferred. *Held:* The evidence fails to establish either negligence or proximate cause on the part of the operator of the bulldozer. *Ibid.*

Nonsuit is proper where plaintiff does not offer evidence to support his allegations of actionable negligence. *Sloan v. Light Co.*, 125.

§ 19c. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence is proper when and only when the evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Currin v. Williams*, 32; *High v. R. R.*, 414; *Sledge v. Wagoner*, 631.

§ 23. Culpable Negligence.

The wilful, wanton, or intentional violation of a safety statute, or the inadvertent or unintentional violation of such statute when accompanied by recklessness amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, constitutes culpable negligence, but the inadvertent or unintentional violation of a safety statute, standing alone, does not constitute culpable negligence. *S. v. Hancock*, 432; *S. v. Neal*, 544.

PARENT AND CHILD

§ 5. Liability for Support.

Where parents of minor children have been divorced and custody of the children has been awarded to the mother, the minor children by a next friend may sue the father for support. *Thomas v. Thomas*, 269.

PARTIES

§ 10. Joinder of Additional Parties.

Where a complete determination of an action cannot be had without the adjudication of the rights of persons not parties to the action, such persons must be joined. *Hendersonville v. Salvation Army*, 52.

PARTITION

§ 1a. Right to Partition in General.

The existence of tenancy in common is prerequisite to partition. *Smith v. Smith*, 194.

§ 1c(3). Partition Between Remaindermen.

The existence of a life estate, even though it be in favor of one of the tenants in common, does not preclude partition of the remainder among the tenants in common. *Smith v. Smith*, 194.

§ 4a. Proceedings for Partition—Parties.

In this proceeding for partition of a number of tracts of land, petitioners asserted title in fee simple in an undivided portion of each tract and a life estate in an undivided portion of each tract, with remainder in fee to de-

PARTITION—*Continued.*

fendants, minors and unborn children represented by guardian *ad litem*, but there was no allegation as to defendants' interest, and the will under which the nature of such interest could be determined was not set out. *Held:* Judgment for actual partition as prayed must be set aside and the cause remanded for reformation of the pleadings and the finding of necessary facts. *Davis v. Griffin*, 539.

§ 4f. Partition Proceedings—Operation and Effect.

Prior to partition, one tenant in common conveyed his interest in fee to another tenant by deed without the joinder of his wife. In the partition by the commissioners and in the consent judgment entered after exception to the report, it appeared that the grantee tenant was allotted, in addition to his own share, the share of the grantor tenant, but that the share of the grantor tenant was identified solely to make certain which land would be subject to the dower of the wife of the grantor tenant if she survived him. *Held:* The mere identification in the commissioner's report and in the consent judgment of the share of the grantor tenant cannot have the effect of reinvesting the grantor tenant with any interest in the land. *Ijames v. Swaim*, 443.

§ 7. Partition by Exchange of Deeds.

In order for reciprocal deeds executed by each tenant in common to the other to constitute a voluntary partition of the lands, intent to partition must appear either on the face of the deeds or otherwise. *Smith v. Smith*, 194.

Deeds executed by tenants in common for the purpose of effecting a voluntary partition, convey no title, and therefore if a deed from one tenant to the other is executed pursuant to a plan for partition, the wife of the grantee tenant would take no interest by virtue of the deed, even though she is also named as grantee and even though the deed states that it creates an estate by the entirety in the grantees. *Ibid.*

PARTNERSHIP

§ 1a. Definition.

A partnership is an association of two or more persons to carry on as co-owners a business for profit. *Peirson v. Ins. Co.*, 215.

A contract under which the vendor retains title to raw materials to be used by the purchaser in the manufacture of articles, with provision that the purchaser should sell the articles manufactured and that upon sale the vendor should own the proportionate part of the accounts receivable or cash realized from the sale, is a conditional sale and does not create a partnership. *Lumber Co. v. Banking Co.*, 308.

PHARMACY

§ 1. Regulation and Control.

The General Assembly, in the exercise of the police power of the State, may regulate the practice of pharmacy. *Board of Pharmacy v. Lane*, 134.

G.S. 90-71 and G.S. 90-72, which relate to the same subject matter, are to be construed *in pari materia*. *Ibid.*

PHARMACY—*Continued.*

G.S. 90-71 and G.S. 90-72 proscribe the dispensing and selling of drugs, as well as the compounding physicians' prescriptions, by persons not licensed as pharmacists or assistant pharmacists, except under the immediate supervision of a licensed person, and therefore, it is immaterial to the application of the statute that an unlicensed person, in dispensing a drug to a customer on prescription in the absence of a licensed pharmacist or assistant pharmacist, merely takes the designated number of tablets prepared by a manufacturer from a large container and removes them to a small container and delivers them to the customer. *Ibid.*

The fact that an unlicensed person, in the absence of any licensed pharmacist or assistant pharmacist, in dispensing drugs on a prescription to a customer, has access by telephone to licensed pharmacists in other stores owned by the same employer, does not render his dispensing the drugs permissible under the statute, since the proviso of the statute requires that he act in the immediate physical presence of a licensed pharmacist or assistant pharmacist and under his personal supervision and direction. *Ibid.*

PLEADINGS

§ 2. Joinder of Causes.

As a general rule, if the causes of action alleged in the complaint are not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole, they may be joined in order to determine the whole controversy in one action. *Dixon v. Dixon*, 239.

§ 4. Verification.

Whether the complaint should be verified is optional with plaintiff unless some statute requires verification as a condition to the maintenance of the action, G.S. 1-144, and in an action on a promissory note verification is not required, and therefore an attempted verification, which is a nullity, cannot defeat the action, although in such instance defendant is not required to verify his answer. *Levy v. Meir*, 328.

§ 7½. Pleas in Bar in General.

A plea in bar is one which denies plaintiff's right to maintain the action and, if established, will destroy that action, and ordinarily it is for the trial judge to determine in its discretion whether in the circumstances of the particular case a plea in bar should be disposed of prior to trial on the merits. *Gillikin v. Gillikin*, 710.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

The complaint alleged that the heirs of an estate agreed that one of them should manage the estate for the benefit of all, that the trustee heir mishandled the properties, and in a purported sale of one of the pieces of realty, conveyed the property to a third person who reconveyed to the wife of the trustee heir. Plaintiff prayed for an accounting of the entire estate and that the deed in question be set aside or for a full accounting of the increases, rents and profits from such property. *Held:* The complaint is not demurrable for misjoinder of causes of action, since the complaint alleges a series of

transactions forming one course of dealings tending to a single end. *Dixon v. Dixon*, 239.

Demurrer for misjoinder of parties and causes is properly overruled when the complaint, properly construed, contains but one cause of action for the wrongful capture and control of defendant corporation by the individual defendants, and the allegations with respect to mismanagement and audit of the books do not state causes of action for which relief is presently sought, but merely point to the necessity for court control of the corporation if the relief sought in the action is obtained. *Pollander v. Hamlin*, 557.

§ 19b. Demurrer for Failure to State Cause of Action.

A pleading must be liberally construed, giving the pleader the benefit of every reasonable intendment and presumption therefrom, and a pleading must be fatally defective before it will be rejected as insufficient. *Woody v. Pickelsimer*, 599.

§ 20½. Form and Effect of Judgments upon Demurrer.

Where it affirmatively appears from the facts alleged in a pleading that plaintiff has no cause of action against defendants, judgment sustaining defendants' demurrer and dismissing the action is proper. *Perrell v. Service Co.*, 153.

§ 22. Amendment by Permission of Trial Court.

The trial court may permit a pleading to be amended at any time provided the amendment does not modify or change the cause of action or deprive defendant of an opportunity to present his defense. *Thompson v. R. R.*, 577.

A denial of a motion to amend will be reversed when the denial, although discretionary, is based on an erroneous view of the law. *Woody v. Pickelsimer*, 599.

§ 24. Variance Between Allegation and Proof.

Plaintiff must make out his cause according to the allegations of the complaint, and a fatal variance between the allegation and proof compels nonsuit. *Lucas v. White*, 38.

§ 28. Nature and Grounds for Judgment on the Pleadings.

A motion for judgment on the pleadings is in the nature of a demurrer *ore tenus* and should be allowed if the answer admits every material averment of the complaint and fails to set up any defense or new matter sufficient to constitute a defense to plaintiff's claim. *Phillips v. Gilbert*, 183.

A motion for judgment on the pleadings is in the nature of a demurrer and presents the question whether the facts alleged in the adversary's pleading, together with all fair inferences of fact to be drawn therefrom, taken as true, are sufficient in law to constitute a cause of action or defense. *Hill v. Parker*, 662.

Defendant's motion for judgment on the pleadings is improperly granted if the complaint in any respect or to any extent is sufficient to state a cause of action. *Ibid.*

PLEADINGS—*Continued.*

§ 30. Discretionary or Legal Right to Have Matter Stricken from Pleading.

A motion to strike irrelevant or redundant matter from a pleading is made as a matter of right when made in apt time. *Batts v. Batts*, 243.

§ 31. Grounds for Motion to Strike.

The test upon motion to strike allegations from a pleading on the ground of irrelevancy or redundancy is whether the pleader has the right to introduce in evidence the facts to which the allegations relate. *Batts v. Batts*, 243.

In action for alimony without divorce, allegations of defendant's mistreatment of plaintiff some twenty-four years prior to the mistreatment constituting the basis of the action, held too remote to be competent and should have been striken on motion. *Ibid.*

PRINCIPAL AND AGENT

§ 12a. Liabilities of Agent to Third Persons.

The rule that where a person purports to act as agent for another he impliedly warrants his authority to bind his principal, does not apply when the person dealing with the agent knows that the agent in fact has no authority to act in the premises. *Griffin v. Turner*, 678.

PROCESS

§ 6. Service by Publication.

An *amicus curiae* may not assume the place of a party in a legal action, and is not a competent person under G.S. 1-98.4 to make the jurisdictional affidavit for service by publication. *Shaver v. Shaver*, 113.

§ 8d. Service on Nonresident Corporations.

Findings of fact to the effect that defendant nonresident corporation was not doing business in this State, had no property here, and that the cause of action did not relate to any contract or tort committed in this State, *held* to support the court's conclusion that the defendant was not subject to service of process by service on the Secretary of State. *Bulman v. Baptist Convention*, 392.

§ 11. Service on Associations and Societies.

The constitutions and bylaws of defendant nonresident labor unions, introduced in evidence, together with affidavits of witnesses, *held* sufficient to support the court's findings that defendant unions exercised such control and supervision over their local unions operating in this State in furtherance of the objectives of the defendant unions as to constitute doing business in this State by defendant unions in performing in this State the acts or some of the acts for which they were formed, and judgment that defendant unions were subject to service of process under G.S. 1-97(6), is affirmed. *Beaty v. Asbestos Workers*, 170.

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal

entity in the courts of this State, and may be served with process in the manner prescribed by statute. *Martin v. Brotherhood*, 409.

Where an unincorporated labor union makes a special appearance and moves to dismiss on the ground of want of valid service, the court, upon request, should hear the evidence, find the facts and decide whether or not the defendant is doing business in this State by performing any of the acts for which it was formed and had failed to appoint an agent upon whom due process could be served, and upon adjudication that the service of summons under G.S. 1-97(6) was valid, without finding the facts, the cause must be remanded. *Ibid.*

PUBLIC DRUNKENNESS

§ 1. Nature and Elements of the Offense.

There is no general law in this State making public drunkenness a crime. That part of G.S. 18-51 relating to public drunkenness pertains, under the doctrine of *ejusdem generis*, to public drunkenness at athletic contests and other similar places; G.S. 14-334 relates to conduct which is both drunken and disorderly; G.S. 14-275 relates to disturbing religious congregations; and G.S. 14-335 is, in effect, seventeen different local statutes, each pertaining to a relatively small group of counties. *S. v. Dew*, 188.

The General Assembly, in the exercise of its police power, may enact local statutes making proscribed acts, such as public drunkenness, criminal offenses in the localities stipulated, provided the local statutes apply alike to all persons within each locality specified. The distinction is noted between local statutes in derogation of the general law applicable to the entire State and exemptions of particular localities from the general law. *Ibid.*

PUBLIC OFFICERS

§ 7a. Performance of Public Duties.

The presumption that a public officer has performed his duty cannot be used as proof of an independent and material fact. *Hall v. Fayetteville*, 474.

RAILROADS

§ 3. Crossings and Underpasses.

Where no factor of public safety is involved, the police power may not be invoked to require a railroad company to rebuild an overpass over a street in furtherance of the public convenience where neither the location of the railroad nor its use for train operations is a reasonably related causative factor in producing the public inconvenience sought to be remedied. *Winston-Salem v. R. R.*, 637.

§ 4. Accidents at Crossings.

Evidence held sufficient to be submitted to jury on question of railroad's negligence and not to show contributory negligence as a matter of law. *High v. R. R.*, 414.

§ 15. Rights of Way.

A railroad company has a right to change the elevation of different por-

RAILROADS—*Continued.*

tions of its right of way to suit its convenience, and its acts in doing so cannot impose liability upon it to abutting land owners. *Thompson v. R. R.*, 577.

The fact that a street is established across railroad tracks subsequent to the location and construction of the railroad does not diminish the character of the street as a public way, and after the street is established the railroad has no more right to impair or prevent its use than any other property owner would have to change the grade or interfere with the use of the street. *Ibid.*

While a railroad company is given authority to construct its tracks across public ways, it may not construct its tracks or change the grade of the tracks unless it restores the street to a useful condition. *Ibid.*

If a railroad company, in the performance of its duty to restore a street to a useful condition after it has changed the elevation of its tracks at the street crossing, is required to go beyond the railroad right of way and change the grade of the street, and such change of grade impairs access to the street of an abutting property owner, the railroad company must pay compensation to such abutting owner for the resulting diminution in value of the land. *Ibid.*

Mere permission given a railroad company by the municipality to change the grade of its tracks does not give the railroad the city's governmental immunity in changing the grade of the street. *Ibid.*

RAPE

§ 28. Verdict and Judgment.

A verdict of guilty of assault on a female is a permissible verdict under an indictment for rape. *S. v. Courtney*, 447.

REFERENCE

§ 10. Review of Report—Duties and Powers of Court.

On appeal from the referee's report, the judge of the superior court has authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or make additional findings of fact, and enter judgment on the report as amended. *Hall v. Fayetteville*, 474.

REGISTRATION

§ 1. Instruments Required to Be or Which May Be Registered.

Prior to the enactment of Ch. 504, Session Laws of 1957, there was no provision for registration of an equitable assignment of accounts receivable, and registration of such equitable assignment could not constitute notice. *Lumber Co. v. Banking Co.*, 308.

SALES

§ 25. Remedies of Purchaser — Rescission and Recovery of Purchase Price.

Allegations held sufficient to state cause of action to rescind sale of car for breach of contract by failing to deliver or tender the vehicle, entitling purchaser to recover his old car surrendered to seller in part consideration,

SALES—*Continued.*

and value of old car at time of delivery was competent in evidence. *Curtis v. Cadillac-Olds, Inc.*, 717.

§ 27. Remedies of Buyer—Actions and Counterclaims for Breach of Warranty.

Complaint held sufficient to state cause of action for breach of express warranty that car purchased by plaintiff was practically new and in good condition. *Hill v. Paylor*, 662.

SCHOOLS

§ 6b. School Property—Sale and Lease.

A city school administrative unit is a governmental agency separate and distinct from the city, and such administrative unit, having acquired more land than presently needed for school purposes, has legislative authority to lease the surplus, G.S. 115-126(5), either for a public or a private purpose so long as it exercises its discretion in good faith. *S. v. Cooke*, 484.

Where a city school administrative unit leases surplus property not then needed for school purposes by an instrument stipulating that its use should be for a public or semipublic purpose, the law will presume the parties intended and contemplated use of the property without unlawful discrimination because of race, color, religion or other illegal classification. *Ibid.*

SEARCHES AND SEIZURES

§ 1. Necessity for Warrant.

Where the victim of an assault and robbery points out defendant to an officer as being one of his assailants, the officer has the duty to arrest defendant, G.S. 15-40, G.S. 15-41, and to search his person, and upon a separate prosecution of defendant for possession of a narcotic drug, G.S. 90-88, based upon marijuana cigarettes discovered on the person of defendant upon the search, the evidence thus obtained is competent upon the court's finding that the officer had reasonable ground to believe that a felony had been committed, notwithstanding defendant's conviction of the lesser offense in the prior prosecution for assault and robbery. *S. v. Grant*, 341.

SIGNATURES

A signature written by another at the request or with the consent of the person whose signature it purports to be, is effective. *Barrett v. Fayetteville*, 436.

STATE

§ 3a. Claims Against the State in General.

The State may be sued in tort only in those instances in which it has waived its sovereign immunity by statute. *Lawson v. Highway Com.*, 276.

Action to recover for the wrongful death of a prisoner assigned to work under the supervision of the State Highway and Public Works Commission may be maintained under the State Tort Claims Act, G.S. 143-291, the sole

STATE—*Continued.*

remedy not being under the Workmen's Compensation Act, G.S. 97-10, G.S. 97-13(c). *Ibid.*

The Board of Trustees of the North Carolina Firemen's Pension Fund is not an agency of the State, and an action attacking the constitutionality of the statute creating the Pension Fund (Chapter 1420, Session Laws of 1957) is not an action against the State, since, although the Commissioner of Insurance and the State Treasurer receive and transmit funds under the Act, their duties are solely custodial and ministerial, and the State has no interest in or control over such funds. *Assurance Co. v. Gold*, 288.

§ 3b. Negligence of State Employee and Contributory Negligence of Party Injured.

This action for wrongful death was instituted to recover for the electrocution of a prisoner while working under the supervision of a State prison guard. The stipulations and findings were to the effect that the crew was working in removing trees and brush blown along the highway by a hurricane, that the guard should have reasonably foreseen that members of the crew might come into contact with a live wire in the performance of the work, and that the guard failed to ascertain whether the prisoners could work in safety in the area to which he assigned them. *Held:* The cause was based upon a negligent act within the purview of G.S. 143-291 prior to the 1955 amendments, rather than negligent omission, the guard's omissions in respect to failing to ascertain whether the prisoners could work in safety in the area being but the circumstance of the negligent act in putting them to work in the area of hidden danger. *Lawson v. Highway Com.*, 276.

Evidence tending to show that school boy, while playing tag, ran toward a power mower, chased by a companion, that when he saw the mower he tried to turn but that his foot slipped so that his foot was caught in the unguarded blade held to support conclusion of negligence and not to establish contributory negligence as a matter of law on the part of the boy. *Adams v. Board of Education*, 506.

§ 3e. Appeal and Review of Proceedings Under Tort Claims Act.

The findings of fact of the Industrial Commission under the State Tort Claims Act are conclusive if supported by competent evidence. *Adams v. Board of Education*, 506.

STATUTES

§ 5d. Construction of Statutes in Pari Materia.

In enacting a special act it will be presumed that the General Assembly was advertent to a former general act on the same subject and that the later statute was enacted in the light of and in reference to the former act, and the two statutes must be construed in *pari materia*. *Strickland v. Franklin County*, 668.

§ 6. Construction in Regard to Constitutionality.

A statute may be valid as to one set of facts and invalid as to another. *Strickland v. Franklin County*, 668.

§ 7. Special and General Statutes.

A statute proscribing public drunkenness, followed by seventeen sub-sections, each of which prescribes a different punishment for the county or counties named in the subsection, is not a general law, but is, in effect, a

STATUTES—*Continued.*

series of local acts combined into one statute for convenience. The legislative intent that the statute should be regarded as a local one is indicated by the history of the statute and the classification made by the Legislature itself. *S. v. Dew*, 188.

TAXATION

§ 3. Constitutional Limitation on Increase of Debt.

School bonds of special tax district held not obligations of county within constitutional limitation on increase of debt, notwithstanding provision of assumption of debt by county under certain conditions. *Strickland v. Franklin County*, 668.

§ 23½. Construction and Operation of Taxing Statutes in General.

The responsibility for interpreting a tax statute is placed on the Commissioner of Revenue, G.S. 105-264, and the Attorney General's opinion in regard thereto is advisory only. *In re Assessment of Taxes*, 531.

§ 29. Income Taxes.

Depreciation is the wearing out or obsolescence of property, the useful life of which may be estimated with reasonable certainty; depletion is the exhaustion of a natural resource, and the time within which hidden resources, such as mineral deposits and oil, will be exhausted is highly speculative. Therefore, the law makes a distinction for income tax purposes between deductions for depreciation and for depletion. *In re Assessment of Taxes*, 531.

Prior to the 1953 amendment to G.S. 104-147, the statute permitted a reasonable allowance for depletion without requiring that it should be calculated on percentage of cost, and the 1953 amendment made mandatory that which was permissible before. *Ibid.*

Petitioner held to have properly based depletion of mines on percentage of income in accordance with federal practice. *Ibid.*

There is a clear distinction made by statute between an excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the State, and an income tax on net corporate income based on a past fact of earned net profits. *Transportation Co. v. Currie*, 560.

Income tax on corporation engaged in interstate transportation is not direct burden on commerce. *Ibid.*

The imposition of an income tax under G.S. 105-134 and G.S. 105-136 upon a foreign corporation engaged exclusively in interstate commerce in regard to its operations within the State, which corporation rents a number of terminals and maintains a number of delivery trucks at such terminals in this State, and employs a number of residents in the State and engages in systematic and continuous business herein, is not in violation of due process of law, Art. I, sec. 17, of the State Constitution, Fourteenth Amendment to the Federal Constitution, there being no discrimination in the imposition of the tax. *Ibid.*

§ 38c. Recovery of Tax Paid Under Protest.

The proper procedure for a taxpayer to determine liability for a tax is to pay the tax under protest and sue to recover such payment. *Transportation Co. v. Currie*, 560.

TENANTS IN COMMON

§ 10. Conveyance or Mortgaging by One Tenant.

Where one of two tenants in common conveys his interest to a third party, such third party becomes a tenant in common with the other. *Smith v. Smith*, 194.

TORTS

§ 6. Right to Contribution Among Joint Tort-Feasors.

An employee injured while engaged in his duties in interstate commerce cannot sue the railroad employer and a third person tort feasor in the same action, nor may the railroad employer file a cross-action against such third person tort feasor upon allegations of indemnity and primary and secondary liability, since there is no common legal right in the action under the Federal Employers' Liability Act and the right of action against the third person tort feasor. *Bryant v. R. R.*, 43.

Right of contribution between joint tort-feasors who are in *pari delicto* did not exist at common law but is purely statutory and is dependent upon the terms and conditions of the statute. *Bell v. Lacey*, 703.

A party injured as a result of negligence of joint tort-feasors may sue any one of them separately, or any or all of them together. *Ibid.*

When plaintiff sues all joint tort-feasors, none may litigate cross-action against the other for affirmative relief not germane to plaintiff's action. *Ibid.*

TRESPASS

§ 9. Nature and Elements of Criminal Trespass.

The invasion of property in the possession of another is a crime under our laws, the severity of the punishment being measured by the character of the entry. *S. v. Cooke*, 484.

In a prosecution for criminal trespass, the State may either show that the property was in the actual possession of another or that such other had right to possession, which by operation of law implies possession. *Ibid.*

§ 10. Prosecutions for Criminal Trespass.

Where the uncontroverted evidence discloses that the property was in the physical possession of the corporation named in the warrant and that defendants took possession over the protests of the corporation's agent in charge, with nothing in the State's evidence showing or tending to show any right to enter on the part of defendants after having been forbidden to do so, nonsuit is properly denied, the burden being upon defendants to establish that they entered under a *bona fide* belief of right, and that such belief had a reasonable foundation in fact. *S. v. Cooke*, 484.

TRIAL

§ 20. Questions of Law and of Fact.

Where the facts are not controverted, the rights of the parties upon such facts are questions of law, and the court may enter judgment thereon in accordance with the rights of the parties without the intervention of the jury. *Peoples v. Ins. Co.*, 303.

Whether the evidence is sufficient to require its submission to the jury is a question of law. *High v. R. R.*, 414.

§ 21½. Necessity for Motion to Nonsuit and Renewal.

Where defendant introduces no evidence and does not move for nonsuit until after argument to the jury has begun, the failure of the court, in the exercise of its discretion, to treat the motion as having been aptly made renders the motion ineffective. *Glenn v. Raleigh*, 378.

§ 22. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable inference to be drawn therefrom. *Sloan v. Light Co.*, 125.

On motion to nonsuit, the court does not pass upon the credibility of the witnesses or the weight of their testimony, but must take the evidence favorable to plaintiff as true and resolve all conflicts of testimony in plaintiff's favor. *High v. R. R.*, 414.

Defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and clarify it, may be considered on motion to nonsuit. *Hincher v. Hospital Care Asso.*, 397.

Upon motion to nonsuit, defendant's evidence at variance with or in contradiction of plaintiff's evidence will not be considered. *Curtis v. Cadillac-Olds, Inc.*, 717.

Plaintiff must recover, if at all, on the basis of the evidence offered, and while on motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, no facts or inferences may be drawn from the evidence predicated upon a disbelief of her testimony. *Cockman v. Powers*, 403.

§ 23f. Nonsuit for Variance.

Plaintiff must make out his cause according to the allegations of the complaint, and a fatal variance between the allegation and proof compels nonsuit. *Lucas v. White*, 38.

§ 24a. Nonsuit on Affirmative Defense.

Where defendant's affirmative defense is established by plaintiff's own evidence, nonsuit may be entered. *Goldberg v. Ins. Co.*, 86.

When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered. *Hincher v. Hospital Care Asso.*, 397.

§ 29. Directed Verdict or Peremptory Instructions.

Where the evidence bearing upon an issue is susceptible to diverse inferences, the court properly refuses motion for a peremptory instruction thereon. *Gouldin v. Ins. Co.*, 162.

Ordinarily, where all the evidence bearing upon an issue points in the same direction, with but one inference to be drawn from it, an instruction to find in support of such inference, if the evidence is found to be true, is proper. *Hincher v. Hospital Care Asso.*, 397.

TRIAL—*Continued.*

Where the evidence is not controverted and is sufficient to make out a case, a peremptory instruction that if the jury believes the evidence and finds the facts to be as all the evidence tends to show, to answer the issue in the affirmative, otherwise in the negative, will be upheld. *Roach v. Ins. Co.*, 699.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

It is error for the trial court to charge the jury as to material matters not raised by the pleadings or supported by the evidence and contained in the issues. *Williams v. Dowdy*, 683.

§ 31d. Charge on Burden of Proof.

Where a single issue is submitted, a charge that the burden was on plaintiff on the issue to make out his case and on defendant to prove his affirmative defense must be held prejudicial as tending to confuse the jury. *Nagle v. Bosworth*, 93.

§ 49½. Motions to Set Aside Verdict for Inadequate or Excessive Award.

Where the jury answers the issues upon sharply conflicting evidence and the verdict is supported by competent evidence and there is nothing to show that the amount awarded was the result of bias or prejudice, the trial court may refuse motions to set aside the verdict for inadequate award and on the ground that the verdict was not supported by sufficient evidence, and, upon its opinion that the award is inadequate, increase the amount of the award with consent of defendant, the motions being addressed to the discretion of the court and there being nothing in the record tending to show abuse of discretion. *Caudle v. Swanson*, 249.

TRUSTS

§ 2a. Creation of Parol Trusts.

A grantor may not engraft a trust upon his deed in fee simple by parol agreement entered into at the time of or prior to the execution of his deed. *Conner v. Ridley*, 714.

Thus the grantor may not contend that the consideration for his deed in fee simple was the promise of the grantee to hold the land for inheritance by the grantee, since this would limit the fee conveyed by the deed. *Ibid.*

§ 8. Incapacity, Death or Resignation of Trustee.

The death of trustees without provision in the instrument for the appointment of their successors does not terminate the trust, since a trust does not fail for want of a trustee. *Mast v. Blackburn*, 231.

§ 9. Appointment of Successor Trustees.

A trustee holds the bare legal title for the purposes of the trust, and therefore the sole heir at law of the survivor trustee can at most convey the bare legal title, but cannot administer the trust or use the trust property for his own benefit, and therefore his deed to trustees designated by him to carry out the trust is ineffectual as an appointment of successor trustees. *Mast v. Blackburn*, 231.

TRUSTS—*Continued.*

Prior to Chapter 1255, Session Laws of 1953, (G.S. 36-18.1) a clerk of the superior court had no power to appoint successor trustees of a charitable trust, such authority being vested solely in the superior court and not in the respective clerks thereof. G.S. 36-21. *Ibid.*

The appointment by the clerk of successor trustees of a charitable trust in *ex parte* proceeding prior to the effective date of G.S. 36-18.1, is void, and such appointees may not maintain an action to restrain others from interfering with their asserted rights as trustees, but successor trustees may be appointed by the judge of the superior court *nunc pro tunc* under G.S. 36-21 or by the clerk under G.S. 36-18.1. *Ibid.*

§ 13. Merger of Legal and Equitable Titles.

In a passive trust the legal and equitable titles are merged in the beneficiary and the beneficial use is converted into legal ownership, but as to an active trust, the title remains in the trustee for the purposes of the trust. *Phillips v. Gilbert*, 183.

UTILITIES COMMISSION

§ 2. Jurisdiction.

Respondents constructed a water main from the end of the municipal lines to their properties for better use of such properties and also permitted others to tap into the lines laterally upon the payment of a fee, and the municipality, upon written statement that the right to tap in had been purchased, installed meters and furnished water to the purchasers direct, respondents owning no laterals between the point where the taps were made in their lines and the residences or other buildings served thereby. *Held:* Respondents were not selling water to any one, at any time, for compensation or otherwise, and were not public utilities within the meaning of G.S. 62-65 (e) 2, and therefore the Utilities Commission had no jurisdiction to order respondents to improve their facilities so as to provide an adequate supply of water. *Utilities Comm. v. Water Co.*, 27.

An irregular route common carrier has no legal right to compel a regular route carrier to interchange intrastate freight, but such interchange of freight between them must be based on an agreement, and in the absence of such agreement voluntarily made by the carriers and submitted by them to the Utilities Commission, the Commission has no jurisdiction of the subject matter. *Utilities Comm. v. Truck Lines*, 625.

§ 5. Appeal and Review.

On appeal from the Utilities Commission the courts have jurisdiction to determine whether the Commission had statutory authority to entertain the proceedings and jurisdiction to enter the order. *Utilities Comm. v. Water Co.*, 27.

WAIVER

Waiver is a mixed question of law and fact, but when the facts are determined or are all one way, waiver is a question of law. *Gouldin v. Ins. Co.*, 162.

WILLS

§ 13. Revocation of Will by Subsequent Marriage.

In those instances not coming within the exceptions enumerated in the statute, the marriage of the testator after the execution of the will revokes it *in toto* and not only to the extent necessary to permit the widow to share in the estate. *In re Will of Tenner*, 72.

§ 21c. Grounds of Invalidity—Undue Influence.

Undue influence which renders a will invalid is that influence exerted upon testator, by any or various means, which so overpowers and subjugates the mind of testator as to destroy his free agency, so that at the very time of executing the paper writing the will of another is substituted for that of the testator. *In re Will of Thompson*, 588.

§ 22b. Competency of Evidence on Question of Mental Capacity.

The rule prohibiting an interested party from testifying as to a transaction with decedent does not preclude a caveator from testifying as to his opinion of the mental condition of testator. *In re Will of Thompson*, 588.

Testimony of a disinterested party that some time after the execution of the will in suit testator stated that he had made no will, is competent upon the issue of mental capacity, but not upon the issue of undue influence. Nevertheless, when there is only a general objection to its admission and no request that it be restricted to the issue of testamentary capacity, its general admission will not be held for error. *Ibid.*

§ 23c. Competency of Evidence on Question of Undue Influence.

Since undue influence is frequently employed surreptitiously and is chiefly shown by its result, wide latitude must be allowed in the introduction of evidence upon the issue, and as a general rule any evidence which tends to show an opportunity and disposition to exert undue influence, the degree of susceptibility of the testator, or a result indicative of the exercise of undue influence, is competent unless proscribed by some rule of law. *In re Will of Thompson*, 588.

Testimony of caveator that when she came to see her 84-year-old father less than two years prior to his execution of the paper writing, he did not recognize her, *is held* competent on the issue of undue influence as tending to establish the mental condition of testator and his susceptibility to influence, as well as on the issue of mental capacity. *Ibid.*

Testimony of declarations by propounder, the sole party interested in sustaining the paper writing, tending to show that he procured an attorney to draw the will he wished testator to sign, that he objected to the other children of testator inquiring about the matter, and as to his financial transactions with testator, *is held* competent, regardless of when made, as declarations or admissions against interest on the issue of undue influence. *Ibid.*

Evidence to the effect that testator kept large sums of money on his person or in his possession as the result of influence exerted by propounder that banks were unsafe, *is held*, in view of the other facts and circumstances adduced by the evidence, properly admitted upon the issue of undue influence. *Ibid.*

Testimony of a disinterested witness of a declaration made by testator, even though made a number of months after the execution of the writing, tending to show coolness in the relationship of testator and propounder, is

competent upon the issue of undue influence when it tends to throw some light on the state of mind of testator at the time of executing the instrument, there being other independent and substantive evidence of undue influence. *Ibid.*

§ 31. General Rules of Construction.

In the construction of a will, the general pervading purpose of the testator as gathered from the instrument considered as a whole must be given effect, and minor inaccuracies or inconsistencies must be reconciled to the dominant purpose if possible by any reasonable construction and otherwise they must yield to the general purpose as expressed in the writing. *Finke v. Trust Co.*, 370.

§ 33d. Estate in Trust.

The will devised the lands in question to be held in trust for the benefit of testator's son during the son's natural life and at the son's death to the trustee in fee simple. *Held:* No duty was imposed upon the trustee in regard to the estate, but the trustee was the holder of bare legal title under a passive trust, and upon the death of testator's son, the remainder vested in the trustee in fee and the trustee was entitled to immediate possession, notwithstanding his failure to qualify as trustee of the son under the will and failure to manage the property for the son's benefit, the vesting of the remainder not being conditioned upon the rendering of any service by the trustee. Therefore, the guardian for the son may not claim a lien on the property for monies expended by him for the medical care and funeral expenses of the son. *Phillips v. Gilbert*, 183.

Ultimate beneficiaries held not entitled to demand payment of corpus of trust during life of widow, since such payment would defeat dominant purpose of testator for her support. *Finke v. Trust Co.*, 370.

GENERAL STATUTES, SECTIONS OF, CONSTRUED

1-36. When State is not a party title is conclusively presumed out of the State, but there is no presumption in favor of either party. *Shingleton v. Wildlife Comm.*, 89.

1-45. Statute does not apply when evidence fails to show that municipality had any title to *locus in quo*. *Hall v. Fayetteville*, 474.

1-54(3). Action for false arrest is barred after one year from release from custody notwithstanding that criminal action in which arrest was made is not terminated until less than year from institution of action. *Mobley v. Broome*, 54.

1-69.1; 1-97(6). Where unincorporated labor union attacks validity of service, court should find whether it was doing business in this state as predicate for judgment sustaining service. *Martin v. Brotherhood*, 409.

1-97(6). Is constitutional and service on nonresident labor union thereunder held valid. *Beaty v. Asbestos Workers*, 170.

1-98.4 *Amicus curiae* is not competent to make jurisdictional affidavit for service by publication. *Shaver v. Shaver*, 113.

1-122. Cause remanded with direction that plaintiff be granted reasonable time to redraft complaint to state cause in plain and concise manner. *Batts v. Batts*, 243.

1-123. Complaint alleging a series of transactions forming one course of dealing tending to one end is not demurrable for misjoinder. *Dixon v. Dixon*, 239.

1-135. Party relying on governmental immunity must plead it. *Thompson v. R. R.*, 577.

1-144; 1-146. Complaint in action on note is not required to be verified, and therefore ineffectual verification is not fatal. *Levy v. Meir*, 328.

1-163. Power of trial court to allow amendment of pleading. *Thompson v. R. R.*, 577.

1-194. Court may set aside, affirm modify or amend referee's report. *Hall v. Fayetteville*, 474.

1-240; 1-137; 1-138. Where plaintiff sues all joint tort-feasors, one defendant may not set up cross-action against another which demands affirmative relief not germane to plaintiff's action. *Bell v. Lacey*, 703.

1-253; 1-254; 1-264; 1-265. Insurance companies held entitled to maintain action to test constitutionality of Firemen's Pension Fund Act. *Assurance Co. v. Gold*, 288.

1-440.22; 1-440.36. When plaintiffs recover judgment in main action in which garnishees were served and there is no attack upon validity of the attachment or demand for jury trial, plaintiffs are entitled to summary judgment on undertaking signed by defendant and one of garnishees. *Hill v. Dawson*, 95.

1-507.2; 55-148. When receiver has full authority to institute suit, his appointment will not suspend running of statute. *Nicholas v. Furniture Co.*, 462.

1-508. Court has authority to order fund paid to party entitled thereto as matter of law. *Peoples v. Ins. Co.*, 303.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

5-8; 5-4. Statutory limit of confinement for period not exceeding thirty days is not applicable to civil contempt. *Smith v. Smith*, 298.

7-64. Superior Court, when sitting in county exempted from statute has no original jurisdiction of misdemeanors. *S. v. Cooke*, 485.

9-26. Under facts of this case defendant was deprived of opportunity to procure evidence in support of alleged racial discrimination in selection of grand jury. *S. v. Perry*, 334.

14-33. Relates only to punishment and creates no new offense. *S. v. Courtney*, 447.

14-45. Conflicting evidence held for jury in prosecution under this act. *S. v. Lee*, 327.

14-107. Signing bank check form does not constitute the instrument a check. *S. v. Ivey*, 316.

15-4.1 Appointment of counsel for indigent defendant charged with less than capital crime rests in discretion of court. *S. v. Davis*, 318.

15-40; 15-41. Where victim of an assault and robbery points out defendant to officer as being one of assailants, the officer has duty to arrest him, and fact that defendant is convicted only of assault does not render arrest unlawful, and therefore search of person of defendant is authorized. *S. v. Grant*, 341.

15-144. Circumstantial evidence of defendants' guilt of homicide held sufficient to be submitted to jury. *S. v. Horner*, 343.

15-200.1. Defendant has right to appeal from domestic relations court to superior court from judgment putting into effect suspended sentence. *S. v. Robinson*, 282.

15-217. Strict enforcement of rules governing appeals does not preclude rights under Post Conviction Hearing Act. *S. v. Davis*, 318.

18-2; 18-48. Under 18-2 warrant should charge the unlawful possession of or sale of intoxicating liquors; under 18-48 it should charge unlawful possession of alcoholic beverages upon which taxes had not been paid; under G.S. 18-50 it should charge unlawful possession for sale, or sale, of illicit liquors. *S. v. May*, 60.

18-48. Upon defendant's plea of not guilty, State has burden of showing beyond reasonable doubt defendant's possession of alcoholic beverages upon which tax had not been paid and that the beverages contained alcohol exceeding 14 per cent by volume. *S. v. Pitt*, 57.

18-51; 14-334; 14-275; 14-355. There is no general statute making public drunkenness a crime, and local act relating thereto is valid. *S. v. Dew*, 188.

18-60. Testimony that liquid was whiskey is sufficient to support finding that it contained in excess of 14 per cent. of alcohol by volume, since whiskey contains from 50 to 58 per cent. alcohol by volume. *S. v. May*, 60.

20-125(b); 20-156(b). Motorist is not required to yield right of way to ambulance unless he hears and comprehends, or should hear and comprehend, siren. *Funeral Service v. Coach Lines*, 146.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-140. Requires motorist to operate his vehicle with due care and circumspection so as not to endanger others. *Funeral Service v. Coach Lines*, 146.

20-146. Evidence held insufficient to be submitted to jury on issue of culpable negligence in violating this section. *S. v. Hancock*, 432.

20-148. Instruction limiting right to assume that approaching motorist would yield one-half of highway to party who was himself on right side of highway held without error. *Blackwell v. Lee*, 354.

20-158(a). Failure to stop at dominant highway is not negligence or contributory negligence *per se* but only evidence upon issue. *Williamson v. Randall*, 20.

20-158(b). Municipalities have authority to maintain traffic control lights, *Funeral Service v. Coach Lines*, 146.

20-158(c). Is not applicable to traffic control lights within municipalities. *Wilson v. Kennedy*, 74; *Funeral Service v. Coach Lines*, 146; *Williams v. Funeral Home*, 524.

20-169. Motorist is guilty of negligence or contributory negligence as matter of law if he fails to stop in obedience to traffic control signal. *Currin v. Williams*, 32.

20-227; 20-279.21. Liability insurer may settle part of multiple claims even though such settlement results in preference. *Alford v. Ins. Co.*, 224.

20-280. Does not apply to judgment based on injuries sustained prior to effective date of statute. *Perrell v. Service Co.*, 153.

28-149; 29-1; 48-23. Adopted child is entitled to inherit from brother of adopting parent notwithstanding that decree of adoption was entered prior to passage of statute. *Bennett v. Cain*, 428.

28-173; 28-174. Actions for wrongful death are purely statutory; where settlement for wrongful death is made on basis on distributee's negligence, such distributee will not be allowed to share in recovery. *In re Estate of Ives*, 176.

31-5.3 In those instances not coming within exceptions enumerated in the statute, subsequent marriage of testator revokes will in toto. *In re Will of Tenner*, 72.

36-18.1; 36-21. Prior to 1953 statute, clerk of superior court had no authority to appoint successor trustees. *Mast v. Blackburn*, 231.

44-70. Factor advances money to manufacturer or processors. *Lumber Co. v. Banking Co.*, 308.

45-21.27(b); 45-21.34. Discretionary power of clerk to refuse to accept upset bid without compliance bond is not presented by attack of foreclosure on equitable grounds. *In re Hardin*, 66.

46-1; 46-3. Existence of tenancy in common is prerequisite to partition. *Smith v. Smith*, 194.

46-23. Existence of life estate, even though it be in favor of one of tenants in common does not preclude partition of remainder. *Smith v. Smith*, 194.

47-20; 47-23. Prior to 1957 Act there was no provision for registration of equitable assignment of accounts receivable and registration could not constitute notice. *Lumber Co. v. Banking Co.*, 308.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

49-7; 49-8. Domestic relations court has power to enter suspended sentence. *S. v. Robinson*, 282.

50-11. 1955 amendment not applicable to decrees for alimony rendered prior to its effective date. *Kinross-Wright v. Kinross-Wright*, 1.

50-16. Complaint alleging indignities, cruelty and abandonment sufficient to sustain alimony *pendente lite* is not demurrable, but allegations of indignities occurring too remote in point of time to be basis of action should be stricken. *Batts v. Batts*, 243.
Resident judge of district has jurisdiction to hear application for alimony *pendente lite*. *Herndon v. Herndon*, 248.

52-15. Landlord's crop lien held not to extend to proceeds of hail insurance taken out by tenant. *Peoples v. Ins. Co.*, 303.

55-56. When corporation has been placed in bankruptcy, right to institute action under this section vests in trustee in bankruptcy, and creditors cannot maintain such action even after refusal of trustee to do so. *Sales Corp. v. Townsend*, 687.

55-125(a) (4). Superior Court has authority in its discretion to order liquidation of corporation operating at loss. *Royall v. Lumber Co.*, 735.

55-143. Judgment creditor of corporation may bring suit in name of corporation only to collect debt due corporation, and statute does not authorize him to bring suit for tortious breach of trust by corporate officers. *Caldlaw, Inc., v. Caldwell*, 235.

59-36. Partnership is association of two or more persons to carry on as co-owners a business for profit. *Peirson v. Ins. Co.*, 215.

62-26.10. On appeal from Utilities Commission, courts have jurisdiction to determine whether Commission had jurisdiction to hear matter. *Utilities Commission v. Water Co.*, 27.

62-65(2) 2. Commission held without jurisdiction over private water company. *Utilities Commission v. Water Co.*, 27.

84-28. Respondent in disbarment proceedings held not to have waived jury trial in superior court. *In re Gilliland*, 517.

90-71; 90-72. Are to be construed in *pari materia*, and proscribe the dispensing and selling of drugs as well as the compounding of prescriptions by unlicensed person not in presence of licensed pharmacist. *Board of Pharmacy v. Lane*, 134.

96-4(m). Findings of Commission are conclusive on courts when supported by evidence. *Employment Security Com. v. Freight Lines*, 496.

96-8(g) (1). Rules of common law determine whether person is employee within meaning of statute. *Employment Security Com. v. Freight Lines*, 496.

97-24. Ch. 1026, sec. 12, Session Laws of 1957, is not applicable to claims existent at the time of the enactment of the statute. *McCrater v. Engineering Co.*, 707.

97-31(t). Prior to 1957 amendment award for partial disability must be based on percentage of weekly wage for entire period of 200 weeks. *Kellams v. Metal Products*, 199.

97-31(u); 97-29. Awards for partial disability are subject to statutory minimum. *Kellams v. Metal Products*, 199.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

105-134; 105-136. Income tax on corporation engaged in interstate transportation is not direct burden on interstate commerce. *Transportation Co. v. Currie*, 560.

105-147. Petitioner held to have properly based depletion of mines on percentage of income in accordance with Federal practice. *In re Assessment of Taxes*, 531.

105-264. Responsibility for interpreting tax statute is on Commissioner of Revenue, and opinion of Attorney-General is advisory only. *In re Assessment of Taxes*, 531.

105-267. Proper procedure to determine liability for tax is to pay the tax under protest and sue to recovery payment. *Transportation Co. v. Currie*, 560.

105-296(4). Where facts agreed are insufficient to determine with definiteness the taxable status of properties, cause must be remanded. *Seminary v. Wake County*, 420.

113-8. Operator of beach under concession from State held not shown by evidence to have been guilty of negligence causing death of swimmer. *Williams v. McSwain*, 13.

114-2. Responsibility for interpreting tax statute is on Commissioners of Revenue, and opinion of Attorney-General is advisory only. *In re Assessment of Taxes*, 531.

115-109. Bonds of special tax district held not obligations of county within constitutional provision relating to increase of county debt when Ch. 1078, Session Laws 1957 is construed in *pari materia* with this statute. *Strickland v. Franklin County*, 668.

115-126(5). City school administrative unit has authority to lease surplus land not presently needed for school purposes. *S. v. Cooke*, 485.

136-69. Gives right to cartway but does not impose duty to exercise that right; right exists only when there is no reasonable access to cartway. *Kanupp v. Land*, 203.

143-291. Prior to 1955 amendments. Cause of action held based upon negligent act within purview of Tort Claims Act. *Lawson v. Highway Com.*, 276.

143-291; 97-10; 97-13(c). Action for wrongful death of prisoner may be maintained under State Tort Claims Act, and plaintiff is not relegated to Workmen's Compensation Act. *Lawson v. Highway Com.*, 276.

143-293. Evidence held insufficient to support finding that minor was guilty of contributory negligence. *Adams v. Board of Education*, 506.

160-200 (35). Authorizes but does not compel municipalities to require taxicab operators to furnish insurance policies or bonds; such policy does not cover injuries to garage mechanic from negligence in operation of cab while on private garage premises. *Perrell v. Service Co.*, 153.

160-222; 60-37(6); 60-43. Evidence held insufficient to show that change of grade of tracks, resulting in change of grade of street to damage of abutting owners, was done under governmental immunity of city. *Thompson v. R. R.*, 577.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

ART.

I, secs. 12 and 13. Contention that violation of order enjoining criminal act would subject defendant to punishment for criminal offense without constitutional safeguards, held untenable. *Board of Pharmacy v. Lane*, 134.

I, sec. 17. Levy of income tax on corporation engaged in interstate transportation does not deprive corporation of property without due process. *Transportation Co. v. Currie*, 560.

Ordinance requiring railroad company to reconstruct overpass held unconstitutional on facts of this case. *Winston-Salem v. R. R.*, 637.

Under facts of this case defendant was deprived of opportunity to procure evidence in support of alleged racial discrimination in selection of grand jury. *S. v. Perry*, 334.

I, sec. 19. Increase of verdict by court with consent of defendant does not infringe plaintiff's right to jury trial. *Caudle v. Swanson*, 249.

III, sec. 14. Responsibility for interpreting tax statute is on Commissioner of Revenue, and opinion of Attorney-General is advisory only. *In re Assessment of Taxes*, 531.

V, sec. 4. Bonds of special tax district held not obligations of county within constitutional provision against increase of debt. *Strickland v. Franklin County*, 668.

VI, Authorizes statutory provisions setting forth qualification of electors. *Lassiter v. Board of Education*, 102.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED

ART.

IV, sec. 1. Where court rendering decree has jurisdiction to modify it for change of conditions, our courts have such power. *Thomas v. Thomas*, 269.

IV, sec. 2. Nonresidents have right to bring action in our courts as one of privileges guaranteed to citizens of several states. *Thomas v. Thomas*, 269.

7th Amendment. Applies to Federal courts but not State courts. *Caudle v. Swanson*, 249.

14th Amendment. Levy of income tax on corporation engaged in interstate transportation does not deprive it of property without due process. *Transportation Co. v. Currie*, 560.

Under facts of this case defendant was deprived of opportunity to procure evidence in support of alleged racial discrimination in selection of grand jury. *S. v. Perry*, 334.

14th, 15th, 17th Amendments to Federal Constitution. Statutory provisions setting forth educational qualification of voters applies to all persons equally and does not violate constitutional rights. *Lassiter v. Board of Elections*, 102.

160-446. Electors may authorize other to sign for them petition for referendum. *Barrett v. Fayetteville*, 436.

163-28. Educational qualification of electors is constitutional. *Lassiter v. Board of Elections*, 102.