NORTH CAROLINA REPORTS

Vol. 249

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1958

SPRING TERM, 1959

REPORTED BY

JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
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4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1958—SPRING TERM, 1959

CHIEF JUSTICE:

J. WALLACE WINBORNE.

ASSOCIATE JUSTICES:

EMERY B. DENNY,
JEFF. D. JOHNSON, JR.,[1]
R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS,
WILLIAM B. RODMAN, JR.

EMERGENCY JUSTICES:

W. A. DEVIN,[2]
M. V. BARNHILL.

ATTORNEY-GENERAL:

MALCOLM B. SEAWELL.

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.[3]

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] Retired 31 January, 1959, succeeded by Clifton L. Moore.
[2] Died February 18, 1959.
[3] Resigned 31 October, 1958, succeeded by Lucius W. Pullen.

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[1]	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	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	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

J. FRANK HUSKINS	Twenty-Fourth	Burnsville.
JAMES C. FARTHING	Twenty-Fifth	Lenoir.
FRANCIS O. CLARKSON	Twenty-Sixth	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh	Gastonia.
ZEB V. NETTLES[2]	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.	Twenty-Ninth	Marion.
GEORGE B. PATTON	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.
ZEBULON V. NETTLES, 1 January, 1959	Asheville.

[1] Appointed to the Supreme Court 2 February 1959; Succeeded on the Superior Court by R. I. Mintz.

[2] Succeeded by W. K. McLean 1 January 1959.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
HUBERT E. MAY	Second	Nashville.
ERNEST R. TYLER[1]	Third	Roxobel.
W. JACK HOOKS[2]	Fourth	Kenly.
ROBERT D. ROUSE, JR.	Fifth	Farmville.
WALTER T. BRITT	Sixth	Clinton.
LESTER V. CHALMERS, JR.	Seventh	Raleigh.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
MAURICE E. BRASWELL	Ninth	Fayetteville.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

HARVEY A. LUPTON	Eleventh	Winston-Salem.
HORACE R. KORNEGAY	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
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[3]	Eighteenth	Forest City.
ROBERT S. SWAIN	Nineteenth	Asheville.
THADDEOUS D. BRYSON, JR.[4]	Twentieth	Bryson City.
CHARLES M. NEAVES	Twenty-first	Elkin.

[1] Succeeded 10 December 1958 by W. H. S. Burgwyn, Jr., Woodland.
[2] Succeeded 1 January 1959 by Archie Taylor, Lillington.
[3] Succeeded 1 January 1959 by Leonard Lowe, Forest City.
[4] Succeeded 1 January 1959 by Glenn W. Brown, Bryson City.

FIRST DIVISION

FIRST DISTRICT
Judge Paul

Camden—Apr. 6.
Chowan—Mar. 30; Apr. 27†.
Currituck—Jan. 19†; Mar. 2.
Dare—Jan. 12†; May 25.
Gates—Mar. 23; May 18†.
Pasquotank—Jan. 5†; Feb. 9†; Feb. 16* (2); May 4† (2); June 1* (2) June 15†.
Perquimans—Jan. 26† (2); Apr. 13.

SECOND DISTRICT
Judge Bundy

Beaufort—Jan. 19*; Jan. 26; Feb. 16† (2); Mar. 9*; May 4† (2); June 8†; June 22.
Hyde—May 18.
Martin—Jan. 5†; Mar. 16, Apr. 6† (2); May 25† (2); June 15.
Tyrrell—Apr. 20.
Washington—Jan. 12*; Feb. 9†; Mar. 30†; Apr. 27*.

THIRD DISTRICT
Judge Stevens

Carteret—Mar. 9†; Mar. 30; Apr. 27†; June 8 (2).
Craven—Jan. 5 (2); Feb. 2† (3); Mar. 9 (A); Apr. 6; May 4† (2); May 25 (2).
Pamlico—Jan. 19 (A) (2).
Pitt—Jan. 19†; Jan. 26; Feb. 23† (2); Mar. 16 (2); Apr. 13†; Apr. 20; May 18; May 25† (A); June 22.

FOURTH DISTRICT
Judge Mintz

Duplin—Jan. 19*; Feb. 9† (2); Mar. 9† (2); Mar. 30*; Apr. 20†.
Jones—Mar. 2; May 11†.
Onslow—Jan. 5 (2); Feb. 23; Mar. 23†; May 18 (2).
Sampson—Jan. 26 (2); Apr. 6† (2); Apr. 27*; May 4†; June 1† (2).

FIFTH DISTRICT
Judge Parker

New Hanover—Jan. 12*; Jan. 19† (2); Feb. 9† (2); Feb. 23* (2); Mar. 9† (2); Apr. 6*; Apr. 13† (2); May 4† (2); May 18*; May 25† (2); June 8*; June 15† (2).
Pender—Jan. 5; Feb. 2†; Mar. 23; Apr. 27†.

SIXTH DISTRICT
Judge Bone

Bertie—Feb. 9 (2); May 11 (2).
Halifax—Jan. 26 (2); Mar. 2† (2); Apr. 27; May 25† (2); June 8*.
Hertford—Feb. 23; Apr. 13 (2).
Northampton—Mar. 30 (2).

SEVENTH DISTRICT
Judge Frizzelle

Edgecombe—Jan. 19*; Feb. 23* (2); Mar. 23† (A) (2); Apr. 20*; June 1 (2).
Nash—Jan. 5* (A); Jan. 26†; Feb. 2*; Mar. 9† (2); Apr. 6* (2); May 18† (2).
Wilson—Jan. 5† (2); Feb. 9* (2); Mar. 9† (A) (2); Mar. 23* (2); May 4* (2); June 15† (2).

EIGHTH DISTRICT
Judge Morris

Greene—Jan. 5†; Feb. 23; Apr. 27.
Lenoir—Jan. 12*; Feb. 9† (2); Mar. 16 (2); Apr. 13† (2); May 18† (2); June 15* (2).
Wayne—Jan. 19*; Jan. 26† (2); Mar. 2† (2); Mar. 30* (2); May 4† (2); June 1† (2).

SECOND DIVISION

NINTH DISTRICT
Judge Bickett

Franklin—Feb. 2*; Feb. 16† (2); Apr. 20† (2); May 11*.
Granville—Jan. 19; Apr. 6 (2).
Person—Feb. 9; Mar. 23† (2); May 25.
Vance—Jan. 12*; Mar. 2*; Mar. 16†; June 15*; June 22†.
Warren—Jan. 5*; Jan. 26†; Mar. 9†; May 4†; June 1*.

TENTH DISTRICT
Judge Williams

Wake—Jan. 5* (A); Jan. 5† (2); Jan. 12† (A) (2); Jan. 19* (2); Feb. 2† (2); Feb. 9† (A) (2); Feb. 16* (2); Mar. 2† (2); Mar. 16* (2); Mar. 23† (A) (2); Mar. 30† (2); Apr. 13* (A) (2); Apr. 13† (2); May 4* (A); May 4† (2); May 18† (2); June 1† (A) (2); June 1* (2); June 15† (2); June 22* (A).

ELEVENTH DISTRICT
Judge Clark

Harnett—Jan. 5*; Jan. 12† (A) (2); Feb. 16† (2); Mar. 16*; Apr. 20† (2); May 18*; May 25†; June 8† (2).
Johnston—Jan. 12† (2); Feb. 9; Feb. 16 (A); Mar. 2† (2); Mar. 30† (2); Apr. 13*; May 4† (2); June 1; June 22*.
Lee—Jan. 26*; Feb. 2†; Mar. 23*; May 4† (A) (2); May 25* (A).

TWELFTH DISTRICT
Judge Mallard

Cumberland—Jan. 5* (2); Jan. 19† (2); Feb. 2* (2); Feb. 16* (2); Mar. 2† (A); Mar. 9*; Mar. 23*; Mar. 30† (2); Apr. 13* (2); Apr. 27† (A); May 4† (2); May 18* (2); June 1† (2); June 15* (2).
Hoke—Jan. 5 (A); Mar. 2†; Apr. 27.

THIRTEENTH DISTRICT
Judge Hall

Bladen—Feb. 16; Mar. 16†; Apr. 20; May 18†.
Brunswick—Jan. 19; Feb. 23†; Apr. 27†; May 11.
Columbus—Jan. 5† (2); Jan. 26* (2); Mar. 2† (2); May 4*; June 15.

FOURTEENTH DISTRICT
Judge Carr

Durham—Jan. 5*; Jan. 12† (2); Jan. 26*; Feb. 2† (2); Feb. 16* (2); Mar. 2† (2); Mar. 16*; Mar. 23* (2); Apr. 6† (2); Apr. 20*; Apr. 27† (2); May 11* (2); May 25† (2); June 8*; June 15* (2).

FIFTEENTH DISTRICT
Judge McKinnon

Alamance—Jan. 5† (2); Feb. 2† (2); Mar. 2* (2); Mar. 30†; Apr. 13† (2); May 4*; May 18† (2); June 8* (2).
Chatham—Jan. 26†; Feb. 23 (A); Mar. 16†; May 11; June 1†.
Orange—Jan. 19†; Feb. 23* Mar. 23† Apr. 27*; June 22†.

SIXTEENTH DISTRICT
Judge Hobgood

Robeson—Jan. 5† (2); Jan. 19* (2); Feb. 23† (2); Mar. 9*; Mar. 23† (2); Apr. 6* (2); Apr. 20†; May 4* (2); May 18† (2); June 8* (2).
Scotland—Feb. 2†; Mar. 16; Apr. 27†; June 22.

THIRD DIVISION

SEVENTEENTH DISTRICT
Judge Preyer

Caswell—Feb. 23†; Mar. 23* (A).
Rockingham—Jan. 19* (2); Mar. 2† (2); Mar. 16*; Apr. 13† (2); May 11†; June 8* (2).
Stokes—Feb. 2*; Mar. 30*; Apr. 6†; June 22.
Surry—Jan. 5* (2); Feb. 9† (2); Mar. 23; Apr. 27* (2); June 1.

EIGHTEENTH DISTRICT
Schedule A — Judge Crissman

Guil. Gr.—Jan. 5* (2); Jan. 19† (2) Feb. 2* (2); Feb. 23* (2); Apr. 13* (2); May 11* (2); June 8* (2).
Guil. H. P.—Feb. 9* (A); Feb. 16†; Mar. 9*; Mar. 16† (2); Mar. 30*; Apr. 27†; May 4*; May 25*.

Schedule B—Judge Armstrong

Guil. Gr.—Jan. 5† (2); Feb. 2† (2); Feb. 16†; Feb. 23† (2); Mar. 9† (2); Mar. 23*; Mar. 30† (2); Apr. 13† (2); Apr. 27† (2); May 25† (2); June 8† (2).
Guil. H. P.—Jan. 5† (A); Jan. 19*; Jan. 26†; May 18†; June 22†.

NINETEENTH DISTRICT
Judge Phillips

Cabarrus—Jan. 5*; Jan. 12†; Mar. 2† (2); Apr. 20 (2); June 8† (2).
Montgomery—Jan. 19*; May 18† (2).
Randolph—Jan. 26*; Feb. 2† (2); Mar. 30*; Apr. 6† (2); May 25† (A) (2); June 22*.
Rowan—Feb. 16 (2); Mar. 16† (2); May 4 (2).

TWENTIETH DISTRICT
Judge Johnston

Anson—Jan. 12*; Mar. 2†; Apr. 13 (2); June 8*; June 15†.
Moore—Jan. 19†; Jan. 26*; Mar. 9†; Apr. 27*; May 18†.
Richmond—Jan. 5*; Feb. 9†; Mar. 16† (2); Apr. 6*; May 25† (2).
Stanley—Feb. 2†; Mar. 30; May 11†.
Union—Feb. 16 (2); May 4.

TWENTY-FIRST DISTRICT
Judge Olive

Forsyth—Jan. 5 (2); Jan. 19† (3); Feb. 2 (A) (2); Feb. 9† (3); Mar. 2 (2); Mar. 16† (3); Apr. 6 (2); Apr. 20† (3); May 11† (A) (2); May 11 (2); May 25† (2); June 8 (2); June 15† (A) (2).

TWENTY-SECOND DISTRICT
Judge Gambill

Alexander—Mar. 9; Apr. 13.
Davidson—Jan. 26; Feb. 16† (2); Mar. 30† (2); Apr. 27; June 1† (2); June 22.
Davie—Jan. 19*; Mar. 2†; Apr. 20.
Iredell—Feb. 2 (2); Mar. 16†; May 18 (2).

TWENTY-THIRD DISTRICT
Judge Gwyn

Alleghany—Jan. 26; Apr. 20.
Ashe—Mar. 30*; May 25†.
Wilkes—Jan. 12† (2); Jan. 26 (A); Feb. 16† (2); Mar. 9* (2); Apr. 27† (2); June 1 (2); June 15† (2).
Yadkin—Jan. 5; Feb. 2 (2); May 11.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge Farthing

Avery—Apr. 27 (2).
Madison—Feb. 2†; Feb. 23; Mar. 23† (2); May 25* (2); June 22†.
Mitchell—Apr. 6 (2).
Watauga—Jan. 19*; Apr. 20*; June 8† (2).
Yancey—Mar. 2 (2).

TWENTY-FIFTH DISTRICT
Judge Campbell

Burke—Feb. 16; Mar. 9 (2); June 1 (2).
Caldwell—Jan. 19† (2); Feb. 23 (2); Mar. 23† (2); May 18 (2); June 15† (A) (2).
Catawba—Jan. 5† (2); Feb. 2 (2); Apr. 6 (2); June 15† (2).

TWENTY-SIXTH DISTRICT
Schedule A—Judge Clarkson

Mecklenburg—Jan. 5* (2); Jan. 19† (2); Feb. 2† (3); Feb. 23† (2); Mar. 9* (2); Mar. 23† (2); Apr. 6* (2); Apr. 20† (2); May 4† (2); May 18† (2); June 1† (2); June 15* (2).

Schedule B—Judge Froneberger

Mecklenburg—Jan. 5† (2); Jan. 19† (2); Feb. 2†; Feb. 9* (2); Feb. 23† (2); Mar. 9† (2); Mar. 23† (2); Apr. 6† (2); Apr. 20† (2); May 4* (2); May 18† (2); June 1† (2); June 15† (2).

TWENTY-SEVENTH DISTRICT
Judge McLean

Cleveland—Jan. 20; Mar. 23† (2); Apr. 27 (2).
Gaston—Feb. 2† (2); Feb. 23* (2); Mar. 9† (2); Apr. 6† (A) (2); Apr. 20* May 25† (2); June 8*.
Lincoln—Jan. 12(2); May 11 (2).

TWENTY-EIGHTH DISTRICT
Judge Pless

Buncombe—Jan. 5* (2); Jan. 12† (A); Jan. 19† (3); Feb. 9† (A) (2); Feb. 9*; Feb. 23† (3); Mar. 16*; Mar. 16† (A); Mar. 23† (3); Apr. 13* (2); Apr. 20† (A); Apr. 27† (3); May 18*; May 18† (A) (2); June 1† (3).

TWENTY-NINTH DISTRICT
Judge Patton

Henderson—Feb. 9 (2); Mar. 16† (2); May 4*; May 25† (2).
McDowell—Jan. 5*; Feb. 23† (2); Apr. 13*; June 8 (2).
Polk—Jan. 26; Feb. 2† (A); June 22.
Rutherford—Jan. 12†* (2); Mar. 9†*; Apr. 20†* (2); May 11†* (2).
Transylvania—Jan. 26† (A); Feb. 2* (A); Mar. 30 (2).

THIRTIETH DISTRICT
Judge Haskins

Cherokee—Mar. 30 (2); June 22†.
Clay—Apr. 27.
Graham—Mar. 16; June 1† (2).
Haywood—Jan. 5† (2); Feb. 2 (2); May 4† (2).
Jackson—Feb. 16 (2); May 18.
Macon—Apr. 13 (2).
Swain—Mar. 2 (2).

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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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1958

MRS. LOREN M. TEW, ADMINISTRATRIX OF THE ESTATE OF LOREN M. TEW, DECEASED v. LOUIS CLAYTON RUNNELS.

(Filed 8 October, 1958.)

1. Appeal and Error § 51—

Where defendant introduces evidence, only the motion for judgment as of nonsuit made at the close of all of the evidence is presented for review.

2. Trial § 22b—

On motion to nonsuit, evidence offered by defendant which is favorable to plaintiff or not in conflict therewith, or which clarifies or explains plaintiff's evidence, will be considered.

3. Negligence § 19c—

Nonsuit on the ground of contributory negligence should not be granted unless the evidence, taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference can be drawn therefrom.

4. Negligence § 11—

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, but it is sufficient if it contributes thereto as a proximate cause or one of them.

5. Automobiles § 50—

If the owner of an automobile is riding therein as a passenger and has the legal right to control the operation of the vehicle by the driver, the negligence of the driver will be imputed to the owner-passenger, and it is immaterial whether the right to control is exercised or not. Further,

the right to exercise such control may be inferred from the fact of the owner's presence in the car.

6. Same— Evidence held to show contributory negligence as a matter of law on part of owner-passenger under the doctrine of imputed negligence.

Evidence tending to show that the owner of an automobile instigated a trip and sat at all times next to the driver of the car, that both the owner and the driver were intoxicated to such an extent that neither was competent to operate the automobile on a public highway, but no evidence that the owner was too drunk to know what was going on, that the owner repeatedly insisted that the driver go faster and repeatedly "stomped" his foot on the driver's foot, pushing the accelerator down, and that the accident in suit resulted from the negligent operation of the car at an excessive speed by the driver, *is held* to show contributory negligence on the part of the owner as a matter of law under the doctrine of imputed negligence, and nonsuit in an action by the administratrix of the owner against the driver should have been entered.

7. Negligence § 19c—

Whether nonsuit should be granted on the ground of contributory negligence must be determined in the light of the facts in each particular case.

PARKER, J., not sitting.

APPEAL by defendant from *Moore (Dan K.), J.*, March Civil Term 1958 of GASTON.

This is a civil action brought by Mrs. Loren M. Tew, the duly appointed administratrix of the estate of Loren M. Tew, deceased, to recover for the alleged wrongful death of the plaintiff's intestate, growing out of a head-on collision between the car owned by plaintiff's intestate, allegedly driven by the defendant Louis Clayton Runnels, and a 1956 Ford convertible being driven by Jackie Ray Jones, on Highway No. 150 in Crouse, North Carolina, about 9:30 a.m., 15 November 1956.

The evidence offered in behalf of the plaintiff is sufficient to establish the fact that the manner in which the plaintiff's intestate's car was being driven at the time of the head-on collision was the sole proximate cause of the collision.

The plaintiff's evidence tends to show that Loren M. Tew arrived at his home about 11:00 p.m. on Wednesday, 14 November 1956; he had been drinking but was not drunk. He stayed at home until about twelve o'clock that night when he left in his 1957 Ford automobile, for which he had traded about three weeks earlier. When he left he said he was going to a store. Mrs. Tew testified, "I do know of my own knowledge that he would drive his car very fast at times and in

violation of the law. * * * When my husband would indulge in alcoholic beverages, he would also frequently drive his own car from the house. * * * Sometimes, he would stay gone all night and maybe all night and the following day. During those times, I wouldn't have any idea where he was, except that I knew he left the house drinking and driving."

Robert Smart, a Highway patrolman, testified that the collision took place in the Town of Crouse and that the speed limit was 35 miles per hour in the area where the collision occurred. That he arrived at the scene of the accident approximately 15 or 20 minutes after the collision. This witness testified that when he arrived at the scene of the collision, "I observed a 1957 Ford, Tudor Victoria, on the left side of the road, off the road down a slight embankment, and further up the road on the opposite side of the highway, I found a 1956 Ford, Tudor Convertible. Prior to the collision, the 1957 Ford automobile was traveling towards Crouse, this is west, and the Ford convertible was traveling east. After the collision, the 1957 Ford automobile was sitting about eight or ten feet off the pavement. There was glass and dirt and oil, an oily substance, looked to be like motor oil and water or something mixed, in the highway at that location. There were black marks leading from this location where the oil and water was on the highway back at an angle across the center line back to — for 78 feet, back to the center line."

This witness further testified that he visited the defendant Runnels at the hospital on the morning following the accident, around 7:00 a.m.; that Mr. Runnels told him he was driving the car; that he had driven it off and on all night. "He told me where all they had been and what they did. He said that they had been in Gastonia and south of Gastonia into the edge of South Carolina; that they had drunk beer in South Carolina, around — I don't recall the name of the town; that he and Jack Cantrell and Mr. Tew had been out together all night on a party; that he had driven it several times during the night, that they had taken time about driving; that Mr. Cantrell had driven the car a lot that night. He stated that they had let Jack Cantrell out of the 1957 Ford at the Bypass Grill before the accident. He also stated that they went to Riverside near Lincolnton and turned around after they had discharged Cantrell, and that they were going to Cherryville. He said that Tew had stomped his foot at many times during the night. * * * The other things he told me in the hospital, he said he had had a few drinks of beer that morning but said he was not drunk. He said that Tew was drinking heavy."

The Reverend Jack Cooke, a Methodist minister, arrived at the scene of the accident almost immediately after it occurred. His evi-

dence is to the effect that the Tew car was resting on the embankment in such manner that the right rear wheel of the car was off the ground and was still spinning. The left door of the car was open. The defendant Runnels was lying on the hard surface road. Mr. Tew was found with his buttocks and feet against the door opposite the steering wheel. The door was closed and his head was down in his arms toward his knees. The driver of a truck, who appeared at the scene about the same time this witness arrived, helped the Reverend Mr. Cooke remove Mr. Tew from the car. They also removed Mr. Jones from his car; Mr. Runnels was the only one of the three who lapsed into consciousness and unconsciousness and was able to tell this witness his name.

Johnnie Boggs, a driver for Carolina Freight Carriers, which firm also employed Loren M. Tew as a driver, testified, "I knew the late Loren Tew. I saw him on the morning of November 15, 1956. At that time I was going towards Cherryville, right there about — Oh, about a mile below Crouse * * *. I was going up to Carolina (Freight Carriers) in an automobile. I was driving my automobile. I was running around 55 miles per hour. * * * I had seen the 1957 Ford automobile. It passed me. After he passed me, he got on up the road. It was going in the same direction I was. I saw Loren M. Tew in the 1957 automobile that passed me. He was sitting with his back to the right-hand door of the car. It looked to me he had his left leg lying up on the seat towards the driver, and he was looking back at me. I knew Louis Clayton Runnels, but I didn't recognize him driving the car. The Tew automobile passed me approximately a mile from the scene of the collision. There was a hill or so between us, and I would see him as he would go up and then down a hill. I saw him right up to the collision, except I didn't see the actual collision. I saw the dust and whatnot from the collision. At the time the automobile owned by Tew passed me, I would say that it was going pretty good. I would say maybe eighty miles per hour or more."

On cross-examination, this witness testified that, "Mr. Tew had on a Carolina Freight regular driver's cap * * *. He was just turned around * * * I don't know whether he was looking at me or what he was looking at * * *. He was looking out the rear view window. Not out of the side. * * * I was doing about 50 or 55, and I would say that he was doing at least 80, and probably faster — could have been a little faster, I don't know. The car came by me pretty quick. It didn't get out of sight pretty quick. I watched him all the way down the long hill, and I would see him topping the other hills between me and the wreck. Yes sir, he was doing at least 30 or 35 miles an hour faster than I was going. He was out of my sight when he went off

the dip. When he would top it, I would see him again right up until the collision."

The defendant's evidence tends to show that Loren M. Tew and two other drivers employed by the Carolina Freight Carriers, the defendant Runnels and Jack Cantrell, entered the Tew car shortly after midnight on the morning of 15 November 1956. Tew wanted them to go on a joy ride with him and see how fast his car would run. Jack Cantrell was driving and they went immediately to get a pint of whiskey. Defendant Runnels testified he didn't remember where they went next, but did remember that at one time they were at Bob's Drive-In, which is in or near Maiden; that they were at Bob's around 2:00 a.m. That the next thing he remembered was being in York, South Carolina, at Jay's Truck Stop, at about 3:30 a.m.; that they stopped there a couple of hours; that he drove when they left there. Going back to Gastonia, they stopped once or twice because Tew was sick and vomited; and then he kept moving his foot over and stomping his on the accelerator. He was doing that because he wanted to go faster. He said, "Come on, let's open it up." They returned to Jack Cantrell's home about six or seven o'clock where they had breakfast about 8:30 a.m. In the meantime they had gotten a half pint of whiskey and they took only one drink at Cantrell's house. This witness further testified, "During these periods that I remember during the night, I had been drinking, but I don't believe I was drunk, Loren Tew was definitely drunk. * * * I have not to my knowledge admitted to anyone that I was driving the car. I can't swear that I wasn't driving the Tew car * * *. I don't remember whether I was driving or not."

The defendant's evidence tends to show that Runnels and Cantrell did all the driving during the night and until Tew and Runnels arrived at the Bypass Grill about 9:00 a.m., a few minutes before the collision in which Tew suffered serious injuries and from which he died on 20 November 1956.

Jack Cantrell testified that, while he was driving the Tew car, Tew kept insisting on testing the car to see how fast it would go; that he did drive it at a speed of 127 miles per hour on the road to Gastonia; that during the night they went to Newton, Kings Mountain, and to York, South Carolina. That Runnels drove the car from South Carolina to Dallas, North Carolina; that he drove through Clover, South Carolina at 100 miles per hour; that Tew kept putting his foot on the foot of the driver of the car and pushing down on the accelerator and insisting that they drive faster. This witness further testified that, while Tew was at his house for breakfast he made two telephone calls; that "he wasn't drunk * * * he was, I would say,

drinking a little heavier than we were." That thereafter he drove the car and they returned to the Bypass Grill; that Tew and Runnels wanted him to go with them to Cherryville, but he refused to do so and got in his car and left. But just before he left, Runnels and Tew got in Tew's car and Tew was under the steering wheel; that he stopped at the Hilltop Grill and he later saw the Tew car pass. "I would say Tew was driving." On cross-examination this witness testified, "We drank two and a half pints of whiskey and four or five or six bottles of beer apiece that night in question. * * * We were having a good time. I was with my buddies. I was never drunk. * * * Yes, Mr. Tew was in control of himself at the Bypass Grill when I last saw him."

Issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered the first issue "Yes," the second issue "No," and awarded damages. From the judgment entered the defendant appeals, assigning error.

William J. Allran, Jr., Hugh W. Johnston, for plaintiff, appellee.

Jonas & Jonas, Helms, Mulliss, McMillan & Johnston, Wm. H. Bobbitt, Jr., Mullen, Holland & Cooke, for defendant, appellant.

DENNY, J. The sole question for determination is whether or not upon the evidence adduced in the trial below the defendant was entitled to have his motion for judgment as of nonsuit sustained on the ground that the plaintiff's intestate was guilty of contributory negligence as a matter of law.

The defendant offered evidence; therefore, the only motion for judgment as of nonsuit to be considered is that made at the close of all the evidence. *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Harrison v. R.R.*, 194 N.C. 656, 140 S.E. 598.

In considering such motion, we will not only consider evidence offered by the plaintiff but that offered by the defendant which is favorable to the plaintiff or not in conflict therewith, or when it may be used to clarify or explain the plaintiff's evidence. *Simmons v. Rogers*, 247 N.C. 340, 100 S.E. 2d 849; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19; *Godwin v. Cotton Co.*, 238 N.C. 627, 78 S.E. 2d 772; *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543; *Ervin v. Cannon Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

A nonsuit on the ground of contributory negligence should not be granted unless the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom. *Simmons v. Rogers, supra; Keener v. Beal, supra; Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549; *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E.

2d 891; *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676.

Even so, the negligence, if any, of the plaintiff's intestate to bar recovery need not be the sole proximate cause of his injury or death. It is sufficient if it contributed to his injury or death as a proximate cause, or one of them. *Blevins v. France, supra; Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623.

In *Harper v. Harper*, 225 N.C. 260, 34 S.E. 2d 185, *Barnhill J.*, later C.J., in speaking for the Court, said: "The owner of an automobile has the right to control and direct its operation. So then when the owner is an occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner. (Citations omitted.) * * *

"Strictly speaking, the person operating with the permission or at the request of the owner-occupant is not an agent or employee of the owner, but the relationship is such that the law of agency is applied. * * *" See Anno: Automobile Accident—Owner's Presence, 50 A.L.R. 2d 1281, et seq.

In considering whether or not the negligence of the driver is imputable to the owner, the Court, in the above case, further said: "The test is this: Did the owner, under the circumstances disclosed, have the legal right to control the manner in which the automobile was being operated — was his relation to its operation such that he would have been responsible to a third party for the negligence of the driver? 38 Am. Jur., 931. If the owner possessed the right to control, that he did not exercise it is immaterial." *Dillon v. Winston-Salem*, 221 N.C. 512, 20 S.E. 2d 845.

The plaintiff's intestate, being the owner of the car, did not occupy the ordinarily favored position of a guest passenger. In 5A Am. Jur., Automobiles and Highway Traffic, section 578, page 587, et seq., it is said: "An inference may readily be drawn, from the fact of the owner's presence, that the automobile was being driven by his agent or that he had some control over it, so as to render the owner liable for the driver's negligence."

The evidence of the plaintiff and the defendant clearly points out that the plaintiff's intestate was the instigator and planner of the trip; that he sat at all times next to the driver of the car and repeatedly "stomped" his foot on the driver's foot and pushed down the accelerator; that he insisted over and over again through the night that the driver go faster and faster. This evidence by the defendant's witnesses is not in conflict with the testimony of the plaintiff's witnesses, but is in accord with it. There is a conflict in the evi-

dence as to whether or not the plaintiff's intestate or the defendant Runnels was driving the car at the time of the collision. This is not material on the present question. Plaintiff would not be entitled to recover against the defendant on any aspect of the present case if at the time of the accident her intestate was driving the car. Therefore, the question posed is bottomed on whether or not the plaintiff is entitled to recover on the facts revealed on the record, conceding that the defendant was driving the car at the time of the accident.

The plaintiff is relying upon the case of *Litaker v. Bost*, 247 N.C. 298, 101 S.E 2d 31. In that case no one contended that Litaker owned the car in which they were riding, or had any control over it. Moreover, there was evidence that Litaker was drunk at the time when the race was planned (just prior to the accident). This Court said: "Whether Litaker was contributorily negligent in riding in the Chrysler when driven by either Stewart or Watson Bost would depend in last analysis on whether he knew what was going on and had consciously committed himself to the assumption of the risk." We concluded that the issue with respect to contributory negligence was properly submitted to the jury. See *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33.

We think that plaintiff's evidence and the defendant's evidence, not in conflict therewith, supports the inference that both the defendant Runnels and the plaintiff's intestate at the time of the collision were under the influence of an intoxicating beverage to such an extent that neither one was competent to operate an automobile on a public highway. However, there is no evidence to the effect that plaintiff's intestate was too drunk to know what was going on. *S. v. Gibbs*, 227 N.C. 677, 44 S.E. 2d 201.

While the last cited case involved a criminal prosecution, it lays down a principle with respect to intoxication that is applicable in the present case. In the *Gibbs* case, one Blake Styles was apprehended by patrolmen while operating a truck on a public highway. He was at the time "highly intoxicated." The owner of the truck was present, riding with Styles at the time. He was also "in a drunken condition." The Court said: "Defendant owned the truck and was present, riding thereon as a passenger, while it was being operated by Styles, who was then in an intoxicated condition. He, as owner, nothing else appearing, had the right of control and could, at will, permit or forbid the use of the truck by another. He and his companion had traveled more than 30 or 40 miles and at the time had liquor on the truck. Sufficient time had elapsed for him to discover Styles' condition and forbid his operation of the vehicle.

"While there is testimony tending to show the defendant was in-

toxicated there is no evidence to the effect he was too drunk to be conscious of what was going on * * *; or that defendant had surrendered or relinquished his right of control. * * *

"When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway, while in a state of intoxication, he is as guilty as the man at the wheel. *Story v. U. S.*, 16 F 2d 342, cert. denied, 274 U. S., 739, 71 L.Ed. 1318; 5 Blash. Cyc. Auto L.&P., 67; 9-10 Huddy Auto Law, 30, 51; 5 A.J., 912."

Kavanaugh v. Myers' Administratrix (Ky. Appeal), 246 S.W. 2d 451, supports the above view. In that case, the plaintiff's intestate was killed in a collision while riding in a car operated by the defendant Michael Kavanaugh, which car belonged to Kavanaugh's father. There was evidence to the effect that plaintiff's intestate, Kenneth Myers, and Kavanaugh, had been driving around and drinking intoxicating beverages for some time before the fatal accident. Plaintiff recovered in the lower court; on appeal, the Kentucky Court of Appeals said: "It is well settled in this jurisdiction that a guest riding in an automobile with knowledge that the driver is so intoxicated as to cause him to be careless or indifferent to his own safety or that of others, or incompetent to operate the car properly, is guilty of contributory negligence as a matter of law and assumes the risk incident to the operation of the car by a driver in that condition. (Citations omitted.) * * * In *W. F. Robinson & Son v. Jones*, 254 Ky. 637, 72 S.W. 2d 16, 19, we made this statement on the subject of drinking: 'It is known of all men that the drinking of intoxicating liquor, though it be not done to the extent of actual intoxication, begets a spirit of recklessness, and is responsible for numerous accidents.' The evidence is overwhelming that decedent was riding in a car knowing full well that the driver was drinking. More than that, Myers drank with young Kavanaugh and both drank to the extent that they could feel the effects of their liquor. * * * Each not only participated in every act performed by the other, but Myers either urged or approved the actions of Michael that brought about the accident. It is obvious that the drinking cannot be separated from the cause of the wreck. Under the circumstances, Myers was guilty of contributory negligence which precludes recovery of damages for his death." See *Schwartz v. Johnson*, 152 Tenn. 586, 280 S.W. 32, 47 A.L.R. 323; 5A Am. Jur., Automobiles and Highway Traffic, section 792, page 739.

Whether a motion for judgment as of nonsuit should be sustained on the ground that the plaintiff is guilty of contributory negligence as a matter of law, presents in many cases a very difficult question. However, the decision on such motion must be made in light of the

facts in each particular case. When the defendant's motion is so considered on the record before us, we hold that the plaintiff's intestate was guilty of contributory negligence which precludes recovery of damages for his death.

Reversed.

PARKER, J., not sitting.

HAJOCA CORPORATION v. R. M. BROOKS.

(Filed 8 October, 1958.)

1. Trial § 53—

When Ch. 1337, Session Laws of 1955, is made applicable to a particular county by proper resolution of its board of county commissioners, the provision of the statute relating to waiver of trial by jury, G.S. 1-539.5, supplements G.S. 1-184 and is to be construed in *pari materia* therewith so that G.S. 1-185, G.S. 1-186, and G.S. 1-187 apply equally to a "small claims action" under the 1955 statute.

2. Sales § 24—

Upon breach of material warranty, the purchaser may either rescind and recover the purchase price, or affirm the contract and recover the damages caused by the breach of warranty, but these remedies are alternative and inconsistent, and are mutually exclusive.

3. Sales § 25—

Ordinarily, the buyer waives and loses the right to rescind if, after he discovers or has reasonable opportunity to discover the defect, he continues to use the chattel for his own purposes.

4. Same— Evidence held to show that purchaser waived his right to rescind sale for breach of warranty.

Evidence tending to show that defendant purchased a heating and air conditioning unit, which was complete in itself and required only connection to outside wiring to put it into operation, that the unit was installed in defendant's house, that the unit was unsatisfactory because of defect in the automatic control, without evidence that the unit was unsatisfactory while in operation, and that defendant continued to use the unit after the defect had been discovered and after the seller had ceased to make any effort to remedy the defect, and did not tender possession of the unit back to the seller until some six months thereafter. *Held:* The evidence does not support a finding of total failure of consideration on the ground that the unit was worthless or findings to the effect that the purchaser was entitled to rescind and did rescind the contract, the right to rescind having been waived by the continued use of the unit. Further, the legal effect of any notice of an election to

rescind prior thereto was nullified by the continued possession of the unit for use by the purchaser and not merely possession in compliance with the purchaser's duty as bailee of the seller after rescission.

JOHNSON and PARKER, J. J. not sitting.

APPEAL by plaintiff from *Craven*, Special J., April 7th Special Civil Term, 1958, of MECKLENBURG.

As to plaintiff's action, there is no controversy. Defendant admitted that, for supplies other than the heating and air conditioning unit, he owed plaintiff a balance of $616.37.

The controversy relates solely to the heating and air conditioning unit; and the issues arise upon the defendant's counterclaim and plaintiff's reply.

This unit, sold by plaintiff to defendant, was delivered to defendant on or about September 14, 1955; and, upon delivery, defendant paid to plaintiff the agreed purchase price of $982.06.

The allegations of defendant's counterclaim, summarized, are these: Plaintiff warranted the unit to be new, in good condition and free from all defects, but in fact it was defective and failed to operate properly both as a heating unit and as an air conditioning unit. When this was called to plaintiff's attention, agents of plaintiff inspected and repaired the unit but were never able to put it in proper operating order. Defendant "continued to call upon the plaintiff to repair the defects in said unit and has requested it on numerous occasions to put the said unit in the proper operating condition which the plaintiff has failed and refused to do." Other experienced heating and air conditioning repairmen, called on by defendant, undertook "to make said unit operate properly"; but "these said repairmen have likewise been unable to remedy the defects in said unit and said unit has never operated properly or in a satisfactory manner." The unit will not operate properly and is worthless; and, on account of failure of consideration, defendant is entitled to recover from plaintiff the amount paid by him to plaintiff as purchase price therefor. And defendant alleged: "10. That the defendant hereby tenders to the plaintiff possession of said unit to be used by the plaintiff, and to do whatever it may desire with it." (Note: Defendant's pleading was verified December 21, 1956.)

In reply, plaintiff denied defendant's allegations relating to warranty and to defects in the unit. It averred that any failure of the unit to operate properly was due to faulty installation, with which plaintiff had no connection. In addition, plaintiff averred that "said equipment has been in operation in the defendant's home for a period of some 15 to 16 months and the defendant has not at any time prior to the filing of his answer and cross-action tendered or sought to have

said equipment returned to the plaintiff, . . ."

The court below entered judgment as follows:

"The above-captioned civil action coming on for trial before the undersigned presiding Judge . . ., without a jury, and being heard by the undersigned Judge sitting as a jury; and the Court finding the facts to be from the evidence and stipulations as follows:

"1. That the plaintiff sold and delivered to the defendant various articles of plumbing, heating and air-conditioning supplies and, specifically an automatic furnace and air-conditioning unit invoiced September 14th at a price of $982.06;

"2. That the defendant has paid the entire account sued on except for a balance remaining unpaid in the amount of $616.37;

"3. That the plaintiff warranted the air-conditioning and heating unit, which will hereinafter be referred to as the 'unit,' to be new and in good condition and free from all defects;

"4. That said unit was defective and failed to operate properly and would not and has not operated in a reasonably satisfactorily *(sic)* manner; that the unit was defective in the internal wiring of the said unit so that intermittently it would cut itself off without apparent reason;

"5. That by reason of the defect in said unit it was not reasonably suitable for the purpose of heating or of air-conditioning the defendant's home;

"6. That there was a total failure of consideration;

"7. That the defendant rescinded his contract and tendered the defective unit back to the plaintiff;

"8. That the unit was invoiced by the plaintiff to the defendant on September 14, 1955; that the rescission was effected sometime in the Spring of 1956 and within a reasonable period of time after the unit was first placed into operation in the defendant's home, which home was not occupied by the defendant until sometime in the spring of 1956.

"That upon the foregoing findings of fact the Court concludes that the defendant is indebted to the plaintiff on the cause of action stated in the complaint in the amount of $616.37; that the plaintiff is indebted to the defendant on the counter-claim stated in the further answer and defense in the amount of $982.06, being the invoice price of the said defective unit; that the plaintiff is entitled to take into his possession the said defective unit by reason of the rescission of the contract and the said plaintiff is the owner of said defective unit and entitled to have the same; that setting off the debt of the defendant to the plaintiff in the amount of $616.37 from the amount due to the defendant which is $982.06 leaves a balance due and owing to the defendant in the amount of $365.69.

"Now, therefore, IT IS ORDERED, ADJUDGED AND DECREED that the defendant have and recover of the plaintiff the sum of $365.69 and that, upon a payment of this judgment, the plaintiff be put into possession of the said defective unit."

Plaintiff excepted and appealed, basing its assignments of error on exceptions to findings of fact 3, 4, 5, 6, 7 and 8, and to the judgment.

Brock Barkley for plaintiff, appellant.
Mason & Williamson for defendant, appellee.

BOBBITT, J. It appears from the record and briefs that the trial was conducted by Judge Craven, without a jury, as a "small claims action," for which provision is made by Ch. 1337, Session Laws of 1955. When made applicable to a particular county by appropriate resolution of its board of county commissioners, the right to jury trial in such county may be waived as provided in said statute. To this extent, said statute supplements G.S. 1-184. Construing these statutes *in pari materia*, it is clear that the provisions of G.S. 1-185, G.S. 1-186 and G.S. 1-187, relating to proceedings upon waiver of jury trial under G.S. 1-184, apply equally when a jury trial is waived under said 1955 statute.

There was ample evidence to support the court's findings of fact as to the alleged warranty and plaintiff's breach thereof. Originally, defendant had the right either to rescind and recover the $982.06 or to affirm the contract and recover the damages caused by plaintiff's breach of warranty. *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448; *Robinson v. Huffstetler*, 165 N.C. 459, 81 S.E. 753; *May v. Loomis*, 140 N.C. 350, 52 S.E. 728; *Powers v. Rosenbloom*, 143 Me. 361, 62 A. 2d 531. These remedies, in respect of the basis for determining defendant's recovery, alternative and inconsistent, are mutually exclusive. Williston on Sales, Revised Edition, Sec. 612.

The judgment is predicated solely on the adjudication that defendant was entitled to rescind and did rescind his contract with plaintiff and defendant's recovery is that applicable in an action for rescission.

Ordinarily, the buyer waives and loses the right to rescind if he continues to use the chattel for the purposes for which it was purchased and designed after he discovers or has reasonable opportunity to discover the defect. 46 Am. Jur., Sales Sec. 765; 77 C.J.S. Sales Sec. 345 (d); Annotations: 77 A.L.R. 1165, 1167; 41 A.L.R. 2d 1173, 1177.

In *Hendrix v. Motors, Inc. supra*, this Court approved, as in accord with North Carolina decisions, the following excerpt from the opinion of *Furches, J.*, in *Manufacturing Co. v. Gray*, 124 N.C. 322, 325, 32 S.E. 718, viz.:

"The purchaser is not compelled in all cases to reject the property,

at once, upon its receipt; if it is machinery, he has a reasonable time to operate the machinery for the purpose of testing it. But when this is done, and it is found that the machine or the machinery does not fill the specifications of the contract and warranty, he must then abandon the contract and refuse to accept and use the property; and if he does not do this, but continues the possession and use of the property, he will be deemed in law to have accepted the property, and his relief then will be an action for damages upon the breach of the warranty."

The evidence relevant to defendant's right to rescind, considered in the light most favorable to defendant, tends to show these facts:

1. *Time and method of installation.* A new house was being constructed for defendant. After delivery, the unit, crated, remained "for quite some time" on the porch. It was not uncrated until after Smith, defendant's electrician, had installed the house wiring. Then, "someone set it up in the basement." Smith, who connected the unit, testified: "This was a complete unit in itself, requiring no work inside the unit, and all that was necessary to put it into operation was to connect up the outside wiring." Defendant testified: "The furnace part of the unit was hooked up first, . . ." Later, the air conditioning part of the unit was connected; but there is no evidence as to when and by whom this connection was made.

2. *Nature of defect.* Defendant testified: ". . . every now and then the furnace would cut off and it wouldn't start up again until I had pressed two buttons on the furnace." Again: "It just cuts off when it ought not do so, . . . Sometimes it will run a week without cutting off and then sometimes it will cut off two or three times a day. It cut off in the bitter cold spells of this past (1958) Winter and I woke up to a cold house." Again: "This has been going on ever since we moved, both as to heating and cooling. It acts worse in extreme cold weather and repeatedly went off during the extreme cold weather last (1958) winter." Smith testified: "It would cut off and you would have to press the relay button to start it up again."

3. *As to tender.* The unit "was turned on while the house was being built to help dry out the walls. It started to give trouble at once." Between then, early in 1956, and May, 1956, when defendant moved into the house, neither plaintiff's representatives nor electricians employed by defendant, despite repeated efforts, were able to fix it. Defendant testified: "These people from Hajoca came down to try to fix the furnace before I had moved in. They didn't come back after I had moved in, and I had to call Mr. Smith and those Laurinburg electric people to try to fix the furnace when the Hajoca people didn't come back." The last dealings between plaintiff and defendant were

in May, 1956. Defendant testified: "I told them—Mr. Ottman—the furnace was no good and that I wanted a new unit or my money back and further, that I was not going to pay my bill until they did what was right. I also later told Mr. Jennings the same thing." Again: ". . . I told him (Mr. Ottman) then the unit did not work, was no good, and that it should either be fixed by them or I wanted a new unit or my money back. I also told him I would not pay my bill until this was done. He later (in May, 1956) sent some switches but these did no good."

4. *As to retention and use.* Defendant (April, 1958) testified: "I have used this heating and air-conditioning unit all of the time since it was installed. I do not have any other one to heat my house in Winter or to cool it in Summer. I am still using it, and it is in use at my house now." Upon oral argument in this Court, it was stated frankly by defendant's counsel that defendant has continued to use the unit pending appeal.

It is noted that no complaint was made as to the heating or air conditioning provided by this unit *while in operation.* The defect related solely to the automatic control.

The evidence for defendant tends to show that until May, 1956, plaintiff made several unsuccessful attempts to discover the cause of the defect in the automatic control and to remedy such defect. Defendant's retention and use of the unit until May, 1956, when plaintiff discontinued such efforts, would not bar defendant from electing then to rescind the contract and demand the return of the purchase price.

In May, 1956, defendant had discovered and was fully aware of the defect in the automatic control.

Appellee cites *Rohland v. International Harvester Co. of America,* 182 Okla. 200, 76 P. 2d 1078, holding that a purchaser does not waive his right to rescind the contract for breach of warranty "where the retention was at the instance and request of the seller and for the benefit of the seller in his endeavors to remedy the defective machine so that it would properly perform the functions for which it was warranted and sold." See, 77 C.J.S., Sales 345(b). Application of this rule to the facts of the present case simply means that defendant's retention and use of the unit until May, 1956, did not constitute a waiver of his right to rescind the contract.

We pass, without decision, whether defendant's statements to plaintiff in May, 1956, were sufficient to constitute notice of an election to rescind. 46 Am. Jur., Sales Sec. 763; 17 C.J.S., Contracts Secs. 434, 435. It is noted that defendant gave no notice that *he had discontinued use of the unit* or that he held it for plaintiff and subject to its instructions. It is noted further that defendant did not allege that he

had tendered possession of the unit to plaintiff prior to the tender made in paragraph (10) of the counterclaim. If it be conceded that defendant gave sufficient notice of an election to rescind, the legal effect thereof was nullified when he continued to use the unit for his own benefit and not merely in compliance with his duty as bailee of plaintiff. Annotations: 77 A.L.R. 1165, 1178; 41 A.L.R. 2d 1173 1185.

While defendant's evidence tends to show that the defect in the automatic control caused considerable inconvenience and dissatisfaction, the fact remains that since May, 1956, the unit has been in operation in defendant's home and has provided both heat and air conditioning for defendant. This continued use of the unit by defendant, for his own use and benefit, is wholly inconsistent with the concept that his possession was that of bailee of plaintiff. See *Critcher v. Porter Co.*, 135 N.C. 542, 47 S.E. 604.

All that was required to put the unit in operation was to connect it with the outside wiring. Conversely, all that was required to discontinue it from operation was to disconnect it from the outside wiring.

Appellee relies strongly on *Holland Furnace Co. v. Korth*, 43 Wash. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166, where it was held, in the circumstances then considered, that the continued use of the furnace did not bar the remedy of rescission. Suffice to say, the opinion in that case discloses a substantially different factual situation.

Our conclusion is that the evidence does not support the finding (No. 6) that there was a *total* failure of consideration, *Cooley v. Stoeffler*, 120 Ind. A. 617, 91 N.E. 2d 653, or the findings (Nos. 7 and 8) to the effect that defendant was entitled to rescind and did rescind the contract. Hence, a new trial is awarded.

No question is presented as to the sufficiency of defendant's allegations or evidence to support a recovery of damages for breach of warranty. See *Hill v. Parker*, 248 N.C. 662, 104 S.E. 2d 848. Even so defendant may desire to ask leave to amend his pleading so as to draw the pertinent issues into clearer focus.

New trial.

JOHNSON AND PARKER, JJ., not sitting.

DAVID CLEELAND v. PENNY CLEELAND.

(Filed 8 October, 1958.)

1. Habeas Corpus § 3—

Under Ch. 545, Session Laws of 1957, (G.S. 17-39.1) *habeas corpus* will lie to determine the right to custody of minor children irrespective of the marital status of the parties.

2. Trial § 4—

Where a cause comes on to be heard at a time agreed upon, an applicant for a continuance should show that he has used due diligence and that a fair trial cannot be had because of circumstances beyond his control. G.S. 1-176.

3. Same: Appeal and Error § 46—

Continuances are not favored, and the act of the trial judge in granting or denying a motion for continuance will not be disturbed in the absence of a showing of abuse of discretion.

4. Same—

Where the trial court denies a motion for continuance made when the cause came on to be heard at the time agreed upon, upon findings supported by evidence that respondent was unable to attend the hearing because of being hysterical and intoxicated, no abuse of discretion is shown.

5. Constitutional Law § 26: Infants § 8: Divorce and Alimony § 22—

A decree of another state approving a prior separation agreement between the parties and awarding the custody of the children of the marriage in accordance therewith does not preclude our court from hearing and determining the right to custody of such children and awarding their custody in accordance with the conditions then existing some three years after the foreign decree, the court rendering the decree having authority to modify it for change of condition.

6. Constitutional Law § 26—

The full faith and credit clause of the Federal Constitution, Art. IV, sec. 1, does not require the courts of this State to treat as final and conclusive an order of a sister state which is interlocutory in nature and can be modified by the foreign court rendering the decree.

PARKER, J., not sitting.

APPEAL by respondent from an order entered 26 April 1958 by *Moore, J.*, at Chambers in PENDER.

On 28 March 1958 petitioner David Cleeland filed a petition for a writ of habeas corpus to obtain custody of David and Paul Cleeland, minor children of petitioner and respondent, whose correct given name is Frances.

Petitioner and respondent, then husband and wife residing in Virginia, entered into a separation agreement in 1955. By the terms of this agreement respondent was given the custody of two children of the marriage and of Kenny K. Cleeland, a minor child of respondent by a prior marriage, adopted by petitioner. By the agreement petitioner was obligated to make payments to the mother for the support of the children.

This separation agreement was followed in October 1955 by a di-

vorce *a vinculo* decreed by the Chancery Court of Arlington County, Virginia, in an action instituted by the wife. That decree provided that the former orders with respect to custody of the minor children should remain in effect.

The writ issued upon the filing of the petition. It was made returnable at Burgaw on 12 April 1958. Service was had on respondent 31 March 1958. On the return date respondent requested a continuance. This request was granted and the cause was continued to 26 April.

Respondent was not present during the hearing on 26 April but was represented by counsel. The court heard evidence, made findings of fact, and thereupon awarded custody of the two children to petitioner, their father. Respondent made no exceptions to the findings of fact. She excepted to the judgment and appealed.

Corbett & Fisler for petitioner, appellee.
Rountree & Clark for respondent, appellant.

RODMAN, J. Respondent challenges the validity of Judge Moore's order on these grounds: (1) Habeas corpus is not available to determine the right to the custody of children whose parents have been divorced in another State; (2) refusal of her request for continuance; (3) the Virginia decree awarding custody is entitled to full faith and credit and by reason thereof the courts of North Carolina are forbidden to presently inquire into her right to custody. Respondent did not plead the Virginia decree as a defense. Apparently the force of the Virginia order was not raised in the court below.

Prior to 1957 habeas corpus could not be used to determine the right to the custody of children whose parents had been divorced, *In re McCormick*, 240 N.C. 468, 82 S.E. 2d 406; but by legislative act, c. 545, S.L. 1957, G.S. 17-39.1, the marital status of parents is not now a factor in determining the procedure to obtain custody of a child. Judge Moore had authority to grant the writ, hear the controversy, and award custody.

To obtain a continuance of a cause to be tried at a time agreed upon, the applicant should show that he has used due diligence and that a fair trial cannot be had because of circumstances beyond his control. G.S. 1-176. Continuances are not favored. *S. v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520. The granting or denial of a motion to continue is a matter in the sound discretion of the trial judge and will not be disturbed unless an abuse of discretion is made to appear. *Furniture Co. v. Baron*, 243 N.C. 502, 91 S.E. 2d 236; *Cole v. Bryant*, 213 N.C. 672, 197 S.E. 160.

Petitioner resides in California. The hearing had previously been continued at the request of respondent. The time for the hearing had

been fixed by consent. Petitioner was present for the hearing. Respondent was represented at the hearing by her attorney, W. E. Blake. Reports of the Welfare Departments of California and Pender County, North Carolina, were put in evidence without objection. Judge Moore found: "That the respondent was unable to attend the hearing in this matter because of being hysterical; that she had been seen to take a drink on the day of the hearing and was staggering when she approached the courtroom, and because of her condition had to be hospitalized." In the agreed statement of the case on appeal it is said the hearing was held "in the absence of the respondent because of her physical inability to appear due to intoxication."

Manifestly there was no abuse of discretion in refusing to grant respondent's request for another continuance. The facts of this case do not approach the factual situation of *Abernethy v. Trust Co.*, 202 N.C. 46, 161 S.E. 705.

Could Judge Moore inquire into the present status of the children and award custody so as to promote their best interests, or was he precluded from inquiring as to the present needs of the children because of the divorce decree entered in Virginia in October 1955?

The entire record in the Chancery Court of Arlington County, Virginia, is not in the record here. Only the final decree awarding a divorce *a vinculo* was in evidence. The only portion of that decree relating to the custody of the children reads: "IT IS FURTHER ORDERED that all former orders heretofore entered in this cause with respect to the care and custody and support and maintenance of David Neil Cleeland, Paul Eric Cleeland and Kenneth Kinsey Cleeland shall continue in full force and effect." Considering that decree only, one could not tell who was given custody of the children. The provision of the Virginia decree is, however, supplemented by a finding made by Judge Moore without exception by respondent. ". . . that prior to the divorce of the petitioner and respondent a Separation Agreement was entered into, which said Separation Agreement was later approved by the Circuit Court of Arlington County, Virginia; that both the Separation Agreement and the Divorce Decree, which said Divorce Decree was entered in the Circuit Court of Arlington County, Virginia, awarded the custody of David Neil Cleeland and Paul Eric Cleeland to the respondent, Penny and/or Frances Cleeland . . ."

The clear inference to be drawn from the finding made by Judge Moore is that the Chancery Court merely accepted the declaration of the parties that the mother was in 1955 a fit and proper person to have the custody of the children, and their welfare would be promoted by such an award. There is no suggestion that the Chancery Court made any independent investigation to determine the fitness of either of the parties to have custody.

The decree of the Chancery Court in October 1955 was a mere interlocutory decree. The Virginia statutes authorize courts which have awarded custody of children to make a new decree "as the circumstances of the parents and the benefits of the children may require." Code of Virginia, 1950, c. 20-107 and 20-108. This power of the court to modify an award cannot be taken away by contract between the parties. *Gloth v. Gloth,* 154 Va. 511, 153 S.E. 879, 71 A.L.R. 700. The Virginia courts exercise this power to modify custody awards so as to promote the welfare of the child. *Judd v. VanHorn,* 195 Va. 988, 81 S.E. 2d 432.

Respondent and the children are residents of this State. North Carolina has assumed responsibilities with respect to children residing here. It seeks to develop strong, law-abiding citizens who may be of service to mankind. To accomplish these purposes it provides large sums for public education, health, and their general welfare. Where a person having custody of a child residing in this State so exercises that control as to prevent the accomplishment of the State's salutary objectives, the courts of this State may step in and award custody to a person or agency which will protect the child and promote its welfare. G.S. 110-21; *In re Gibbons,* 247 N.C. 273; *Holmes v. Sanders,* 246 N.C. 200, 97 S.E. 2d 683; *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744; *Sheehy v. Sheehy,* 107 A.L.R. 635; *Eggleston v. Landrum,* 23 A.L.R. 2d 696; *Mitchell v. Davis,* 12 A.L.R. 2d 1042; *Wicks v. Cox,* 4 A.L.R. 2d 1, and annotations p. 41 et seq.

The petition in this case asserted: ". . . the respondent is an unfit person to have the custody of said children due to the fact that she is a heavy drinker and living in adultery with another man to whom she is not married."

Judge Moore found these facts: "That the respondent, Penny Cleeland, who now has the custody of minor children, David Neil Cleeland and Paul Eric Cleeland, has since the time of the divorce from the petitioner, lived principally in Pender County, North Carolina; that she is an excessive drinker who periodically drinks to the extent of becoming irrational and at such times abuses said minor children; that since Christmas of 1957, up and until the 23rd day of April 1958, she and her two children have been residing in the home of one, James Justice; that the only occupants of said home were the said James Justice, the respondent, and the two minor children, David Neil Cleeland, and Paul Eric Cleeland; that since the commencement of this proceeding, to-wit: on the 23rd day of April 1958, the respondent and the said James Justice were married; that since Christmas of 1957 the respondent has been living in the house with said James Justice, cooking for him and doing his laundry, and that said house is not

of such size as to adequately accommodate the respondent and the said minor children; that James Justice is considered a regular drinker; that because of the circumstances surrounding the home in which said minor children are maintained, said children are now being socially ignored by the other children in the community."

"That the petitioner herein is a fit and suitable person to have the custody of said David Neil Cleeland and Paul Eric Cleeland and that it would be for the best interest for said minor children that their custody be awarded to the petitioner.

"That the respondent, Penny Cleeland and/or Frances Cleeland, because of her alcoholism, general behavior, and conduct, is an unfit person to have the custody of said children."

The facts found were conditions existing at the date of the hearing and just prior thereto. These findings must be accepted as true. They are supported by evidence, and no exception thereto was taken.

If the parties had continued to live in Virginia, its courts could, and no doubt would, upon a showing of facts as found by Judge Moore, have taken the children from the custody of respondent *Gloth v. Gloth, supra; Nix v. Nix,* 186 Va. 14, 41 S.E. 2d 345; *Mullen v. Mullen,* 188 Va. 259, 49 S.E. 2d 349; *Taylor v. Taylor,* 182 Va. 602, 29 S.E. 2d 833.

The Virginia decree awarding custody to respondent was based on a contract and conditions existing in 1955. The decree appealed from is based on conditions existing in 1958.

The constitutional provision (Art. IV, s. 1) requiring full faith and credit to be given to judicial proceedings of sister States does not require North Carolina to treat as final and conclusive an order of a sister State awarding custody of a minor when the courts of the State making the award can subsequently modify the order or decree. *New York v. Halvey,* 330 U.S. 610, 19 L.ed. 1133. "The full faith and credit to which a judgment is entitled is the credit which it has in the State from which it is taken, not the credit that under other circumstances and conditions it might have had." *Morris v. Jones,* 329 U.S. 545, 91 L.ed. 488. 168 A.L.R. 656; *Robertson v. Pickrell,* 109 U. S. 608, 27 L.ed 1049.

Since the Virginia decree awarding custody was subject to modification when changing conditions so required, the Superior Court of Pender County where the children resided had authority to examine the conditions now existing and, with the welfare of the children as its guide, determine the present right to custody. Its findings of present conditions demonstrate the necessity for a change. The finding that

the father is a fit and proper person to have the custody is in no wise challenged.

Affirmed.

PARKER, J., not sitting.

HENRY VANN COMPANY, INC. v. THERLO BAREFOOT AND WIFE, RUBY BAREFOOT.

(Filed 8 October, 1958.)

1. Sales § 27—

Allegations in the complaint as amended to the effect that plaintiff traded motor vehicles with defendants, that the vehicle traded to plaintiff was thereafter seized and confiscated by the Federal Government, resulting in a total failure of consideration for the vehicle traded to defendants, and seeking to recover the value of the vehicle traded to defendants, *are held* sufficient to allege a cause of action for damages for breach of implied warranty of title of the vehicle traded to plaintiff.

2. Trial § 36—

Even though the facts relating to a particular matter are controverted in the pleadings, unless the controverted facts raise an issue "material to be tried," i.e. determinative of the rights of the parties, G.S. 1-200, it is error to submit such issue.

3. Same: Sales § 27— Where vehicle sold is seized and confiscated by Federal Government, purchaser is not required to prove ground for seizure in order to recover.

Plaintiff and defendants traded motor vehicles. The vehicle traded to plaintiff was thereafter seized and confiscated by the Federal Government. *Held:* In order to recover for breach of implied warranty of title, plaintiff was not required to prove, as the basis of the confiscation, that the vehicle had been used in the illegal transportation of intoxicating liquor, such issue being determinable solely as provided in Federal statutes, and the submission of such issue and the court's action in basing judgment thereon is prejudicial error, entitling plaintiff to a new trial. However, in order to recover for breach of implied warranty of title, plaintiff should allege and prove that the vehicle was confiscated by judgment of the Federal Court, and that defendants' title to the vehicle was divested prior to the trade.

PARKER, J., not sitting.

APPEAL by plaintiff from BONE, *J.*, April Civil Term, 1958, of SAMPSON.

Civil action to recover damages on account of alleged breach of implied warranty of title.

Plaintiff's original allegations, summarized, are as follows:

On December 13, 1954, defendants were the owners of a 1954 Ford Victoria, Motor No. U4NV 153435; and on said date Sherwood Barefoot, defendants' minor son, was arrested by the Chief of Police of Benson, North Carolina, "while transporting nontax-paid whiskey on said car." Defendants, with knowledge that "the Federal Treasury Department was in search of said automobile for the purpose of confiscating" it, "conspired each with the other to trade said automobile in order that the Federal Government would not seize said automobile and confiscate same." Pursuant to said conspiracy, defendants, on February 23, 1955, traded said automobile to plaintiff and received from plaintiff a credit of $2,033.00 on a new 1955 pickup truck. Plaintiff sold the 1954 Ford Victoria delivered to it by defendants; but thereafter the Federal Government located, seized and confiscated it. Plaintiff refunded the purchase price paid by the purchaser. Plaintiff, "as a result of the conspiracy of the defendants in trading said automobile," was damaged in the amount of $2,033.00 and in the additional amount of $125.00 on account of expenses incurred in securing and delivering the 1954 Ford Victoria to the United States Treasury Department.

An amendment to the complaint alleged that the 1955 pick-up truck delivered by plaintiff to defendants in said trade had a value of $2,033.00; that there was a total failure of consideration; and that defendants were indebted to plaintiff in the amount of $2,033.00.

Answering the original complaint, defendants admitted that on December 13, 1954, the 1954 Ford Victoria was being operated by their minor son; that their minor son was arrested on said date by the Chief of Police of Benson; and that "said automobile was traded to the plaintiff for a truck and that certain credit was allowed therefor." Answering the amendment, defendants admitted "that on February 23, 1955, the defendant Therlo B. Barefoot traded vehicles with the plaintiff." Defendants did not deny that plaintiff had sold the 1954 Ford Victoria or that the same was seized by federal officers; but, except as stated, the allegations of the complaint were denied. Defendants specifically denied that the 1954 Ford Victoria was "subject to, or confiscated by the U. S. Government."

The jury's verdict was as follows:

"1. Did the plaintiff sell to the defendants the pickup truck described in the complaint and receive as payment therefor the 1954 Ford Victoria automobile described in the complaint? Answer: Yes.

"2. Was said 1954 Ford Victoria automobile used by defendants' son, Sherwood Barefoot, on December 13, 1954, in the illegal transportation of intoxicating liquors upon which the taxes due the United

States Government had not been paid? Answer: No.

"3. Was said automobile subsequently seized from plaintiff by the Federal officers and confiscated by judgment of the United States District Court? Answer: Yes.

"4. What amount, if any, is plaintiff entitled to recover of the defendants? Answer ....."

Judgment was entered providing that plaintiff take nothing by its action and that defendants go without day and recover their costs. Plaintiff excepted and appealed, assigning errors.

Butler & Butler for plaintiff, appellant.
No counsel contra.

BOBBITT, J. The only evidence was that offered by plaintiff. All the evidence was to the effect that the transaction of February 23, 1955, was an even trade in which each vehicle was valued at $2,033.00.

In charging the jury, the court gave peremptory instructions in plaintiff's favor on the first and third issues. As to the fourth issue, the instruction was as follows: "Now, if you have answered either one of the first three issues no, then you would answer the fourth issue 'nothing;' but if you have answered all of the first three issues yes, and come to consider the fourth issue, then if you believe the evidence and find the facts to be as all the evidence tends to show, you would answer the fourth issue $2,033.00."

As appears from the quoted instruction and the judgment, the court held that plaintiff could not recover unless it established by jury verdict in this action that the 1954 Ford Victoria was used by defendants' son on December 13, 1954, in the illegal transportation of intoxicating liquors upon which the taxes due the United States Government had not been paid. Moreover, it seems that plaintiff, when the original complaint was filed, had the same idea.

But, while relying on certain of the facts originally alleged, plaintiff, by amendment, based its cause of action on total failure of consideration. The complaint, as amended, apart from original allegations as to conspiracy and as to what occurred on December 13, 1954, alleged that plaintiff was entitled to recover the reasonable market value of the 1955 pickup truck delivered by it to defendants because defendants had no title to the 1954 Ford Victoria they delivered to plaintiff as full purchase price for the 1955 pickup truck. Liberally construed, the complaint, as amended, alleged a cause of action for damages on account of defendants' alleged breach of their implied warranty of title to the 1954 Ford Victoria. *Hodges v. Wilkinson,* 111 N.C. 56, 15 S.E. 941; *Martin v. McDonald,* 168 N.C. 232, 84 S.E. 258; 46 Am. Jur., Sales sec. 403; 77 C.J.S. Sales sec. 334; 1 Williston on

Sales, Revised Edition, sec. 218. Also, see *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448.

Plaintiff, upon exceptions aptly taken, assigns as error, *inter alia*, (1) the submission of the second issue, (2) the court's instructions relating thereto, and (3) the court's action in basing judgment thereon.

True, defendants denied plaintiff's allegations relating to facts referred to in the second issue. In this sense, the issue was raised by the pleadings. But it was not an issue "material to be tried," G.S. 1-200; for final disposition of this case did not depend upon the determination of this issue. *Coulbourn v. Armstrong*, 243 N.C. 663, 666, 91 S.E. 2d 912, and cases cited. Whether the 1954 Ford Victoria was subject to forfeiture on account of use in violation of federal statutes was determinable solely as provided in federal statutes.

Plaintiff alleged that defendants owned the 1954 Ford Victoria on December 13, 1954. Hence, in the factual situation disclosed by this record, it was incumbent upon plaintiff to establish that thereafter, in legal proceedings binding upon defendants, defendants' title to the 1954 Ford Victoria was divested prior to the trade on February 23, 1955.

By answering the third issue, "Yes," the jury found that the 1954 Ford Victoria was "subsequently seized from plaintiff by the Federal officers and confiscated *by judgment of the United States District Court.*" (Our italics) The third issue goes beyond plaintiff's allegation. The allegation is that "the Federal Government . . . seized and confiscated said automobile." Plaintiff did not plead a judgment of the United States District Court. It is noted that this action was instituted May 2, 1955, and that the judgment referred to was entered October 29, 1955, or thereafter.

Plaintiff offered in evidence *the portion* of a judgment of the United States District Court in a cause entitled, *"In re United States of America v. One 1954 Model Ford Victoria Automobile, Motor No. U4NV 153435, Henry Vann Company, Inc., Civil No. 441, Fayetteville Division,"* reading as follows:

"It is, therefore, ordered, adjudged and decreed that the said 1954 Ford Victoria, Motor No. U4NV 153435, be and the same is hereby condemned as forfeited to the United States of America and that Henry Vann Company, Inc. is not entitled to remission of forfeiture. It is further ordered that the United States Marshal for the Eastern District of North Carolina be authorized and empowered, and he is hereby directed, to deliver said motor vehicle to the Regional Commissioner of Internal Revenue, Treasury Department, Atlanta, Georgia, or his authorized representative, upon payment by said Regional Commissioner of the storage charges incurred on said motor vehicle."

Thus, while the portion of the judgment offered in evidence identifies the 1954 Ford Victoria as the vehicle "condemned as forfeited to the United States of America," whether such forfeiture is based on what occurred prior to February 23, 1955, is not shown. Plaintiff did not offer in evidence the portion of the judgment of the United States District Court containing that court's findings of fact nor did plaintiff offer in evidence any portion of the record showing proceedings prior to judgment.

Upon this record, we express no opinion as to the legal effect of said judgment upon the rights of the parties to this action. Suffice to say, neither the third issue nor the portion of the judgment offered in evidence was sufficient to establish that, in legal proceedings binding on defendants, defendants' title to the 1954 Ford Victoria was divested prior to the trade on February 23, 1955.

For error in submitting the second issue and in basing judgment thereon, plaintiff is entitled to a new trial. Prior thereto, the parties may desire to ask leave to amend so as to draw the determinative issues into clearer focus.

New trial.

PARKER, J., not sitting.

ROBERT L. DAVIS III AND WIFE, ANNE S. DAVIS, MARGARET DAVIS ALLEN AND HUSBAND, W. A. ALLEN, AND JANIE DAVIS GRIFFIN, UNMARRIED, v. FRANCIS MILLARD GRIFFIN, W. A. ALLEN III, FRANCES MARION ALLEN, AND MARGARET ELISABETH DAVIS, MINORS; 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; ALL PERSONS NOW IN BEING WHO ARE OR MAY IN ANY CONTINGENCY BECOME INTERESTED AS NEAREST OF BLOOD KIN OF MARGARET DAVIS ALLEN, JANIE DAVIS GRIFFIN, AND ROBERT L. DAVIS III, IN THE TRACTS OR PARCELS OF LAND DESCRIBED IN THE PETITION FILED IN THIS PROCEEDING, AS CONTINGENT REMAINDERMEN, BUT WHO BECAUSE OF THE CONTINGENCY CANNOT BE ASCERTAINED AND ARE NOW UNKNOWN, ALL APPEARING HERE BY THEIR GUARDIAN AD LITEM, SAM B. UNDERWOOD, JR.

(Filed 8 October, 1958.)

1. Partition § 1a—

Petitioners, owning undivided interests in fee in several tracts of land and also owning life estates in the balance of the undivided interests

in the same tracts of land, with contingent limitation over to persons not presently determinable, have the right, as against the contingent remaindermen, to partition the several tracts so that petitioners may hold some of the tracts in fee and in common, and thus know the boundaries of the real estate owned by them in fee distinct from the boundaries of that in which they own life estates with contingent remainder over.

2. Same—

A tenant in common is entitled as a matter of right to partition real estate held in common to the end that he may have and enjoy his share therein in severalty, G.S. 46-3, and a person owning an estate for life may join in the proceeding. G.S. 46-24.

APPEAL by respondent Sam B. Underwood, Jr., Guardian ad litem from *Bundy, J.*, Resident Judge of Third Judicial District, in Chambers at Greenville, North Carolina.

Special proceeding for actual partition of 57 tracts of land, heard before Clerk of Superior Court of Pitt County from whose judgment appeal as aforesaid was taken to *Bundy, J.*, as above stated.

This proceeding was before this Court at Spring Term 1958,—the opinion then rendered is reported in 248 N.C., at page 539, 103 S.E. 2d, 728.

It is there stated that in the light of the admissions and denials set out in the answer, and the plea as therein 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 from which appeal was then taken was set aside and the cause remanded to the end that perhaps the pleadings might be reformed, or hearing had, and facts found and conclusions made as to justice appertains, and the law directs.

The record discloses that the parties, through their counsel, have stipulated, among other things, that the original petition and the original answer as contained in the record on former appeal are correct. And, upon motion made in this Court, they are permitted to consider same as a part of the record on this appeal, without being printed herein.

The record also discloses by petition of petitioners that since the original petition was filed in this proceeding there has been born to Robert L. Davis III and his wife Anne S. Davis a child, Margaret Elisabeth Davis, who is without general or testamentary guardian in this State; that she is a necessary party and has been named and

served by process as defendant in this proceeding; and that Sam B. Underwood, Jr., has been appointed guardian ad litem to defend her in this proceeding; and that he has filed answer.

The record shows that the proceeding came on for hearing before the Clerk of Superior Court of Pitt County, North Carolina, on 6 August, 1958, and was heard "upon evidence adduced, exhibits offered, admissions of counsel, and pleadings filed." The Clerk found facts and entered judgment which, with exhibits, covers more than fifty-five pages of the record on appeal,—far too extensive to be set forth in full in an opinion of the Supreme Court. Summarily stated, the facts found are these:

The late R. L. Davis of Pitt County who owned varying interests in fifty-seven tracts of land in Pitt and Greene Counties, died leaving a last will and testament in which he devised to the five children of his brother F. M. Davis to wit: Frances Marion Davis, Virginia Elizabeth Davis, Janie Davis (now Janie Davis Griffin), Margaret Davis (now Margaret Davis Allen) and Robert L. Davis III "share and share alike for their natural lives then to go to the nearest of blood kin of each in fee simple."

After the death of R. L. Davis, two of the children, Frances Marion Davis, and Virginia Elizabeth Davis, have died intestate, unmarried and without issue surviving, leaving as the nearest of blood kin to each the survivors of the five of them, the petitioners in this proceeding. As a result the petitioners have acquired in fee varying interests in the fifty-seven tracts in which they also have life interests in the remaining interests of the several tracts.

The Clerk finds that: In one group, consisting of 42 certain tracts, petitioners own a two-fifths undivided interest in fee. In a second group, consisting of eight certain tracts they own a four-fifths undivided interest in fee. In a third group, consisting of two certain tracts, they own a seven-tenths undivided interest in fee. In a fourth group, consisting of four certain tracts, they own a one-fourth undivided interest in fee. And fifth, in one certain tract they own 318/360th interest in fee.

And the Clerk finds that the petitioners own a life estate in the remaining fractional interests in all the tracts,—and that the remainder, after the life estate of the petitioners Robert L. Davis III, Janie Davis Griffin and Margaret Davis Allen, was devised by the late R. L. Davis to the "nearest of blood kin" of the said petitioners respectively.

And the Clerk finds that as of this date the nearest of blood kin (1) of Robert L. Davis III is Margaret Elisabeth Davis, his daughter, (2) of Margaret Davis Allen are (a) W. A. Allen III and (b) Frances Marion Allen, her son and daughter, and (3) of Janie Davis Griffin

is Francis Millard Griffin, her son, but that who will be included in the class of nearest blood kin to each can be determined and ascertained only at the death of each life tenant, the respective petitioners; and that, therefore, as of this date, each of their respective children has a contingent remainder in a one-third undivided interest in each of the tracts of land grouped in each of the five different categories as above stated.

And the Clerk further found:

"FOURTEENTH: All of the parties to this proceeding are tenants in common or joint tenants of the lands described as aforesaid and that the petitioners are entitled to the relief sought in this proceeding.

"FIFTEENTH: That an actual division and partition of the lands described as aforesaid can be made among and between the parties of this action according to present values.

"SIXTEENTH: That the petitioners, tenants in common, and joint tenants have in their petition requested that the Commissioners allot their several shares owned by petitioners in fee simple to them in common as one parcel and that such a division will not be injurious or detrimental to any co-tenant or joint tenant.

"SEVENTEENTH: That this Court has jurisdiction of this cause and it has the authority to grant the relief sought by petitioners."

Therefore the Clerk "Ordered, Adjudged and Decreed that the petitioners as tenants in common or joint tenants of the lands described as aforesaid are entitled as a matter of right to the partition of the lands so held in common to the end that they might have and enjoy their share, owned in fee simple, in severalty.

" * * * that the petitioners as tenants in common or joint tenants shall have allotted their several shares owned by the petitioners in fee simple to them in common, as one parcel.

" * * * that the Commissioners hereinafter appointed by this Court shall allot to Robert L. Davis III, Margaret Davis Allen, and Janie Davis Griffin, as life tenants with remainder over to the nearest of blood kin of the said Robert L. Davis III, Margaret Davis Allen, and Janie Davis Griffin, the proportions in the said lands that are so held by them as life tenants, which said life estate with remainder over to the nearest of blood kin of each of the said petitioners shall be allotted to them in common as one parcel.

" * * * that Arch J. Flanagan, A. W. Bobbitt and B. M. Lewis be, and they are hereby appointed Commissioners to partition the lands as hereinabove described and as hereinabove set out and to allot to said tenants in common or joint tenants said lands as hereinabove set out.

" * * * that if said Commissioners find it impossible otherwise to

partition said lands fairly and equitably that they shall charge the more valuable dividends with such sums of money as they may think necessary to be paid to the dividends of inferior value in order to make an equitable partition and within 60 days after notification of their appointment shall make to this court a full and ample report of their proceedings as by law provided."

To the foregoing order the defendant respondent Sam B. Underwood, Jr., guardian ad litem, excepted, and appealed to Superior Court. And being heard by Bundy, resident Judge of Third Judicial District, upon the "pleadings filed, exhibits offered, argument and admissions of counsel," and defendants contending that the Clerk of Superior Court of Pitt County did not have jurisdiction to grant the relief sought by the petitioners and that there is error in the judgment of the Clerk, the Judge entered order that the judgment of the Clerk be, and the same is "in all respects ratified, confirmed and approved."

Defendants appeal to Supreme Court and assign error.

Lewis & Rouse for plaintiffs, appellees.
Underwood & Everett for respondents, appellants.

WINBORNE, C. J. The appellant states, and the appellees agree, that the question involved on this appeal is substantially as follows:

Do the petitioners, owning in fee undivided interests in several tracts of land, and also owning life estates in the balance of the undivided interests in the same tracts of land, have the right, as against contingent remaindermen, to partition the several tracts of land so that petitioners may hold some tracts in fee and in common, and the remainder of the tracts be held by them as life tenants with remainder over?

The petitioners are not asking for a partition as between themselves and the remaindermen as to the fractional shares of real estate in which the petitioners as life tenant and the remaindermen are concerned. They are seeking a partition separating these fractional interests from the fractional interest in which they have the fee— so that they may know the boundaries of the real estate they own in fee, distinct from the boundaries of that in which they as life tenants and the defendants as contingent remaindermen are interested.

In the light of our statute pertaining to partition, Chapter 46 of General Statutes, as interpreted by decisions of this Court, it is held that the question merits an affirmative answer.

In this State pertaining to partition of real estate it is provided by statute, G.S. 46-3, that "one or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the Superior Court." Such partition "shall be by special proceeding,

and the procedure shall be the same in all respects as prescribed by law in special proceedings except as modified" in the statute, G.S. 46-1.

And it is provided in G.S. 46-23 that the existence of a life estate in any real estate shall not be a bar to a sale for partition of the remainder or reversion therof, and "for the purpose of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed." See *Richardson v. Barnes,* 238 N.C. 398, 77 S.E. 2d 925, and cases cited.

Therefore the proceeding, if adversary, must be instituted by a tenant in common against his co-tenant, deeming the remaindermen as "seized and possessed as if no life estate existed." *Richardson v. Barnes, supra,* and cases cited.

Indeed a tenant in common is entitled as a matter of right to partition of real estate held in common, to the end that he may have and enjoy his share therein in severalty. *Barber v. Barber,* 195 N.C. 711, 143 S.E. 469, and cases cited. And, as held in *Richardson v. Barnes, supra,* a person owning an estate for life may join in the proceeding. G.S. 46-24.

Therefore the judgment from which appeal is taken is affirmed, and the cause will be remanded to the Clerk of the Superior Court of Pitt County for further proceedings accordant with law.

Affirmed.

F. A. McDANIEL, JR. v. REVEREND AUBREY T. QUAKENBUSH AND FRED WEAVER ET AL., TRUSTEES, AND YATES HARBISON, ET AL., DEACON BOARD OF THE FIRST BAPTIST CHURCH OF KINGS MOUNTAIN, NORTH CAROLINA.

(Filed 8 October, 1958)

1. Pleadings § 19c—

If any portion of a complaint alleges facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be reasonably and fairly gathered from it, the pleading is good as against demurrer.

2. Pleadings § 15—

A demurrer admits the truth of all allegations of fact contained in the complaint and all inferences of fact which may be reasonably drawn therefrom.

3. Injunctions § 13—Where serious controversy exists temporary order to preserve the status quo will ordinarily be continued to the hearing on the merits.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the final hearing, the merits

of the action are not involved, and where the complaint alleges that defendants are threatening to sell realty of the church in question and divert its building fund pursuant to an election of the congregation improperly called, the result of which was brought about by undue influence, coercive, or fraudulent means, the temporary order restraining defendants from transferring the real estate or expending any portion of the church's building fund is properly continued until the final hearing, although such restraining order would not preclude the church from thereafter holding an election bearing on the question or from approving or disapproving the action taken at the election.

4. Religious Societies § 2—

Where a church has no written constitution or bylaws, the manner of calling meetings for the purpose of ascertaining the will of the members of the church should be governed by the established customs and practices of the church, and a majority of its membership, ordinarily, controls the right to the use and title to the property.

PARKER, J., not sitting.

APPEAL by defendants from *Moore (Dan K.), J.*, March 29 Civil Term 1958 of CLEVELAND.

This is a civil action instituted by the plaintiff on behalf of himself and other members of the First Baptist Church of Kings Mountain, North Carolina, to restrain the defendants from proceeding further pursuant to the result of an alleged illegal election held in said church on 23 October 1957; and from unlawfully diverting and using the building fund of said church, in the sum of $88,000, for a purpose other than that for which it was specifically donated by the plaintiff and other members of the church; and further from disposing of any church property until a final disposition of the cause.

Among other things, it is alleged (1) that during the month of October 1956, the church upon recommendation of the Board of Deacons held an election to determine whether or not the church would purchase 2.6 acres of land near the city limits of the City of Kings Mountain, on U. S. Highway 74, for the sum of $12,000 for the purpose of relocating the church on said 2.6 acres of land; that the purchase of said land was rejected by a unanimous vote of the congregation. (2) That, thereafter, ten members of the church obtained an option and later purchased the 2.6 acres of land and offered it as a gift to the church, provided the church would dispose of its present property and build on the new site. (3) "That during the latter part of the year 1957 the ten members aforementioned, who acquired an option on said property, together with the pastor of the First Baptist Church, illegally and improperly called for a new election to be held on October 23, 1957, to determine whether or not the congregation of the First Baptist Church should accept the gift of 2.6 acres and relocate

the church thereon. This election was not called by the Board of Deacons or the congregation or any other governing body of said church and, therefore, was contrary to past precedents in regard to calling an election within the First Baptist Church of Kings Mountain * * *." (4) That the Reverend Aubrey T. Quakenbush, pastor of the church, during the months of September and October 1957, acting with the authority of an "illegally elected Board of Deacons and using church funds and church bulletins, began an extensive and malicious campaign through the use of bulletins, to exert undue and fraudulent influence on the members of the congregation of the First Baptist Church of Kings Mountain, to coerce the said members to vote for relocating the said church." (5) "That on October 23, 1957 an election was held and 235 members voted to accept the gift of 2.6 acres, more or less, and relocate the church on that lot, and 163 members voted not to accept the gift and relocate the said church." (6) "That since said election, 216 members of the First Baptist Church of Kings Mountain, together with this plaintiff, have indicated their desire to keep the church on its present location and to carry through with the plans previously made of constructing a new church on the present location." (7) "That since said election, the First Baptist Church of Kings Mountain, through its governing bodies, has begun to make immediate plans toward relocating the old church and disposing of the assets belonging to said church." (8) "That if the defendants are allowed to proceed under the illegal election of October 23, 1957; to alter or destroy the present church building; or use the special building fund collected as set forth herein as they now propose to use same, the plaintiff and all other members of the church will be caused irreparable damage."

A temporary order restraining the defendants "from disposing and transferring, in any manner, any of the real estate belonging to the First Baptist Church of Kings Mountain, North Carolina and * * * from disposing of and transferring, in any manner, the building fund of the First Baptist Church of Kings Mountain, North Carolina," was entered on 18 January 1958. The court set a date for the defendants to appear and show cause, if any, why the restraining order should not be continued to the hearing. In the meantime, the defendants filed a demurrer to the complaint on the ground that the complaint does not state a cause of action.

When this matter came on for hearing on the show cause order, the demurrer was overruled and the restraining order was continued until the final hearing. The defendants appeal, assigning error.

Davis & White, Kennedy, Mahoney & Mull, Horn & West for plaintiff appellees.

Mullen, Holland & Cooke for defendant appellants.

DENNY, J. The appellants assign as error the overruling of their demurrer and the continuance of the restraining order until the final hearing.

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action should be overruled if the complaint, when liberally construed in favor of the pleader, alleges facts sufficient to constitute a cause of action. Or, to put it another way, if any portion of a complaint alleges facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be reasonably and fairly gathered from it, the pleading will survive a demurrer. *Bryant v. Ice Co.*, 233 N.C. 266, 63 S.E. 2d 547, and cited cases. See also *Bailey v. Bailey*, 243 N.C. 412, 90 S.E. 2d 696; *Workman v. Workman*, 242 N.C. 726, 89 S.E. 2d 390; *Batchelor v. Mitchell*, 238 N.C. 351, 78 S.E. 2d 240.

A demurrer admits the truth of all allegations of fact contained in the complaint and inferences of fact reasonably drawn therefrom. *Mills Co. v. Shaw, Com'r. of Revenue*, 233 N.C. 71, 62 S.E. 2d 487; *Read v. Roofing Co.*, 234 N.C. 273, 66 S.E. 2d 821; *Stribbling v. Lamm*, 239 N.C. 529, 80 S.E. 2d 270; *Belch v. Perry*, 240 N.C. 764, 84 S.E. 2d 186.

We are not dealing with the merits of this controversy but only with the allegations of the complaint. *Furniture Co. v. R.R.*, 195 N.C. 636, 143 S.E. 242. However, whether the meeting on 23 October 1957 was properly or improperly called, if the plaintiff can show upon the final hearing that the result of the election complained of was brought about by undue influence, coercive, or fraudulent means, as alleged, the election should be set aside.

The restraining order as we interpret it, restrains the defendants from selling and transferring any of the real estate belonging to the First Baptist Church of Kings Mountain, North Carolina, and also forbids them from disposing, transferring, or expending any portion of the building fund of the church in connection with the relocation of the church, until the final hearing on this cause, unless otherwise ordered by the court.

We do not interpret the order complained of to restrain the church, in any manner, from holding an election bearing on the question of the removal of the church, or any other question that may properly come before it, save and except in the respects enumerated hereinabove. The church is free to approve or to rescind the action taken on 23 October 1957, if it desires to do so.

Since it appears from the record that this Church has no written constitution or bylaws, the manner of calling meetings for the pur-

pose of ascertaining the will of the members of the church should be governed by the customs and practices of the church as they have been observed and practiced through the years relating to such matters. A majority of such membership, ordinarily, controls the right to the use and title to church property. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114; *Dix v. Pruitt,* 194 N.C. 64, 138 S.E. 412. There is no doctrinal departure involved in this action as in *Reid v. Johnston, supra.*

The rulings of the court below, overruling the demurrer and continuing the restraining order until the final hearing, will be upheld.

Affirmed.

PARKER, J., not sitting.

STATE v. JAMES R. WALKER, JR.

(Filed 8 October, 1958.)

1. Indictment and Warrant § 9—

An indictment must charge each element of the offense of which defendant is accused with such certainty as to identify the offense and protect the accused from being twice put in jeopardy for the same offense, enable the accused to prepare for trial, and enable the court to proceed to judgment.

2. Same—

While an indictment for a statutory offense is ordinarily sufficient if it follows the language of the statute, if the statute characterizes the offense in mere general or generic terms or does not sufficiently define the crime or set forth all its essential elements, the language of the statute must be supplemented by other allegations so as to set forth intelligently and explicitly every essential element of the offense.

3. Indictment and Warrant § 14: Criminal Law § 121—

Insufficiency of an indictment to charge the commission of any criminal offense is properly presented by motion to quash, but may also be raised by motion in arrest of judgment, or the Supreme Court may take cognizance of such defect *ex mero motu.*

4. Elections § 12—

An indictment charging that defendant unlawfully and willfully by his own boisterous and violent conduct disturbed a named registrar while in the performance of her duties in examining a named applicant for registration, is insufficient, it being necessary that the language of the statute, G.S. 163-196, be supplemented by averments particularizing the crime with sufficient certainty to protect the accused from subsequent prosecutions for the same offense.

PARKER, J., not sitting.

APPEAL by defendant from *Morris, J.*, at March-April 1958 Term of NORTHAMPTON.

Criminal prosecution upon a bill of indictment charging "that James Robert Walker, Jr., late of the County of Northampton, on the 12th day of May in the year of our Lord, One thousand nine hundred and fifty-six, with force and arms, at and in the County aforesaid, did unlawfully and willfully by his own boisterous and violent conduct disturb one Helen H. Taylor, a duly qualified, appointed and acting registrar for the May 1956 Democratic Primary for the voters of Seaboard Township in Northampton County while in the performance of her duties as such registrar, to wit: While examining one Mark Johnson, an applicant for registration against the form of the statute in such case made and provided and against the peace and dignity of the State."

The record discloses that prior to pleading to the bill of indictment, defendant made motion to quash the bill. The motion was overruled, and defendant excepted. This is Exception 1 in statement of case on appeal.

Upon motion of defendant the court ordered the Solicitor for the State to file a bill of particulars. This was done.

The case was submitted to the jury upon evidence offered by the State— the defendant resting his case without offering evidence. Motion of defendant for judgment as of nonsuit was denied. Exception.

The jury returned a verdict of guilty as charged. Defendant then moved in arrest of judgment, and for a new trial by reason of errors allegedly committed by the court during the progress of the trial. The motion was denied. Exception. And from judgment then pronounced, a jail sentence of four months, suspended upon certain conditions, defendant appeals to the Supreme Court and assigns error.

Attorney General Malcolm B. Seawell, Assistant Attorney General Ralph Moody, for the State.

Taylor & Mitchell, and R. O. Murphy for defendant, appellant.

WINBORNE, C. J. The bill of indictment under which defendant stands convicted is founded upon the statute G.S. 163-196, which provides that "Any person who shall, in connection with any primary or election in this State, do any of the acts and things declared in this section to be unlawful, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court." And the statute further provides that "It shall be unlawful" * * * "(4) for any person to be guilty of any boisterous conduct so as to disturb any member of any election or any registrar or judge of elections in the performance of his duties as imposed by law."

In the light of the provisions of the statute, G.S. 163-196, this Court is constrained to hold that the bill of indictment here involved fails to particularize the crime charged, and is not sufficiently explicit to protect the accused against subsequent prosecutions for the same offense. *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d, 654.

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

Indeed it is stated in *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, that "the authorities are in unison that an indictment, whether at common law or under a statute, to be good, must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provision is (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty, to pronounce the sentence according to the rights of the case," citing *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883.

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

And while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where as here the words do not in themselves inform the accused of the specific offense of which he is accused, so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. *S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413, and cases cited. See among others *S. v. Watkins,* 101 N.C. 702, 8 S.E. 346; *S. v. Whedbee,* 152 N.C. 770, 67 S.E. 60; *S. v. Ballangee,* 191

N.C. 700, 132 S.E. 795; *S. v. Cole, supra; S. v. Gibbs, supra; S. v. Greer, supra; S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *S. v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793; *S. v. Strickland, supra; S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497.

A defect appearing in a warrant or bill of indictment can be taken advantage of only by motion to quash, aptly made, or by motion in arrest of judgment. *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401.

The most appropriate method of raising the question as to whether the bill of indictment charges the commission of any criminal offense is by motion to quash. Yet motion in arrest of judgment may be used to the same end. *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d, 663; *S. v. Raynor, supra; S. v. Thorne, supra; S. v. Scott, supra; S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81.

Indeed if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu,* will arrest the judgment. See *S. v. Watkins, supra; S. v. Thorne, supra; S. v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734; *S. v. Lucas, supra; S. v. Jordan, supra; S. v. Banks,* 247 N.C. 745, 102 S.E. 2d 245; *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 241.

Applying these principles of law, the bill of indictment, here involved, will be and it is hereby quashed. Hence verdict rendered and the sentence imposed are vacated.

Bill Quashed— Judgment Vacated.

PARKER, J., not sitting.

STATE v. DURWOOD REESE SWARINGEN AND GEORGE LESLIE THOMAS.

(Filed 8 October, 1958.)

1. Criminal Law § 32—

Defendants' pleas of not guilty place the burden on the State of proving beyond a reasonable doubt each essential element of the offenses charged.

2. Criminal Law § 108—

In the absence of a judicial admission, the assumption by the court that any fact controverted by defendant's plea of not guilty has been established, is error, notwithstanding the expression of opinion may have been unintentional or inadvertent, and notwithstanding the manner in which counsel examined the witnesses or argued the case to the jury.

3. Automobiles § 74—

In prosecutions under G.S. 20-138 and G.S. 20-140, it is error for the court, in the face of defendants' pleas of not guilty, to assume in its

charge that it had been established that one of the defendants was operating the motor vehicle at the time in question.

PARKER, J., not sitting.

APPEAL by defendants from *Crissman, J.*, March 3, 1958 Term of JONES.

Defendant Swaringen was charged in a bill of indictment with (a) operating a motor vehicle while under the influence of intoxicating liquors in violation of G.S. 20-138, and (b) careless and heedless operation of a motor vehicle in violation of G.S. 20-140.

Thomas was charged in a bill of indictment with a violation of G.S. 20-138 by aiding and abetting Swaringen in the operation of a motor vehicle while Swaringen was under the influence of intoxicating liquors.

The State submitted to a nol pros as to the second count in the bill which charged Swaringen with reckless driving in violation of G.S. 20-140. The causes were consolidated. Each defendant entered a plea of not guilty. The jury found defendants guilty. Judgment was entered on the verdict and defendants appealed.

Attorney General Seawell and Assistant Attorney General McGalliard, for the State

Larkins & Brock for defendant appellants.

RODMAN, J. The crime with which defendant Swaringen was charged consists of two essential elements: (1) driving a motor vehicle on the public highways, and (2) operation of such vehicle while under the influence of intoxicating liquors. *S. v. Hairr*, 244 N.C. 506, 94, S.E. 2d 472.

The criminal charge directed at defendant Thomas consists of these two elements plus the asserted fact that he aided and abetted in such operation.

Defendants' pleas of not guilty put in issue each essential element of the crimes charged. *S. v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537; *S. v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549; *S. v. Brown*, 225 N.C. 22, 33 S.E. 2d 121; *S. v. Yow*, 227 N.C. 585, 42 S.E. 2d 661.

The State had the burden of establishing beyond a reasonable doubt each element of the crime. Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. G.S. 1-180.

The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. *S. v. Cuthrell*, 235 N.C. 173, 69 S.E. 2d 233; *S. v. Love*, 229 N.C. 99, 47 S.E. 2d 712; *S. v. Snead*, 228 N.C. 37, 44 S.E. 2d, 359; *S. v. Minton*, 228 N.C. 15, 44 S.E. 2d 346; *Ward v. Mfg. Co.*, 123 N.C. 248.

The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. *S. v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173; *Miller v. R.R.,* 240 N.C. 617, 83 S.E. 2d 533; *S. v. Shinn,* 234 N.C. 397, 67 S.E. 2d 270; *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568.

Nor does the manner in which counsel examines the witnesses or argues the case to the jury justify the court in assuming the existence of an essential fact. *S. v. Ellison,* 226 N.C. 628, 39 S.E. 2d 824. There must be a judicial admission before the existence of an essential element of a crime can be stated as a fact. *S. v. Hairr, supra.*

The State put on only one witness who testified he saw the car in operation. He swore three people were on the front seat, that Swaringen was driving, Thomas sat next to him, and the third person was on the extreme right. This witness expressed the opinion that Swaringen was under the influence of intoxicants. There was other evidence tending to establish that Swaringen was in an intoxicated condition shortly after the automobile ran into a tree. There was evidence tending to show a confession of Thomas that he owned and had control of the automobile and permitted Swaringen to operate it with knowledge of Swaringen's condition. The evidence offered by the State was ample to go to the jury and support a verdict of guilty.

Defendants offered no evidence but relied on their pleas of not guilty and the presumption of innocence raised thereby.

The court, after reading the statute, G.S. 20-138, told the jury: "Now in this case the defendant Swaringen was the driver of the vehicle, the motor vehicle; he is charged with actually driving on a public highway while under the influence of some intoxicating beverage; and the defendant Thomas is charged with being an aider or an abetter and charged as a principal, because of the situation."

Defendants excepted to the foregoing charge.

The statement in the quoted portion that Swaringen was the driver of the vehicle was emphasized when the court came to give the contentions of the State and of defendants. The State's contention was expressed in this manner: "Now, members of the jury, the State says and contends from this evidence that you should be satisfied beyond a reasonable doubt that the defendant Swaringen was under the influence of an intoxicating beverage as he drove this motor vehicle across Highway 17 from a street in Maysville, and that therefore you ought to return a verdict of guilty as to him . . ."

The contentions of the defendants were stated thus: "Now, members of the jury, the defendants, on the other hand, say and contend that there isn't any evidence here that would be sufficient to satisfy you that either one of them was under the influence to the point where

either their mental or physical faculties were appreciably impaired and cause them not to have the normal control . . ."

It is true that the court charged the jury that to convict it had to find beyond a reasonable doubt that defendant Swaringen was at the time charged driving the automobile on a public highway, and that he had drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties; but a reading of the entire charge impels the conclusion that the only controverted fact which the jury was expected to determine was whether Swaringen was under the influence of intoxicating liquors.

Before Swaringen could be convicted the jury had to find, without an intimation or expression of opinion from the trial judge, that he was operating a motor vehicle on the highways. Since the jury has not found, on a charge free from a prohibited expression of opinion, that Swaringen was the operator of the motor vehicle, it follows that neither defendant has been properly convicted of the crimes charged in the bills of indictment.

New Trial.

PARKER, J., not sitting.

D. A. ROEBUCK v. THE CITY OF NEW BERN, A MUNICIPAL CORPORATION, AND HON. C. E. HANCOCK, JUDGE OF MUNICIPAL RECORDER'S COURT, NEW BERN, NORTH CAROLINA.

(Filed 8 October, 1958.)

1. Mandamus § 1: Constitutional Law § 29—

The provisions of G.S. 7-204 that upon demand for a jury in prosecutions in a municipal recorder's court the cause should be tried in the same manner as actions before a justice of the peace upon like demand, establish a jury of six by reference to Article IV, Section 27, of the State Constitution, and G.S. 7-150.

2. Same—

Where a statute declares that criminal offenses below the grade of felony committed within the corporate limits of a municipality or within five miles thereof are petty misdemeanors within the jurisdiction of the municipal recorder's court, G.S. 7-190 (1) and (3), the State Constitution, Article I, Section 13, authorizes the legislature to provide means of trial other than by common law jury.

3. Courts § 14: Criminal Law § 16—

Statutory provisions for a jury of twelve, applicable solely to civil actions in a municipal recorder's court, G.S. 7-250, G.S. 7-252, cannot be invoked by a defendant in a criminal prosecution in such court as the basis for demand for a jury of twelve in the face of statutes establishing a jury of six in criminal prosecution in such court.

PARKER AND RODMAN, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Parker, J.*, May, 1958 Term, CRAVEN Superior Court.

Civil action for mandamus to compel the defendants to provide a jury of twelve for the trial of a criminal action (driving drunk) pending against the plaintiff in the Municipal Recorder's Court of New Bern. It is stipulated the defendant in the criminal action (the plaintiff here) made a motion for a jury of twelve and the motion was denied.

The recorder filed an answer in which he stated ". . . the sole matter in controversy here is whether the jury shall be composed of six or twelve men. . . . This answering defendant has . . . concluded that the plaintiff is not entitled to a trial by a jury of twelve men, but by a jury of six men."

The City of New Bern demurred on the ground that it had no control over the operation of the municipal court. From a judgment dismissing the action as to both defendants, the plaintiff appealed.

Charles L. Abernethy, Jr., for plaintiff, appellant.
A. D. Ward for defendants, appellees.

HIGGINS, J. Mandamus is an extraordinary remedy designed to enforce clear legal rights or to compel performance of ministerial duties enjoined by law. *Hospital v. Wilmington*, 235 N.C. 597, 70 S.E. 2d 833; *Hayes v. Benton*, 193 N.C. 379, 137 S.E. 167; *Person v. Watts*, 184 N.C. 499, 115 S.E. 336; *State v. Justices*, 24 N.C. 430.

In this action it may be doubted whether the plaintiff's allegations are sufficient to entitle him, by mandamus, to challenge the jury of six in the municipal recorder's court or whether he should try his case and, if the decision is adverse, appeal to the superior court where provision is made for trial by common law jury of twelve. If it be conceded that mandamus from the superior court is the proper remedy to compel a recorder's court to provide a lawful jury, the plaintiff is still in the woods until he shows the jury available to him is an unlawful one.

The Municipal Recorder's Court of New Bern was created pursuant to provisions of Article 24, Chapter 7, General Statutes. (G.S. 7-185 to 7-217, inclusive.) The article refers to *municipal recorders' courts*. Section 7-204 provides: "In all trials in the court upon demand for a jury by the defendant or the prosecuting attorney representing the State, the recorder shall try the same as is now provided in actions before a justice of the peace wherein a jury is demanded. And the same procedure as is now provided by law for jury trials before a

justice of the peace shall apply."

The Constitution of North Carolina, Article IV, Section 27, and G.S. 7-150 provide: "When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same." The jury in a municipal recorder's court, therefore, shall consist of six. The number is determined by this reference with as much certainty as if actually set out in Section 7-204.

The legislature has declared, G.S. 7-190 (1) and (3), that criminal offenses below the grade of felony committed within the corporate limits of the municipality or within five miles thereof are petty misdemeanors. For such offenses Article I, Section 13, of the State Constitution authorizes the legislature to provide means of trial other than by (common law) jury.

The plaintiff, however, attempts to support his claim for a jury of twelve by invoking G.S. 7-250 and G.S. 7-252. The sections are part of Article 28 (G.S. 7-246 to 7-255, inclusive). The article refers *exclusively to the civil jurisdiction* of recorders' courts. Section 7-252 provides: "The jury shall be a jury of twelve, and the trial shall be conducted as nearly as possible as in the superior court."

The reason for a jury of twelve in a civil action before a municipal recorder's court is made apparent by examination of G.S. 7-253, which provides for appeals in civil cases from recorder's court to the superior court in term. The appeal is only "for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the Supreme Court, with the exception that the record may be typewritten instead of printed, . . . Upon such appeal the superior court may either affirm or modify the judgment of the recorder's court, or may remand the cause for a new trial." A jury trial is not available in the superior court in a civil case. Therefore, a jury trial in the constitutional or common law sense (in a civil case) must be provided in the municipal recorder's court. It should be noted that the proviso in Section 7-253 (trial *de novo*) refers to appeals *from the county recorder's court* and not *from a municipal recorder's court.* The defendant's contention that G.S. 7-252 must be resorted to for the purpose of determining the number required to constitute a jury in a criminal case is untenable. Applicable law provides for a jury of six and not twelve for criminal trials in the Municipal Recorder's Court of New Bern.

We conclude, therefore, the recorder was correct in ordering a jury of six to try the case against the plaintiff. The judgment of the superior court dismissing this action is

Affirmed.

PARKER AND RODMAN, JJ., took no part in the consideration or decision of this case.

STATE v. JAMES C. CLENDON.

(Filed 8 October, 1958.)

1. Criminal Law § 131: Habeas Corpus § 2—

Where bills of indictment for offenses each carrying a maximum imprisonment of ten years are consolidated for judgment, G.S. 14-70, G.S. 14-54, and only one judgment is entered thereon, sentence in excess of ten years is unwarranted, but is not void, and when defendant has not served that part of the sentence which is within lawful limits, he is not entitled to his discharge.

2. Criminal Law §§ 133, 169—

Where sentence having a maximum in excess of that allowed by law is entered and thereafter sentence for another offense is imposed to begin at the expiration of the previous sentence, the cause will be remanded for proper sentence in the first prosecution, giving defendant the benefit of the time already served, and then remanded to the superior court of the county in which the second sentence was entered for the imposition of sentence to begin at the expiration of the first.

Certiorari upon petition of James C. Clendon to review prison sentences imposed at the October 1953 Term of the Superior Court of Madison County and the March 1958 Term of the Superior Court of CURRITUCK County.

The petition, answer of the Attorney General, and certified copies of the records of the Superior Courts of Madison and Currituck Counties attached to and made a part of the answer of the Attorney General establish these facts:

At the February 1953 Term of Madison Superior Court defendant was charged in a bill of indictment with larceny of property of a value of $400. Another count in the bill charged him with breaking and entering. Defendant in open court entered a plea of guilty to each count. The counts were consolidated for the purpose of judgment. Whereupon the court entered judgment "that the defendant be confined in the State's prison at hard labor for a period of not less than 9 nor more than 15 years." Pursuant to this judgment commitment issued 23 February 1953. He is presently confined pursuant to this commitment.

At the March 1958 Term of Currituck Superior Court defendant was charged in a bill of indictment with an escape from the Maple Prison Camp of the State Prison System where he was then serving

a sentence imposed upon a conviction of a felony. Upon trial had on defendant's plea of not guilty, the jury returned a verdict of guilty, whereupon judgment was rendered "that the defendant be imprisoned in the State's Prison for the term of two years, to begin at the expiration of the 9-15 year sentence prisoner is now serving."

Petitioner applied to Judge Clarkson of the Superior Court for a writ of habeas corpus, asserting in his petition his right to his discharge substantially on the facts as stated above. Judge Clarkson, by order dated 28 June 1958, denied the prayer without prejudice to prisoner's right to seek relief by application for *certiorari* addressed to this Court.

Attorney General Seawell and Assistant Attorney General Bruton, for the State.

PER CURIAM. The prayer of petitioner is that this Court review the record and "issue an order directing that petitioner be discharged from custody."

The sentence imposed in Madison County is, as to the minimum time the prisoner is to serve, within the limits permitted by statute; but the maximum term set is beyond statutory authorization. G.S. 14-70, G.S. 14-54. The sentence imposed is not void *in toto*. Petitioner is not entitled to be released from custody. He has not served that part of the sentence which is within lawful limits. Habeas corpus is, as Judge Clarkson held, not an appropriate means of correcting the errors of which prisoner can justly complain. *S. v. Austin*, 241 N.C. 548, 85 S.E. 2d 924; *S. v. Byers*, 248 N.C. 744. *Certiorari* is the proper method to have the judgment corrected.

The cause is remanded to the Superior Court of Madison County for imposition of a sentence not in excess of statutory authorization based on defendant's plea of guilty. The sentence imposed will be effective as of 23 February 1953 so that prisoner will have the benefit of the time already served.

Vacating the sentence imposed in Madison County in 1953 makes uncertain the time when the sentence imposed in Currituck is to begin. Upon the imposition of an authorized sentence in Madison County the cause will then be remanded to Currituck for imposition of an appropriate sentence based on the verdict of guilty rendered at the March 1958 Term of the Superior Court of Currituck County.

Remanded.

MEARL N. TATUM v. EVELYN G. TIPPETT.

(Filed 8 October, 1958.)

APPEAL by plaintiff from *Pless, J.*, Schedule "B" Term, 10 March 1958, of MECKLENBURG.

Civil action to recover for personal injuries allegedly sustained as a result of an automobile wreck on 30 July 1955.

Some time during the afternoon of the above date the defendant drove her automobile to the home of plaintiff on McClintock Road, in the City of Charlotte, for the purpose of visiting plaintiff. When she arrived, the plaintiff was in bed with a heating pad on her neck and shoulders; she was complaining about some aches. After visiting for some time, the plaintiff suggested that she must go to the grocery store. The defendant offered to take her and they left in defendant's car to go to the B & B Grocery on Central Avenue. The defendant was driving her car on McClintock Road where she was supposed to turn left into Iris Drive. The street was paved with asphalt and had loose rock and pebbles on it; it had been raining and the street was wet. According to plaintiff's evidence, the defendant did not slow down, and almost passed the intersection when she said, "Oh, I was supposed to turn here," and put on the brakes and the car swung around completely to the right and the left side of the car hit a telephone pole on McClintock Road.

The evidence is conflicting as to plaintiff's injuries, especially as to whether or not her present condition was caused by injuries sustained in the automobile accident.

The issues of negligence and damages were submitted to the jury, and the issue of negligence was answered in favor of the defendant.

The plaintiff appeals, assigning error.

McDougle, Ervin, Haracok & Snepp for plaintiff.
Carpenter & Webb, John G. Golding for defendant.

PER CURIAM. We have carefully examined the plaintiff's exceptions and assignments of error and, in our opinion, no prejudicial error that would justify a new trial has been made to appear.

In the trial below we find no error in law.

No Error.

JOHNNIE STRICKLAND v. ROBERT LEE WILLIAMS AND ATHEA WILLIAMS.

(Filed 8 October, 1958.)

APPEAL by defendant Robert Lee Williams from *Paul, J.*, at June 1958 Civil Term of WILSON.

Civil action to recover for personal injury and property damage as result of automobile collision on 24 December, 1955, between the 1951 Ford automobile owned and operated by plaintiff, and a 1950 International pick-up truck owned by defendant Athea Williams and operated by defendant Robert Lee Williams.

Plaintiff alleged in his complaint in substance that the collision was caused by actionable negligence of defendant Robert Lee Williams; and defendants, answering, deny said allegations in the complaint, and for further answer and new matter alleged as counterclaim against plaintiff aver and say the collision was proximately caused by negligence of plaintiff to their damage in substantial amount.

Plaintiff, replying, denies that he was negligent; and also demurs to the cross-action. The demurrer was sustained. And the parties waived jury trial and agreed that the trial judge should find the facts and render judgment thereon.

Thereupon the court found as a fact that as proximate result of failure of defendant Robert Lee Williams to yield to plaintiff the right of way, plaintiff's automobile was wrecked and damaged in sum of $600.00, and plaintiff sustained personal injury and medical expenses in sum of $100.00; that plaintiff was operating his automobile in a reasonable and lawful manner and was not guilty of any negligence which proximately caused the collision and damages resulting therefrom; but that Robert Lee Williams was not operating the truck as the agent, servant or employee of Athea Williams, who was guilty of no negligence which proximately caused the collision and damages resulting therefrom. The court rendered judgment accordingly in favor of plaintiff and against defendant Robert Lee Williams, who excepts thereto and appeals to Supreme Court.

Talmadge L. Narron for plaintiff, appellee.
Allen W. Harrell for defendant, appellant.

PER CURIAM. The only exception on this appeal is to the judgment. And the facts found are sufficient to and do support the judgment. Thus error is not made to appear. Hence the judgment from which appeal is taken is

Affirmed.

MABEL SMITH v. DICK MASON LUMBER COMPANY, INC. (ORIGINAL DEFENDANT) AND PAUL QUEEN (ADDITIONAL DEFENDANT.)

(Filed 8 October, 1958.)

APPEAL by original defendant from *Sharp, S. J.*, May-June 1958 Civil Term of GASTON.

The complaint alleges plaintiff, a guest of Paul Queen, was injured in a collision between Queen's truck and a truck of defendant lumber company, backed without adequate warning from a private entrance into the Gastonia-Dallas highway along which the Queen vehicle was traveling. The collision occurred about 6:30 a.m., 1 February 1957. The paved portion of the highway is 22 feet in width. It is alleged that appellant's vehicle was without lights. It was rainy, foggy, and dark. Visibility was limited to 50 feet according to plaintiff's testimony. Defendant's vehicle had been backed so as to occupy the entire width of the highway. Plaintiff seeks damages from the lumber company.

Original defendant denied any negligence on its part causing injury to plaintiff but asserted if in fact it was negligent, Queen was likewise negligent, entitling it to contribution for any damages it was compelled to pay. On its motion Queen was made an additional defendant.

Responding to appropriate issues, the jury found plaintiff was injured by the negligence of defendant lumber company, that Queen did not contribute thereto, and the amount of plaintiff's damage.

Judgment was entered in conformity with the verdict. Defendant lumber company excepted and appealed.

O. A. Warren and Whitener & Mitchem for plaintiff, appellee.
Garland & Garland for defendant, appellant.
L. B. Hollowell for additional defendant, appellee.

PER CURIAM. The only error asserted is the refusal of appellant's motion to nonsuit. An examination of the record discloses evidence sufficient to support the verdict. Conflicts in the evidence were solved by the jury. No new legal question is presented.

No Error.

SKIPPER *v.* YOW.

MARY S. SKIPPER AND HUSBAND N. R. SKIPPER, K. C. SIDBURY and CHARITY SIDBURY, HIS WIFE; MURRAY G. JAMES, TRUSTEE, AND WINSTON WILLIAMS AND OTHERS (THE HEIRS AT LAW OF THE LATE ELIJAH B. WILLIAMS), PETITIONERS v. E. L. YOW AND WIFE MRS. E. L. YOW, AND CICERO YOW AND WIFE MRS. CICERO YOW, DEFENDANTS.

(Filed 15 October, 1958.)

1. Partition § 4a—

Petition for partition should accurately describe the specific lands sought to be partitioned and should affirmatively make it appear that all parties who claim an interest in the property are before the court.

2. Partition § 5a—

Where respondents in a proceeding for partition deny that petitioners own any interest in the land, the proceeding is converted into a civil action to try title.

3. Ejectment § 10—

Where a proceeding for a partition is converted into an action to try title by respondents' denial that petitioners own any interest in the land, petitioners cannot be nonsuited if their evidence is sufficient to warrant a jury in finding that they own some interest in the land entitling them to the present right of possession, and it is not required that they establish the exact interest claimed in their pleading.

4. Same—

Plaintiffs seeking to establish title by showing a common source of title and a better title from that source, must not only show that the parties trace their title to the same person, but must also show title to the same land from that source.

5. Descent and Distribution § 1—

Real property passes to collateral relations only in the absence of lineal descendants.

6. Same—

Upon proof of death there is a presumption that deceased died intestate, but there is no presumption that he died without lineal descendants.

7. Same: Ejectment § 9: Evidence § 25½—

A deed executed by a sister of the common source of title more than thirty years prior to its introduction in evidence, reciting that the common source of title was unmarried, that he died intestate seized of the land, and that his interest descended to his brothers and sisters, is competent under the ancient document rule to prove that the land descended to the collateral heirs of the common ancestor, it affimatively appearing that at least some who spoke through the recitals are dead and there being no suggestion that the instrument is spurious or had been altered in any respect.

8. Ejectment § 10—

Where plaintiffs in an action to try title introduce evidence that the land descended to the collateral heirs of the common ancestor, together with evidence of their inheritance from such collateral heirs and evidence

of defendants' title from the same source, the evidence is sufficient to be submitted to the jury on the question of inheritance and precludes nonsuit if plaintiffs' evidence is sufficient to identify the land as the land in controversy.

9. Boundaries § 1—

The fact that the descriptions in deeds forming the chain of title are not identical is not material if the differing language may in fact fit the same body of land, and if it is apparent from an examination of the descriptions in the several deeds that the respective grantors intended to convey the identical land, effect will be given to that intent.

10. Ejectment § 10—

Evidence that the differing descriptions in the deeds in petitioners' chain of title did in fact describe the land in dispute, together with testimony of a surveyor that the lands described in the respective descriptions covered substantially the tracts as described in the petitions, is sufficient to overrule respondents' motion to nonsuit in an action to try title to the land.

11. Appeal and Error § 51—

Judgment of nonsuit cannot be sustained where the evidence is sufficient to make out a *prima facie* case even though, in the absence of objection to the evidence, all of the evidence tending to establish the affirmative of the issue is incompetent.

PARKER, J., not sitting.

APPEAL by petitioners from *Bone, J.*, March 1958 Term of ONSLOW.

J. T. Gresham, Jr., Nere E. Day, Jr., and Nere E. Day for petitioner appellants.

Beasley & Stevens for respondent appellees.

RODMAN, J. This is a partition proceeding instituted 21 April 1958. A prior proceeding for the same purpose involving the same land resulted in an involuntary nonsuit which was affirmed on appeal. *Skipper v. Yow*, 238 N.C. 659, 78 S.E. 2d 600; 240 N.C. 102, 81 S.E. 2d 200.

The petition alleges that petitioners and defendants are the owners of a tract of land there described which, it is alleged, was surveyed by A. Cheney in July 1926. Following the description of the property alleged to be owned by petitioners and defendants is this allegation: "That the ownership of the defendants in said tract of land is subject to numerous conveyances they have made from the above bounds, as petitioners are informed and believe, and also to final determination of the number and identity of the heirs at law of the late Dempsey Williams, as to some of whom there seems to be some controversy and from two of whose heirs at law (as alleged, John Williams and Jane Williams Cummings) the late G. S. Gray obtained a conveyance reciting that the interest conveyed was 2/96 of the whole tract." It is

then averred: "Subject to conditions stated in the foregoing section of this petition . . ." Then follows an averment that defendants own 31/48 of the land, petitioners K. C. Sidbury and wife own 77/256, Mary S. Skipper, 11/256, Winston Williams and others, the heirs at law of the late E. B. Williams, 1/96 of the land.

The petition on its face presents serious questions with respect to the power of the court to enter a decree directing partition. The petition should describe the land owned by petitioners and defendants as tenants in common. Here by express language the petition negatives the idea that defendants were at the time of the filing of the petition cotenants of all the land as to which partition was sought. What area petitioner asserts defendants presently own an interest in as cotenants is left in the realm of speculation. Not only should the petition adequately describe the very land with respect to which cotenancy exists, but it should affirmatively appear that all parties who claim an undivided interest in the property are properly before the court before it proceeds to direct partition. *Alsbrook v. Reid,* 89 N.C. 151; *Ledbetter v. Gash,* 30 N.C. 462; *Richardson v. Barnes,* 238 N.C. 398, 77 S.E. 2d 925; *Lockleair v. Martin,* 245 N.C. 378, 96 S.E. 2d 24; 68 C.J.S. 140, 145, 146; 40 Am. Jur. 52.

Defendants did not elect to challenge by appropriate motions the sufficiency of the petition. They answered and denied that petitioners owned any interest in the land described. The answer had the effect of converting a special proceeding for partition into a civil action to try title. *Murphy v. Smith,* 235 N.C. 455, 70 S.E. 2d 697; *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554.

The burden is on petitioners to establish that they own some interest in the land which entitles them to the present right to possession. They do not have to establish that they are the owners of the exact interest claimed in their pleading. If the evidence is sufficient to permit a jury to find that petitioners in fact own some share, they are entitled to have the issue of ownership submitted to the jury.

Petitioners here elected to establish their title and right to possession by the sixth method enumerated in *Mobley v. Griffin,* 104 N.C. 112, that is, by tracing their title and defendants' title to a common source. Petitioners, to succeed, must establish not only that the parties trace their titles to the same person but trace title to the same land to the same person. The trial court, when plaintiffs rested, was of the opinion that the evidence was insufficient to be submitted to the jury and therefore sustained defendants' motion to nonsuit. We are now called upon to answer the same questions stated in the opinions rendered on appeal in the prior proceeding, but the answers now given must be in the light of the evidence appearing in the present record.

The land in controversy is situate on the Atlantic Ocean, having, according to petitioners' contention, a frontage on the ocean of approximately 9800 feet. It is situate between the ocean and Stump Sound. It is, petitioners contend, the land originally owned by M. L. F. Redd, who on 19 March 1870, by deed recorded Book 31, p. 9, conveyed an undivided one-half interest therein to Elijah Williams. Petitioners assert (1) they are the heirs of Elijah Williams and acquired an undivided interest by descent, and (2) they have purchased additional undivided interests from other heirs of Elijah Williams. Thus they say they have traced their title to M. L. F. Redd. They assert that certain of the heirs of Elijah Williams conveyed to G. S. Gray and that defendants purchased the Gray title. They assert that the only heir of M. L. F. Redd conveyed to Gray and that defendants acquired this interest from Gray. Thus they assert that they have established their title tracing back to Elijah Williams and his grantor, M. L. F. Redd, and have shown defendants' title, which they likewise trace back to their ancestor, Elijah Williams and also to Elijah Williams' ancestor, M. L. F. Redd. The evidence must establish both the descent and identity of property. If either fails, the nonsuit was correctly entered.

Reviewing the evidence to find the answer to each question, we deal first with the question of descent.

Petitioners offered parol evidence to the effect that Mary S. Skipper and K. C. Sidbury were descendants of Henrietta Sidbury, who prior to marriage was Henrietta Williams. Henrietta Williams was a sister of Elijah Williams.

Winston Williams is a grandson of Dempsey Williams. Dempsey Williams was a descendant of John Williams. John Williams and Jane Williams Cummings are children of Dempsey Williams and grandchildren of John Williams. There is no parol evidence tending to establish the relationship of John Williams to Elijah Williams. The parol evidence enumerates all of the descendants of Henrietta Sidbury. All except Mrs. Skipper have conveyed what they assert is the land in controversy to K. C. Sidbury. He has conveyed to his wife, Charity Sidbury.

The parol evidence is sufficient to establish that Mary S. Skipper and K. C. Sidbury and his grantors are collateral relations of Elijah Williams, but that fact does not suffice to show that they inherited the property of Elijah Williams. Real property passes to collateral relations only in the absence of lineal descendants. G.S. 29-1, Rules 1, 3, and 5. Death being established, there is a presumption of law that the deceased died intestate. *Barham v. Holland,* 178 N.C. 104, 100 S.E. 186, cited with approval in *Skipper v. Yow,* 240 N.C. 102, 81 S.E. 2d 200. There is, however, no presumption as to how the in-

heritance is cast. Did he leave descendants? That is a question which must be established by proof. *Murphy v. Smith, supra; Trust Co. v. Deal,* 227 N.C. 691, 44 S.E. 2d 73.

Petitioners, to establish inheritance by the brothers and sisters, rely on recitals contained in a deed which they offered in evidence. This deed, made by descendants of Henrietta Sidbury, a sister of Elijah Williams, to petitioner K. C. Sidbury conveys grantors' interest in land which is asserted to be the land now in controversy. The deed is dated 12 July 1926. It recites: "That, whereas, the late Elijah Williams died in Onslow County on or about the .... day of ....., 1876, intestate and seized of a certain undivided interest in the tract of Beach and Marsh land hereinafter described, as by reference to deed from M. L. F. Redd to Elijah Williams, recorded in Book 30, page 9, of the registry of deeds for Onslow County, will more fully appear; and, wereas, the said Elijah Williams was unmarried and his interest in said land hereinafter described descended to his next of kin, to wit, Kitty Ennett, wife of John S. Ennett; Henrietta Sidbury, wife of the late Richard W. Sidbury; John Williams and Ben Williams, sisters and brothers respectively, of said Elijah Williams . . ."

Are the recitals in this deed competent as evidence which a jury could accept as establishing the fact that Elijah Williams had no descendants but did have brothers and sisters who survived him? If so, petitioners have made a *prima facie* showing of inheritance to some interest in the land which Redd conveyed to their ancestor in 1870. Attention was directed to this question, but it was left unanswered in *Skipper v. Yow,* 240 N.C. 102, 81 S.E. 2d 200. Attention was then pointly directed to the fact that a material difference exists between recitals in an ancient document and recitals in an instrument which fails to meet the qualifications requisite to classify it as an ancient document.

We reach the conclusion that the recitals here in question are competent evidence. It has been established by parol evidence that the persons who made the declarations are the nephews, nieces, and great-nephews of the person with whom the relationship is asserted. They were qualified to speak with respect to family history. *Ashe v. Pettiford,* 177 N.C. 132, 98 S.E. 304. It affirmatively appears that at least some of those who spoke through the recitals are dead. It is not suggested that any controversy existed at the time they spoke with respect to the facts which entitled them to inherit from their uncle Elijah. The instrument containing the statement, was, when offered as evidence, more than thirty years old. No suggestion is made that the instrument is spurious or has been altered in any respect. It meets the test of an ancient document.

Our conclusion is supported by well-considered opinions elsewhere.

In *Rollins v. Atlantic City R.R.*, 62 A 929, the recitals under consideration were in deeds and read: "She being the issue and heir at law of George Ashebridge"; and "Sarah Hastings is a widow and that she was formerly Sarah Richards, and the sister of Mary Ball who was the mother of Joseph Ball, deceased." The Supreme Court of New Jersey, after reviewing the authorities, reached the conclusion that the recitals in the deeds, ancient documents, were competent and sufficient to justify a finding in accordance with the facts recited. *Moses v. Chapman*, 280 S.W. 911, held competent and sufficient this language in a power of attorney: ". . . for me and in my name and place and stead, as the father and sole heir of George Dyer, deceased, late a soldier in the Texas revolution . . ." Similar conclusions have been reached in *Fielder v. Pemberton*, 189 S.W. 873; *Sun Pipe Line Co. v. Wood*, 129 S.W. 2d 704; *Neustadt v. Coline Oil Co.*, 284 P 52; *Kirkpatrick v. Tapo Oil Co.*, 301 P 2d 274. See also annotations 6 A.L.R. 1437; Jones Commentaries on Evidence, 2d ed., 2057 and 2058; 32 C.J.S. 662 and 689; 20 Am. Jur. 794.

Petitioners offered in evidence a deed from John Williams and Jane Williams Cummings to G. S. Gray. This deed dated 17 July 1926, like the deed from Sidbury to Sidbury referred to above, recites that Elijah Williams died in 1876, intestate, "and seized of a certain undivided interest in the tract of Beach and Marsh land hereinafter described, as by reference to deed from M. L. F. Redd to Elijah Williams, recorded in Book 31, page 9, of the registry of deeds for Onslow County . . ." It also recites that Elijah Williams was unmarried, that his interest descended to his next of kin, that the grantors were children and heirs at law of Dempsey Williams, and that Dempsey Williams was one of four children of John Williams. The description in this deed is identical with the description in the deed from Sidbury to Sidbury. This deed from Williams and Cummings to Gray was offered by petitioners as a link in defendants' title.

Further to trace title by defendants' to a common source, petitioners offered a deed from Hill E. King and wife, Susan, to G. S. Gray. This deed is dated 28 June 1926. The description set out in that deed is not verbatim the same as in the deed from Williams and Cummings to Gray and the deed from Sidbury to Sidbury, petitioners, but petitioners assert that in fact the description covers the identical land. That deed recites ". . . the share herein released and conveyed being the undivided share of said Susan R. King in said lands as the daughter and only heir of M. L. F. Redd, deceased." Petitioners offered the will of G. S. Gray, probated in 1931, which appointed R. N. Summersill as executor and as trustee and authorized and empowered the executor and trustee to sell and convey any of testator's real estate in the executor's discretion; and a deed from Summersill as trustee,

acting pursuant to the authority given, to defendant E. L. Yow. This deed, dated July 1946, conveys a tract of land described by course and distance which adjoins the Atlantic Ocean and which is recited as "containing 356 acres more or less and being substantially the same land as was conveyed to G. S. Gray by Hill E. King and Susan R. King . . ."

Petitioners offered in evidence deeds to them from other parties who, according to the evidence, were heirs at law of Elijah Williams. We perceive no evidence in the record tending to locate the land described in these other deeds. They are not material to a determination of the appeal.

Petitioners were entitled to have an appropriate issue submitted to the jury if, in addition to the evidence recapitulated above, the evidence is sufficient for a jury to find that the land described in the petition for partition and hence the subject of the controversy is within the boundaries set out in the deeds put in evidence.

We consider now the evidence offered to establish the fact of identity. Notwithstanding the recital of identity of lands, the descriptions used in the deed from Sidbury to Sidbury and in the deed from Williams and Cummings to Gray, which are identical, do differ from the description used in the deed from Redd to Elijah Williams, recorded in Book 31, page 9. The beginning point in the latter deed is at the mouth of Muddy Creek. The next call in that deed goes to the sea. There is no call in that deed for Swash Creek. The other deeds begin at the sea. They do not refer to Muddy Creek but call for Swash Creek as a boundary.

Notwithstanding the difference in beginning points and other descriptive language, the differing language may in fact fit the same body of land.

If the grantors Sidbury, Williams, and Cummings, intended to convey the identical land described in the deed from Redd to Williams and that fact is apparent upon an examination of the deeds, effect will be given to that intent. *Franklin v. Faulkner*, 248 N.C. 656; *Benton v. Lumber Co.*, 195 N.C. 363, 142 S.E. 229; *Quelch v. Futch*, 172 N.C. 316, 90 S.E. 259; *Gudger v. White*, 141 N.C. 507.

Petitioners did not, however, rest their case on the recitals in the deeds to establish the identity of the land conveyed by these deeds. Meriwether Lewis, a registered surveyor with more than thirty years' experience, testified without objection (1) that the land described in the deeds from Sidbury to Sidbury, from Williams and Cummings to Gray, and from King to Gray were substantially the same tracts as described in the petition, and (2) the description in the deed from Redd to Williams and from Gray's executor and trustee to Yow covered all but a small portion at the north end of this land.

This testimony was before the jury without objection. Credibility only was challenged. We are not now called on to pass upon the competency of this witness to testify and identify the lands in the manner described by him. Where testimony sufficient if true to establish a fact at issue has been received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent. *Frazier v. Gas Co.*, 247 N.C. 256; *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14; *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919; *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316.

Since petitioners have offered evidence sufficient to justify a jury in finding that petitioners and defendants each traced title to the same source for differing fractional interest in the land in controversy, they were entitled to have an issue submitted to the jury to determine their asserted title and hence cotenancy. Petitioners' ownership of an undivided interest was not defeated by failure to show who the other cotenants were or to show the share owned by each cotenant.

To avoid repetitious litigation, attention is called to the fact that no judgment can be entered which will bind parties having an interest in the land in controversy who are not now before the court.

Reversed.

PARKER, J., not sitting.

STATE v. LESTER FRANCIS CALDWELL, JACK AYSCUE, DAVID DENNIS QUICK, WILLIAM OLIVER SPENCER, AND ARTHUR MONROE BROWN, JR.

(Filed 15 October, 1958.)

1. Criminal Law § 7—

While each case must be decided on its own facts, if a police officer or his agent, for the purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit except for the persuasion, encouragement, inducement and importunity of the officer or agent, the plea of entrapment is good; if the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense, such is not entrapment.

2. Conspiracy § 7—

Where the indictment charges the defendants named and "other person or persons to the State unknown," with conspiracy to commit a criminal act, an instruction requiring the jury to find that at least two of the defendants named conspired together in order to convict any of them, cannot be held for error, the instruction being favorable to defendants on this point.

3. Criminal Law § 7—

Where the agent of the police testifies that the idea of committing the unlawful act originated with defendants and that they freely accepted his assistance, with evidence for defendants in conflict therewith, the issue of entrapment is for the jury, and its verdict is conclusive thereon.

JOHNSON AND PARKER, JJ., not sitting.

APPEAL by Lester Francis Caldwell, William Oliver Spencer, and Arthur Monroe Brown from *Nettles, J.*, March 10, 1958 Criminal Term, MECKLENBURG Superior Court.

Criminal prosecutions upon two bills of indictment. The bill in No. 27985 charged that Lester Francis Caldwell, William Oliver Spencer, Arthur Monroe Brown, David Dennis Quick, and other person or persons to the State unknown, did unlawfully, wilfully, and feloniously combine, conspire, confederate and plan together to wilfully, maliciously and wantonly injure the Woodland School building by the use of dynamite and other high explosives, etc. The bill in No. 27990 charged that Lester Francis Caldwell and Jack Ayscue did unlawfully, wilfully, maliciously, wantonly, and feloniously injure and damage, and did attempt to injure and damage the Woodland School building by the use of dynamite and other high explosives, etc.

The State's principal witness was Robert Lee Kinley who testified that Caldwell, Spencer and Brown were members of the Klan. "I joined the Klan in January, 1958. I went to Caldwell's with Arthur Brown and they wrote it up out there at Caldwell's house . . . At the time of or prior to the time I signed up I had talked to Officer Ross of the City Police about the Klan, about joining it. As a result of the conversation with Officer Ross, I joined the Klan; it cost $9.00, which was paid by Chief Littlejohn of the Charlotte Police." Kinley testified that on February 5, he, Caldwell, Spencer, Brown, and two others made and burned a cross at the Woodland School in Mecklenburg County. "After the burning of the cross there was a conversation between me and the other defendants about the use of dynamite; Brown, Caldwell, Spencer, and Quick all wanted to ride back by the school and see what kind of activity they had out there and they wanted to go in another automobile, so we went in my car . . . We parked there in front of it and the subject of dynamite came up, about bombing the school. Caldwell first brought it up. I did not make any suggestion about dynamiting the school, but Caldwell, Brown, Quick, and Spencer wanted to throw it the following Wednesday night."

The witness testified as here quoted and summarized, that he, Caldwell, and Spencer went to Monroe in the witness's car to get dynamite. They were unsuccessful but the next day the witness and Caldwell went back to Monroe where the witness furnished the money

and Caldwell paid 75c for two sticks of dynamite. "On Saturday afternoon, February 15, I had notified the police we would take the dynamite to the school at this time. . . . After the dynamite was purchased in Monroe, I was with the dynamite until it was taken to the school. I couldn't afford to let it get out of my sight."

Caldwell, Jack Ayscue and the witness drove to the schoolhouse in the witness's car. The officers were waiting and immediately arrested Caldwell and Ayscue, and recovered the dynamite with fuse and cap attached.

Frank Littlejohn, Chief of Charlotte Police, testified for the State: . . . "Kinley told me plans had been made for using some explosive there on the night of February 12, . . . He said the Klan was unable to procure the dynamite for that occasion which was postponed 'until he could procure some dynamite' . . . I never did make him any promise of a reward for information concerning these defendants. . . .

"The first time I had a conversation with Kinley . . . was in the early part of February; . . . Kinley had at that time been to some of the Klan meetings but I don't think he had paid his dues. The $10 I gave was for the purpose of paying his initiation dues into the Klan; . . . I had several in the organization."

C. N. Ross of the Charlotte Police Department, testified: "It was at or about the time he (Kinley) joined the Klan that I did tell him that there was a reward of $1,000 for the arrest and conviction of persons in connection with the dynamiting here in Charlotte; that was before the cross burning which occurred February 5, . . . before the dynamite was taken by Kinley, Caldwell and Ayscue to the Woodland School."

The officers testified as to admissions by Caldwell and Spencer as to their purpose in using the dynamite at the school. The purpose was publicity in aid of the campaign for membership in the Klan.

Other evidence was introduced by the State which is not repeated here. Only the evidence bearing on the defendants' pleas of entrapment is recited.

In Case No. 27985 the jury returned a verdict of guilty against Caldwell, Spencer, and Brown, and not guilty as to Quick. In No. 27990 the jury returned as to Caldwell a verdict of guilty of "an attempt to unlawfully, wilfully and maliciously to injure and damage the Woodland School building with the use of dynamite." A verdict of not guilty was returned as to Ayscue. From the judgments pronounced on the verdicts, the defendants appealed.

Malcolm B. Seawell, Attorney General, Harry W. McGalliard, Ass't. Attorney General, for the State.

Marvin L. Ritch for defendant, Lester Francis Caldwell, appellant.

Henry E. Fisher for defendant, Arthur Monroe Brown, Jr., appellant.

Hugh McAuley for defendant, William Oliver Spencer, appellant.

Francis M. Fletcher, Jr., Of Counsel for defendants on appeal.

HIGGINS, J. The two cases are inseparably linked together. The substantive offense is but part and parcel of the conspiracy. The appellants, for their defenses, rely upon their pleas of entrapment. The courts generally hold that a verdict of not guilty should be returned if an officer or his agent, for the purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit but for the persuasion, encouragement, inducement, and importunity of the officer or agent. If the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense, such is not entrapment. The courts do not attempt to draw a definite line of demarcation between what is and what is not entrapment. Each case must be decided on its own facts. This Court, in two recent cases, has stated the rule as it prevails in this jurisdiction: *State v. Jackson,* 243 N.C. 216, 90 S.E. 2d 507; *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191. See also, *State v. Kilgore,* 246 NC. 455, 98 S.E. 2d 346; *State v. Wallace,* 246 N.C. 445, 98 S.E. 2d 473; *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476; *State v. Nelson,* 232 N.C. 602, 61 S.E. 2d 626; *State v. Love,* 229 N.C. 99, 47 S.E. 2d 712; *State v Godwin,* 227 N.C. 449, 42 S.E. 2d 617.

Appellants contend that if this Court should hold the evidence of entrapment was not sufficient to entitle them to a directed verdict of not guilty, at least they should be given a new trial for errors committed in the court's charge. Particularly, the defendants object to the following: ". . . or you may return a verdict of guilty as to any two of them in the conspiracy case, and not guilty as to the rest, or you may convict all four of them, or you may return a verdict of not guilty as to all four . . ." Preceding the foregoing as a part of the same sentence, the judge had instructed the jury they might return a verdict of guilty of conspiracy as to Brown, Quick, Spencer, and Caldwell, or "you may return a verdict of not guilty . . ." Directly following the part of the charge to which objection was made, also in the same sentence, the court said: ". . . remembering that the burden is upon the State to satisfy you from the evidence in this case, and beyond a reasonable doubt as to the guilt . . ." Actually the purport of the charge was more favorable than defendants were entitled to. In this respect it must be remembered that not only the four men named were indicted for conspiracy with each other, but also with "other person or persons to the State unknown."

There was evidence Ayscue, a fellow named Myers . . . "two other

fellows" attended a meeting, or at least were on hand on one occasion. There was evidence a man in Monroe gave instructions where the dynamite could be procured after Caldwell told him he wanted to bomb the Woodland School. Under the bill any one of the four named could be convicted if he conspired with Ayscue or Myers or the man in Monroe or the "two other fellows," or any one of them. *State v. Wynne,* 246 N.C. 686, 99 S.E. 2d 923. Instead, the court required the State to prove a defendant on trial must have conspired with at least one of the others on trial. The jury acquitted Quick and convicted the other three. There is no indication that the jury misunderstood or drew any unwarranted conclusions from the judge's charge.

Not only in the challenged part, but otherwise, the charge met all legal requirements. The court reviewed the evidence in detail, stated the defendants' contentions fully, and applied the law to the evidence in the case. Especially with reference to the law of entrapment, the instructions were carefully and accurately stated. Taken as a whole, as it must be, the charge contains nothing of which the defendants, or either of them, may justly complain.

The evidence in this case does not disclose a wholesome picture. Neither law nor public conscience will tolerate the use of dynamite as a means of settling racial or other disputes. And while the officers of the law are not infrequently hard put to it to ferret out crime, at the same time it is to be regretted that the police department, through its agent, took such an active part in the events which culminated in the arrest at the Woodland School. The agent, in his own car, made two trips from Charlotte to Monroe for the dynamite which was paid for from the money left after paying "initiation" dues. It was fashioned into a bomb—the agent assisted—and carried to the school in his car. This, after he was told by a police officer, "there was a reward of $1,000 for the arrest and conviction in connection with dynamiting here in Charlotte." The conspiracy here involved originated after the agent was told of the reward. It may be he was directing part of his efforts toward the discovery of past bombings. It may be, however, the crimes here charged were an outgrowth of a larger plan which the agent, by virtue of his membership in the organization, had opportunity to see develop. Anyway, the jury has accepted the view the plan to bomb the school originated with the defendants and that they freely accepted the assistance of Kinley. The issues were of fact. The jury's findings are conclusive. In law there is

No Error.

JOHNSON AND PARKER J.J., not sitting.

EVANGELINE KOUTRO HICKS v. LOTTIE M. KOUTRO, INDIVIDUALLY, AND LOTTIE M. KOUTRO, ADMINISTRATRIX C.T.A. OF THE WILL OF VAN P. KOUTRO, AND AGAMEMNON KOUTRO.

(Filed 15 October, 1958.)

1. Appeal and Error § 35—

Where the judgment recites that the parties waived a jury trial, such recital is conclusive on the Supreme Court, and an exception to trial by the court on the ground that appellants had not waived trial by jury cannot be sustained.

2. Appeal and Error § 39—

Where there is nothing in the record to show that the judgment was entered out of term, the presumption of regularity prevails, and an exception on the ground that the judgment was entered out of term and in chambers cannot be sustained.

3. Trial §§ 36, 53—

The court should not enter a fragmentary judgment settling part of the case and leave part of the issues to be settled at a later date or in another action, even though the parties consent thereto, since it is the duty of the court to dispose of all issues raised by the pleadings in the one action, the courts and the public having an interest in the finality of litigation.

4. Wills § 44—

Whether a beneficiary is put to an election under the will is controlled by the intent of the testator, and while this intent must be gathered from the will, the value of the respective properties devised or bequeathed to the beneficiary and the value of the properties of the beneficiary disposed of by the will, are attendant circumstances which well may be material on the question of intent.

5. Same—

A holding by the court that the doctrine of election is not applicable to the will in question without any findings as to the value of the respective properties and without attempting to determine the testator's intent, is error, and on appeal the cause must be remanded for another hearing.

PARKER, J., not sitting.

APPEAL *in forma pauperis* by the plaintiff from judgment entered on July 25, 1958 by *Froneberger, J.*

Civil action in which the plaintiff alleged: (1) Van P. Koutro died on January 4, 1956, leaving a will in which the Citizens National Bank of Gastonia was named executor. (2) The bank refused to qualify and the defendant, Lottie M. Koutro, widow, qualified as administratrix C.T.A. (3) The administratrix C.T.A. has refused to file inventories and a final account; has converted funds of the estate to her personal use; has permitted the defendant, Agamemnon Koutro, to

use funds belonging to the estate; has failed and refused to collect assets of the estate; has given to Agamemnon Koutro certain diamond and sapphire jewelry belonging to the estate. (4) The testator bequeathed personal property, including stocks and bonds and jewelry, to be equally divided—one-third to the plaintiff and one-third to each of the defendants. (5) The testator devised the following real estate to Lottie M. Koutro in fee: One apartment house and lot on East Second Street; one house and lot on Eighth Avenue; one building and lot on East Airline Avenue; and one house and lot on West Airline Avenue. The testator devised to Agamemnon Koutro one building and lot on East Chestnut Street and one building and lot on North Falls Street. To the plaintiff, the testator devised one house and lot on South Willow Street. The foregoing properties he owned in fee. He also devised an apartment house and lot on North Marietta Street and a vested remainder in a house and lot on West Walnut Street to the plaintiff after a life estate to the widow, Lottie M. Koutro. The last two described properties—on Marietta Street and Walnut Street—the testator and his wife, Lottie M. Koutro, held as estates by the entireties. (6) By qualifying as Administratrix C.T.A. and by taking under the will, and by placing encumbrances on certain property belonging to the estate, Lottie M. Koutro elected to be bound by the will, and by accepting benefits under it she must give up her own property which the testator devised to the plaintiff; and that the plaintiff is the owner of the property and interest therein devised to her.

The foregoing is a summary of the presently material allegations in the plaintiff's complaint to which she attached a copy of the will. The plaintiff asked (1) for an accounting and distribution of assets; (2) for the delivery of the rings and jewelry by Agamemnon Koutro to the co-defendant Administratrix C.T.A.; (3) for the appointment of a receiver to collect the rents from the property belonging to the estate; and (4) for the construction of the will to determine whether Lottie M. Koutro had made an election to take under it.

The defendants filed a joint answer in which they denied all allegations summarized under (3) above. They allege the jewelry described therein was given to the defendant, Agamemnon Koutro, prior to the death of the testator. They allege also that Lottie M. Koutro was not required to make an election, and that the devise to the plaintiff by Van P. Koutro of the properties held by entireties be declared void, and that Lottie M. Koutro be declared the owner in fee.

On July 25, 1958, the resident judge of the district entered judgment in part as follows:

"This cause, coming on to be heard, and being heard before the Honorable P. C. Froneberger, Resident Judge of the Twenty-Seventh Judicial District, by consent of the parties and their counsel and

it appearing to the Court that the parties have waived trial by a jury and have agreed that the Last Will and Testament of the late Van P. Koutro shall be submitted to the undersigned to determine whether or not the plaintiff is the owner of a house and lot located at 307 North Marietta Street in the City of Gastonia, North Carolina, and whether or not the plaintiff has a remainderman's interest in the house and lot situated at 818 West Walnut Street in the City of Gastonia, North Carolina pursuant to the terms of the Last Will and Testament of said Van P. Koutro; and it further appearing to the Court that the parties, through their counsel, have agreed that all matters arising on the pleadings relative to the administration of the estate and the ownership of certain jewelry shall not be considered by the Court but will be determined in a subsequent action brought by the plaintiff in the event such action becomes necessary; and it further appearing to the Court that the parties have agreed that 'Exhibit A' of the plaintiff's Complaint is a copy of the Last Will and Testament of Van P. Koutro and that at the time of his death Van P. Koutro was the owner in fee simple of the following real estate"; . . . (Here follows descriptions substantially as alleged in the complaint.)

". . . Van P. Koutro and wife, Lottie M. Koutro own the following property as tenants by the entirety: House and lot on West Walnut Street; house and lot on Marietta Street . . .

"The Court having considered the foregoing agreed facts, admissions in the pleadings and argument of counsel, concludes that the doctrine of election is not applicable to this case," and that Lottie M. Koutro is the owner in fee of both properties held by the entireties.

The plaintiff excepted to the judgment on the following grounds:

"1. The Court had no authority to enter said Judgment since issues of fact arose on the pleadings and plaintiff had not consented to a waiver of jury trial.

"2. The Court had no authority to entertain said cause or enter said Judgment out of term time and in chambers since plaintiff had not consented to a waiver of jury trial.

"3. The Court erred in entering the Judgment as appears of record in that said Judgment is fragmentary and does not dispose of issues raised on the pleadings.

"4. The Court failed to find any facts in said Judgment.

***

"6. The Court failed to find as a fact that the defendant, Lottie M. Koutro qualified as Administratrix C.T.A. under the Will of Van P. Koutro.

"7. The Court failed to find as a fact that the defendant, Lottie

M. Koutro had claimed certain property namely the property on Oakland Avenue and Second Avenue and the property known as 146 West Airline Avenue as her own individual property and that she had executed a Deed of Trust on said property reciting in said Deed of Trust that said property was devised to her by Van. P. Koutro."

8. The Court failed to conclude as a matter of law that Lottie M. Koutro had elected to take under the will and was estopped to assert title to the property devised to the plaintiff.

The plaintiff excepted and appealed.

Bell, Bradley, Gebhardt, and Delaney, By Ernest S. DeLaney, Jr., for plaintiff, appellant.

L. B. Hollowell, Hugh W. Johnston for defendant, appellees.

HIGGINS, J. The judgment recites the parties waived a jury trial. The Court is bound by the recital. Exception No. 1 is not sustained. There is nothing in the case to show the judgment was entered out of term. The presumption of regularity prevails. Exception No. 2 is not sustained.

The question raised by the plaintiff's Exception No. 3 presents real difficulty. The pleadings raise issues of fact as to whether the Administratrix C.T.A. has mismanaged the estate and whether a receiver should be appointed on that account. Can the court, by consent, enter a fragmentary judgment settling a part of the case and leave part of the issues to be settled at a later date or in another action? A judgment is conclusive as to all issues raised by the pleadings. When issues are presented it is the duty of the court to dispose of them. Parties, even by agreement, cannot try issues piecemeal. The courts and the public are interested in the finality of litigation. This idea is expressed in the Latin maxim *interest reipublicae ut sit finis litium*, that there should be an end of litigation for the repose of society. *Horne v. Edwards*, 215 N.C. 622, 3 S.E. 2d 1. "The law requires a lawsuit to be tried as a whole and not as fractions. Moreover, it contemplates the entry of a single judgment which will completely and finally determine all the rights of the parties." *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384. "A party should be required to present his whole cause of action at one time in the forum in which the litigation has been duly constituted." *Jenkins v. Jenkins*, 225 N.C. 681, 36 S.E. 2d 233; *Jefferson v. Sales Corp.*, 220 N.C. 76, 16 S.E. 2d 462. "Appellate procedure is designed to eliminate the unnecessary delay and expense of re-repeated fragmentary appeals, and to present the whole case for determination in a single appeal from a final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669.

The judgment here involved shows the court passed on only one of

the issues and leaves others to be determined at another time or "in a subsequent action brought by the plaintiff in the event such action becomes necessary."

The court, in the judgment, "concludes that the doctrine of election is not applicable in this case." The court makes no findings of fact upon which the question of election may be determined. It appears from the will that the testator had acquired considerable property. By admission of the parties he devised four separate parcels with improvements to his wife, Lottie M. Koutro, in fee. He devised two parcels of land to his son, Agamemnon Koutro. He devised one lot and improvements to his granddaughter, the plaintiff. All the foregoing he owned in fee. Another lot and improvements he devised to the plaintiff in fee. Still another lot with improvements he devised to the defendant, his wife, for life with remainder to the plaintiff. The two properties last described were held by the testator and his wife as tenants by the entireties. We know nothing of the value of the four tracts the testator devised to his wife. We know nothing of the value of the properties she acquired by survivorship. These unfound facts would be important on the question of election. The court should find what the defendant administratrix C.T.A. has done in carrying out the provisions of the will, and especially what she, as devisee, has done with respect to the properties devised to her in fee. The question whether Lottie M. Koutro was put to an election is controlled by the intent of the testator. This intent must be gathered from the will, but the value of the properties conveyed at the time the will was made are attendant circumstances which well may be material on the question of intent. *Trust Co. v. Wolfe,* 245 N.C. 535, 96 S.E. 2d 690. The court, in the judgment, does not attempt to determine the testator's intent, but holds that the doctrine of election is not applicable.

For the reasons here indicated, the judgment of the superior court is set aside and the case is remanded to the Superior Court of Gaston County for another hearing.

Reversed and Remanded.

PARKER, J., not sitting.

WILLIE WASHINGTON, BY HENRY WASHINGTON, HIS NEXT FRIEND v. WILLIE DAVIS, JR.

(Filed 15 October, 1958.)

1. Automobiles § 84—

It is the duty of a motorist in regard to a child on or near the traveled portion of a street to use proper care with respect to speed and control

of his vehicle, maintain a vigilant lookout and give timely warning to avoid injury, G.S. 20-174(e), recognizing the likelihood of the child's running across the street in obedience to childish impulses, and the duty of the motorist in this respect applies not only to a child whom the motorist sees but also to a child whom a motorist should have seen in the exercise of reasonable vigilance, since he is charged with seeing what he could and should have seen.

2. Same—

The fact that a child attempts to cross a street elsewhere than at a recognized crosswalk does not relieve a motorist of his duty to exercise proper care under the circumstances to avoid injuring the child, and it is error for the court to charge the jury that the motorist would be under no affirmative duty to yield the right of way to the child if the child was crossing or attempting to cross at a place not a recognized crosswalk.

3. Trial § 31b—

It is the duty of the court to charge upon a substantive and essential feature of the case arising on the evidence, even in the absence of request for special instructions. G.S. 1-180.

4. Automobiles § 46—

Error in an instruction to the effect that a motorist would not be under affirmative duty to yield the right of way to a child if the place where the child was crossing or attempting to cross the street was not a recognized crosswalk, *held* not cured by a subsequent charge that, notwithstanding the law with regard to right of way, the motorist would be under duty to exercise proper precaution upon observing any child to avoid injuring him, since such duty obtains not only to a child whom the motorist saw, but also to a child whom the motorist could and should have seen in the exercise of due care.

JOHNSON AND PARKER, JJ., not sitting.

APPEAL by plaintiff from *Craven, Special Judge,* May 19 Civil Term, 1958, of MECKLENBURG.

Personal injury action.

On October 21, 1956, about 12:40 p.m. on Seaboard Street, at or near its intersection with Maxwell Street, in the City of Charlotte, an automobile operated by defendant collided with plaintiff, a four year old boy.

Seaboard Street, a narrow paved street running east-west, is the top of a "T" intersection, being the south terminus of Maxwell Street. An embankment and railroad tracks are situated to the south of Seaboard Street.

Plaintiff lived with his parents in an apartment house fronting on Seaboard Street, located at the northeast corner of said intersection. It was stipulated that this was a residential district. G.S. 20-141(b)2.

George Elliott's automobile was parked on the south side of Seaboard Street, headed east, across Seaboard Street from said apartment

house. Defendant was operating his car, headed west, along Seaboard Street.

Plaintiff alleged: As plaintiff attempted to cross from the north side to the south side of Seaboard Street, he was struck and injured by defendant's car; and the negligence of defendant proximately caused plaintiff's injuries.

Defendant alleged: As defendant proceeded lawfully, west, along Seaboard Street, plaintiff, who was completely concealed behind the Elliott car, ran from this position, in a northerly direction, into the left front fender of defendant's car, an event which defendant could not reasonably foresee or avoid.

Issues of negligence and of damages were submitted. The jury having answered the negligence issue, "No," judgment was entered in favor of defendant. Plaintiffff excepted and appealed, assigning errors relating solely to the court's charge to the jury.

Bell, Bradley, Gebhardt & DeLaney for plaintiff, appellant.
John H. Small for defendant, appellee.

BOBBITT, J. Plaintiff's evidence tends to show that he was injured under these circumstances: On October 21, 1956, plaintiff was with Mrs. Streeter and her two daughters in the Streeter apartment, located in the apartment house at the northeast corner of Seaboard and Maxwell Streets. Mrs. Streeter, with her daughters and plaintiff, were going to ride with Elliott. Leaving her apartment, Mrs. Streeter crossed Seaboard Street with her eight year old daughter. Then her nine year old daughter crossed safely. Plaintiff, about ten feet behind the nine year old girl, attempted to cross. He came south, off of the (east) side of Maxwell Street nearest the Streeter apartment, towards the Elliott car. Plaintiff had "almost crossed" in front of defendant's car when struck by its left front fender. The impact occurred "about the center of Seaboard Street, and just a slight bit west of the northern projection of Maxwell." Defendant's speed was 45-50 miles per hour.

It is noted that defendant's evidence tends to show an entirely different factual situation.

Plaintiff assigns as error:

1. The court's failure to instruct the jury "with respect to the duty imposed by law upon a motorist to avoid injuring children whom he may see, or by the exercise of reasonable care should see, on or near the highway."

2. This excerpt from the charge, viz,: "If, however, you find that the child was not within a crosswalk, but instead the child was crossing in the middle of the intersection or was crossing at some other place there that was not a recognized crosswalk where people crossed,

or if you find that the particular place where he was crossing, wherever you find it to be, was not a crosswalk and was not used by people as a crosswalk at an intersection, *then* as a necessary corollary of this principle of law *I charge you that the defendant motorist would have been under no affirmative duty to yield the right of way to the said child.*" (Our italics)

Immediately following the challenged excerpt, the court gave this further instruction: "Notwithstanding what the law may be with regard to right of way, I charge you that it was the duty of this defendant motorist to exercise due care to avoid colliding with any pedestrian upon the roadway and also his duty to give warning by sounding the horn when he knew, or should have known in the exercise of ordinary due care, that it was necessary for him to do so. And also I charge you it was his duty to exercise proper precaution, that is to say ordinary due care, *upon observing any child upon the street, if he did observe the child upon the street,* so as to avoid injury to the said child." (Our italics)

Since plaintiff, as a matter of law, was incapable of contributory negligence, *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124, we are concerned only with (1) defendant's legal duty and (2) his alleged failure to exercise due care in the performance thereof. *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898.

"It has been frequently declared by this Court to be the duty of one driving a motor vehicle on a public street who sees, or by the exercise of due care should see, a child on the traveled portion of the street or apparently intending to cross, to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning, to avoid injury, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection." Devin, J., (later C. J.), in *Sparks v. Willis,* 228 N.C. 25, 28, 44 S.E. 2d 343.

"A motorist must recognize that children have less judgment and capacity to appreciate and avoid danger than adults, and that children are entitled to a care in proportion to their incapacity to foresee, to appreciate and to avoid peril." Parker, J., in *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706, citing *Sparks v. Willis, supra,* and other prior decisions.

If in fact plaintiff attempted to cross Seaboard Street elsewhere than in a legal or recognized crosswalk, such fact would not relieve defendant of his legal duty under the rule of law stated above.

There was evidence which, if accepted by the jury, was sufficient to support a finding that defendant, by the exercise of due care, could and should have seen plaintiff as he attempted to cross from the north

to the south side of Seaboard Street. This was a substantive and essential feature arising on the evidence, G.S. 1-180; and plaintiff was entitled, without special request therefor, to an instruction applying the rule of law stated in *Sparks v. Willis, supra,* and in other cases, in respect of defendant's legal duty under such circumstances. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331. We find nothing in the charge deemed sufficient to give plaintiff the benefit of this rule of law.

The court was in error in instructing the jury that defendant "would have been under no affirmative duty to yield the right of way to the said child" if the place where plaintiff was crossing or attempting to cross was not a legal or recognized crosswalk.

G.S. 20-174(e) provides: "Notwithstanding the provisions of this section, *every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway,* and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway." (Our italics)

The duty to exercise due care to avoid colliding with any pedestrian upon any roadway clearly embraces the duty to see what the motorist reasonably could and should have seen; and the further provisions, to wit, that the motorist give warning by sounding a horn when necessary and that he exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway, must be held to relate to what the motorist reasonably could and should have seen as well as to what he actually saw. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323.

The error in the challenged excerpt cannot be deemed cured by the instruction given immediately therafter; for that instruction was to the effect that it was defendant's duty to exercise proper precaution so as to avoid injury to the child *if and when* he actually observed the child upon the street.

G.S. 20-174(e), as well as the rule of law stated in *Sparks v. Willis, supra,* and other cases, imposed upon defendant the legal duty to exercise proper precaution to avoid injury to the child if by the exercise of reasonable care he could and should have observed the child upon the street.

As to the rule in respect of sudden emergency, see *Brunson v. Gainey,* 245 N.C. 152, 95 S.E. 2d 514, and cases cited.

For the errors assigned, which we hold well taken, a new trial is awarded.

New trial.

JOHNSON AND PARKER, JJ., not sitting.

JOSEPH A. ABERNETHY, J. GLENN ABERNETHY, AND HAL T. ABERNETHY, PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF ABERNETHY LUMBER COMPANY v. KENNETH G. NICHOLS AND MARY S. NICHOLS.

(Filed 15 October, 1958.)

Judgments § 27a—

Findings, supported by evidence, to the effect that in an action against husband and wife arising out of business dealings between plaintiffs and the husband, the wife relied upon the husband's assurance that he would handle the matter, and that the wife has a meritorious defense to the action against her, *are held* sufficient to support the court's order setting aside the judgment against her for suprise and excusable neglect under G.S. 1-220 upon her motion made within one year of the rendition of judgment.

JOHNSON AND PARKER, JJ., not sitting.

APPEAL by plaintiff appellants from *Craven, S. J.*, at April 7, 1958 Special Term of MECKLENBURG.

Civil action to recover for materials furnished by plaintiffs to defendants for the erection of a dwelling on lands of defendants and to enforce lien therefor, heard upon motion of feme defendant to set aside as to her judgment by default.

The record shows order of Craven, J., as follows:

"This cause coming on to be heard and being heard before the Honorable J. B. Craven, Jr., Judge presiding at the April 7, 1958 Special Civil Term of the Superior Court of Mecklenburg County, and being heard upon the motion of the defendant, Mary S. Nichols, that the default judgment heretofore entered in this cause against her be set aside as to her for the reason that the said judgment was entered against said defendant as the result of her mistake, surprise and excusable neglect and that the said defendant has a meritorious defense to this action;

"And the court, based upon affidavits herein filed and upon oral argument by counsel for both sides, finds the following to be the facts:

"1. That summons was issued in this action on March 5, 1957, and service of same and a copy of the complaint was had on the defendant Mary S. Nichols on March 14, 1957.

"2. That a default judgment was entered against both defendants on April 15, 1957, which judgment on its face perfects a lein in said amount against that property described as being all of Lot 1 in Block 4 of Hobb Hills as shown on map recorded in Map Book 6, page 5, of the Mecklenburg Public Registry, which judgment is recorded in the civil minute book 88, page 98, and is docketed in judgment Book 21, page 27, all in said registry.

"3. That upon being served with process, as described in paragraph

1 above, the defendant Mary S. Nichols inquired of the other defendant, her husband, Kenneth G. Nichols, as to why and for what reason she had been sued; that the other defendant, her husband, Kenneth G. Nichols, advised her to give the legal papers to him and he would relieve her of responsibility in the matter; that Mrs. Nichols complied with her husband's request and dismissed the matter from her mind; that Mrs. Nichols was advised, some months later, that a default judgment had been obtained against her.

"4. That the debt out of which this cause of action arose was incurred in the course of business dealings between the plaintiffs and the other defendant, Kenneth G. Nichols; that Mrs. Nichols did not enter into and had no part in the contract sued upon in this cause, and is not liable under the same.

"5. That the defendant, Mary S. Nichols, filed her motion to set aside said judgment above described on March 11, 1958, less than one year after the entry of the said judgment against her.

"As a result of the facts found, as set out above, the court concludes as a matter of law:

"1. That the default judgment, above described, was entered against the defendant, Mary S. Nichols, as the result of her excusable neglect.

"2. That the defendant, Mary S. Nichols, has a meritorious defense to the cause of action alleged in the complaint herein filed.

"It is, therefore, Ordered, Adjudged and Decreed by this Court, in the exercise of its discretion, that the judgment heretofore entered in this cause against the defendant, Mary S. Nichols, be and the same is hereby set aside; that said judgment, as to the defendant, Mary S. Nichols, is ordered to be stricken from Judgment Book 21, page 275, and from the Civil Minute Book 88, page 98; that the defendant, Mary S. Nichols, is granted thirty days from the date of this order to file answer or otherwise plead in this cause; that this case be placed on the trial docket that it may come on for trial in due time."

"The plaintiffs object and except to the foregoing judgment, and * * * to that portion of findings of fact numbered 3, reading as follows: 'that Mrs. Nichols was advised, some months later, that a default judgment had been obtained against her.' * * * to conclusion of law numbered 1 set forth in said Order or Judgment, and to the Order and Decree, the findings and rulings made therein; and to the Order setting aside said judgment as to Mary S. Nichols;" and plaintiffs appeal to Supreme Court and assign error.

Sedberry Sanders & Walker for plaintiff, appellants.

Whitlock, Dockery, Ruff & Perry, by: James O. Cobb for defendant, appellee.

WINBORNE, C. J.: Is there error in the judgment from which plaintiffs appeal? In the light of statute G.S. 1-220, under which appellee moves, and decisions of this Court, *Bank v. Turner,* 202 N.C. 162, 162 S.E. 221, *Sikes v. Weatherly,* 110 N.C. 131, 14 S.E. 511, and *Nicholson v. Cox,* 83 N.C. 48, the answer to the question is in the negative.

It is provided by statute, G.S. 1-220, that: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from judgment • • • taken against him through his • • • excusable neglect • • • ." That is, if the party, moving timely, can show excusable neglect, and that he has a meritorious defense the judgment so taken may be set aside. See *Dunn v. Jones,* 195 N.C. 354, 142 S.E. 320; *Van Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d, 84; *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d, 849, and numerous other cases.

And this Court has held that under G.S. 1-220 a wife's failure or neglect to file answer in a suit against her and her husband, upon assurances by her husband that he will be responsible for and assume the defense of the action, is excusable neglect. See *Bank v. Turner, supra,* where the cases of *Sikes v. Weatherly, supra,* and *Nicholson v. Cox, supra,* are cited with approval. While the facts in these cases are not identical with those in case in hand, the principle there applied is applicable here.

On the authority of decisions in these cases, applied to facts of case in hand, the conduct of the feme defendant in relying upon her husband under the circumstances portrayed in the findings of fact is excusable neglect. And the finding of the Court that Mary S. Nichols has a meritorious defense to the cause of action alleged in the complaint appears to be supported by competent evidence. Hence the judgment below must be affirmed. Therefore let it be so certified, to the end that Mrs. Mary S. Nichols may be allowed to set up any defense she may have to the action of the plaintiffs. *Nicholson v. Cox, supra.*

Affirmed.

JOHNSON AND PARKER, JJ., not sitting.

AUTO FINANCE COMPANY OF N. C., INC. v. PAUL J. McDONALD.

(Filed 15 October, 1958.)

Payment § 9—

Plaintiff sued on a note and conditional sales contract for a car. Defendant offered in evidence title to the car marked paid and accompany-

ing letter from plaintiff stating that the contract of purchase had been paid, but the note and contract remained in plaintiff's hands and were introduced in evidence by it. *Held:* The burden of proving payment was upon defendant, and the action being upon the note and contract and not the title, defendant's possession of the title marked paid did not place the burden of going forward with the evidence upon plaintiff.

JOHNSON AND PARKER, JJ., not sitting.

APPEAL by defendant from *Pless, J.*, March 28, 1958 Regular Civil "B" Term, MECKLENBURG Superior Court.

Civil action to recover $3,297.60, balance of the purchase price due on a note and conditional sales contract for a 1955 Oldsmobile.

The parties agree on all matters except whether payment has been made. The plaintiff introduced the contract and note for the amount sued on. Their execution was admitted. The office manager of the plaintiff testified the full amount was due and unpaid.

The defendant's wife testified she went to the plaintiff's office on June 24, 1955, and "paid them off in cash." She did not require surrender of the note and contract and she did not get a receipt for the payment. However, the plaintiff sent by mail to the defendant the certificate of title to the Oldsmobile with the notification, "Paid July 20, 1955, Auto Finance Company, by W. B. Lattimer." Accompanying was a letter to the defendant, stating: "On June 24, you satisfactorily completed payment of your contract purchased by Auto Finance Company. We are pleased to forward you attached your paid contract . . ." The title to the Oldsmobile, but not the contract, accompanied the letter.

The plaintiff contended, and Mr. Lattimer testified, that the title and letter were sent by mistake. He further testified that at the time the defendant purchased the Oldsmobile he transferred a Buick as a trade-in on the Oldsmobile; that the plaintiff also held a conditional sales contract on the Buick, on which a small balance was still due, and that this small balance was liquidated in the sales contract and note for the Oldsmobile. He testified that the title to the Oldsmobile was sent to the plaintiff by mistake, the intention being to send the title to the Buick; that the form letter was intended to refer to the transaction involving the Buick, and not the Oldsmobile.

Both parties offered evidence tending to corroborate their respective contentions. The jury found the defendant was indebted to the plaintiff in the sum of $3,297.60 and from the judgment accordingly, the defendant appealed.

James B. Ledford, L. Glen Ledford for defendant, appellant.
B. Irvin Boyle, J. J. Wade, Jr., for plaintiff, appellee.

HIGGINS, J. One question only was in dispute in the court below: Was the debt paid? The defendant admitted the execution and delivery of the note and contract. The plaintiff had possession and introduced both in evidence. Defendant relied on the defense of payment.

The court charged the jury that the burden of showing payment was on the defendant. This the defendant challenges upon the ground that the receipt from the plaintiff of the title (not the note and contract) marked paid, together with the accompanying letter, placed upon the plaintiff the burden "of going forward with the evidence" and impeaching the receipt.

This action was brought on the note and contract, and not on the title. The defendant's contention would have more weight if he had the obligation itself in his possession, marked paid. But the obligation upon which suit is brought was in the hands of the plaintiff and introduced in evidence. The burden of showing payment, therefore, was upon the defendant. "It is well settled that the plea of payment is an affirmative one, and the general rule is that the burden of showing payment must be assumed by the party interposing it." *White v. Logan*, 240 N.C. 791, 83 S.E. 2d 892; *Builders Supply Co. v. Dixon*, 246 N.C. 136, 97 S.E. 2d 767; *Davis v. Dockery*, 209 N.C. 272, 183 S.E. 396; *Collins v. Vandiford*, 196 N.C. 237, 145 S.E. 235; *Swan v. Carawan*, 168 N.C. 472, 84 S.E. 699.

The court's charge properly placed upon the defendant the burden of showing payment.

No Error.

JOHNSON AND PARKER, JJ., not sitting.

MATTIE ROBINSON BRICE, WIDOW; ALICE BUSH BRICE, WIDOW; EMMA LEE BRICE, WIDOW; WILLIE BRICE, ELIZABETH BRICE, DAVID BRICE, JR., SAMUEL BRICE, JAMES T. BRICE AND DOROTHY LEE BRICE, CHILDREN OF DAVID BRICE, DECEASED, EMPLOYEE, v. ROBERTSON HOUSE MOVING, WRECKING AND SALVAGE COMPANY, EMPLOYER; BITUMINOUS CASUALTY CORPORATION, CARRIER.

(Filed 29 October, 1958.)

1. Appeal and Error § 2—

The Supreme Court, in the exercise of its supervisory jurisdiction, has the power to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts, Constitution of North Carolina, Article IV, section 8, and in proper instances

it will grant *certiorari* to review an order of the superior court involving a matter of public interest in order to promote the expeditious administration of justice.

2. Master and Servant § 55d—

The Industrial Commission is constituted the fact finding body in proceedings coming within its jurisdiction, G.S. 97-77, and review on appeal from its judgment is limited to the legal questions of whether there is competent evidence to support its findings and whether such findings support its legal conclusions, and the superior court cannot in any event consider evidence on appeal for the purpose of finding the facts for itself, its power being limited to remand of the cause for proper findings if the findings of the Commission are insufficient to enable the court to determine the rights of the parties.

3. Master and Servant § 53b(4)—

The provisions of G.S. 97-90 that the Industrial Commission approve fees for attorneys implies the exercise of discretion and judgment by the Commission, and the superior court on appeal is without power to hear evidence upon the question and strike out the fee allowed by the Commission and approve a fee in a different amount.

PARKER, J., not sitting.

Proceeding under the North Carolina Workmen's Compensation Act, General Statutes, Chapter 97 as amended, coming before the Supreme Court of North Carolina by order on petition for *certiorari* filed by the Attorney General of North Carolina, J. W. Bean, Chairman of the North Carolina Industrial Commission, and the North Carolina Industrial Commission for judicial review of judgment of the Honorable Francis O. Clarkson, Senior Resident Judge of the 26th Judicial District of North Carolina, dated 21 March, 1958, striking out as inadequate award of the North Carolina Industrial Commission in respect to attorneys' fees of $850.00, "fixed and allowed" for claimant's attorneys and in lieu thereof "approving and allowing" a fee of $1,931.37, and ordering same paid to said attorneys.

The record of the proceeding, as certified to this Court, shows that a hearing was had before Commissioner Frank H. Gibbs at Charlotte on 2 March, 1957, all parties being represented, at which time the parties stipulated, and the Commissioner found jurisdictional facts, and made conclusions of law as to employer-employee relationship between deceased employee and defendant employer at the time complained of, as to injury by accident arising out of and in the course of his employment by defendant employer, resulting in his death on 19 February, 1957, and as to the average weekly wage of employee, $34.88, at time of his death, by which award to beneficiary is determined.

The record further discloses that at said hearing three women were present or represented by attorneys, each claiming to be the widow

of the deceased employee, but one of them present in person made no claim for compensation. One of the other two, Alice Bush Brice, was represented by Charles M. Welling and Elbert E. Foster, attorneys of Charlotte, North Carolina. The hearing commissioner found facts on which he concluded as a matter of law by way of award (1) that Alice Bush Brice is the widow of the deceased employee, and entitled to compensation payable by defendants for his death at the rate of $20.93 per week for a period of 350 weeks, beginning 19 February, 1957; and (2) after providing for payment by defendants of (a) funeral benefit of $400.00, (b) all medical expenses, "when bills for the same shall have been submitted to and approved by the Industrial Commission," and (c) certain costs, the hearing commissioner awarded (paragraph 6) "that a fee in the sum of $750.00 is hereby approved and allowed for the plaintiff Alice Bush Brice's attorneys, and the same shall be deducted from the compensation herein ordered paid said plaintiff and paid directly to said attorneys." And accordingly an award was filed 29 July, 1957, and received 6 August, 1957.

Thereafter, on 9 August, 1957, Elbert E. Foster and Charles M. Welling, attorneys for Alice B. Brice, widow, came and objected and excepted to "paragraph 6 of the award as entered, allowing attorneys' fee to them, on the grounds": (1) That said attorney fee allowed in the sum of $750.00 to said attorneys is grossly inadequate, entirely insufficient, unreasonable and contrary to the course and practice of the Bar, and

"(2) That the said fee as allowed of $750.00 to said two attorneys for the professional services rendered said claimant in said case, wherein the sum of approximately $7,700.00 was recovered by said claimant does not in any measure compensate said attorneys for the services rendered, the efforts expended, and the expenses incurred in performing the legal services necessary to a successful conclusion of the matter."

Thereafter on 12 August, 1957, the hearing commissioner entered an order, in which it is found that "it has been made to appear that fee of $750.00 is not adequate for the services rendered by said attorneys, and that a fee of $850.00 should be allowed in lieu of the fee theretofore approved." And, therefore, it was ordered "that the original opinion and award filed in this cause on 29 July, 1957, be, and the same is hereby amended by striking out paragraph 6 in said award and inserting in lieu thereof the following: '(6) That a fee in the sum of $850.00 is hereby approved and allowed for the plaintiff Alice Bush Brice's attorneys, and the same shall be deducted from the compensation herein ordered paid said plaintiff and paid directly to said attorneys.'" And in accordance therewith the original award

was amended to that extent, but "in all other respects the said original award is unchanged and remains in full force and effect."

Thereupon the said attorneys objected and excepted and appealed to the Full Commission on substantially the same grounds as hereinabove shown, and requested a hearing in the usual course in Charlotte, N. C., "prior to the hearing before the Full Commission for the purpose of presenting evidence as to the reasonable value of services rendered and as to the course and practice of the Bar in connection with legal matters on a contingent fee basis, and that the Commission make an award approving reasonable attorney fees in the sum of not less than $2,000.00 as a fair reasonable and adequate attorney fee commensurate with the legal services performed by them for the claimant, and which the claimant has heretofore on August 9, 1957, by letter to the Commission requested that a fee of $2,000.00 be approved for her attorneys and urges the Commission to so act."

The record does not show that such preview hearing in Charlotte was held, but the record does contain affidavits of eleven licensed attorneys, members of the North Carolina State Bar and the Twenty-Sixth Judicial District Bar Association, practicing in Mecklenburg, each of whom states, among other things, his familiarity with the contingent fees charged in said county, and what is the normal contingent fee charged by attorneys practicing there.

The record shows that said attorneys amended their objections and exceptions to the attorneys fee as allowed and notice of appeal, by adding thereto seven additional grounds for appeal and review, including charges, among other things, that Commission abused any discretion it had, and "that in fixing and approving said fee acted unreasonably, arbitrarily and capriciously."

The record also shows that the proceeding came on for review by the Full Commission on 12 December, 1957, and that Commissioner N. F. Ransdell wrote opinion for the Full Commission. And in this opinion it is stated as follows:

"The Commission has carefully, minutely, and thoroughly considered the amount of work involved in the trial of this cause. The Full Commission has carefully read and studied each and every affidavit filed by members of the North Carolina State Bar and the 26th Judicial Bar Association, the agreement and affidavit of plaintiff Alice Bush Brice, the affidavits of the appealing counsel, the letter dated August 15, 1957, from Mr. Harry DuMont, attorney for the defendants, together with any and all other documentary matters contained in the Commission's file in this case. After carefully considering these matters, together with the argument before the Full Commission of the attorneys representing the successful plaintiff, the Commission finds as a fact that the fee in the amount of $850.00

heretofore approved by Commissioner Frank H. Gibbs, who conducted the hearing of this matter in Charlotte, is a fair, just, adequate and reasonable fee."

"* * * It is ordered that the fees heretofore approved and allowed in this case be, and the same are hereby in all respects approved and affirmed. The motion on the part of counsel for Alice Bush Brice is hereby denied. The defendants shall comply with the award of the Commission heretofore entered in this case."

The attorneys objected and excepted and appealed to Superior Court, assigning numerous exceptions, all pertaining to the award of attorneys fees as made by the Full Commission.

The cause came on for hearing, and was heard before Judge Clarkson, as first above related, who made findings of fact purporting to relate to the whole case, more particularly that "a fee of $850.00, which was fixed and allowed by the North Carolina Industrial Commission as a fee for the successful claimant's attorneys is not adequate to compensate the claimant's attorneys for services rendered in this matter"; and that "a fee amounting to 25% of the total recovery would be fair, just, reasonable and adequate fee for the services performed by said attorneys, on behalf of their client."

Thereupon on 21 March, 1958, the Judge "ordered, adjudged and decreed that the award of the Full Commission heretofore entered in respect to attorney fees fixed and allowed for the claimant's attorneys is stricken as being an inadequate fee for said attorneys; that in lieu of said $850.00 a fee of $1,931.37 to attorneys Elbert E. Foster and Charles M. Welling be, and the same is hereby approved and allowed for all the legal services rendered and expenses incurred by said attorneys in representing the claimant Alice Brice in the above entitled cause, and said fee of $1,931.37 shall be deducted from the compensation due and ordered by the Industrial Commission paid by the defendants to Alice Brice and that said sum of $1,931.37 shall be paid directly to said attorneys by the compensation carrier Bituminous Casualty Corporation.

"* * * that this judgment be certified to the North Carolina Industrial Commission at Raleigh, N. C., by the Clerk of this court.

"* * * that the North Carolina Industrial Commission shall upon receipt of a certified copy of this judgment enter and promulgate an award of attorneys fee to said appealing attorneys consistent with this judgment and in the sum of $1,931.37."

Thereupon the North Carolina Industrial Commission passed the following resolution:

"Whereas, the Commission has received from the Clerk of the Superior Court of Mecklenburg County a certified copy of a judgment entered by the Honorable Francis O. Clarkson, a Resident Judge of

the Superior Court of Mecklenburg County in the above-captioned case, in which Judge Clarkson vacates and sets aside the amount of attorneys' fee approved by the Commissioner who heard the case and subsequently approved by the Full Commission, and in said judgment directs the Commission to amend the award in this case to approve the attorneys' fee in the amount specified in said judgment, which is much larger than the amount approved by the Commission; and

"Whereas, the Commission has grave doubts that a Superior Court Judge has jurisdiction or authority over attorneys' fees as has been attempted to be exercised in this case;

"Now, therefore, be, and it is hereby resolved that the Attorney General be requested to obtain a ruling and determination by the Supreme Court as to the authority in such matters, and the Honorable J. W. Bean, Chairman of the Industrial Commission, be, and he is hereby authorized and empowered to execute in the name of the Commission any petition or other paper or document necessary to effectuate this end."

Pursuant thereto petition for writ of *certiorari* upon which this proceeding is based was filed.

The petitioners invoke the jurisdiction of the Supreme Court of North Carolina under the provisions of Article IV, Section 8, of the Constitution of North Carolina, which gives the Supreme Court "the power to issue remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts"; and to hear and pass upon matters presented by their petition, and to grant the relief sought by reason of the provision of G.S. 97-86, and so on.

And petitions for writ of *certiorari* say in paragraph 6 of their petition that they "are advised and believe and so allege: The judgment, findings of fact and conclusions of law, signed and entered by the Senior Resident Judge of the Twenty-Sixth Judicial District, in this cause, a certified copy of which is hereto attached as a part of the Record, is invalid, erroneous, void and of no effect, and should be so declared by this court for the reasons which follow:

"(a) For that the parties hereto are bound by the statutory remedy provided by the North Carolina Workmen's Compensation Act and this includes the approval of attorneys' fees by the Commission; that in connection with the fees of physicians, which power of approval appears in the same Section (G.S. 97-90, as amended), this Court has passed on the matter in the case of *Worley v. Pipes*, 229 N.C. 465, saying: 'Thus it is seen that the General Assembly has prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workmen's Compensation Act may be determined and settled.'

"(b) For that the Trial Court has misconstrued the scope of his Judicial Review and has illegally and erroneously heard this matter *de novo*, has made independent findings of fact and conclusions of law, and has substituted his judgment in place of and in lieu of the authority and judgment of the Commission, which is the body vested by statute with the authority to make such approval and issue an award therefor.

"(c) For that the findings of fact made by the Commission are binding upon the Trial Court if supported by any competent evidence and this is so even though the evidence might support a contrary finding and, therefore, the Trial Court had no authority to substitute his own findings and his own evaluation of the amount of fees that should be approved for said attorneys.

"(d) For that the said Trial Court had no power or authority of law to order and command said Commission to peremptorily enter an award in accordance with the findings and judgment of said Trial Court and contrary to the approval of fees heretofore made by said Commission.

"(e) For that the power of the Trial Court is limited to a review of arbitrary and capricious action on the part of the Commission and to a judicial determination as to whether the Commission is operating within the scope of its powers as fixed by Statute and in this connection it is recognized by petitioners that a proceeding can be remanded to the Commission for further findings or for further action by the Commission in accordance with law but these petitioners do not believe that the Trial Court can pass upon a proceeding such as this *de novo* and enter such judgment as to both the facts and approval of fees as the Trial Court sees fit.

"(f) For that if said judgment is allowed to stand unreversed, it will mean that the fixing of attorneys' fees in proceedings before the Commission has been transferred from the Commission to the Superior Court and there will thus result a disorganization of the whole system that has existed in the State for many years and there will be no fixed standards of measurement of same.

"(g) That if said judgment is correct and if attorneys' fees can be fixed by a Superior Court Judge in proceedings before the Commission in this manner and without the free approval of the Commission, as commanded by the Statute, then the profession and the people of the State are entitled to know of this change in system and this Court should so declare and give its approval."

And petitioners in paragraph 7 allege that "this application is made in good faith and for the reason that the matters herein alleged as error and now excepted to are matters of great public interest and further a quasi-judicial agency of the State is entitled to know as

to how it shall proceed in the future."

And the record shows that the respondents as "the attorneys representing the successful claimant, Alice B. Brice," answering the petition filed, among other things admit that "the jurisdiction of the Supreme Court of North Carolina to hear and determine questions under the provisions of Article IV, Section 8, of the Constitution of North Carolina, gives the Supreme Court of North Carolina 'the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts'; It is further admitted that the petitioner is attempting to invoke the provisions of G.S. 97-86, Cumulative Supplement of 1957, in order to secure a review of the actions of the Superior Court of Mecklenburg County and that the Industrial Commission passed a Resolution authorizing the petitioner to proceed in that manner, and that the Petition has attached to it a copy of the Resolution of said Commission."

The Supreme Court allowed the petition to be docketed and heard at the Fall Term, 1958, with cases from the 26th District.

Attorney General Seawell, Assistant Attorney General Ralph Moody for petitioners, appellants.

Elbert E. Foster, Charles M. Welling for respondents, appellees.

WINBORNE, C. J. The Constitution of North Carolina, Article IV, Section 8, declares in pertinent part that "The Supreme Court • • • shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." This provision has been invoked in many decisions of the Court, among which are: *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663, and *Park Terrace v. Indemnity Co.,* 243 N.C. 595, 91 S.E. 2d 584.

In the *Park Terrace case, supra,* it is said: "This Court has general supervisory authority over the orders, judgments, and decrees of the Superior Courts of the State • • • This is a prerogative which, in a proper case, when necessary to promote the expeditious administration of justice, we will not hesitate to exercise."

The North Carolina Industrial Commission, created under G.S. 97-77, is primarily an administrative agency of the State charged with the duty of administering the provisions of the Workmen's Compensation Act, Chapter 97 of General Statutes. *Hanks v. Public Utilities Co.,* 210 N.C. 312, 186 S.E. 252.

In the event of disagreement, the Commission is to make award after hearing. G.S. 97-83.

The Commission or any of its members shall hear the parties and

their representatives and witnesses, on matters at issue, and shall determine the dispute in a summary manner.

The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the question at issue shall be filed with the record of the proceedings. G.S. 97-84. Under this section the Commission is made the fact finding body. The finding of facts is one of its primary duties. *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515.

Either party to the dispute may appeal from the decision of the Commission to the Superior Court "for errors of law". G.S. 97-86. And the Superior Court on such appeal has appellate jurisdiction to review an award of the Industrial Commission for errors of law. *Thomason v. Cab Co.,* 235 N.C. 602, 70 S.E. 2d 706.

The findings of fact of the Industrial Commission are conclusive and binding on appeal when supported by competent evidence — even though there is evidence that would have supported a finding to the contrary. *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109; *Penland v. Coal Co.,* 246 N.C. 26, 97 S.E. 2d 432.

The procedure prescribed for hearing on appeal is summarized in *Penland v. Coal Co., supra,* in this manner: "When an appeal is taken from the Industrial Commission, the statute, G.S. 97-86, requires that a certified transcript of the record before the Commission be filed in the Superior Court (citing case). When the appeal comes on for hearing it is heard by the presiding judge who sits as an appellate court. His function is to review alleged errors of law made by the Industrial Commission, as disclosed by the record and as presented to him by exceptions duly entered. Necessarily the scope of review is limited to the record as certified by the Commission and to the questions of law therein presented"—citing case.

And to the same effect this Court said in *Thomason v. Cab Co., supra:* "In passing upon an appeal from an award of the Industrial Commission in a proceeding coming within the purview of the act, the Superior Court is limited in its inquiry to these two questions of law: (1) Whether or not there was any competent evidence before the commission to support its findings of fact; and (2) whether or not the findings of fact of the commission justify its legal conclusions and decision. *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760. The Superior Court cannot consider the evidence in the proceeding in any event for the purpose of finding the facts for itself. *Reed v. Lavender Bros.,* 206 N.C. 898, 172 S.E. 877; *Ussery v. Cotton Mills,* 201 N.C. 688, 161 S.E. 307. If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether or not they

justify the legal conclusions and decision of the commission. *Blevins v. Teer,* 220 N.C. 135, 16 S.E. 2d 659; *Rankin v. Mfg. Co.,* 212 N.C. 357, 193 S.E. 389. But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *Cook v. Lumber Co.,* 217 N.C. 161, 7 S.E. 2d 378; *Farmer v. Lumber Co.,* 217 N.C. 158, 7 S.E. 2d 376; *Gowens v. Alamance County,* 214 N.C. 18, 197 S.E. 538; *Singleton v. Laundry Co.,* 213 N. C. 32, 195 S.E. 34."

Indeed, it is succinctly stated in *Evans v. Lbr. Co.,* 232 N.C. 111, 59 S.E. 2d 612, that "Neither this Court nor the Superior Court has the right to make an award pro or con upon the evidence which was submitted or which may be submitted before the Industrial Commission"—citing cases.

In the light of these applicable principles, it is seen that the judgment in question is not in keeping with the practice and procedure in such case made and provided. Hence this Court is constrained to declare it null and void.

This is such a matter of public interest that the Supreme Court finds it necessary to exercise its supervisory jurisdiction—to promote the expeditious administration of justice.

Finally it may be noted that while the claimant's attorneys set forth as one of the grounds for their appeal from award of the Industrial Commission that the "Hearing Commissioner and the Full Commission * * * arbitrarily and capriciously fixed a fee * * *" the Judge of Superior Court did not so hold. And the statute, G.S. 97-90, requires that "fees for attorneys, and physicians and charges of hospitals for services * * * under this article shall be subject to the approval of the commission." And the word "approve" as used in decisions of this Court implies the exercise of discretion and judgment. *Key v. Board of Education,* 170 N.C. 123, 86 S.E. 1002; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328; *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351.

Indeed, Black's Law Dictionary defines it "'the act of approval' imports the act of passing judgment, the use of discretion and determination as a deduction therefrom."

The proceeding will be remanded to Superior Court for further orders in conformity with provisions of this opinion.

Error and Remanded.

PARKER, J., not sitting.

JOHN A. THOMASSON, ON BEHALF OF HIMSELF AND OTHER PROPERTY OWNERS AND TAXPAYERS IN THE CITY OF CHARLOTTE, N. C., v. JAMES S. SMITH, CLAUDE L. ALBEA, HERBERT H. BAXTER, HERMAN A. BROWN, STEVE W. DELLINGER, MARTHA W. EVANS, ERNEST C. FOARD, W. EVERETT WILKINSON, AND THE CITY OF CHARLOTTE, N. C.

(Filed 29 October, 1958.)

1. Municipal Corporations § 5—

Section 6, Chapter 802, Session Laws of 1957, authorizes the City of Charlotte to extend its water and sewer lines into the area to be annexed, upon the approval of the voters of annexation, prior to the time fixed by the statute as the effective date of the annexation.

2. Same: Taxation § 5: Constitutional Law § 23— Bonds for extension of municipal services to territory to be annexed are for public purpose.

A municipal corporation may issue bonds and levy taxes to pay principal and interest thereon and use the proceeds to finance the extension of water and sewer facilities into an area to be annexed at a fixed future date after the residents of the area to be annexed have approved the annexation and the citizens of the municipality have approved both the annexation and the issuance of bonds, and such bonds are for a public purpose, and the tax imposed within the municipality prior to annexation does not deprive the taxpayers of the city of property without due process of law. Fourteenth Amendment to the Constitution of the United States, Article I, Section 17, of the Constitution of North Carolina, G.S. 160-239, G.S. 160-255, G.S. 160-238, Chapter 366, Section 32(25), Public-Local Laws of 1939. However, the extension of the fire alarm system is properly limited to two miles from the present city limits under G.S. 160-238.

3. Municipal Corporations § 3: Taxation § 9—

Upon extension of the corporate limits of a municipality under legislative authority, the municipality acquires jurisdiction over the territory annexed and may levy and collect taxes on property embraced within the annexation, notwithstanding that a part of the taxes so collected may be used to pay municipal indebtedness incurred prior to the time of annexation, and in like manner the municipality may, under legislative authority and upon approval of its voters, issue bonds to finance extension of municipal facilities to the territory to be annexed and levy taxes to pay same prior to the fixed date of annexation.

4. Constitutional Law § 10—

Doubt as to the constitutionality of a statute authorizing the imposition of a tax, approved by the voters, must be resolved in favor of the constitutionality of the statute and tax.

PARKER, J., not sitting.

APPEAL by plaintiff from *Froneberger, J.*, at Chambers in Charlotte, North Carolina, 4 August 1958. From MECKLENBURG.

The plaintiff, a citizen and resident of the City of Charlotte, North Carolina, instituted this action in behalf of himself and other prop-

erty owners and taxpayers in said city, seeking to enjoin the defendant City of Charlotte, its Mayor and City Council, from issuing General Obligation Bonds to finance the extension of water, sewer and fire alarm services into the territory to be annexed to the City of Charlotte, from and after 31 December 1959, prior to said date of annexation.

This cause was heard pursuant to stipulations entered into by the parties by Froneberger, J., assigned to hold the courts of the Twenty-Sixth Judicial District, without a jury. A jury having been waived, the hearing was held at Chambers in Charlotte, North Carolina on 4 August 1958, and it was agreed that the court should find the facts and make its conclusions of law and enter judgment accordingly. The trial judge found the facts, made his conclusions of law and entered judgment, denying the plaintiff the relief demanded, except the defendants were enjoined from extending fire alarm service for more than two miles from the corporate limits of the city.

On 23 May 1957 the General Assembly of North Carolina enacted Chapter 802 of the 1957 Session Laws, amending the charter of the City of Charlotte so as to provide for the extended boundaries of said city. The Act provided for an election to be held on 15 July 1957 among the qualified voters of the City of Charlotte and the adjacent territory proposed to be annexed to said city; and further providing that if the election carried, the city limits of said city should be extended, as set out in the Act, from and after 31 December 1959. The special election was held and the extension of the city limits duly approved, and it is conceded that the election was properly called and conducted.

The territory to be annexed pursuant to said election comprises approximately thirty square miles, so that the area of the City of Charlotte will be substantially doubled by said extension of the city limits. The area to be annexed has a density of population of 1,357 per square mile, or a total population of approximately 41,000.

Section 6 of Chapter 802 of the Session Laws of 1957 provides: "Should said election carry, the City of Charlotte is hereby authorized and empowered to plan for extending and to extend, municipal public works into the territory coming into the city limits by virtue of said election. The City of Charlotte is granted the right to acquire the necessary lands in connection with such public works and to acquire property in connection therewith by condemnation, if necessary, under the present law governing condemnation of property within the present city limits of the City of Charlotte, which said law is hereby extended to cover such added territory."

On 12 March 1958 the City Council of the City of Charlotte enacted an ordinance duly authorizing, subject to the approval of the

voters, the issuance of $1,301,000 water bonds, $3,265,000 sanitary sewer bonds, and $134,000 fire alarm system bonds, for the purpose of providing funds for enlarging and extending such services within and without the city limits, including the territory to be annexed; and providing for a sufficient tax to pay the principal and interest on said bonds to be annually levied and collected. At the same time, said Council also duly adopted a resolution calling for a special bond election on 26 April 1958, and approved notice of such special bond election and an official ballot.

It is conceded that the election was duly called and conducted and that the qualified voters of the City of Charlotte approved the issuance of said bonds, including the levy of a tax to pay the interest and principal on such indebtedness.

The budget of the City of Charlotte for the fiscal year 1 July 1958 to 30 June 1959, as adopted by the City Council of the City of Charlotte on 16 July 1958, provides for the payment of approximately $62,158.00 in interest and bank commissions on said bonds during the current fiscal year.

On 16 July 1958 the City Council of the City of Charlotte levied a tax on all real and personal property in said city in order to raise the funds necessary to meet said interest and bank commissions. The defendants admit they intend to issue said bonds for the extension of said services to the territory to be annexed prior to 1 January 1960, and will, in addition to the tax heretofore levied to pay interest and bank commissions as hereinabove set out, levy a tax prior to 1 January 1960 for the payment of principal and interest on said bonds.

From the judgment entered the plaintiff appeals, assigning error.

Taliaferro, Grier, Parker & Poe, Sydnor Thompson, attorneys for plaintiff.

John D. Shaw, attorney for defendants.

DENNY, J. The plaintiff contends that the City of Charlotte is without authority to issue bonds and to levy and collect taxes from the citizens of the city for the purpose of extending water and sewer facilities and its fire alarm system to an area which is, at present, not within the city limits and will not become a part of the city until 1 January 1960. The plaintiff further contends that such expenditures would be in violation of both the Constitution of the United States and the Constitution of North Carolina, in that it would constitute the taking of property of the citizens of Charlotte without due process of law, and that such expenditures would not be for a public purpose.

It would seem, therefore, that the question posed for determination is simply this: May a municipal corporation, with legislative sanction,

issue bonds and levy taxes to meet the required payment of principal and interest thereon, and use the proceeds therefrom to finance the extension of water and sewer facilities and a fire alarm system into an area which is to be annexed to the municipality at a fixed future date, after the residents of the area to be annexed have approved the annexation and the citizens of the municipality have approved both the annexation and the issuance of the bonds?

We shall not undertake a *seriatim* discussion of all the appellant's exceptions. We shall, however, discuss the questions raised which are, in our opinion, essential to the proper disposition of the appeal.

The briefs filed in connection with this appeal cite no case from this or any other state involving a factual situation similar to that presented on this record. Neither have we been able to find such a case. Even so, the general law authorizes a municipality in this State to establish and maintain a sewer system. G.S. 160-239. A municipality is likewise authorized to maintain a waterworks system and to furnish water "to any person, firm or corporation desiring the same outside the corporate limits where the services can be made available by the municipality * * *." G.S. 160-255 (1957 Cum. Supp.).

G.S. 160-238 provides: "The governing body may provide, install, and maintain water mains, pipes, hydrants, and buildings and equipment, either inside or outside of the city limits, for protection against fire of property outside of the city limits, and within such area as the governing body may determine, not exceeding a boundary of two miles from the city limits, under such terms and conditions as the governing body may prescribe. * * * "

Furthermore, the charter of the City of Charlotte, as adopted in Chapter 366, Section 32, Subsection (25), Public-Local Laws of 1939, authorizes the city, "To establish systems of sewerage and works for sewage disposal, and to extend and build the same beyond the corporate limits when deemed necessary, to permit owners of residences or industrial plants outside the limits of the City of Charlotte to connect to the sewerage system of said City of Charlotte and to remove said sewage through its system as is now done for residents of said city, and to make such reasonable charges for such service as may be set by the city council; * * *." According to the testimony in the court below, approximately thirty-five per cent of the residents in the area to be annexed are presently served by the extension of the sewerage system of the City of Charlotte, and two-thirds of the homes in the area are supplied with city water through local water supply systems.

Moreover, we interpret Section 6 of Chapter 802 of the Session Laws of 1957, amending the charter of the City of Charlotte, to give the city the authority to extend its water and sewer lines into the area to be annexed, and to do so prior to 1 January 1960. This Section

authorizes the City of Charlotte, in the event the election shall carry, to annex the involved area, "to plan for extending and to extend, municipal public works into the territory coming (not which has been annexed) into the city limits by virtue of said election."

Section 6 also extends from the date of the ratification of the Act, being 23 May 1957, the law governing condemnation of property within the present city limits of the City of Charlotte to the additional area.

This entire Section was wholly unnecessary if it was not the legislative intent that the City of Charlotte should proceed immediately to provide these facilities within the area which is to become a part of the City of Charlotte on 1 January 1960. After an area is annexed to a municipality, it becomes a part of it and subject to all the debts, laws, ordinances and resolutions in effect on the date of the annexation. This is expressly so provided by statute. G.S. 160-449.

We think it reasonable to assume that the purpose in fixing 1 January 1960 as the date on which the area to be annexed should become effective, was to give the City of Charlotte a reasonable time to install these facilities so that they would be available to the residents of the area to be annexed at the time the annexation would become effective or as soon thereafter as practicable.

In light of the facts in this case, we are not impressed by the argument that the tax levy complained of constitutes a taking of the property of the citizens of the City of Charlotte without due process of law, in violation of both the Constitution of the United States and the Constitution of North Carolina. The expenditure of funds for the construction of water and sewerage facilities by a municipality, outside its corporate limits, if done pursuant to legislative authority, is for a public purpose and is not violative of the Fourteenth Amendment to the Constitution of the United States or of Article I, Section 17, of the Constitution of North Carolina. *Ramsey v. Commissioners*, 246 N.C. 647, 100 S.E. 2d 55; *Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600; *Holmes v. Fayetteville*, 197 N.C. 740, 150 S.E. 624.

It is said in the last cited case, "If the defendant should attempt to pledge the faith of the city or to contract a debt or levy a tax for an enterprise conducted within the designated territory, the taxpayer would have ample remedy." Plaintiff contends that the foregoing statement should be construed as prohibiting the City of Charlotte from issuing the bonds involved in this action and from levying any tax in connection therewith. However, the plaintiff seems to have overlooked the fact that in addition to the legislative authority granted to the defendants, the qualified voters of the City of Charlotte have approved what the city is attempting to do.

In the case of *Dunn v. Tew, et al*, 219 N.C. 286, 13 S.E. 2d 536, the lands of the defendants were being sold for nonpayment of mu-

nicipal taxes. The property was located in an area that had been annexed by the plaintiff city and the defendants contended that their property was not subject to the full rate of tax levied, for that a part of the taxes would go toward payment of debts that were existing prior to the time of the annexation and from which the defendants derived no benefit. The holding of the Court is succinctly stated in the third headnote of the opinion as follows: "Where the corporate limits of a municipality have been extended by legislative act * * * the municipality has jurisdiction over the territory annexed and may levy and collect taxes on the property embraced therein, notwithstanding that the taxes so collected may be used to pay municipal indebtedness incurred prior to the time of the annexation * * *."

Certainly the citizens in the area to be annexed by the City of Charlotte will, beginning with the year 1960, be taxed to pay for indebtedness of the City of Charlotte, no part of which was expended for their benefit. G.S. 160-449.

The General Assembly has expressly authorized the extension of these facilities in the event the election carried and the qualified voters of the City of Charlotte, with full knowledge that the area involved would not be subject to the levy and collection of taxes until on and after 1 January 1960, approved the bond issue to finance the extension of the public utilities of the City of Charlotte into the area of approximately thirty square miles, which area will by the expiration of time, without any further legal steps being taken by anyone, become a part of the City of Charlotte on the date fixed in its charter, to wit, 1 January 1960. Doubtless the provision for the extension of these water and sewer facilities prior to the effective date of the annexation, may have had a material bearing on the result of the voting in this additional area, which is about equal to the area contained within the present corporate limits of the City of Charlotte.

In the case of *Briggs v. Raleigh*, 195 N.C. 223, 141 S.E. 597, the plaintiff undertook to restrain the City of Raleigh from issuing bonds which had been approved by the voters of the city. The proceeds from the sale of the bonds were to be used for the purpose of erecting buildings, etc., on land donated by the State to be used for a State Fair to be operated within five miles of the City of Raleigh. This Court held the expenditures to be for a public municipal purpose and that it was within the power of the city to issue said bonds. Stacy, C. J., in speaking for the Court, said: "Where the question is doubtful, as it is here, and the Legislature has decided it one way and the people to be taxed have approved that decision, it is the general rule of construction that the will of the lawmakers thus expressed and approved, should be allowed to prevail over any mere doubt of the courts."

In the instant case, upon the findings of fact made by the court

below, and which are supported by competent evidence, the court held that the plaintiff has not sustained his burden in showing that the legislative action upon which the defendants are relying is unconstitutional. The court further concluded as a matter of law that the issuing of bonds to extend the water and sewer systems as contemplated by the City of Charlotte, is not in violation of the Fourteenth Amendment to the Constitution of the United States, or of Section 17 of Article I or Section 3 of Article V of the Constitution of North Carolina. The court, however, held that the City of Charlotte should be restrained from extending the fire alarm system beyond two miles from the present city limits, as provided in G.S. 160-238. Judgment was accordingly entered.

The judgment of the court below is

Affirmed.

PARKER, J., not sitting.

MRS. JAMES R. STAMEY, JR., ADMINISTRATRIX OF THE ESTATE OF JAMES R. STAMEY, JR., DECEASED, PLAINTIFF, v. RUTHERFORDTON ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT, AND BRAWLEY CONSTRUCTION COMPANY, ADDITIONAL DEFENDANT.

(Filed 29 October, 1958.)

1. Negligence § 16—

The three year statute of limitations applies to a cause of action to recover for personal injuries negligently inflicted. G.S. 1-52(5).

2. Pleadings § 22—

Even though the complaint in an action to recover for negligent injury fails to state facts sufficient to constitute a cause of action, an amendment, supplying the deficiency by alleging relevant facts connected with the transactions forming the subject of the original complaint, may be permitted under G.S. 1-163, no statute of limitations being involved: an order of the court striking the amendment as not permissible and sustaining demurrer to the complaint is error.

3. Death § 4—

Under the 1951 amendment to G.S. 28-173 the two year statute of limitations is applicable to actions for wrongful death, G.S. 1-53(4), and such limitation is no longer a condition annexed to the cause of action but an ordinary statute of limitations.

4. Limitations of Actions § 11—

An amendment introducing a new cause of action does not relate back, and the bar of the statute of limitations must be computed as of the time of filing the amended pleading rather than the time the action was insti-

tuted, irrespective of whether the limitation is a condition annexed to the cause of action or an ordinary statute of limitations.

5. Same—

Where the original complaint fails to state facts sufficient to constitute a cause of action, an amendment supplying the deficiency constitutes a new cause of action for the purpose of computing the bar of the statute of limitations.

6. Pleadings § 8a—

A cause of action consists of the facts alleged in the complaint. G.S. 1-122.

7. Appeal and Error § 60—

A holding on a former appeal that the complaint as then drawn failed to state a cause of action becomes the law of the case.

8. Death § 4—

Where the complaint in an action for wrongful death fails to state a cause of action, an amendment thereafter filed, supplying the deficiencies, constitutes a new cause of action, and the two year statute of limitations must be computed from the date of death until the filing of the amendment.

9. Limitation of Actions § 15—

The contention that an amendment constituting a new cause of action was filed after the bar of the statute of limitations was complete cannot be raised by demurrer or motion to strike, but can be presented only by answer. G.S. 1-15.

PARKER, J., not sitting.

APPEAL by plaintiff from *Pless, J.*, June 2, 1958, Schedule B Regular Civil Term, of MECKLENBURG.

On former appeal, the demurrer interposed by defendant in this Court to the amended complaint was sustained. Reference is made to the statement of facts in *Stamey v. Membership Corp.*, 247 N.C. 640, 101 S.E. 2d 814, for the particulars as to prior proceedings in the case, and to the opinion of *Parker, J.*, for a full summary of the allegations of the amended complaint. ("Defendant," as used herein, refers to Rutherfordton Electric Membership Corporation, the original defendant.)

On March 20, 1958, Judge Craven, in his discretion, allowed plaintiff's motion of March 7, 1958, and granted leave to plaintiff to amend her amended complaint. By amendments filed pursuant to Judge Craven's order, plaintiff (1) deleted the allegations of paragraph 11 of each cause of action and substituted therefor new allegations relating to what occurred on the occasion of her intestate's injury, and (2) added to each cause of action a new sub-paragraph, "12(j)," therein alleging, *inter alia*, that defendant "did inform and advise the

plaintiff's intestate that the current on the occasion and at the place in question, in the old energized, 'live' and uninsulated wire, had been cut off, but . . . nevertheless did carelessly and negligently fail to cut off the high voltage of current, . . ."

Defendant then filed its "DEMURRER AND MOTION TO STRIKE," directed to the amended complaint, as amended in March, 1958, the ground of objection being that it did not state facts sufficient to constitute a cause of action. Defendant set forth, *inter alia*, the following: "5. The matters appearing in paragraph 11 as amended and paragraph 12(j) as amended constitute new matter and it affirmatively appears from the allegations of the complaint that more than two (2) years elapsed between the accrual of the cause of action of the plaintiff and the pleading of such allegations and the same are barred by the statute of limitations."

After hearing thereon, Judge Pless entered an order containing these provisions:

". . . In paragraph 12(j) of the amendment the plaintiff for the first time, and more than two years after the death of plaintiff's intestate, seek (sic) to inject into the case a completely new element of negligence by now alleging that the defendant advised the plaintiff's intestate that the current on the live wire had been cut off and that this had not been done. The Court is of the opinion that such amendment is tardy and the motion of the defendant to strike said paragraph 12(j) is therefore allowed.

"The Court is of the opinion, and so holds, that the remaining portions of the amendment to the Amended Complaint are not sufficient to overcome the deficiencies stated by the Supreme Court, and accordingly the demurrer of the defendant to said pleadings is hereby sustained.

"The plaintiff is allowed thirty days from this date in which to file such additional pleadings or amendments as she may be advised."

Preceding the quoted portions, the order of Judge Pless contains this statement: "Counsel for all parties and Judge Craven, himself, state that Judge Craven merely authorized the filing of said amendment without considering the merits and that in so doing he did not rule upon the propriety or legal effect of same."

Plaintiff excepted and appealed, assigning errors.

Wm. H. Booe and Carswell & Justice for plaintiff, appellant.

Carpenter & Webb for defendant Rutherfordton Electric Membership Corporation, appellee.

BOBBITT, J. Plaintiff alleged, separately, two causes of action. Her first cause of action is for personal injuries suffered by her intestate

from his injury on February 22, 1956, until his death on February 26, 1956; and her second cause of action is for her intestate's wrongful death. *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585; *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105.

We are of opinion, and so hold, that the amended complaint, as amended in March, 1958, states facts sufficient to constitute a cause of action. We need not determine whether the facts alleged in paragraph 11, as amended in March, 1958, standing alone, are sufficient to establish legal responsibility of defendant for the contact made with the "live" power line.

While the allegations *relating to defendant's negligence* are identical in both causes of action, both before and after the amendments of March, 1958, the legal significance of these amendments in relation to the first cause of action is different from their legal significance in relation to the second cause of action. Hence, each cause of action requires separate consideration.

1. *First cause of action.* The *three* year statute of limitations applies to this cause of action. G.S. 1-52(5). It appears affirmatively that the amendments of March, 1958, were filed within three years from the date of the intestate's injury. Hence, the question presented is whether these amendments were permissible under G.S. 1-163.

Unquestionably, the facts alleged in the amendments of March, 1958, are material to the case. They relate directly to plaintiff's right to recover from defendant on account of the intestate's injury on February 22, 1956, on the occasion referred to in plaintiff's prior pleadings. While, for reasons stated below, we are of opinion that plaintiff, in the amendments of March, 1958, for the first time stated facts sufficient to constitute a cause of action, the cause of action then stated embraces relevant facts connected with the transactions forming the subject of her prior pleadings. Hence, absent the bar of an applicable statute of limitations, such new cause of action may be introduced by way of amendment of plaintiff's prior pleadings. *Perkins v. Langdon*, 233 N.C. 240, 63 S.E. 2d 565; *Capps v. R. R.*, 183 N.C. 181, 111 S.E. 533.

The amendment approved in *Perkins v. Langdon, supra, filed within three years of the accrual of the cause of action,* permitted the plaintiff to allege (a) that the defendant covenanted not to sell the warehouse properties during the term of their three year lease, and (b) that he breached the covenant by selling after the end of the first year to a *bona fide* purchaser. It is noted that a demurrer *ore tenus* in this Court to the original complaint, which was silent as to the matters alleged in said approved amendment, had been sustained in *Perkins v. Langdon*, 231 N.C. 386, 57 S.E. 2d 407.

On authority of *Perkins v. Langdon, supra* (233 N.C. 240), and

cases therein cited, we hold that the court erred in striking paragraph 12(j) of the *first cause of action* and in sustaining the demurrer thereto.

2. *Second cause of action.* The two year statute of limitations applies to this cause of action. G.S. (Vol. 1A) 1-53(4); G.S. (Vol. 2A) 28-173, as amended by Ch. 246, Session Laws of 1951.

"In the absence of statute otherwise providing, the general rule is that an amendment introducing a new cause of action does not relate back to the commencement of the action, with respect to limitations, but is the equivalent of a new suit, so that the statute of limitations continues to run until the time of the filing of the amendment." 54 C. J. S., Limitations of Actions Sec. 281; 34 Am. Jur., Limitation of Actions Sec. 260. This is the established rule in North Carolina. *Capps v. R. R., supra,* and cases cited therein. While a statute of limitations was not involved in *Perkins v. Langdon, supra* (233 N.C. 240), it is noted that Johnson, J., quoting from *Capps v. R. R., supra,* recognized this limitation on the discretionary power of the court to allow amendments under G.S. 1-163.

It appears that the amendments of March, 1958, were filed more than two years from the date of the intestate's death. Nothing else appearing, this cause of action is vulnerable to a proper plea of the two year statute of limitations if plaintiff, in the amendments of March, 1958, for the first time stated facts sufficient to constitute a cause of action.

While, as indicated below, a statute of limitations may not be pleaded by demurrer, it seems appropriate, for the guidance of the court and of the parties in further proceedings, that we consider and pass upon whether the cause of action alleged in the amendments of March, 1958, is a new cause of action. In this connection, it is noted that this question was debated in the briefs and on oral argument on this appeal.

A cause of action consists of *the facts* alleged in the complaint. G.S. 1-122; *Lassiter v. R. R.,* 136 N.C. 89, 48 S.E. 642. The decision on former appeal, sustaining the demurrer to the amended complaint "for the reason that the amended complaint considered in its entirety fails to allege a case of actionable negligence proximately causing the injury to, and death of, plaintiff's intestate," became the law of the case. *George v. R. R.,* 210 N.C. 58, 185 S.E. 431; *Webb v. Eggleston,* 228 N.C. 574, 46 S.E. 2d 700; *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673; *Robinson v. McAlhaney,* 216 N.C. 674, 6 S.E. 2d 517.

In *George v. R. R., supra,* and in *Webb v. Eggleston, supra,* demurrers had been sustained for the reason that the original complaints did not state facts sufficient to constitute causes of action. It was held that the amendments, if otherwise good and available, "would

relegate plaintiff to the position of having thereby for the first time stated a cause of action against the demurring defendants." Devin, J. (later C. J.), in *George v. R. R., supra,* quoted by Barnhill, J. (later C. J.), in *Webb v. Eggleston, supra.*

In *George v. R. R., supra,* referring to the original complaint, Devin, J. (later C. J.), said: "It was not a defective statement of a good cause of action; it did not state facts sufficient to constitute a cause of action."

"As a general rule, and in the absence of statute otherwise providing, where the original complaint or declaration states no cause of action whatever, an amendment made after the bar of the statute will not relate back, but will be regarded as the beginning of the action, in reckoning the statutory period of limitations." 54 C.J.S., Limitations of Actions Sec. 279(b); *Marks v. St. Francis Hospital and School of Nursing,* 179 Kan. 268, 294 P. 2d 258; *Waddell v. Woods,* 160 Kan. 481, 163 P. 2d 348; *Bahr v. National Safe Deposit Co.,* 234 Ill. 101, 84 N.E. 717; *Fowler v. City of Seminole,* 202 Okla. 635, 217 P. 2d 513; *Murray v. McGehee,* 121 Okla. 248, 249 P. 700.

In *Ely v. Early,* 94 N.C. 1, cited by appellant, the original complaint stated facts sufficient to constitute a cause of action; and this Court held that the amendment "constituted a part of the plaintiff's cause of action at first alleged."

George v. R. R., supra, and *Webb v. Eggleston, supra,* are discussed and distinguished in *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43, where, upon the facts then considered, it was held (1) that the original complaint was not demurrable for failure to allege facts sufficient to constitute a cause of action, (2) that the amendment merely particularized prior general allegations of negligence, and (3) that the court was in error in sustaining the demurrer and in dismissing the action.

"The question whether an amendment of a pleading states a new cause of action is not affected by whether the statute involved is an ordinary statute of limitations or a limitation which goes to the existence of the right itself." 54 C. J. S., Limitations of Actions Sec. 279(c), p. 324. In each instance, the ultimate determinative question is whether the amendment states a new cause of action.

But there is this distinction: In *George v. R. R., supra* and in *Webb v. Eggleston, supra,* decided when C. S. 160, later G.S. 28-173, prior to the amendments of 1951, was in effect, the one year limitation was an integral part of plaintiff's right of action, a condition precedent thereto. Accordingly, these actions were properly dismissed upon demurrer when it appeared affirmatively from plaintiff's pleadings that a cause of action was first stated more than one year after the death of the intestate. However, since the enactment of Ch. 246, Session Laws

of 1951, the time within which a wrongful death action may be commenced is not an integral part of the right of action or a condition precedent thereto but is an ordinary (two year) statute of limitations.

"The objection that the action was not commenced within the time limited can *only* be taken by answer." (Our italics) G.S. 1-15. It is not one of the grounds for demurrer specified in G.S. 1-127. "The statutes of limitations can never be taken advantage of by demurrer." *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320, and cases cited; *Moody v. Wike,* 170 N.C. 541, 87 S.E. 350, and cases cited. It is equally true that statutes of limitations cannot be taken advantage of by motion to strike.

Although the reasons therefor are different in respect of each separately stated cause of action, as indicated above, we reach the conclusion that, as to both causes of action, defendant's demurrer should have been overruled and its motion to strike denied. Hence, the order from which plaintiff has appealed is vacated and the cause remanded, with direction that an order be entered in conformity with the law as stated herein.

Order vacated and cause remanded.

PARKER, J., not sitting.

STATE EX REL EAST LENOIR SANITARY DISTRICT, PLAINTIFF v. THE CITY OF LENOIR, NORTH CAROLINA, EARL H. TATE, MAYOR, AND JAMES BARGER, ALBERT CARPENTER, ARCHIE COFFEE, FRED M. DULA, PAUL PENDRY, JOE J. STEELE, FRIE TORRENCE, COMMISSIONERS OF THE CITY OF LENOIR, NORTH CAROLINA, DEFENDANTS.

(Filed 29 October, 1958.)

1. Appeal and Error § 1—

A correct judgment of the lower court will not be disturbed regardless of whether the lower court assigned the correct reasons therefor.

2. Appeal and Error § 2—

The Supreme Court will take note *ex mero motu* of the failure of the complaint to state a cause of action.

3. Actions § 3—

Before a party can invoke the jurisdiction of a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby and is thus the real party in interest. G.S. 1-57.

4. Constitutional Law § 8—

The Legislature has complete authority to create, control and dis-

solve cities, towns and other public corporations or other governmental agencies.

5. Municipal Corporations § 3: Sanitary Districts § 2—

A sanitary district is not a "municipality" within the meaning of G.S. 160-1, so as to preclude a municipality from annexing territory within a sanitary district.

6. Same—

The territory of governmental agencies or municipal corporations may overlap even when both have the same general purpose.

7. Sanitary Districts § 2—

A sanitary district exercises a governmental function in operating its water system to provide fire protection and kindred services; it acts in a proprietary capacity in providing water to its inhabitants for their convenience.

8. Same: Municipal Corporations § 3—

A public corporation formed by the merger or consolidation of two or more public corporations succeeds to all the duties, obligations and assets of its previous parts; where the boundaries of one public corporation are extended to take in part of the territory of another and each corporation continues its services and exercises the function authorized by the Legislature, there is no merger, and each continues to own and hold its property necessary for its corporate purposes, certainly in the absence of clear legislative mandate to the contrary.

9. Same—

A sanitary district has no right to challenge the enlargement of the boundaries of a municipal corporation to include part of the territory of the sanitary district, since the mere enlargement of the city's boundaries does not appropriate the property of the district or deprive the district of its function of selling water transported through its mains to all its customers living in its district.

PARKER, J., not sitting.

APPEAL by plaintiff from *Froneberger, J.*, at Chambers in CALDWELL on 3 July 1958.

Plaintiff seeks to challenge the validity of the action of the City of Lenoir in the fall of 1957 by which it enlarged its boundaries. A permanent injunction is likewise sought prohibiting defendants from levying taxes on property or business within the area annexed.

As the basis for the relief sought, it is alleged:

(1) Plaintiff is a sanitary district created pursuant to the provisions of G.S. 130-33 et seq.

(2) The City of Lenoir, a municipal corporation subject to the provisions of c. 160 of the General Statutes, on 23 September 1957 adopted a resolution to enlarge its corporate limits so as to include a portion of the area in plaintiff's boundaries, and pursuant to said resolution,

caused a notice to be published in a newspaper of the intent to annex the territory therein described under the provisions of G.S. 160-145.

(3) The description of the area to be annexed was not by metes and bounds as required by the statute and was in fact inadequate to describe any area.

(4) The ordinance approving the annexation was adopted before the statutory notice had been published for the requisite time.

(5) Plaintiff was not consulted nor had it given its permission to the annexation.

(6) The maps required by G.S. 160-450 had not been filed.

(7) Prior to the asserted annexation plaintiff had constructed a water line to serve people living within its boundaries. Part of the water line so constructed by plaintiff was within the area annexed.

(8) Defendants, "by the annexation herein complained of unlawfully took said water lines" and "the purported annexation constitutes an unlawful taking of plaintiff's property without due process of law and an illegal and unlawful invasion of the rights of the plaintiff."

(9) A city has authority under G.S. 160-445 to annex contiguous areas only when "not a part of another municipality."

Defendants answered. They asserted the annexation proceedings were had at the instance of the property owners residing in the area annexed, and the validity of the annexation proceedings. They denied the legal conclusions made by plaintiff and particularly denied that they had appropriated plaintiff's water mains or properties.

The parties stipulated "that an Agreed Statement of Facts be presented to the Court out of the District out of term, that jury trial is waived, and the Trial Judge is to determine the facts and conclusions of law, and render judgment." An agreed statement of facts was submitted to the court. The court, reciting that it acted pursuant to the stipulation, made findings of fact which, while not in the language of the facts stipulated, were apparently intended as summary of the facts so stipulated.

The court concluded as a matter of law: (1) the territory annexed was not a part of a municipality as that word was used in G.S. 160-445; (2) the advertisement of the proposed annexation was adequate to comply with the requirements of the statute; (3) the description used in the advertisement was adequate to meet statutory requirements; (4) there is no legally constituted board of commissioners of plaintiff sanitary district.

Based on the facts stated and conclusions drawn therefrom, the court dismissed the action. Plaintiff, having excepted to the findings of fact, conclusions of law, and the judgment, appealed.

Claud F. Seila and W. C. Palmer for plaintiff, appellant.
L. H. Hall for defendant, appellees.

RODMAN, J. We think it unnecessary to compare the facts stated in the judgment with the facts stipulated to ascertain if indeed there is a variance or a mere condensation of the agreed statement of facts; nor is it necessary to pass on exceptions 2, 3, and 4 to the court's conclusions of law.

In our opinion the case can properly be disposed of by considering the exception to the judgment. If the correct result has been reached, the judgment should not be disturbed even though the court may not have assigned the correct reasons for the judgment entered.

A reading of the complaint immediately raises this question: Has plaintiff stated a cause of action? If not, it is our duty, *ex mero motu*, to take note of that fact. *Caldlaw, Inc. v. Caldwell*, 248 N.C. 235; *Cotton Mills Co. v. Duplan Corp.*, 246 N.C. 88, 97 S.E. 2d 449; *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910; *Aiken v. Sanderford*, 236 N.C. 760, 73 S.E. 2d 911; *Watson v. Lee County*, 224 N.C. 508, 31 S.E. 2d 535.

Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby. He must be the real party in interest. G.S. 1-57; *In re Pupil Assignment*, 247 N.C. 413; *Joyner v. Board of Education*, 244 N.C. 164, 92 S.E. 2d 795; *Lipe v. Bank*, 236 N.C. 328, 72 S.E. 2d 759; *Thomas v. Insurance Co.*, 222 N.C. 754, 22 S.E. 2d 711; *Insurance Co. v. Locker*, 214 N.C. 1, 197 S.E. 555; *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E. 2d 673; *Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609; *Bank v. Thomas*, 204 N.C. 599, 169 S.E. 189.

Plaintiff bases its assertion of violation of its rights on two legal propositions: (1) Plaintiff and Lenoir are both municipal corporations. The statute does not permit defendant city to enlarge its boundary so as to include any portion of the area lying within plaintiff's corporate boundaries. (2) The enlargement of defendant's boundary results in a diminution of plaintiff's corporate limits and has the effect of transferring title to that portion of plaintiff's property, its water mains, lying within the area transferred to the new sovereign.

Articles VII and VIII of the Constitution give the Legislature complete authority to create, control, and dissolve cities, towns, and other public corporations or governmental agencies. *Moore v. Board of Education*, 212 N.C. 499, 193 S.E. 732; *Saluda v. Polk County*, 207 N.C. 180, 176 S.E. 298; *Starmount Co. v. Hamilton Lakes*, 205 N.C. 514, 171 S.E. 909; *Matthews v. Blowing Rock*, 207 N.C. 450, 177 S.E. 429; *University v. High Point*, 203 N.C. 558, 166 S.E. 511; *Highlands v.*

Hickory, 202 N.C. 167, 162 S.E. 471; *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758.

Exercising its constitutional authority, the Legislature has made general provision for the creation, modification, and operation of numerous kinds of public or quasi-public corporations. In the codification of our statute law these various agencies have been assigned their appropriate places dependent upon the functions they exercise. Illustrative: School District and School Administrative Units as governmental agencies are provided for in the chapter on education. G.S. 115. Drainage districts, quasi-public corporations, *Davenport v. Drainage District*, 220 N.C. 237, 17 S.E. 2d 1, are provided for in the chapter on drainage. Housing facilities are provided for in the chapter on housing authorities, G.S. 157, counties as governmental agencies, c. 153, sanitary districts in the chapter dealing with health, G.S. 130. These districts have been defined as quasi-municipal corporations. *Paper Co. v. Sanitary District*, 232 N.C. 421, 61 S.E. 2d 378. Cities and towns are provided for in c. 160 entitled "Municipal Corporations." That chapter does not purport to deal with sanitary districts or other quasi-municipal corporations.

The Legislature of 1947 took note of the need to provide some ready means by which cities might modify their corporate limits without awaiting the passage of some private act. It enacted a general statute dealing with the problem. That statute is now incorporated as Art. 36 of c. 160 of the General Statutes. The first section of the statute permits a city or town to annex contiguous territory which is "not embraced within the corporate limits of some other municipality." Does the word "municipality" as there used mean another city or town, or does it comprise sanitary districts and other quasi-municipal corporations? It is, we think, apparent that the word was intended to mean cities and towns and is limited to that meaning. That fact is, we think, apparent from the caption of the act and its preamble.

It is not unusual for one governmental agency to occupy the same territory as another governmental agency, and this is particularly true when the governmental objects are not coequal and coextensive. Instances are not wanting where the same general purpose is to be accomplished. *Drainage Commissioners v. Farm Association*, 165 N.C. 697, 81 S.E. 947. The town does not need to secure the approval of a sanitary district in order to enlarge its boundaries and cover the sanitary district. On the other hand, a sanitary district may with, but only with, the consent of a municipality, occupy the same territory as the city. G.S. 130-33.

Plaintiff exercises under the statute creating it both governmental functions and proprietary rights. In operating a water system to provide fire protection and kindred services it is acting in a governmental

capacity, *Baker v. Lumberton*, 239 N.C. 401, 79 S.E. 2d 886; *Mabe v. Winston-Salem*, 190 N.C. 486, 130 S.E. 169; *Mack v. Charlotte*, 181 N.C. 383, 107 S.E. 244. In supplying water to the individual inhabitants for their convenience, it was acting in a proprietary capacity. *Hamilton v. Rocky Mount*, 199 N.C. 504, 154 S.E. 844; *Munick v. Durham*, 181 N.C. 188, 106 S.E. 665; *Terrell v. Washington*, 158 N.C. 281, 73 S.E. 888.

Where there is in effect a merger or consolidation of corporations and the surviving corporation succeeds to all the duties and obligations of the constituent parts which then cease to exist, the survivor properly succeeds to the assets of the previous parts. It would be expected that the Legislature would so provide. *Green v. Asheville*, 199 N.C. 516, 154 S.E. 852; *Vilas v. Manila*, 220 U.S. 344, 55 L. ed. 491, 31 S. Ct. 416.

But where each corporation continues to survive and exercise the function authorized by the Legislature, each will continue to own and hold the property acquired and necessary for its corporate purposes. Certainly this is true in the absence of clear legislative mandate to the contrary.

The rule is well illustrated in the case of *City of Winona v. School District*, 12 Am. St. Rep. 687, 3 L.R.A. 46. There the town and the school district each operated a public school system. The town boundaries were enlarged so as to include a school house belonging to defendant. The third headnote, which accurately summarizes the decision, reads: "Where part of the territory of one municipal corporation is taken from it and annexed to another, the former corporation retains all its property, including that which happens to fall within the limits of such other corporation, unless some other provision is made by the act authorizing the separation."

Without specific language to so indicate, we will not assume that the Legislature intended to permit a city to acquire property of a quasi-municipal corporation by a mere enlargement of the city's boundaries. The mere fact that a person is moved into a city by a change of boundary does not deprive him or his vendor of the privilege of buying and selling water transported through the mains of the vendor.

Plaintiff has not alleged facts permitting it to challenge the validity of the proceedings by which Lenoir undertook to enlarge its corporate limits. *Turner v. Reidsville*, 224 N.C. 42, 29 S.E. 2d 211; *Utilities Commission v. Kinston*, 221 N.C. 359, 20 S.E. 2d 322; *Yarborough v. Park Commission*, 196 N.C. 284, 145 S.E. 563. The judgment dismissing the action is

Affirmed.

PARKER, J., not sitting.

JOHN B. PRESSLEY v. LAWRENCE JAMES TURNER; GERALDINE MARKHAM, ALSO KNOWN AS CAROL BROOKS; AND PARENTS' INSTITUTE, INC., A CORPORATION.

(Filed 29 October, 1958.)

1. Process § 10—

A nonresident who has the legal right to exercise control over the operation of a motor vehicle at the time of the collision in this State is subject to service of process under G.S. 1-105, neither ownership nor physical presence being necessary for valid service under the statutes.

2. Master and Servant § 4a—

The distinction between an independent contractor and an employee or agent is the right of the employer to exercise control over the manner in which the work is performed.

3. Same—

That the person doing the work determines the hours of work and is paid on a commission basis rather than a fixed salary, are not determinative of whether such person is an employee or an independent contractor but are merely indicia to be considered with the other factors in determining the status of the parties under the contract.

4. Same: Process § 10— Nonresident held subject to service of process under G.S. 1-105 under doctrine of respondeat superior.

Evidence and findings to the effect that the person driving the car at the time of the collision was office manager for a nonresident corporation, paid on a commission basis, that she fixed her own hours of work, but that the office was listed in the name of and maintained by the corporation, that the corporation exercised control with respect to the manner and way in which she discharged the duties of her employment, and that she collected monies for the corporation in this State and remitted same to the corporation, and was acting in the course of her employment at the time of the collision, *held* sufficient to support judgment that the nonresident corporation was subject to service of process under G.S. 1-105.

PARKER, J., not sitting.

APPEAL by defendant Parents' Institute, Inc. from *Craven, S. J.*, March 10, 1958 Special Civil Term of MECKLENBURG.

Plaintiff, a guest in a car owned and driven by defendant Turner, was injured in a collision occurring in Charlotte on 13 August 1957 between the Turner automobile and an automobile owned and driven by Geraldine Markham, hereinafter referred to as Markham. Plaintiff, asserting joint negligence, sued the operators of the two motor vehicles. Written interrogatories were submitted to defendant Markham. Based on the answers to the interrogatories plaintiff obtained leave to amend his complaint and to make Parents' Institute, Inc., hereinafter designated as Institute, a party defendant for that Markham was

the agent or servant of Institute and Institute was liable under the doctrine of *respondeat superior.*

Institute is a nonresident corporation with officers in New York City. Process issued for Institute. Service was completed in the manner prescribed by G.S. 1-105. Institute thereupon entered a special appearance and moved to dismiss, asserting that Markham was not its servant or agent but an independent contractor, it was not operating a motor vehicle in North Carolina, and for these reasons the statute authorizing service of process had no application.

Judge Craven heard the evidence offered by the parties and found in substance these facts:

"(1) That Geraldine Markham, also known as Carol Brooks, was employed by Parents' Institute, Inc., on or about May 18, 1957, to work for said company in Charlotte, Mecklenburg County, North Carolina, and other places in the State of North Carolina."

(2) That Markham was, at the time of the collision, operating one of the automobiles.

(3) That Markham "was placed in charge of an office located in Charlotte, North Carolina, that the rent on said office was paid by Parents' Institute, Inc., the telephone was listed in the Charlotte directory for said office, that said office was also listed in the Charlotte City Directory, in the name of Parents' Institute, Inc."

(4) That the duties of Markham "consisted of office manager, and among other things, the hiring and training of personnel for said company, the making of reports, the supervising of workers, the collection of moneys for said company in North Carolina . . ."

(5) That Markham "did hire and train personnel for said company, that she did collect monies for said company in North Carolina, and remit them to said company."

(6) That Institute "did exercise control over the said Geraldine Markham, also known as Carol Brooks, with respect to the way and manner in which she was to discharge the duties of her employment for and with said Parents' Institute, Inc."

(7) That just prior to the collision Markham had been working in Institute's Charlotte office, that when the collision occurred, Markham was on her way to pick up an employee of Institute and was traveling a direct route, and that at the time of the collision Markham "was acting in the course of and in the scope of her employment, and was acting in the furtherance of the business of the said defendant Parents' Institute, Inc."

(8) Institute regularly ran advertisements in the *Charlotte Observer* advertising for employees to work for it in North Carolina.

"(12) That Parents' Institute, Inc., was present and doing business in the State of North Carolina on August 13, 1957, and at the time

of said collision referred to in the Amended Complaint, that on said date the said company had employees working in the State of North Carolina, selling its products, to-wit: certain magazines and other publications, that said employees were collecting moneys in North Carolina at said time, and at the time of the collision referred to in the Amended Complaint, at said time, Geraldine Markham, also known as Carol Brooks, was employed by and acting for and on behalf of said Parents' Institute, Inc., and in the furtherance of the business of said company."

Based on his findings, Judge Craven held that Institute had been properly served and was before the court. Institute excepted to the findings of fact and conclusions of law and appealed.

Elbert E. Foster and Charles M. Welling for plaintiff, appellee.

Kennedy, Covington, Lobdell & Hickman for defendant, Parents' Institute, Inc., appellant.

RODMAN, J. By the express language of our statute, G.S. 1-105, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. *Winborne v. Stokes*, 238 N.C. 414, 78 S.E. 2d 171; *Davis v. Martini*, 233 N.C. 351, 64 S.E. 2d 1; *Ewing v. Thompson*, 233 N.C. 564, 65 S.E. 2d 17; *Queen City Coach Co. v. Chattanooga Medicine Co.*, 220 N.C. 442, 17 S.E. 2d 478; *Wynn v. Robinson*, 216 N.C. 347, 4 S.E. 2d 884. The findings of fact suffice to sustain the service of process.

Institute maintains that Markham was not an agent or servant but an independent contractor. The distinction between an independent contractor and a servant, employee, or agent has been clearly drawn in numerous recent cases. *Pearson v. Flooring Co.*, 247 N.C. 434; *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220; *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298; *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137; *Construction Co. v. Holding Corp.*, 207 N.C. 1, 175 S.E. 843; *Aderholt v. Condon*, 189 N.C. 748, 128 S.E. 337. Tersely stated, the test which will determine the relationship between parties where work is being done by one which will advantage another is: Who is boss of the job? Work done by one which benefits another is normally the result of a contract. The relationship existing between the worker, on the one hand, and the beneficiary, on the other, may be variously indicated as servant, agent, or employee, each of whom has the same legal relationship to the beneficiary of the work, or, on the other hand,

he may be called an *independent* contractor. All who work do so by virtue of a contract. The servants, the agents, the employees, the executives are not independent. They are subject to orders and under the control of the party for whom the work is being done; and because of the right to control, the doctrine of *respondeat superior* applies. But when in fact the one doing the work is independent and free from control, the beneficiary is not responsible for the manner in which the work is done.

Recognizing that the right to control is the proper test to determine the validity of service of process, Institute contends two facts stated in its affidavit and not specifically challenged by the evidence for the plaintiff establish that Markham was an independent contractor. These facts are: (1) Markham received no fixed salary, but was paid on a commission basis, and (2) Markham fixed her own hours of work. If it be conceded that these are facts, they do not singly nor in combination serve to establish the relationship of independent contractor. They are at most but signs which must be considered with other indicia to determine the true status of the parties.

The fact that Institute did not prescribe the hours that Markham should keep the office open, or when she should be out soliciting subscriptions to its magazines, or when her work should begin or terminate is, under the facts of this case, of little probative value. Certainly it is not unusual for the manager of an office to establish his own hours of work, to determine when he shall be at his desk, when he shall be out training personnel, or when he shall be engaged in promoting sales. A manager who prescribes his own and the janitor's hours of work is, in the eyes of the law, as much a servant as the janitor so far as imposing liability on the employer for the manner in which the task assigned is performed.

Institute furnished blank receipts to Markham for completion when money was paid to her for magazines sold or for delinquent accounts collected. These receipts prepared by Institute designate her as "agent." Markham refers to herself as "manager" or "employee." The fact that the parties found a commission on monies received from sales or collections a satisfactory means of compensation rather than a fixed salary is of no real moment. Certainly it is not sufficient to overcome other evidence tending to establish agency with its inherent right to control.

The evidence is, in our opinion, sufficient to sustain the findings of fact, and since the findings support the conclusions and judgment, it follows that the judgment is

Affirmed.

PARKER, J., not sitting.

BEULAH HATCHER BEMONT v. WILLIAM L. ISENHOUR, JR. AND MARJORIE D. ISENHOUR, T/A BLYTHE AND ISENHOUR.

(Filed 29 October, 1958.)

1. Master and Servant § 14—

An employer owes the duty to an employee to exercise ordinary care to provide a reasonably safe place to work and reasonably safe ingress and egress.

2. Negligence § 4f—

An employee, in using the means provided by the employer and the employer's contractor for ingress to the place of work, is not a licensee but an invitee, and the contractor engaged in enlarging the building under contract with the employer owes the duty to exercise the care of a reasonably prudent person not to render the entrance dangerous to those properly using it.

3. Same— Evidence held sufficient to be submitted to jury on issue of negligence in failing to provide invitee safe place to walk and not to show contributory negligence as matter of law.

Evidence tending to show that the employer, while its building was being enlarged, designated the entrance to be used by employees, that the contractor, in performing the work, had broken the concrete walkway to that entrance and placed boards over the broken areas, that the end of a brace of the scaffolding protruded some 8 to 18 inches into the doorway, and that plaintiff employee, hurrying in the rain and picking her way over the portions of the broken concrete along the boards, hit her head on the projecting portion of the brace, with further evidence that several others had entered just ahead of plaintiff without observing the projecting brace, *is held* sufficient to be submitted to the jury on the issue of the contractor's negligence and not to disclose contributory negligence as a matter of law on the part of the employee.

4. Negligence § 11—

A pedestrian is required to exercise the care of a reasonably prudent man to avoid being injured, the rule being constant while the degree of care varies with the exigencies of the occasion. Whether the pedestrian's attention was distracted is a factor in determining the question.

PARKER, J., not sitting.

APPEAL by defendants from *Pless, J.*, March 10, 1958 Regular Term of MECKLENBURG.

Plaintiff, an employee of Rehabilitation & Spastics Hospital Center at Charlotte, was injured as she entered the hospital on her way to work. Her head struck a board extending into a doorway used by employees on their way to work. This board was placed by defendants as a part of a scaffold for use by brickmasons in work they had contracted for the extension and enlargement of the hospital. The work was done by defendants as independent contractors. The hospital was to function while the contractors were at work.

Plaintiff alleged her injuries were proximately caused by the negli-

gence of defendants. Defendants denied negligence causing injury and pleaded the affirmative defense of contributory negligence. Appropriate issues were submitted to the jury and answered in favor of plaintiff. From a judgment in conformity with the verdict defendants appealed.

Harkey & Faggart for plaintiff, appellee.
John H. Small for defendants, appellants.

RODMAN, J. Defendants challenge plaintiff's right to recover by motions to nonsuit and by request for a directed verdict on the issues of negligence and contributory negligence. The questions raised by the motions and by the request to charge are the same. They are: (1) Was plaintiff a mere licensee to whom the only duty owing was not to willfuly or wantonly inflict injuries, or did defendants owe her the duty of exercising reasonable and ordinary care; (2) Does the evidence suffice to show lack of ordinary and reasonable care on the part of defendants; and (3) Does the evidence necessarily lead to the conclusion that plaintiff failed to exercise reasonable care for her own safety?

Plaintiff's employer owed her the duty of exercising ordinary care to provide a reasonably safe place to work and reasonably safe ingress and egress therefrom. *Bennett v. Powers,* 192 N.C. 599, 135 S.E. 535; *Elliott v. Furnace Co.,* 179 N.C. 142, 101 S.E. 611. Recognizing this obligation to its employees, the hospital arranged with the building contractors for periodic designation of ways that persons entering the hospital might use with safety. By agreement with defendants the door to be so used was indicated by a notice posted on the hospital bulletin board. The door plaintiff entered was so designated and had been so used for two or three weeks prior to her injury.

To hold that defendant owed no more duty to plaintiff than a property owner owes to a bare licensee would do violence to defendants' implied agreement not to render the designated way hazardous and would impose liability on the owner for failure to perform its duty to its employees. Plaintiff entered the doorway because of her duty to her employer. Her position with respect to defendants was at least that of an invitee. *Sledge v. Wagoner,* 248 N.C. 631; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33; *Hahn v. Perkins,* 228 N.C. 727, 46 S.E. 2d 854; *Pafford v. Construction Co.,* 217 N.C. 730, 9 S.E. 2d 408; *Brigman v. Construction Co.,* 192 N.C. 791, 136 S.E. 125; Annotations, 23 A.L.R. 1009. Defendants owed plaintiff and other employees of the hospital a duty to exercise the care of a reasonably prudent person not to render the entrance and passageway dangerous to those properly using it. *Harris v. Department Stores Co.,* 247 N.C. 195; *Sledge v.*

Wagoner, supra: Copeland v. Phthisic, 245 N.C. 580, 96 S.E. 2d 697; *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652.

The evidence from which it might be found that defendants breached their duty is, we think, ample to require submission to a jury. The accident occurred at 8:30 a.m. on 5 February. It was raining. The grounds and walkways, except where paved, were muddy. A door frame had been set as an entrance to the new wing. It would provide entrance along the same passageway as the old door. The new door was six feet wide and seven feet high. It had been partially bricked in prior to plaintiff's injury. To finish bricking and extending the wall of the wing, the bricklayers would need a scaffold. Late in the afternoon of 4 February the contractor erected a scaffold which was entirely outside of the doorway. This scaffold was braced by two pieces of two by eight in the form of an X. The upper portion of one of these pieces of wood projected into the doorway some eight or ten inches, as testified by defendants' superintendent of construction, or as much as 18 inches, according to other witnesses. There was a concrete walk from the grounds leading to this doorway. The concrete was two feet wide and adjacent to the side of the door nearest the scaffold. The projecting portion of the brace was over a portion of this concrete walkway. At or near the door the concrete walkway had been broken during the construction. Boards had been placed over these broken areas.

Plaintiff was driven by automobile to the concrete walkway. She alighted some seven or eight steps from the doorway and on the concrete walkway. She had no hat. She hurried to enter the building to avoid getting wet. She was picking her way over the broken portions of the concrete and along the boards when her head struck the projecting portion of the brace. That the projecting board was of such character and so placed as not to be readily discernible was shown by others who entered the same doorway just ahead of plaintiff. Defendants had not given any sign of warning that they had occupied a portion of the doorway which had been designated with their consent and approval for use by hospital employees. Whether the conduct of defendants sufficed to meet the test of the reasonably prudent person was a question for the jury.

Was plaintiff, as a matter of law, contributorily negligent?

The rule defining the duty of a pedestrian to exercise care for his safety is stated in *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424. It is there said: "A person traveling on a street is required in the exercise of due care to use his faculties to discover and avoid dangerous defects and obstructions, the care required being commensurate with the danger or appearance thereof. (Citations) He is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect which is visible and obvious."

The care exercised or which should be exercised by a reasonably prudent man is standard while the degree of care which such person exercises varies with the exigencies of the occasion. *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 358. *Dennis v. Albemarle,* 242 N.C. 263, 90 S.E. 2d 532, illustrates an application of the rule where the injured person's attention was distracted. Here plaintiff had no reason to suspect a violation of the implied promise given her to keep the way safe for passage. The defect cannot be said to have been readily visible and obvious—a fact demonstrated by evidence that several others had entered just ahead of plaintiff without observing this projecting board. It was at a point where reasonably it could be anticipated attention would be given to the conditions under foot because of the broken pavement covered by loose boards. She had to pick and choose her way. The heavy rain caused her to move in a hurry. The question of plaintiff's negligence was properly submitted to the jury.

We have examined the other exceptions but find nothing of which defendants can properly complain.

Affirmed.

PARKER, J., not sitting.

GEORGE THROWER, TRADING AS BOULEVARD SUPERMARKET, v. COBLE DAIRY PRODUCTS CO-OPERATIVE, INC.

(Filed 29 October, 1958.)

1. Corporations § 26: Principal and Agent § 10—

Evidence that defendant corporation's agent obtained the signatures of plaintiff's employees to invoices for products delivered and, by the use of carbons, to additional invoices, which the agent later filled in, and obtained payment for both the genuine and spurious invoices, is sufficient predicate for liability of defendant corporation under the general rule that the principal is liable for the fraud of its agent committed while acting within his authority.

2. Same—

The purchaser of products, in permitting the seller's agent to deposit invoices, over the course of years, in a receptacle in the purchaser's office, is not guilty of negligence barring recovery for the fraud of the seller's agent in thus presenting both genuine and spurious invoices, since the seller selected the agent, and it is necessary to trade and commerce that a party may rely on the integrity of men.

3. Evidence § 26—

Where plaintiff demands that defendant produce the original invoices for the purpose of ascertaining which carbon copies in plaintiff's possession are genuine and which spurious, and defendant states that the originals are not available, defendant cannot complain of the introduc-

tion of the carbons in evidence, since it is apparent that defendant had within its power the means of establishing the matter if plaintiff were in error as to which of the invoices are genuine and which spurious.

4. Damages § 14—

While the damages must be established with reasonable certainty, it is not required that they be established with absolute certainty, and where plaintiff has paid both genuine and spurious invoices, the ascertainment of the amount of the spurious invoices by taking the invoices for the less amount for those days during which both a genuine and a spurious invoice were paid, establishes the amount of damages with reasonable certainty, and is sufficient.

PARKER, J., not sitting.

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

Civil action to recover $21,200 which the plaintiff alleged the defendant, through its agent and servant, Raymond Queen obtained by false pretenses from the plaintiff. The defendant denied that Queen was acting as its agent; that if it be found to the contrary, the "negligence and lack of care in the operation of his business and in his dealings with . . . Queen, . . . aided, abetted, and contributed" to any loss sustained by him. The parties waived a jury trial and stipulated the presiding judge "should hear the matter, find the facts, and render judgment."

The plaintiff's evidence in short summary tended to show: During the time involved, the plaintiff operated a grocery store and market in the Town of Belmont. From August, 1953 to February, 1956 the plaintiff purchased on open account from the defendant corporation its milk and dairy products delivered at his store. In these transactions Raymond Queen was the agent and employee of the defendant, except for about five months beginning April 21, 1954. In connection with his deliveries, and as a means of keeping account of them, Queen made use of invoice tickets consisting of an original and one or more carbon copies. However, he employed the device of withdrawing the carbon paper from all except the first copy at the time he listed the purchases, and then reinserted the carbon for the other copies before he obtained the signature of the plaintiff's employee whose duty it was to approve the invoice. The result was an original ticket, one correct carbon copy with the approval signature of the plaintiff's employee, and one or more blank copies with the carbon signature of the employee. Thereafter Queen filled out the additional copy, or copies, showing fictitious deliveries. He then deposited all carbon copies, both genuine and spurious, in a receptacle in the plaintiff's office. At the end of each week he collected not only for the amount

showing the actual delivery, but for the amount shown on the spurious invoices.

The plaintiff's evidence tended to show that only one delivery was made on Mondays, Thursdays, and Sundays. On many Mondays and Thursdays, and on one Sunday, Queen submitted and collected for more than one invoice. About once each month as many as two deliveries were made on Wednesdays and Fridays. Frequently Queen submitted and collected for two or three invoices on Wednesdays and Fridays. No deliveries were actually made on Tuesdays, but Queen submitted and collected for invoices on that date. The plaintiff offered in evidence all invoices (genuine and spurious) left with the plaintiff by Queen, and plaintiff's checks in payment.

The court examined all checks and invoices, and made its determination as to which were spurious. The court thus stated its method of fixing the plaintiff's loss: "In arriving at the amount of loss sustained by the plaintiff the court has given the defendant the benefit of the invoices for the larger amount and in the computation of the said loss by the plaintiff has taken the invoices for Wednesdays stating the lesser amounts." A similar method was followed in determining the loss for the other days for which invoices were submitted.

The defendant did not offer any evidence. The court found the plaintiff had paid $15,579.25 for milk products not delivered, rendered judgment accordingly, and the defendant appealed.

Carpenter & Webb, By: William B. Webb for defendant, appellant.

E. R. Warren, Whitener & Mitchem, By: Basil L. Whitener, By: Wade W. Mitchem for plaintiff, appellee.

HIGGINS, J. The defendant presents three questions for review: (1) Is the defendant responsible to the plaintiff for the loss caused by Queen's falsification of the invoices? (2) Is the plaintiff barred from recovery by his negligent failure to discover and prevent Queen's fraud? (3) Did the court err in fixing the amount of the recovery?

The evidence is amply sufficient to support the court's findings that Queen was "an employee, agent, and servant of the defendant corporation . . . was acting in the course and scope of his employment in dealing with the plaintiff and the controversy herein involved arises out of the acts of said Queen as agent, servant, and employee." The general rule is that a principal is responsible to third parties for the fraud of its agent while acting within his authority. "It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant, which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment." *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446.

"There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts. A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing and trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress and the corporation can commit fraud with impunity." *Peebles v. Patapsco Co.*, 77 N.C. 233. The master is liable for the unlawful or negligent acts of his servant if about the master's business, and if doing or attempting to do that which he was employed to do. *Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224.

The evidence in this case shows the court found the fraud was committed in the sale of defendant's products and in the padding of accounts its agent was authorized to collect. The defendant is liable for plaintiff's loss.

The defendant here contends the plaintiff is barred from recovery by his own negligence in permitting Queen to deposit the invoices in a receptacle in plaintiff's office. This from his brief: "In permitting the practice to continue for that period (2½ years) the plaintiff chose to put his faith and trust in Queen. Such was not a faith and trust solicited by the defendant." The argument is not persuasive. It ignores the fact that Queen was selected and sent out by the defendant as its agent to sell and deliver, and collect for its products. "Where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger." *Bank v. Liles*, 197 N.C. 413, 149 S.E. 377. There must be reliance on the integrity of men, or else trade or commerce could not prosper. *Gray v. Jenkins*, 151 N.C. 80, 65 S.E. 644; *Machine Co. v. Bullock*, 161 N.C. 1, 76 S.E. 634. The plaintiff's conduct in trusting Queen does not preclude the recovery.

The defendant challenges the amount found by the court (acting as the jury) to be plaintiff's loss by reason of Queen's fraudulent invoices. In support of its assignment of error No. 18, the defendant offers the following in its brief: "Surely such testimony as that admitted by the court over objection to the effect that his milk bills were 'right around $2,500 a month' before Queen's arrest and 'around $1,500' after his arrest, furnishes no such foundation. Apart from its vagueness, this was a clear violation of the best evidence rule." There was also evidence that in the year 1955 the plaintiff had an operating loss of $24,000, and that on a smaller volume in 1956 (during which Queen made deliveries for only one month) the plaintiff showed a profit of $9,000. The evidence was offered without objection. The defendant cannot justly complain of the violation of the best evidence rule.

Queen gave the plaintiff carbon copies of all invoices, genuine and spurious. The plaintiff introduced them in evidence, together with the checks that paid them. The evidence is that Queen kept the genuine originals and presumably settled with his employer on the basis of these only. The plaintiff demanded that the defendant produce them. The demand was met with the statement they were not available. It is fair to assume, therefore, the defendant had within its power the means of ascertaining the amount of plaintiff's loss. Not only did defendant fail to produce the original invoices, it failed to offer any evidence. The plaintiff offered the admission of Queen that he raised the tickets from $100 to $125 per week in excess of his actual deliveries.

In case a jury trial is waived, the court's findings of fact are conclusive upon appeal, if there is evidence to support them. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. "The amount of damages must be established with reasonable, but not with absolute certainty, . . . absolute certainty is not required; it is sufficient if a reasonable basis or computation is afforded, though the result be only approximate; . . ." 25 C.J.S., Damages, sec. 26(c), p. 491. "However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed." *Norwood v. Carter,* 242 N.C. 152, 87 S.E. 2d 2; *Story Parchment Corp. v. Patterson Parchment Paper Co.,* 282 U. S. 555; *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359.

The evidence furnished sufficient support for the court's finding as to the amount of plaintiff's loss. The findings are sufficient to sustain the judgment. The defendant's assignments do not present error of substance. The judgment is

Affirmed.

PARKER, J., not sitting.

STATE v. ALLEN DENNY.

(Filed 29 October, 1958.)

Homicide § 29—

The 1949 amendment to G.S. 14-17 does not create a separate crime of "murder in the first degree with recommendation of mercy," but merely gives the jury, in the event it convicts defendant of murder in the first degree, the unbridled discretion to recommend that the punishment should be life imprisonment rather than death, and therefore an instruction, pursuant to statement of the solicitor, to the effect that the charge of murder in the first degree was no longer in the case, but that the charge of

murder in the first degree with recommendation of mercy was in the case, is prejudicial.

PARKER, J., not sitting.

APPEAL by defendant from *Preyer, J.*, at July 1958 Term of WILKES.

Criminal prosecution upon a bill of indictment charging defendant with the crime of murder in the first degree of one Boyden Richardson.

The record discloses the following: "Solicitor: 'May it please the Court, the defendant Allen Denny is charged here with murder in the first degree. At this time the State desires to try the case. The State will not ask for murder in the first degree under the statute, but will ask for a verdict of murder in the first degree with a recommendation of mercy.' (After discussion between the Court and defense counsel, Solicitor stated:) 'Gentlemen of the jury, at this time it appears that maybe the State should clarify the matter somewhat and the State now states that the State will ask for a verdict of guilty of murder in the first degree with a recommendation of mercy or a verdict of murder in the second degree or manslaughter as the evidence may warrant in the case, but the State is not asking for a verdict of murder in the first degree without a recommendation which would mean that if he was convicted of murder in the first degree that the Judge would have to impose a death sentence. The State is not asking for the death penalty in this case but rather for a verdict of guilty of murder in the first degree with a recommendation of mercy which would mean that defendant would not be electrocuted or gassed, or a verdict of second degree murder, or manslaughter, as the evidence may warrant. Of course, that can only be determined after the evidence has been heard by you, gentlemen of the jury.' "

Plea: Not guilty.

And upon the trial in Superior Court both the State and the defendant offered evidence, and the case was submitted to the jury under the charge of the court.

In this connection the court after stating to the jury that the defendant in this case, Allen Denny, stands indicted on a bill of indictment which charges him with the capital felony of murder in the first degree, charged the jury in part as follows:

"The Solicitor, on the calling of this case for trial, announced in open court that he would not seek a verdict of murder in the first degree at your hands, but would ask for a verdict of murder in the first degree with recommendation for mercy, or a verdict of murder in the second degree, or manslaughter, as the evidence and the facts might justify, that is the State is not seeking the death penalty in this case but is asking that you return a verdict of guilty of murder in the first degree with recommendation of mercy, which would mean life im-

prisonment, or murder in the second degree, or manslaughter, as the facts may justify." Defendant excepts to this charge.

And it is seen that all through the charge the jury was given instructions accordant with this theory;— and the jury returned the verdict of "(Guilty as charged) Guilty as charged of murder in the first degree with recommendation of mercy." Defendant moved (1) To set aside the verdict, (2) for a new trial, and (3) in arrest of judgment. The motions were severally denied, and defendant excepts in each instance.

The court entered judgment that defendant be confined in the Central Prison in Raleigh for life.

Defendant excepts thereto, and appeals to Supreme Court and assigns error.

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

J. H. Whicker, Sr., Allen, Henderson & Williams for defendant, appellant.

WINBORNE, C. J. The record on this appeal discloses that the case in hand was tried in Superior Court upon the theory that, in view of the statement by the Solicitor, as above recited, "the charge of murder in the first degree is no longer in this case, but the charge of murder in the first degree with recommendation for mercy is in the case." The question then arises as to whether there is in this State any crime known to criminal law as "murder in the first degree with recommendation of mercy." The answer is "No." Recommendation by the jury pertains to punishment, and is not an element of murder in the first degree.

In this connection, G.S. 14-17, as amended by Section 1 of Chapter 299 of 1949 Session Laws of North Carolina, provides that "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or 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 and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished," etc.

The proviso embraces the 1949 amendment, and has been the subject of discussion in several cases. *S. v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212; *S. v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684; *S. v. Simmons*, 234

N.C. 290, 66 S.E. 2d 897; s. c. 236 N.C. 340, 72 S.E. 2d 743; *S. v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664; *S. v. Conner*, 241 N.C. 468, 85 S.E. 2d 584; *S. v. Carter*, 243 N.C. 106, 89 S.E. 2d 789; *S. v. Adams*, 243 N.C. 290, 90 S.E. 2d 383; *S. v. Cook*, 245 N.C. 610, 96 S.E. 2d 842.

In the *McMillan case, supra*, this Court said that "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning,— a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature." And, continuing, the Court then declared: "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison * * * No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficient to set aside a verdict where no recommendation is made."

Thus the statute "commits the matter to the unrestrained discretion of the jury." *S. v. Marsh, supra*, citing the *McMillan case*. To like effect are the holdings in above cited cases.

In *S. v. Carter, supra*, opinion by *Johnson, J.*, it is stated: "Prior to 1949, the punishment for murder in the first degree was death. A recommendation of mercy by the jury meant nothing as bearing on the duty of the judge to impose punishment. The recommendation was treated as surplusage. The death sentence followed as a matter of course. It was so fixed by statute, G.S. 14-17.

"But this has been changed. Now by virtue of Chapter 299 Session Laws of 1949, the statute (G.S. 14-17) contains a proviso which directs that 'if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.'" And it is then declared that "the jury now has discretionary right to recommend 'imprisonment for life in the State's prison'. Now the recommendation when made may not be treated as surplusage. The recommendation has the salutary effect of mitigating the punishment from death to imprisonment for life, and the Act of 1949 expressly provides that the 'court shall so instruct the jury * * *.' It is not enough for the judge to instruct the jury that they may recommend life imprisonment. The statute now requires that he go further and tell the jury what the legal effect of such recommendation will be, i.e., that if they make the recommendation, it will mitigate the punish-

ment from death to imprisonment for life in the State's prison." To like effect are *S. v. Adams, supra,* and *S. v. Cook, supra.*

It is fair to say that the case of *S. v. Green,* 246 N.C. 717, 100 S.E. 2d 52, doubtless caused the procedure followed in this case. There the defendant was charged with rape, and the Solicitor for the State made this announcement at the outset of the trial: "The State will not ask for a verdict of guilty of the capital crime carrying the death penalty, but will ask for a verdict of guilty of rape, with the recommendation of life imprisonment or guilty of attempt to commit rape, as the facts and law may justify." The jury returned verdict of "Guilty of an assault with intent to commit rape."

And on appeal to this Court there was no exception to the statement of the Solicitor, and consideration of it was not essential to decision on matters presented. Hence no expression of opinion by this Court in respect thereto was then made. The statement of the Solicitor had been by-passed, so to speak, by the verdict of the jury finding defendant guilty of a lesser offense than rape.

For reasons stated herein the judgment in the instant case will be arrested, and a new trial ordered.

New Trial.

PARKER, J., not sitting.

DELMAR STUDIOS OF THE CAROLINAS, INC., A CORPORATION, v. J. E. GOLDSTON.

(Filed 29 October, 1958.)

1. Appeal and Error § 50—

Where the findings of fact in injunction proceedings are supported by ample evidence, exceptions to the findings will not be sustained.

2. Injunctions § 13—

Where the sole purpose of the suit is to obtain injunctive relief, plaintiff is entitled as a matter of law to the continuance of the temporary restraining order to the hearing, notwithstanding the denial of the primary equity in the answer, when the complaint sufficiently alleges the primary equity and the evidence and findings make it appear that continuance of the temporary order is necessary to protect plaintiff's right until the controversy can be determined upon its merits, since in such instance the dissolution of the temporary order would virtually decide the case upon the merits upon the hearing of the order to show cause.

PARKER, J., not sitting.

APPEAL by defendant from *Pless, J.*, Regular Civil Term, 3 March 1958, of MECKLENBURG.

This is an action to restrain the defendant from competing with the plaintiff in 74 counties in North Carolina, all of the State of South Carolina, and eleven counties in the State of Georgia, for a period of two years, from and after 25 January 1958, in violation of an agreement of employment entered into by and between the plaintiff and the defendant on 22 September 1956.

The pertinent part of paragraph four of said agreement of employment reads as follows:

"The Photographer (the defendant) shall not, during the period of two (2) years next following the date of the termination for any reason of his employment with Delmar, directly or indirectly for himself or as the agent of, or on behalf of, or in conjunction with any person, firm, association or corporation except as the representative or in the employ of Delmar, engage in or become financially interested in the business of soliciting and procuring from schools within the Territory applications for photographs or yearbook contracts, or in the business of the taking of photographs in the fulfillment of any such contract, and it is hereby provided that if the Photographer shall violate or attempt to violate any provision of this Section 4, he may be enjoined in an action to be brought in any court of competent jurisdiction and such action shall not be subject to the defense that there exists an adequate remedy at law."

The defendant terminated his employment by the plaintiff on 25 January 1958.

The complaint alleges that shortly after the defendant terminated his employment by the plaintiff, he became affiliated with Strawbridge Studios of Durham, North Carolina, a competitor of plaintiff, and began to solicit contracts from plaintiff's former customers, in violation of the agreement between plaintiff and defendant.

A temporary restraining order was issued on 17 February 1958 and the defendant was directed to appear before his Honor J. Will Pless, Jr., Judge Presiding over the courts of the Twenty-Sixth Judicial District, at Chambers in Charlotte, North Carolina, on Monday, 3 March 1958, at 10:00 a.m., and show cause, if any he has, why the restraining order should not be continued until the final hearing.

The cause was heard on the date, hour, and at the place fixed in the temporary restraining order, upon the verified complaint, agreement of employment, and affidavits filed by the plaintiff and an affidavit and verified answer by the defendant.

His Honor, among other things, found that the plaintiff is engaged in the field of selling and taking photographs, particularly in schools and colleges, and selling school annuals or yearbooks, in the territory

in North and South Carolina and Georgia, as described in the complaint; that it was so engaged in 1956, 1957 and early 1958, and that it had contracts for photographic work in more than one thousand schools in the described territory in the school year 1957-1958; that the compensation which defendant earned in the employ of the plaintiff was substantial, being approximately $1,000.00 per month; that the plaintiff has a legitimate business interest to protect in the area described in the employment agreement; that the defendant is free under the terms of the agreement to return to the kind of photographic work he was doing before he entered the employment of the plaintiff.

The court, upon these and other facts, held that the restraining order should be continued until the final determination of the action on its merits. Judgment was entered accordingly and the defendant appeals, assigning error.

Helms, Mulliss, McMillan & Johnston, Wm. H. Bobbitt, Jr., for plaintiff, appellee.

E. K. Powe for defendant, appellant.

DENNY, J. The question for determination on this appeal is whether or not the court below committed error in continuing the temporary restraining order until the final determination of the action on its merits.

The defendant's assignments of error numbered 1 through 8 are based on similarly numbered exceptions to the refusal of the court below to find facts as requested by the defendant. These assignments of error are without merit and are, therefore, overruled.

Assignments of error numbered 9 through 15 are based on like numbered exceptions to the court's findings of fact numbered 1, 2, 3, 5, 6, 8 and 9, while assignment of error numbered 16 is based on an exception to the signing of the order continuing the temporary restraining order to the final hearing.

There is ample evidence to support the findings of fact challenged by the defendant's exceptions and assignments of error. Hence, they are overruled.

In *Cobb v. Clegg*, 137 N.C. 153, 49 S.E. 80, *Walker, J.*, speaking for the Court, in pointing out the distinction between the old forms of common and special injunctions, said: "If the facts constituting the equity were fully and fairly denied, the injunction was dissolved unless there was some special reason for continuing it. Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the

coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." *Scott v. Gillis,* 197 N.C. 223, 148 S.E. 315; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319; *Roberts v. Cameron,* 245 N.C. 373, 95 S.E. 2d 899.

We think, in light of the facts found by the court below, the plaintiff was entitled to have the temporary restraining order continued until the final hearing as a matter of law, and we so hold.

The judgment of the court below is

Affirmed.

PARKER, J., not sitting.

HORACE ROBINSON AND WIFE, MARY K. ROBINSON, v. STATE HIGHWAY COMMISSION.

(Filed 29 October, 1958.)

1. Eminent Domain § 5—

Where a part of a tract of land is taken for highway purposes, the measure of damages is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left after the taking.

2. Same—

In ascertaining the difference between the fair market value of land immediately before and immediately after a partial taking, the value of the land taken and the value of the remaining land after giving consideration to general and special benefits, if any, are elements to be considered, and it is error for the court to instruct the jury that it should ascertain the difference between the value of the land immediately before

and immediately after the taking and then subtract from this difference any general and special benefits.

3. Eminent Domain § 6—

While uses to which the remaining lands are reasonably susceptible as a direct result of the location of the highway may be considered in proper instances in determining general and special benefits, testimony of a witness as to his observations of sales made of unidentified properties on similar highways under unidentified circumstances would seem impertinent.

PARKER, J., not sitting.

APPEAL by petitioners from *Clark, J.*, May Civil Term, 1958, of WARREN.

Special proceedings under G.S. 40-11 et seq., to recover compensation for the taking by respondent under G.S. 136-19 of an easement of right of way, including the right to limit access thereto, over 15 acres of a 76-acre tract of land owned by petitioner Horace M. Robinson.

The 15-acre portion was appropriated by respondent for the relocation, including a "clover-leaf" interchange, of U. S. Highway No. 1, Project #4950. It crosses the Robinson tract, separating 54.5 acres of the unappropriated portion from 6.5 acres thereof.

Commissioners assessed the landowner's damages at $7,908.00. The clerk, overruling respondent's exceptions, entered judgment in accordance with the report of the commissioners. Respondent excepted and appealed to the superior court.

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

"What sum, if any, is the Petitioner Horace M. Robinson entitled to recover of the Respondent, State Highway Commission, for the appropriation of that portion of the lands of the Petitioner described in the Petition, together with the damages, if any, to the remainder of Petitioner's lands described in the Petition, over and above all general and special benefits, if any, accruing to Petitioner's land by reason of the construction of the highway? ANSWER—$4220.00 Inc. Int. at 6%."

The court entered judgment in accordance with the verdict. Petitioners excepted and appealed, assigning errors.

Attorney-General Seawell, Assistant Attorney-General Wooten, H. Horton Rountree, Member of Staff, and Kerr & Kerr, for the State.

Gholson & Gholson and Banzet & Banzet for petitioners, appellants.

BOBBITT, J. The applicable rule, well established, is stated by *Ervin, J.*, in *Proctor v. Highway Commission*, 230 N.C. 687, 691, 55

S.E. 2d 479, as follows: "Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. G.S. 136-19; *Highway Commission v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314." Later cases in accord include *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778; *Gallimore v. Highway Commission*, 241 N.C. 350, 85 S.E. 2d 392; *Statesville v. Anderson*, 245 N.C. 208, 95 S.E. 2d 591; *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61.

Based on appropriate exceptions and assignments of error, petitioners contend that the court's instructions relating to the measure of damages were erroneous and prejudicial. The assignments are well taken. The final instruction, particularly the third paragraph thereof, will suffice to point out the error. It was as follows:

"So I say in summary, members of the jury, you will arrive at a fair market value of the entire tract of land in question, immediately before the taking, under the rules that I have given you, and also a fair market value of the entire tract immediately after the taking.

"Now, if there is no difference between the two values, then, of course, the issue submitted to you would be answered 'None.' Or if you should find that the fair market value after the taking exceeds what it was before, of course the answer would be 'None.'

"If, however, you find that the fair market value of the entire tract of land is less after the taking than it was immediately before the taking, then to such a decrease in value *you must give credit for any special or general benefit*, under the rule that has already been explained to you, *and subtract that from the difference that you arrive at as between the before and after value*, and then after having done that you must, or may add interest at the rate of 6% from the date of the taking of the property by the respondent, as being a sum, additional sum awarded to the petitioner for the delay in payment of the property taken, as an element of compensation." (Our Italics)

General and special benefits, if any, accruing to the landowner from the location and construction of the new highway are elements for consideration in determining the fair market value of *what is left* immediately after the taking. If an entire tract is taken, a landowner has nothing to which general and special benefits might attach.

The instructions given are to the effect that the jury, having first determined the difference between the fair market value of the entire tract immediately before and immediately after the taking, was to subtract from such difference the value of general and special benefits. The value of general and special benefits, if any, is not to be subtracted from such difference; but, as heretofore stated, the general and special benefits, if any, were elements for consideration in determining the fair market value of what was left immediately after the taking.

Respondent's emphasis upon the general and special benefits accruing to Robinson in respect of his remaining 61 acres from the location and construction of the new highway indicates the prejudicial effect of the erroneous instruction. Indeed, one of respondent's witnesses, on direct examination, was permitted to testify, over objection, as follows: "I have seen some of these properties on similar highways sell for phenominal prices, I thought, as compared with the prices they were sold at for farm land. Some were sold for industrial property. It has been mostly motels, filling stations, restaurants and occasionally a variety store." The testimony of this witness as to his observations of sales made of unidentified properties under unidentified circumstances at what he considered "phenominal" prices would seem rather far afield from the issue before the jury. However, since there must be a new trial for error in the charge, we need not elaborate on the assignment of error directed by petitioners to the reception of this testimony.

New trial.

PARKER, J. not sitting.

JAMES LEONARD McFALLS v. CLARA LEE SMITH AND ROY LEE SMITH

(Filed 29 October, 1958.)

1. Trial § 19—

Whether the evidence is sufficient to be submitted to the jury is a question of law for the court.

2. Negligence § 19b(1)—

If the evidence in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive motion to nonsuit, or demurrer to the evidence.

3. Automobiles § 42h—

Plaintiff's allegations and evidence which are sufficient to support the inferences that plaintiff, at a time when the lights of motor vehicles

were required to be shining, gave the proper signal for a left turn, looked for and did not see the lights of any other vehicles which could be affected by his movement, and that defendant, failing to give warning of his intention to pass, crashed into the left side of plaintiff's vehicle as it was making the turn, *is held* sufficient to be submitted to the jury on the issue of negligence.

4. Trial § 22c—

Equivocation in the evidence goes to its weight only and does not warrant nonsuit.

PARKER, J., not sitting.

APPEAL by plaintiff from *Huskins, J.*, July, 1958 Term, MITCHELL Superior Court.

Civil action to recover for personal injury and property damage alleged to have been caused by defendants' actionable negligence. The defendants denied negligence, pleaded sole and contributory negligence on the part of the plaintiff, and set up a counterclaim. At the close of the plaintiff's evidence the court, on motion of the defendants, entered judgment of compulsory nonsuit from which the plaintiff appealed.

G. D. Bailey and W. E. Anglin for plaintiff, appellant.

Williams and Williams, By: William C. Morris, Jr., and James N. Golding for defendants, appellees.

HIGGINS, J. The only question presented by the appeal is the sufficiency of the evidence to go to the jury. The question is one of law, always to be decided by the court. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463. If the evidence in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit, or demurrer to the evidence. *Chambers v. Edney,* 247 N.C. 165, 100 S.E. 2d 343; *High v. R.R.,* 248 N.C. 414, 103 S.E. 2d 498; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849.

Plaintiff's testimony tended to show that on January 26, 1958, he was driving a pickup truck south on Highway 26 in Mitchell County at around 5:45 p. m. "It was not completely dark and it was not light. . . . I couldn't travel without headlights." Intending to turn left on Hall Town Road, he gave the required hand signal for about the last 100 feet as he approached the intersection. He looked in his rear view mirror for traffic approaching from his rear. "I did not see lights behind me, nor ahead of me. I looked in the rear view mirror some more." The plaintiff's evidence further tended to show the road was straight to the north for more than three miles; and that as he was making the left turn the defendant Roy Lee Smith's car, driven

south by the defendant Clara Lee Smith, approached from his rear, and without any warning crashed into the left side of his pickup truck, inflicting personal injury to the plaintiff and damage to the truck. The inference is permissible the defendant Clara Lee Smith was driving without lights, else he could have seen them in his mirror; that she failed to observe and heed plaintiff's signal that he intended to make a left turn; and that she did not give a timely signal of her intention to pass.

It may be noted the complaint only by indirection alleges driving without lights as an element of negligence. The plaintiff, driving along the highway in the nighttime, was entitled to the notice the lights of a car approaching from the rear would give him in determining whether he could turn in safety. It must be noted also the evidence is not without some equivocation. However, that goes to its weight, which is for the jury. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463.

The plaintiff, on the showing made, was entitled to present his case to the jury.

Reversed.

PARKER, J., not sitting.

TED R. NICHOLS v. ISAAC McFARLAND.

(Filed 29 October, 1958.)

1. Appeal and Error § 19—

An assignment of error that the court erred in permitting a witness "to testify as shown by exceptions" of designated number, with reference to the page of the record, is insufficient, it being required that an assignment of error definitely and clearly present the error relied on without compelling the Court to go beyond the assignment itself to learn what the question is.

2. Appeal and Error § 51—

Where motion to nonsuit is renewed at the close of all of the evidence, the correctness of the ruling on the last motion only is presented upon appeal.

3. Appeal and Error § 21a—

An assignment of error to the court's ruling on motion to nonsuit is sufficient if it refers to the motion, the ruling thereon, the number of the exception, and the page of the record where found.

4. Appeal and Error § 19—

The rules governing appeals are mandatory.

PARKER, J., not sitting.

APPEAL by defendant from *Crissman, J.*, April-May, 1958 Regular Civil Term, WILKES Superior Court.

This civil action grew out of a street crossing motor vehicle accident in the City of Durham. The plaintiff alleged his personal injury and property damage resulted from the defendant's actionable negligence. The defendant denied negligence on his part, filed a counterclaim for personal injury and property damage, allegedly resulting from the plaintiff's actionable negligence. Appropriate issues were submitted to and answered by the jury in favor of the plaintiff. From the judgment on the verdict, the defendant appealed.

Hayes & Hayes, By: Kyle Hayes for defendant, appellant.
Ralph Davis for plaintiff, appellee.

HIGGINS, J. The appellant asks for a reversal of the judgment or a new trial on the basis of 12 assignments of error. We quote assignment No. 1: "The court erred in permitting the plaintiff to testify as shown by Exceptions Nos. 1 (R p 11), 2 (R p 12) and 3 (R p 12)." Assignments Nos. 2, 3, 4, 6, 7, and 9 are in similar form.

Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554, 555, as interpreted in the decisions of this Court, require: "Always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *State v. Mills*, 244 N.C. 487, 94 S.E. 2d 324; *Allen v. Allen*, 244 N.C. 446, 94 S.E. 2d 325; *Parsons v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829; *Porter v. Lumber Co.*, 164 N.C. 396, 80 S.E. 443; *Thompson v. R.R.*, 147 N.C. 412, 61 S.E. 286. The objectionable assignments in their present form would require the Court to undertake a voyage of discovery through the record to ascertain what the assignments involve. This the Court will not do. *Cecil v. Lumber Co.*, 197 N.C. 81, 147 S.E. 735.

Assignment No. 5 relates to the refusal of the court to allow the motion for nonsuit at the close of the plaintiff's evidence. By introducing evidence after the court overruled the motion, the defendant waived his right to insist on the motion. However, the defendant renewed the motion at the close of all the evidence and thus preserved his right of appeal, but only upon the insufficiency of all the evidence to present a jury question. This right he has preserved by assignment No. 8, based on exception No. 13: "When the assignment of error is to the court's ruling on nonsuit, it is enough to refer to the motion, the ruling thereon, the number of the exception, and the page of the record where found." *Allen v. Allen, supra.*

By assignment No. 10 the defendant raises the question whether the court, in the charge, gave undue emphasis to plaintiff's evidence

and contentions. The objection is not valid. The court's charge appears to be full, complete, and without favor.

Evidence of defendant's actionable negligence was sufficient to go to the jury and to support the verdict. Evidence of contributory negligence on the part of the plaintiff does not appear as a matter of law. It is doubtful whether it was even sufficient to require the submission of the issue to the jury. The motion of nonsuit was properly denied.

Assignments of error Nos. 11 and 12 are to the refusal of the court to set aside the verdict and to the signing of the judgment. They do not require discussion.

Appeal from a final judgment of the superior court is a matter of right. This right is exercised with such frequency as makes mandatory adherence to the rules governing appeals.

No Error.

PARKER, J., not sitting.

STATE v. ROBERT AARON GARNER.

(Filed 29 October, 1958.)

1. Criminal Law § 154—
An assignment of error not supported by an exception is ineffectual.

2. Criminal Law § 156—
When the charge read contextually clearly presents the applicable principles of law in such manner as to leave no reasonable ground to believe that the jury was misinformed or misled, an assignment of error thereto cannot be sustained.

PARKER, J., not sitting.

APPEAL by defendant from *Clark, J.*, January Term, 1958, of GRANVILLE.

Indicted for the murder of Murphy Ellis, defendant was put on trial for second degree murder or manslaughter as the evidence might justify.

The jury's verdict was "Guilty of Manslaughter." Thereupon, the court pronounced judgment imposing a prison sentence of 15 years, from which defendant appealed, assigning errors.

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

Hugh M. Currin for defendant, appellant.

PER CURIAM. There was ample evidence to support the verdict. Indeed, no question is raised as to the sufficiency of the evidence. The

assignments of error brought forward in defendant's brief, referred to below, relate solely to the charge.

Assignments 2, 3, 4, 5, 7 and 8, based on exceptions of like number, are directed to designated portions of the charge. Assignment 9, based on Exception 9, is directed to the failure of the court to instruct the jury as set out in this exception and assignment. Assignments 11, 12, and 13 are not supported by exceptions; hence, no question of law is presented thereby. *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926; *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408.

Careful consideration of each of defendant's assignments fails to disclose prejudicial error; for the charge, when read as a composite whole, indicates clearly that the applicable principles of law were presented in such manner as to leave no reasonable ground to believe that the jury was misinformed or misled. Hence, defendant's assignments are overruled.

No error.

PARKER, J., not sitting.

JANET ANDERSON, BY HER NEXT FRIEND, OLETA ANDERSON v. CHARLES LINDSAY LUTHER.

(Filed 29 October, 1958.)

1. Automobiles § 41s—

Evidence tending to show that defendant motorist overtook and struck a bicyclist who was traveling in the same direction, one or two feet from the edge of her right side of the highway, is sufficient to be submitted to the jury, defendant's evidence in conflict not being considered in passing upon motion to nonsuit.

2. Appeal and Error § 38—

A contention not based on any exception or assignment of error will not be considered.

PARKER, J., not sitting.

APPEAL by defendant from *Preyer, J.,* February Term, 1958, of DAVIDSON.

Personal injury action in which the jury, having answered issues of negligence and contributory negligence in favor of plaintiff, awarded damages in the amount of $1,500.00.

Plaintiff was injured September 22, 1957, as the result of a collision on Highway 109, near Denton, between an automobile operated by defendant and a bicycle on which plaintiff was riding. Both vehicles were traveling south, the automobile overtaking the bicycle.

The only evidence was that offered by plaintiff. According to her testimony, she was riding on her right (west) side of the highway in a straight course, one or two feet from the edge of the pavement, when defendant's car overtook and struck her. Defendant, relying on testimony elicited on cross-examination of the investigating State Highway Patrolman relating to physical conditions and to declarations of defendant, contended that the collision occurred near the center of the highway and that shortly before the collision "the bicycle took to the left" into the path of defendant's car.

Judgment was entered in accordance with the verdict. Defendant excepted and appealed.

W. H. Steed for plaintiff, appellee.
Otway Burton and Don Davis for defendant, appellant.

PER CURIAM. Assignments of error brought forward in defendant's brief are based on exceptions (1) to the overruling of his motion for judgment of nonsuit and (2) to designated portions of the charge. It is quite plain that the court's action in overruling defendant's motion for judgment of nonsuit was correct; and careful consideration of each assignment directed to a designated portion of the charge fails to disclose prejudicial error.

It is noted that defendant contends that the court erred in failing to charge the jury in certain respects set forth in his brief. However, the appeal presents no question of law relating to these matters; for these contentions are not based on any exception or assignment of error. *Rigsbee v. Perkins*, 242 N.C. 502, 87 S.E. 2d 926; *Moore v. Crosswell*, 240 N.C. 473, 82 S.E. 2d 208.

No error.

PARKER, J., not sitting.

JOSEPH EUGENE DAVIS v. SANFORD CONSTRUCTION COMPANY, INC. AND HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 29 October, 1958.)

Master and Servant § 40j—

Evidence *held* sufficient to support the finding of Industrial Commission that claimant had suffered a facial disfigurement sufficient to adversely affect claimant's appearance to such extent that it may be reasonably presumed to lessen his opportunity for remunerative employment, and award of compensation therefor is upheld. G.S. 97-31(v).

PARKER, J., not sitting.

APPEAL by defendants from *Gwyn, J.*, May 26, 1958 Civil Term of FORSYTH.

Plaintiff, an employee of Sanford Construction Company, sustained an injury resulting in the loss of two teeth. Plaintiff's right to compensation for disfigurement resulting from the loss of his teeth was considered on a prior appeal, *Davis v. Construction Co.*, 247 N.C. 332.

It was there held that an award could not be made under G.S. 97-31(w) for bodily disfigurement, but, if the evidence established a compensable facial disfigurement, an award could be made under G.S. 97-31(v). The cause was accordingly remanded "for further consideration consistent with the applicable law."

On the remand the Commission, in March 1958, vacated its previous finding of fact #3 (See 247 N.C. p. 333) and substituted therefor this finding:

"3. That plaintiff has suffered serious facial or head disfigurement for which compensation is allowable under the provisions of G.S. 97-31(v); that proper and equitable compensation therefor is $450.00."

Based on the new finding the Commission concluded that plaintiff was entitled to compensation. It made an award in his favor. The finding and award were affirmed by the Superior Court. Defendants appeal from the judgment of the Superior Court.

Leake and Phillips for plaintiff, appellee.

Adams, Kleemeier & Hogan for defendant appellants.

PER CURIAM. Defendants recognize that the weight of the evidence is for the Commission, and findings of fact made by the Commission are conclusive when supported by any evidence. Their appeal is based on the contention that there is no evidence to show a disfigurement sufficient to adversely affect the appearance of plaintiff to such an extent that it may be reasonably presumed to lessen his opportunity for remunerative employment.

The hearing Commissioner saw and observed plaintiff when he testified. Pictures of plaintiff made before and after the injury were in evidence and before the full Commission when it made its findings of fact. The evidence available to the Commission was sufficient for it to find a facial disfigurement sufficient to reasonably lessen plaintiff's opportunity for remunerative employment. We interpret the finding made by the Commission to have that meaning although not expressed in those words.

Affirmed.

PARKER, J., not sitting.

BOLES *v.* GRAHAM.

J. F. BOLES, SR., AND WIFE, ETTA BOLES; J. F. BOLES, JR., AND WIFE, MILDRED BOLES; REUBEN T. BOLES AND WIFE, ODRIE BOLES; SPENCER O. BOLES AND WIFE, NELLIE BOLES; GLENN D. BOLES AND WIFE, EVELYN BOLES; J. CLINT DAVIS AND WIFE, JENCIE DAVIS; AND FRANCIS P. KINNEY AND WIFE, FRANCES E. KINNEY, v. W. E. GRAHAM; W. E. GRAHAM, JR.; JOHN H. GRAHAM; LEWIS S. GRAHAM; AND S. PAGE GRAHAM, t/a W. E. GRAHAM & SONS.

(Filed 29 October, 1958.)

Appeal and Error § 8—

When, pending hearing upon demurrer for misjoinder of parties and causes, some of plaintiffs take a voluntary nonsuit obviating the grounds of that demurrer, the overruling of a demurrer thereafter filed for failure of the complaint to state a cause of action is not reviewable except by writ of *certiorari*. Rule of Practice in the Supreme Court No. 4(a).

PARKER, J., not sitting.

APPEAL by defendants from *Johnston, J.*, Out of Term, July 29, 1958, FORSYTH Superior Court.

Civil action instituted by the plaintiffs in which they seek to restrain the defendants from operating a quarry upon the alleged ground that it constituted a continuing trespass and nuisance. The defendants filed a demurrer upon the ground of misjoinder of parties and causes of action. Pending the hearing on the demurrer, the plaintiffs, except Reuben T. Boles and Odrie Boles, took voluntary nonsuits. The defendants filed a second demurrer upon the ground the complaint failed to state a cause of action and, at the same time, moved that the plaintiffs be ordered to make the complaint more definite and certain. The second demurrer and motion were overruled. The defendants excepted and appealed.

Womble, Carlyle, Sandridge & Rice, Wade M. Gallant, Jr., for defendants, appellants.

No counsel contra.

PER CURIAM. The nonsuit removed the defendants' objections raised by the first demurrer. They have abandoned their assignment of error based on the refusal of the court to require the plaintiffs to make their complaint more definite. They now present for review only that part of the court's order overruling the second demurrer interposed in the superior court upon the ground the complaint failed to state a cause of action.

Appeal does not lie from an order overruling a demurrer in any case except where it is interposed as a matter of right for misjoinder of parties and causes. Prior to trial on the merits, an order overruling a demurrer for failure to state a cause of action can be reviewed only

by writ of *certiorari*. Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766. The defendants are here prematurely.

Appeal Dismissed.

PARKER, J., not sitting.

STATE v. CLYDE YORK.

(Filed 29 October, 1958.)

APPEAL by defendant from *Armstrong, J.*, at July 21, 1958 Term of FORSYTH.

Criminal prosecution upon a bill of indictment charging defendant with the crime of subornation of perjury, G.S. 14-210, in the way and manner specified.

Defendant, in open court, pleaded not guilty.

The case was submitted to the jury upon evidence offered by the State, and by the defendant, under the charge of the court.

Verdict: Guilty of subornation of perjury as charged in the bill of indictment in this case.

Judgment: That the defendant be confined in the State's prison at Raleigh for a period of not less than seven nor more than ten years, to be assigned to do labor as provided by law.

Defendant, through his counsel, excepts and appeals to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard, for the State.

Spry, White & Hamrick for defendant, appellant.

PER CURIAM. Defendant, as appellant, presents for consideration on this appeal nineteen assignments of error based upon like number of exceptions taken during the course of the trial, and to matters occurring in Superior Court. It is noted, however, that in nine cases the exception is to the action of the court in sustaining objections to questions asked in behalf of defendant. In each of these instances the record fails to show what the answer of the witness would have been, so as to indicate its materiality.

After careful consideration the exceptions (1) to denial of motions for judgment as of nonsuit, aptly made, (2) to portions of the charge, (3) to remarks of the judge, (4) to the failure of the trial judge to charge the law in various aspects, and (5) to all others, error for

which the verdict and judgment below should be set aside is not made to appear.

Hence in the trial below there is

No Error.

PARKER, J., not sitting.

CARL F. SPAUGH, JR., AND WIFE, BETTY JO SPAUGH v. CITY OF WINSTON-SALEM.

(Filed 29 October, 1958.)

APPEAL by plaintiffs from *Sharp, S. J.*, at June 16, 1958, Civil Term of FORSYTH.

Civil action to recover for damage to home place of plaintiffs by reason of alleged pollution of air from the city's disposal plant.

Defendant, answering complaint of plaintiffs, denies liability and pleads statute of limitations.

Upon trial in Superior Court, on evidence offered by the respective parties, the case was submitted to the jury upon these issues, the first two of which the jury answered as indicated:

"1. Is the plaintiffs' cause of action barred by the 3-year statute of limitations, as alleged in the answer? Answer: Yes, except from June 19, 1954.

"2. Has the defendant damaged the home of the plaintiff by operation and maintenance of its sewer system? Answer: No.

"3. What amount, if any, is the defendant indebted to the plaintiffs because of temporary damages to plaintiffs' home from June 19, 1954 through June 19, 1958? Answer ....."

And, pursuant to the verdict so rendered, the trial court entered judgment that plaintiffs recover nothing of the defendant and that plaintiffs be taxed with the costs. Plaintiffs except thereto and appeal to Supreme Court, and assign error.

Deal, Hutchins & Minor for plaintiff, appellants.

Womble, Carlyle, Sandridge & Rice, Henry G. Barnhill, Jr., for defendant, appellee.

PER CURIAM. The assignments of error brought up on this appeal relate only to the exclusion of testimony of male plaintiff, and of his father pertaining to matters not relevant and material to the issues raised by the pleadings. In them prejudicial error is not made to appear. Hence in the judgment below there is

No Error.

PARKER, J., not sitting.

SHERWOOD PERRY, ADMINISTRATOR OF THE ESTATE OF JAMES K. PERRY, DECEASED v. C. P. GIBSON.

(Filed 29 October, 1958.)

APPEAL by plaintiff from *Clark, J.*, February Civil Term 1958 of FRANKLIN.

This is a civil action to recover damages from the defendant for the alleged wrongful death of plaintiff's intestate.

The defendant, a police officer of the Town of Franklinton, North Carolina, and constable for Franklinton Township, shot and killed plaintiff's intestate under the circumstances set out in a former appeal in this case and reported in 247 N.C. 212, 100 S.E. 2d 341, where a new trial was granted.

In the trial below the case was again submitted to the jury on the following issues: 1. Did the defendant wrongfully and unlawfully assault and kill the plaintiff's intestate, James K. Perry, as alleged in the complaint? 2. If so, what amount of damages, if any, is plaintiff entitled to recover of the defendant?

The jury answered the first issue "No." The plaintiff appeals, assigning error.

Taylor & Mitchell for plaintiff.

Charles P. Green, Alton T. Cummings for defendant.

PER CURIAM. All of plaintiff's assignments of error are directed either to the charge of the court as given or to the alleged failure of the court to charge on pertinent aspects of the case. However, a careful examination of these assignments of error leads us to the conclusion that no sufficient prejudicial error has been shown to justify another trial. Two juries have accepted the defendant's version of the facts and rendered verdicts on the crucial issue in his favor.

In the trial below we find

No Error.

PARKER, J., not sitting.

STATE v. CLEVELAND JONES.

(Filed 5 November, 1958.)

1. Rape § 8—

The act of carnally knowing and abusing any female child under the age of twelve years is rape; neither force nor intent are elements of the offense. G.S. 14-21.

2. Same: Rape § 1—

The terms "carnal knowledge" and "sexual intercourse" are synonymous and are effected in law if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. G.S. 14-23.

3. Criminal Law § 159—

Assignments of error not brought forward and discussed in the brief are deemed abandoned.

4. Criminal Law § 162—

Where the record does not show what the witness would have answered to questions asked on cross-examination, an exception to the exclusion of the testimony presents nothing for review.

5. Criminal Law § 32—

The burden is on the State to offer evidence sufficient to establish the *corpus delicti* beyond a reasonable doubt.

6. Rape § 10—

Where the prosecuting witness, a female child under the age of twelve, testifies that defendant had sexual intercourse with her, testimony of physicians that the child was suffering from gonorrhea some six days after the alleged rape is competent in corroboration of the child's testimony that a male person had carnally known and abused her, notwithstanding the absence of evidence that defendant had gonorrhea.

7. Criminal Law § 90—

The general admission of evidence competent against defendant for a restrictive purpose will not be held for error in the absence of request by defendant at the time that its admission be restricted. Rule of Practice in the Supreme Court No. 21.

8. Rape § 26—

G.S. 15-169 and G.S. 15-170 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense included in the crime charged, and where the State's evidence is positive as to each and every element of the crime of rape and there is no conflict in the evidence relating to any element thereof or evidence that would warrant or support a finding that defendant was guilty of a lesser offense, it is not error for the court to limit the jury to a verdict of guilty of rape, guilty of rape with recommendation that the punishment be imprisonment for life, or not guilty.

9. Criminal Law § 156—

Exceptions and assignments of error to the charge on the ground that it failed to declare and explain the law arising on the evidence given in the case, without pointing out any particular matter arising on the evidence concerning which the court failed to declare and explain the law, are ineffectual, and further, in this case, the charge of the court was clear, full and explicit.

10. Criminal Law § 108—

Where the court makes a plain and accurate statement of the testimony of each witness and states the contentions of the State and de-

fendant respectively in regard thereto, the fact that the court does not state any contentions as to why the jury should or should not believe and accept the testimony of any of the State's witnesses, is not ground for objection, since the court may appropriately leave to the respective counsels the making of contentions relating to the credibility of the witnesses and the probative value of the testimony.

PARKER, J., not sitting.

APPEAL by defendant from *Paul, J.*, July Assigned Criminal Term, 1958, of WAKE.

Criminal prosecution on indictment for rape, charging in substance, that defendant on May 28, 1958, unlawfully and feloniously, did carnally know and abuse a named female child under the age of twelve years.

The bill of indictment was returned at June 23rd Term. Thereupon, defendant being without means to employ counsel, the court appointed Ellis Nassif, Esq., to represent him. The trial was at a later term, namely, that commencing July 7, 1958. The evidence consisted of that offered by the State. Defendant did not testify or offer evidence.

The State's principal witness, the eight year old girl, testified that on Wednesday, May 28, 1958, about 9:00 a.m., she was alone in her apartment; that her father and mother, with whom she lived, had gone to work; that defendant, who lived in the same apartment building and whom she knew, entered her apartment, took off her underpants, put her upon a bed, and there carnally knew and abused her; that she was hurt, cried and called upon defendant to stop and to go home; and that defendant made no reply except to say "if (she) told it he was going to kill (her)." There was other evidence in corroboration.

The jury returned a verdict of guilty of rape with the recommendation that defendant be confined in the State's Prison for life. The court entered judgment, imposing a sentence of life imprisonment, from which defendant appeals, assigning errors.

Attorney-General Seawell and Assistant Attorney General Bruton, for the State.

Ellis Nassif for defendant, appellant.

BOBBITT, J. The act of "carnally knowing and abusing any female child under the age of twelve years" is rape. G.S. 14-21; *S. v. Monds*, 130 N.C. 697, 41 S.E. 789; *S. v. Johnson*, 226 N.C. 671, 40 S.E. 2d 113. Neither force, *S. v. Johnson, supra*, nor intent, *S. v. Gibson*, 221 N.C. 252, 20 S.E. 2d 51, are elements of this offense.

"The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal

sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. G.S. 14-23; *S. v. Monds*, 130 N.C. 697, 41 S.E. 789; *S. v. Hargrave*, 65 N.C. 466; *S. v. Storkey*, 63 N.C. 7; Burdick: Law of Crime, section 477; 44 Am. Jur., Rape, section 3; 52 C.J., Rape, sections 23, 24." *S. v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107; *S. v. Reeves*, 235 N.C. 427, 70 S.E. 2d 9.

The State's evidence was positive as to each and every element of the crime charged in the bill of indictment.

There are sixty-two assignments of error, based on sixty-five exceptions. Only those brought forward in defendant's brief will be discussed. The other assignments, plainly without merit, are deemed abandoned. *S. v. Gordon*, 241 N.C. 356, 362, 85 S.E. 2d 322.

Assignments 6 and 7 relate to the court's action in sustaining the State's objections to questions asked by defendant's counsel in his cross-examination of the child's mother. Since the record does not show what this witness would have testified if permitted to answer these questions, *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342, there is no need to set forth the reasons why we think these objections were properly sustained.

Assignments 8 and 10, which we consider together, relate to the court's action in overruling defendant's *general* objections to questions asked two qualified medical experts.

The evidence tends to show that on June 3rd, six days after the alleged rape, the child was first examined by Dr. McDowell, who sent her to St. Agnes Hospital where she was examined by Dr. Bradby; and that she remained in the hospital for treatment from June 3rd until June 10th. Dr. McDowell, based upon his clinical examination, and Dr. Bradby, based upon his clinical examination and upon laboratory tests, testified that in their opinion the child was suffering from gonorrhea. Dr. McDowell testified that, on the average, it would take from three to five days for the disease to appear after a person had been contacted with gonorrhea. Dr. Bradby testified that in his opinion the child had been penetrated.

It appears further that Dr. Bradby testified, without objection, both on direct and cross-examination, that in his opinion the child had contracted gonorrhea by sexual intercourse.

Defendant's basic contention is that the evidence to the effect that the child was suffering with gonorrhea on June 3rd was incompetent and prejudicial in the absence of evidence tending to show that defendant had gonorrhea.

It was incumbent upon the State to establish the *corpus delicti*, the fact that a crime of the character charged had been committed. *S. v.*

Cope, 240 N.C. 244, 81 S.E. 2d 773. Moreover, the State was required to offer evidence sufficient to establish this fact beyond a reasonable doubt. The doctors' testimony, to which objection was made, was admissible as tending to corroborate the testimony of the child as to the fact that a male person had carnally known and abused her. *Malone v. State,* 37 Ala. App. 432, 71 So. 2d 99. In *S. v. Edwards,* 224 N.C. 577, 31 S.E. 2d 762, this Court quoted with approval, and applied to the case before it, this statement from 22 C.J.S., Criminal Law Sec. 567: "The prosecution has the burden of proving the *corpus delicti,* that is, that a crime has been committed, before the jury may proceed to inquire as to who committed it."

It is not a "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." Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 544, 558; *S. v. Sutton,* 225 N.C. 332, 336, 34 S.E. 2d 195, and cases cited. Here, defendant made no request that the doctors' testimony be restricted to corroboration of the child in respect of the *corpus delicti.*

The only contention made by defendant in support of assignments 17, 53 and 54 is that the court erred in instructing the jury that it could return one of only three possible verdicts: (1) guilty of rape, (2) guilty of rape with recommendation that the punishment be imprisonment in the State's Prison for life and (3) not guilty. Defendant's contention calls for consideration of G.S. 15-169 and G.S. 15-170, the provisions of which are set out below.

G.S. 15-169. "Conviction of assault, when included in charge.—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, *if the evidence warrants such findings*; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character." (Our italics)

G.S. 15-170. "Conviction for a less degree or an attempt.— Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

An indictment for rape, as G.S. 15-169 declares, includes an assault against the person; and *where there is evidence sufficient to warrant such finding,* the jury may acquit of the felony of rape and return a verdict of guilty of a lesser criminal assault.

Thus, in *S. v. Williams,* 185 N.C. 685, 116 S.E. 736, where the in-

dictment was for rape, the State's evidence tended to show rape accomplished by defendant's use of a pistol or gun. However, the defendant's evidence was that the admitted act of sexual intercourse was by consent, that he neither used nor had a pistol or gun, and that he used no force of any kind. On account of defendant's said evidence, it was held that the court erred in refusing to give in substance the defendant's special request that the jury be instructed to the effect that they could return any one of five possible verdicts, viz.: (1) guilty of rape, (2) guilty of assault with intent to commit rape, (3) guilty of assault with a deadly weapon, (4) guilty of assault upon a female, the defendant being a male person over 18 years of age, and (5) not guilty, according to the jury's findings as to what occurred.

But G.S. 15-169 and G.S. 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense. *S. v. Jackson,* 199 N.C. 321, 154 S.E. 402; *S. v. Smith,* 201 N.C. 494, 160 S.E. 577; *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Farrell,* 223 N.C. 804, 28 S.E. 2d 560; *S. v. Brown,* 227 N.C. 383, 42 S.E. 2d 402. These decisions relate to criminal prosecutions and convictions for the crime of rape. In the cases cited by defendant, none of which involves a prosecution and conviction for the crime of rape, the Court held the evidence sufficient to warrant a finding that the defendant was guilty of a lesser offense.

In *S. v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, where the crime charged, robbery, *ex vi termini,* included an assault on the person, this Court, citing earlier cases, said: "The distinction is this: The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice."

As stated above, the State's evidence was positive as to each and every element of the crime charged in the bill of indictment. There was no conflict in the evidence relating to any element of the crime charged. There was no evidence that would warrant or support a finding that defendant was guilty of a lesser offense. The carnal knowledge and abuse of the child was the only assault supported by evidence. Disbelief of the testimony of the child as to any essential element of the crime charged in the bill of indictment would not warrant a conviction for a lesser offense but would require a verdict of not guilty.

Defendant's assignments to the court's said instructions lack merit and are overruled.

In support of assignments 18-50, inclusive, which are based on all exceptions taken to the charge, defendant contends that the court failed to comply with G.S. 1-180 in that (1) it failed to declare and explain the law arising on the evidence given in the case, and (2) it failed to give equal stress to the contentions of the defendant. These contentions are without merit.

As to (1), it is noted that defendant does not attempt to point out any particular matter arising on the evidence concerning which the court failed to declare and explain the law. Indeed, an examination of the charge reveals that the court did not, as suggested by defendant, confine his instructions to a "general statement of legal principles," but clearly instructed the jury that it could return a verdict of guilty only if the State had satisfied them beyond a reasonable doubt as to the particular facts, stated in detail in terms of the evidence in this case, necessary to constitute the crime charged.

As to (2), defendant cites *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196, and other cases, all involving entirely different factual situations. It is noted that *Denny, J.,* in *Brannon v. Ellis, supra,* citing cases, points out that "a trial judge is not required by law to state the contentions of litigants to the jury." In reviewing the evidence, the court made a plain and accurate statement of the testimony of each witness. Nowhere does the court undertake to state any contentions of the state as to *why* the jury should believe and accept the testimony of any of the State's witnesses. As to contentions, he simply stated that the State contended that the jury should be satisfied from the evidence beyond a reasonable doubt that the facts were as testified by the State's witnesses and that defendant contended that the jury should not be so satisfied. It was not inappropriate for the court to leave to counsel for the State and counsel for defendant, respectively, the making of contentions relating to the credibility of the witnesses and the probative value of their testimony.

A full and careful review of the record discloses no prejudicial error. Indeed, it appears that the case was fairly and well tried.

No error.

PARKER, J., not sitting.

BETTY MARIE MILLER FORD v. SECURITY NATIONAL BANK OF GREENSBORO, NORTH CAROLINA, GUARDIAN FOR CHARLIE W. MILLER, INCOMPETENT, ALBERT W. MILLER, EFFIE MILLER BARE, JENNIE MILLER SMITH, AND BESSIE MILLER SMITH.

(Filed 5 November, 1958.)

1. **Insane Persons § 6: Parent and Child § 5—**

A parent is under legal and moral obligation to support his minor children, which obligation is applicable to both sane and insane parents, but this obligation normally terminates when the child reaches his majority and ceases to be dependent.

2. **Insane Persons § 6— Findings held to support order for advancement to adult children out of estate of incompetent father.**

Findings to the effect that an incompetent was incurably insane, that his estate was greatly in excess of any needs for his support, hospitalization and maintenance, that his adult children were in dire financial need, and that advancements to them from their father's estate would operate for the better promotion and advancement in life of the children, support an order directing advancements to be made to the children out of the surplus estate of the incompetent, G.S. 35-20, G.S. 35-21, and such order will not be held erroneous for want of direction in the order securing the advancements from being wasted, G.S. 35-26, the finding that the advancements would operate for the better promotion in life of the children, supported by evidence, being conclusive even though it should later turn out that the advancements were wasted, and it being a permissible inference from the evidence and findings that the advancements would be used to aid the children, respectively, in the purchase of homes.

PARKER, J., not sitting.

APPEAL by defendant guardian from an order entered by *Rousseau, J.*, in Chambers on 8 March 1958.

Plaintiff instituted this proceeding in the Superior Court of Ashe County against her father, Charlie W. Miller, an incompetent, his guardian, Security National Bank, and her brother and sisters to have an advancement made to her from her father's estate pursuant to the provisions of G.S. 35-19 et seq. The individual defendants, having first denied plaintiff's right to have an advancement made, amended their answer and asked that advancements be made to them. The guardian denied advancements should be made and asserted if awards were made they would be wasted, and for that reason should not be made.

The clerk of the Superior Court, having heard evidence, made findings of fact which, abbreviated, are:

Charlie W. Miller is and has been for many years mentally incompetent. He is confined in a veteran's hospital. His mental condition is permanent. He is unmarried and has made no will. Plaintiff and individual defendants, all of age, are his children and in the event

of present death would be his heirs and distributees.

The incompetent has assets held by his guardian in excess of $47,000 and receives from the Veteran's Administration an annual income of $310.44, hospitalization, and custodial care provided without expense to the incompetent. These amounts are greatly in excess of any needs of the incompetent.

Plaintiff is married and has one child nine years old. She has been abandoned by her husband, has no home, and is, and, for some time past, has been, unable to support herself and to keep and provide a home for her child. She has been variously employed as a seamstress and a cook, earning approximately $30 to $35 per week. She is wholly without property and virtually without any funds whatsoever and in destitute financial circumstances. An advancement from the estate of her said father would operate for her better promotion and advancement in life.

Effie M. Bare is living separate and apart from her husband, has no property of her own, and is living in a rented home and has and is supporting seven children, the youngest of whom is one year of age and the eldest of whom is fourteen years of age. She is receiving the sum of $69 per month from the Ashe County Department of Public Welfare for assistance in the support and maintenance of said children.

Jennie Miller Smith owns no property and lives with her husband and four children in a rented house.

Bessie M. Smith is a widow with three children. She has no property and lives in a rented house.

Albert W. Miller is married and has two children and has recently purchased a home on which he owes a balance of $5500 and owes at least $700 in other bills which he is financially unable to pay.

An advancement from the estate of their father will operate for the better promotion and advancement in life of defendants.

Based on his findings, the clerk directed the guardian to pay to each of the children, as an advancement the sum of $4,770.30. The total of this amount represents half of the assets held by the guardian. The order does not restrict the use of the funds to the purchase of a home, but applicants had requested advancements for that purpose. The guardian excepted to the order and appealed to Judge Rousseau, resident judge.

Upon a review of the evidence, Judge Rousseau adopted the findings of fact made by the clerk and thereupon approved the order of the clerk directing the guardian to make the advancement to each of the children.

The guardian excepted to the findings of fact and to the order directing an advancement to each child and appealed.

Bowie, Bowie & Vannoy for petitioner, appellee.
W. B. Austin for respondent appellees.
Cooke & Cooke for guardian for Charlie W. Miller, Incompetent.

RODMAN, J. The assignments of error do not challenge the impoverished condition of the children nor the adequacy of the incompetent's estate to make the payments as directed without endangering his prior right to support.

The guardian's position is that the evidence demonstrates that an advancement made to any child would be wasted unless properly secured by court order and for that reason the payment ordered is not for the better promotion or advancement in life of any child and is not therefore authorized.

While a parent is under a legal as well as a moral obligation to support his minor children, that obligation normally terminates when the child reaches his majority and ceases to be dependent. *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31, 1 A.L.R. 2d 905.

This parental obligation was recognized as applicable to both sane and insane parents in *Brooks v. Brooks*, 25 N.C. 389. *Ruffin, C. J.*, there said: "It is true, as we think, that the wife and children of a lunatic are entitled to maintenance out of the estate, according to their circumstances, after providing properly for the lunatic. The statute *de prerogative regis*, 17 Ed. II, ch. 10, which provides that lunatics 'and their households' shall live and be maintained competently from the issues of their estates, has not indeed been re-enacted here; and for that reason our Courts may not be authorized to extend the allowance to collateral relations, or to advancements to married children, as is done in England. *In re Cotton* and *in re Hinde*, 2 Mer., 99."

Whether the statute of 17 Ed. II was in fact merely declaratory of the common law which the courts had a right to exercise without statutory authorization or whether the courts derived their authority from the statute was again adverted to in *In re Latham*, 39 N.C. 231. The decisions in these cases were perhaps the reason which caused the Legislature to write as a part of our statute law what is now the first sentence of G.S. 35-20 and sections 22 to 27 of c. 35 of the General Statutes. They were enacted by the Legislature which adopted the Revised Code of 1854. Notwithstanding the statutes have been on our books for more than a century, we are now for the first time called upon to interpret the meaning of secs. 22 and 26. This absence of litigation speaks highly, we think, of the manner in which guardians and court officials have exercised the authority granted them.

As first enacted, only surplus income could be used; but any doubt cast by *Brooks v. Brooks, supra*, as to the right to use such surplus

income to assist adult members of the incompetent's family was removed by sec. 10 of the original Act, now G.S. 35-22. In granting this authority to the court, the Legislature declared that advancements should not be made to persons who would probably waste them and granted the court authority to secure the advancements so as to protect the family of the person advanced. G.S. 35-26.

In 1924 the Legislature broadened the authority given the court so as to permit the use of either surplus income or surplus estate when the incompetent had neither wife nor children. This provision is now the last sentence of G.S. 35-20. In 1925 similar provision was made for the use of surplus estate for the better promotion in life of adult children when there was no one to whom the incompetent owed a legal obligation of support. G.S. 35-21.

No one can doubt that financial assistance would be of benefit to the children of the incompetent occupying the economic status in life depicted by the evidence and the findings of fact. If their father were mentally competent, would he not aid them? If so, the court has the authority to use his money for that purpose.

The court, having reached the conclusion that financial help should be given, was confronted with the problem of determining the time and manner and the amount. What finer thing could be done for these children of this incompetent veteran of World War I than to assist them in acquiring a home? Our fundamental law recognizes the benefits accruing from home ownership. Within the limits provided, the homestead cannot be taken for debt. Constitution, Art. X, sec. 2. It can be conveyed only with the written assent of the wife. Art. X, sec. 8. It may be exempted from taxation to the extent of $1000. Art. V. sec. 5.

The evidence demonstrates a need and a proper purpose. Will the moneys advanced be used wisely or will the recipients in fact waste the advancements from their father? Only time will tell. Neither clerks nor judges are infallible. All that is required is an honest and sincere effort to ascertain the facts. If future events should demonstrate that the court made an erroneous finding, that does not invalidate a fact found after a full hearing and sincere consideration of all of the evidence.

The statute imposed a duty on the clerk and judge to ascertain the facts. That duty has been performed. No suggestion is made that it was not sincerely performed. Appellant challenges only the soundness of findings and the wisdom of the order.

The evidence shows none of the applicants have accumulated any property. There is evidence of sexual promiscuousness by some applicants, but the evidence also indicates at least a part of the many difficult problems confronting applicants in early life.

It cannot be said that the evidence leads to the sole conclusion that applicants are unworthy to presently receive a part of their father's estate, or if it is paid to them it will be wasted to their detriment, or that their families will thereby be deprived of proper support.

The facts have been ascertained. The evidence is sufficient to support the findings, and the findings are adequate to justify the judgment.

Affirmed.

PARKER, J., not sitting.

STATE v. WARREN HARDING NEWTON.

(Filed 5 November, 1958.)

1. Criminal Law § 108—

Where the court, in stating the State's contentions, makes a separate statement to the effect that there could be no other explanation of defendant's conduct than that he was guilty of the offense charged, without any words indicating that such statement was a further contention of the State, the charge must be held for prejudicial error, notwithstanding that the court may have intended to make such statement a part of the statement of contentions.

2. Same—

A statement of the court to the jury, upon the jury's request for further instructions, that the verdict need not be in writing but that the court had instructed the jury to return a verdict of guilty as charged in the indictment, otherwise to specify the verdict, must be held for prejudicial error as an expression of opinion by the court on the evidence.

3. Same—

An expression of opinion by the court upon the evidence, directly or indirectly, must be held prejudicial.

PARKER, J., not sitting.

APPEAL by defendant from *Williams, J.*, July Term 1958 of GRANVILLE.

This is a criminal prosecution tried upon a bill of indictment charging that the defendant did unlawfully and feloniously assault Mrs. Myrtle Setzer with a deadly weapon, to wit, a hammer, with the felonious intent to kill and murder the said Mrs. Myrtle Setzer, inflicting serious injury upon her not resulting in death.

The State's evidence tends to show that late in the afternoon of 12 June 1958 the defendant met Mrs. Myrtle Setzer at the store of Felix

Wilson on the Stovall Road near Oxford in Granville County, a distance of about one-half mile from the home of the prosecuting witness. The prosecuting witness purchased groceries and drinks from Mr. Wilson. It was about dark, and the proprietor of the store suggested that the defendant would take her home on his pick-up truck. The defendant then said, "Yes, Mrs. Setzer, I will take you on down by your house." The defendant took Mrs. Setzer to her house; she got out, took her groceries into the house and the defendant took the drinks into the house. The defendant then took the prosecuting witness by the arm and forced her to get back in the truck and to go with him. They went to a deserted house from which the defendant had recently moved, to draw some tomato plants. After they had drawn the tomato plants and the defendant had put them in his truck, he tried to get her to go into the house. She refused and he hit her on the back of her head with a hammer, knocked her down, choked her into unconsciousness, and threw her into a nearby well. When she regained consciousness she found the chain to the well bucket had been pulled up and that a board had been placed over the opening of the well. She managed to climb out of the well and sought help at a nearby house.

The defendant was arrested on the afternoon of 13 June 1958 and upon his arrest he said to the officers, "I reckon you all have found her. If you haven't you would not be over here looking for me * * * I throwed (sic) her in that old well over yonder where we moved from."

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed on the verdict the defendant appeals, assigning error.

Attorney General Seawell, Asst. Attorney General Bruton, for the State.

William T. Watkins, Royster & Royster for the defendant.

DENNY, J. Among the defendant's 26 assignments of error numbers 20 and 25 involve instructions to the jury. Assignment of error number 20 is directed to the following portion of the court's charge: "There could be no other explanation of his conduct there except the assault was made with a deadly weapon with the intent to kill, and that it constituted within the purview of the law and the statute, serious injury."

While the above language was used while the court was undertaking to state the State's contentions, such statement is a separate and distinct sentence and is not preceded by the words, "The State further says and contends," or similar language, and while it may have been the Court's intention to make this statement to the jury as a part of the State's contentions, it was not so stated.

Assignment of error number 25 challenges the instruction given to the jury under the following circumstances. The Sheriff informed the court that the jury wanted to ask a question. When the jury returned to the courtroom, the court inquired whether or not it had agreed upon a verdict. The foreman informed the court that it had not. The court then said, "Is there some information that you desire?" The foreman of the jury replied, "We understood that you wanted this in writing." The court then said, "No, not necessarily in writing, but I want you to specify your verdict. I instructed you you could return a verdict of guilty as charged in the bill of indictment, which charge was assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. Otherwise, specify it. Do you understand?"

We think the foregoing instructions embraced in the assignments of error numbered 20 and 25 are susceptible of being interpreted by the jury as an expression or intimation on the part of the court to the effect that in its opinion the jury should return a verdict of guilty as charged.

In *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568, *Stacy, C. J.,* in speaking for the Court, said: "It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. The statute forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury." *S. v. Love,* 229 N.C. 99, 47 S. E. 2d 712; *S. v. Benton,* 226 N.C. 745, 40 S.E. 2d 617; *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130; *S. v. Maxwell,* 215 N.C. 32, 1 S.E. 2d 125; *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388.

While there are other exceptions and assignments of error which are not without merit, we deem it unnecessary to discuss them since, in our opinion, the defendant is entitled to a new trial, and it is so ordered.

It must be conceded that the defendant's conduct toward the prosecuting witness was unwarranted, indefensible and vicious. However, he is entitled to a trial free from prejudicial error.

New Trial.

PARKER, J., not sitting.

CITY OF WINSTON-SALEM, PETITIONER v. C. H. WELLS AND WIFE, AUGUSTA H. WELLS, RESPONDENTS.

(Filed 5 November, 1958.)

Eminent Domain § 5—

Where petitioner deposits into court the sum fixed by the commissioners as just compensation and enters into possession, respondents may not accept such sum except as full payment, and therefore upon the later adjudication of the amount of compensation in a larger sum, respondents are entitled to interest on the full sum so adjudicated from the time petitioner took possession until payment of compensation is made.

PARKER, J., not sitting.

APPEAL by respondents from *Craven, S. J.*, May 26, 1958 Civil Term, FORSYTH Superior Court.

The City of Winston-Salem instituted this proceeding before the clerk to acquire by condemnation for street purposes an easement over certain described lands of the respondents. The commissioners appointed for the purpose determined the City should pay as just compensation for the taking the sum of $2,860. The respondents filed exceptions to the report which were overruled by the clerk. From his order confirming the report, the respondents appealed to the superior court in term. The City paid into the clerk's office the sum of $2,860 and entered into possession on March 30, 1956.

The jury in the superior court fixed the defendants' damage at $11,500. Pending decision on petitioner's motion to set the verdict aside as excessive, the parties stipulated: "The judge will enter a judgment for the principal amount of $10,000." Judgment as stipulated was entered July 18, 1958. The court held the respondents were not entitled to interest and so provided in the judgment. Respondents excepted and appealed.

Deal, Hutchins & Minor, By Roy L. Deal for respondents, appellants.

Womble, Carlyle, Sandridge & Rice, By: W. F. Woble for petitioner, appellee.

HIGGINS, J. The only questions presented by this appeal are whether the respondents are entitled to interest; and, if so, on what amount, and from what date. The petitioner deposited in the clerk's office $2,860 for the property taken. The respondents objected on the ground the deposit was inadequate. Subsequent trial and judgment sustained their contention and fixed the amount of just compensation at $10,000. The respondents could not have accepted the deposit without exposing themselves to the charge that they had settled the controversy. "True,

the respondent was not obligated to accept the amount, but it was an offer subject to acceptance by her. And when she accepted it, the question of compensation was settled — and the purpose of the proceeding accomplished." *Highway Commission v. Pardington,* 242 N.C. 482, 98 S.E. 2d 102. The deposit with the clerk was of no benefit to the respondents. It was intended by the City as payment in full. The respondents had to accept on that basis or not at all.

The case of *DeBruhl v. Highway Commission,* 247 N.C. 671, 102 S.E. 2d 229, settles the question of interest. "On the facts before us, we hold as a matter of law that petitioners are entitled to have the jury award them interest at the rate of six per cent from the day of the taking . . . on whatever sum they may find to be the fair market value of their property on the taking date, such interest to be deemed an additional sum awarded to petitioners . . . in payment of their property taken, as an element of the just compensation guaranteed to them by Article I, Section 17, of the North Carolina Constitution, and by the 14th Amendment to the United States Constitution."

We conclude, therefore, the respondents are entitled to interest on $10,000 from March 30, 1956 — the date of the taking. The judgment of the Superior Court of Forsyth County will be modified in accordance with this opinion and, as so modified, is affirmed.

Modified and Affirmed.

PARKER, J., not sitting.

ROBERT LEE TALLENT BY MARVIN TALLENT, HIS NEXT FRIEND v. HELEN HOWARD TALBERT AND CHARLES JOE TALBERT.

(Filed 5 November, 1958.)

Automobiles § 42h— Evidence held to disclose contributory negligence as matter of law in making "U" turn without signal or lookout.

Evidence tending to show that plaintiff, driving a farm tractor, made a "U" turn on the highway without giving signal and without ascertaining, during the last ninety feet of travel, whether a vehicle was approaching from his rear, and was struck by a car driven by the femme defendant as it was attempting to pass, *is held* to disclose contributory negligence barring recovery as a matter of law, G.S. 20-149, notwithstanding plaintiff's evidence of defendant's failure to sound her horn before attempting to pass as required by G.S. 20-154. This result is not affected by the fact that plaintiff was only fifteen years old and without much education, when his evidence discloses experience in operating tractors and his knowledge of safety requirements in such operation.

PARKER, J., not sitting.

TALLENT *v.* TALBERT.

APPEAL by plaintiff from *Preyer, J.*, March 1958 Term of DAVIE.

Plaintiff, a fifteen-year-old boy, seeks compensation for injuries sustained in a collision between a tractor driven by him and an automobile driven by Mrs. Talbert, maintained as a family car by her husband, Charles Talbert. Plaintiff appeals from a nonsuit entered at the conclusion of the evidence.

Peter W. Hairston for plaintiff, appellant.
Walser & Brinkley for defendant appellants.

PER CURIAM. Viewed in the light most favorable to plaintiff, the evidence is sufficient to establish these facts:

Highway U. S. 158 runs north and south. It is intersected by the Baltimore Road which runs eastwardly from the intersection. Both are paved. From the intersection the grade ascends to the Pentecostal Church on the north side of the Baltimore Road and 300 feet from the intersection. A double yellow line extends from the intersection 255 feet on the Baltimore Road.

On the day in question plaintiff, driving a tricycle type tractor, traveled on the highway northwardly until he reached the Baltimore Road. Approaching the intersection, he indicated he would turn right by giving the statutory hand signal. He made the turn as indicated and proceeded along the Baltimore Road. The automobile was also proceeding northwardly on the highway. Plaintiff knew that it was following him but did not know that it also turned into the Baltimore Road.

When plaintiff was 210 feet beyond the intersection, he looked behind him to see if there were other vehicles on the road. He neither saw nor heard any. He traveled ninety feet after looking, and without again looking or giving signals of any kind, started to reverse his line of travel by making a "U" turn to his left. At that moment defendant also pulled to her left, intending to pass. The collision resulted. There is no evidence with respect to the speed of the tractor. The only direct evidence with respect to the speed of the car came from defendant, fixing it at 20 to 25 m.p.h.

The tractor turned over and fell on plaintiff. It was lying about the center of the roal. The damage to it occurred when it struck the ground.

Defendant's car stopped headed in a southeasterly direction with the front to the left of the center of the road. The damage to the car was negligible, consisting of a bent right fender with a hole in it and a broken right headlight. There were no skidmarks on the highway.

Plaintiff had finished the fifth grade in school but was not an apt pupil and could do little more than write his name. He had been operating a tractor since he was ten years old and had previously operated tractors on the highways.

Conceding that plaintiff's evidence that he didn't hear the Talbert car is sufficient to establish a violation of G.S. 20-149 and hence sufficient to justify an affirmative answer to the issue of negligence notwithstanding defendant's positive testimony that the horn was sounded, it is manifest that plaintiff's admitted violation of G.S. 20-154 in turning without ascertaining that he could do so in safety and without giving the required signal was a proximate cause of the collision. *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891; *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538; *Toney v. Henderson*, 228 N.C. 253, 45 S.E. 2d 41.

Neither plaintiff's age nor lack of literary capacity sufficed, in view of his positive testimony with respect to his experience in operating tractors and his knowledge of safety requirements in such operation, to relieve him from responsibility for his negligence.

Affirmed.

PARKER, J., not sitting.

A. E. GIBSON, EMPLOYEE, v. KEY MOTOR COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 5 November, 1958.)

APPEAL by defendants from *Frizelle, J.*, at April, 1958 Term of New Hanover.

White & Aycock, and Harvey Marcus for defendants, appellates.
Addison Hewlett, Jr. and Lonnie B. Williams for plaintiff, appellee.

PER CURIAM. This is an appeal from a judgment of the Superior Court affirming an award made by the Industrial Commission in a proceeding under the Workmen's Compensation Act.

The award is based upon findings that the claimant, who was employed by the defendant Motor Company as an automobile salesman, sustained a disabling injury to his back while attempting to push a used car to start the motor preparatory to demonstrating the car to prospective customers.

A study of the record discloses that the crucial findings of fact, all challenged by exceptions taken by the defendants, are supported by competent evidence. The defendants' other exceptions, relating mainly to evidentiary and procedural matters, have been examined and found to be without substantial merit. The record is free of prejudicial error. The judgment is

Affirmed.

EVALYN CARSON PERKINS v. SIDNEY E. PERKINS.

(Filed 19 November, 1958.)

1. Reformation of Instruments § 7—

A deed absolute on its face cannot be converted into a mortgage without allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage.

2. Reformation of Instruments § 8—

In order to correct a deed absolute on its face into a mortgage, plaintiff must establish his case by clear, strong and convincing proof.

3. Reformation of Instruments § 6—

In order to maintain an action to reform a deed absolute on its face into a mortgage, the party asserting the right must be the grantor in the deed or in privity with him. However, if the grantor has conveyed his entire interest, he is not a necessary party and the person succeeding to his equity may maintain the action without his joinder.

4. Trusts § 2b—

The party seeking to establish a resulting trust upon a fee simple deed must allege that the deed was executed by a third party to the grantee with the understanding that the grantee would hold the property in trust for him and would convey same to him upon payment of a stipulated sum or the performance of some specified act, and that he had complied with the conditions upon which the agreement was based, and mere allegation that the grantee had agreed to hold the property in trust for him without setting forth the conditions of the asserted trust or the facts and circumstances that led up to and created the trust relationship, is insufficient.

5. Pleadings § 10—

A counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it must set forth the facts constituting such cause with the same precision as if the cause were alleged in a complaint.

6. Husband and Wife § 5: Trusts § 2a—

Where the husband conveys, or has a third party convey, to his wife a tract of land without consideration, the transaction will be presumed a gift to the wife, and in order to establish a resulting trust in his favor, he must rebut the presumption by clear, strong and convincing proof, and allegation merely that the wife paid no consideration and had no financial interest in the property is insufficient.

7. Reformation of Instruments § 7—

Where the party seeking to reform a deed absolute on its face into a mortgage, offers evidence that the deed was executed to the grantee in fee simple at his request, the court properly refuses to permit him to amend his pleading after verdict so as to allege that the redemption clause was omitted from the deed by reason of ignorance or mutual mistake, since the evidence does not support such allegation.

8. Pleadings § 22b—

The court properly refuses to allow an amendment after verdict when the evidence fails to support the requested amendment.

9. Husband and Wife § 5—

A conveyance by the wife to the husband without complying with the statutory requirements of G.S. 52-12, is null and void.

10. Pleadings § 24c—

The admission of evidence upon an aspect of the case not supported by allegation is error.

PARKER, J., not sitting.

APPEAL by plaintiff and defendant from *Pless, J.*, June 2, 1958 Regular "B" Civil Term of MECKLENBURG.

This action was instituted by the plaintiff on 28 January 1957 to have a certain deed from the plaintiff to the defendant, dated 18 September 1951 and filed for record on 19 November 1956 and recorded in the office of the Register of Deeds of Mecklenburg County, in Book 1889, page 20, declared null and void and removed from the record as a cloud on plaintiff's title.

Facts alleged in the complaint which are necessary to an understanding of this appeal are as follows:

The defendant, Sidney E. Perkins, and the plaintiff, Evalyn Carson Perkins, were husband and wife when the deeds challenged herein were executed. (However, according to the evidence introduced in the trial below they were divorced in the State of Alabama on 28 May 1957.)

The defendant conveyed the property in controversy, known as 806 East Tremont Avenue, Charlotte, North Carolina, to his brother, Thomas P. Perkins, on or before 4 December 1948, which deed is duly recorded in the office of the Register of Deeds of Mecklenburg County, in Book 1439, page 436.

Thereafter, on 17 August 1950, Thomas P. Perkins and his wife conveyed the property to the plaintiff for a recited consideration of $100.00 and other valuable considerations, which deed was filed for registration on 2 October 1950 and duly recorded in the office of the Register of Deeds of Mecklenburg County, in Book 1471, page 273.

In the acknowledgment of the deed dated 18 September 1951, which the plaintiff alleges is a cloud on her title, the provisions of G.S. 52-12 were not observed as required by the foregoing statute for the conveyance of property from a wife to her husband.

The defendant answered, setting up defenses by way of counterclaims or cross-actions, that: (1) the original deed from Thomas P. Perkins and wife (not parties to this action) to the plaintiff was actually a mortgage from the defendant to the plaintiff; (2) the

conveyance from Thomas P. Perkins and wife to the plaintiff was executed with the understanding that the plaintiff would hold said property in trust for the defendant; (3) the plaintiff paid no consideration for the property; and (4) at no time has the defendant made a gift of this property to the plaintiff, neither has the plaintiff returned or reported the property for gift tax purposes.

The plaintiff filed a reply to the further answers and defenses including the cross-actions, and denied them in pertinent part.

The plaintiff at the close of defendant's evidence demurred *ore tenus* to the first, second, third and fourth further answers and defenses and counterclaims or cross-actions, for that:

(1) With respect to the defendant's first further answer and defense by way of counterclaim or cross-action, (a) there is nowhere alleged that the clause of defeasance or redemption was omitted from the deed from Thomas P. Perkins to Evalyn C. Perkins by reason of fraud, mistake, undue influence or ignorance on the part of the plaintiff; (b) the instrument sought to be reformed and declared to be a mortgage is a deed absolute wherein the grantor therein is not a party to this action, and the defendant herein seeking to reform said instrument was not a party to the instrument in question.

(2) With respect to the defendant's second further answer and defense by way of counterclaim or cross-action, (a) no facts or substantial allegations appear to show the court the conditions under which the plaintiff agreed to take title to the property in trust for the defendant, etc.

(3) With respect to the defendant's third further answer and defense, (a) only a conclusion is alleged with respect to lack of consideration or inadequate consideration. No allegation is made to indicate what the consideration was or what adequate consideration would have been.

(4) With respect to the defendant's fourth further answer and defense, (a) this defense wholly and fatally fails to state any declaration upon which relief can be granted. The pleadings clearly indicate that the defendant did not have title to the property in question.

The court below overruled the demurrer *ore tenus* as to each of the four further answers and defenses by way of counterclaims or cross-actions.

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

"1. Was the deed from Thomas P. Perkins and wife to the plaintiff, dated August 17, 1950, and recorded in the Mecklenburg Registry in Book 1471 at page 273 intended as a mortgage from Sidney E. Perkins to the plaintiff? Answer: Yes.

"2. If so, was the redemption clause omitted therefrom by reason of ignorance or mutual mistake of the parties? Answer: Yes.

"3. If so, what amount is Sidney E. Perkins indebted to the plaintiff under said mortgage? Answer: $3,000.00 with interest at 4% from August 17, 1950.

"4. Is the plaintiff trustee of a resulting trust, in favor of the defendant, of the real property described in deed from Thomas P. Perkins and wife to the plaintiff, dated August 17, 1950, and recorded in the Mecklenburg Registry in Book 1471, at page 273? Answer: No."

Judgment was entered on the verdict except interest at six per cent was substituted in lieu of the four per cent awarded on the third issue, and both the plaintiff and the defendant appeal, assigning error.

Clayton and London for plaintiff.
Peter H. Gerns, for defendant.

DENNY, J. We shall first consider the plaintiff's appeal.

The plaintiff assigns as error the overruling of her demurrer *ore tenus* to the defendant's first further answer and defense by way of counterclaim or cross-action.

The plaintiff is relying on two grounds for reversal of the ruling on her demurrer *ore tenus.*

It is conceded that the deed from Thomas P. Perkins and wife to the plaintiff is a fee simple deed on its face. It further appears from the defendant's evidence that Thomas P. Perkins held the absolute fee simple title to the property involved in this controversy at the time he and his wife executed the deed dated 17 August 1950, conveying the property to the plaintiff.

It is well settled in this jurisdiction that a deed absolute on its face cannot be converted into a mortgage without allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. *Streator v. Jones,* 5 N.C. 449; *Bonham v. Craig,* 80 N.C. 224; *Egerton v. Jones,* 102 N.C. 278, 9 S.E. 2; *Norris v. McLam,* 104 N.C. 159, 10 S.E. 140; *Sprague v. Bond,* 115 N.C. 530, 20 S.E. 709; *Newton v. Clark,* 174 N.C. 393, 93 S.E. 951; *Williamson v. Rabon,* 177 N.C. 302, 98 S.E. 830; *Newbern v. Newbern,* 178 N.C. 3, 100 S.E. 77; *Chilton v. Smith,* 180 N.C. 472, 105 S.E. 1; *Davenport v. Phelps,* 215 N.C. 326, 1 S.E. 2d 824.

In the last cited case, *Stacy, C. J.,* speaking for the Court, pointed out that *Pearson, J.,* in delivering the opinion in *Sowell v. Barrett,* 45 N.C. 50, said: "Since *Streator v. Jones,* 10 N.C. 423, there has been a uniform current of decisions, by which these two principles are

established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt:

"1. It must be alleged, and of course, proven, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage;

"2. The intention must be established, not merely by proof of declarations, but by proof of facts and circumstances, *dehors the deed,* inconsistent with the idea of an absolute purchase. Otherwise, title evidenced by solemn deeds would be, at all times, exposed to the 'slippery memory of witnesses.' "

Moreover, in order to correct a deed absolute on its face into a mortgage, it must not only be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage, the quantum of proof in such case must be clear, strong and convincing. *Davenport v. Phelps, supra; Ray v. Patterson,* 170 N.C. 226, 87 S.E. 212.

The second ground upon which the plaintiff argues that her demurrer should have been sustained is bottomed on the ground that the defendant was not a party to the deed under which the plaintiff holds the title, and, therefore, he has no legal or equitable right to have the deed reformed. We think this position is also well taken.

It is said in *Sills v. Ford,* 171 N.C. 733, 88 S.E. 636, "A court of chancery cannot (for example) change an agreement between A & B into one between A & C. Bisphams Pr. of Equity, section 468. * * * The authorities are uniform in holding that the relief by reformation of a written instrument will be granted to the original parties thereto, and to those claiming *under* or *through* them *in privity.* Eaton on Equity, p. 621; 24 A. and E. Enc. (2 Ed.), p. 655, and note 87, and *Adams v. Baker,* 24 Nev. 162, in which case it was held: 'In all cases of mistake in written instruments courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the fact. Story's Equity Jurisprudence, sec. 165.' "

We hold that no privity exists between the plaintiff and the defendant under the facts revealed on the record before us. *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892; *Sills v. Ford, supra; Moore v. Moore,* 151 N.C. 555, 66 S.E. 598. However, if privity did exist between the plaintiff and the defendant, Thomas P. Perkins and wife would not be necessary parties since they conveyed their entire interest in the property to the plaintiff. *Sills v. Ford, supra; Moore v. Moore, supra.*

In view of the absence of any allegation in the defendant's plead-

ings to the effect that the clause of redemption was omitted by ignorance, mistake, fraud or undue advantage, together with the fact that the defendant was not a party to the instrument he seeks to reform, or in privity with the plaintiff in relation thereto, the demurrer *ore tenus* should have been sustained, and we so hold.

The plaintiff assigns as error the overruling of her demurrer *ore tenus* to the defendant's second further answer and defense by way of counterclaim or cross-action. The only allegation in this cross-action upon which the defendant bottoms his right to establish a parol trust in his favor is as follows: "That plaintiff agreed with the defendant to hold the said property in trust for him, and to reconvey the same under the agreement, that the said property was purchased wholly and completely from the funds of this defendant, and before he married the plaintiff, that the conditions of the trust have been satisfied * * *."

This allegation is not sufficient to warrant the submission of an issue pursuant thereto for the purpose of establishing a parol trust. If the defendant had alleged that the deed was made to plaintiff with the understanding and agreement that she would hold the property in trust for him and would convey the same to him upon the payment of a certain sum or sums of money to her, or upon the performance of some specific act or acts upon which the agreement was predicated, and had further alleged that he had complied with the conditions upon which the agreement was based, he would have stated a cause of action. He does allege that the conditions of the trust have been satisfied. What conditions? These he does not specify or disclose. The payment of the original purchase price by the defendant for the property in litigation before he married the plaintiff, is nothing more than the recital of facts which are neither pertinent to nor challenged by the plaintiff in this action.

It is essential in a case like this for the pleader to allege the facts and circumstances that led up to and created the trust relationship. *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725.

"It is well settled that the averments as to set-off or counterclaim must be definite and certain. Vague, general, and indefinite allegations are not sufficient. The counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with * * * precision and certainty." *Bank v. Hill,* 169 N.C. 235, 85 S.E. 209; *Bank v. Northcutt,* 169 N.C. 219, 85 S.E. 210; G.S. 1-135.

In *Smith v. McGregor,* 96 N.C. 101, 1 S.E. 695, it is likewise said: "A counterclaim should be alleged with clearness and precision; its nature, and the consideration supporting it; when, how, and where

it arose, should be stated with reasonable certainty. This the statute requires, and moreover, it is necessary to just and intelligent procedure. The counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with the same precision as if alleged in the complaint."

Moreover, the defendant alleges in paragraph two of this cross-action that the plaintiff paid no consideration whatsoever for said property when the same was purchased by the defendant; that she has no financial interest in the property and that he is entitled to have the court find that there is a resulting trust in his favor in the event the court should find that the deed to the plaintiff was not a mortgage.

In *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418, the husband had caused certain land to be conveyed from a third party to his wife, who would hold title to the land, which land was to be used for a campsite, for the joint benefit of herself and the plaintiff, her husband, until a corporation could be formed and the property conveyed thereto. No corporation was formed, and the plaintiff and defendant separated. We held: "The plaintiff and defendant being husband and wife, the fact that the plaintiff paid the purchase price and caused title to be taken in his wife's name does not create a resulting trust in his favor for a one-half undivided interest in the land which he now claims; but, on the contrary, where a husband pays the purchase money for land and has the deed made to his wife, the law presumes he intended it to be a gift to the wife. (Citations omitted.) This presumption, however, is one of fact and is rebuttable. * * * A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. *Ritchie v. White, ante* 450. And to rebut the presumption of a gift to the wife, and to establish a parol trust in his favor, no greater degree of proof is required than is required to establish a parol trust under any other circumstances. To rebut the presumption of a gift to the wife, and to establish a parol trust, the evidence must be clear, strong, cogent, and convincing." *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48.

In our opinion, the allegations in this cross-action are insufficient to withstand the demurrer *ore tenus,* and the exception to the ruling below is sustained.

It would seem that the question of consideration and whether or not the defendant made a gift of this property to the plaintiff are not pertinent matters, unless the defendant can establish a parol trust in his favor and rebut the presumption of a gift to the plaintiff. These are matters determinable in an action to establish a parol trust. We

hold that the third and fourth purported cross-actions do not state or constitute causes of action. Therefore, the demurrer *ore tenus* as to them should have been sustained, and the ruling thereon in the court below is reversed.

Defendant's Appeal

The defendant assigns as error the refusal of the court below to permit him to amend his pleadings after verdict so as to allege that the clause of redemption in the deed from Thomas P. Perkins and wife to the plaintiff was omitted by reason of ignorance or mutual mistake.

The court properly refused to allow this amendment. The defendant's evidence is insufficient to support such an allegation if it had been allowed.

There is some evidence tending to show that the deed was given to the plaintiff at the request of the defendant without any request on her part and was to be held by her as security for certain indebtedness owed by the defendant to the plaintiff. Even so, the defendant's evidence tends to show the conveyance was made in accord with his request. He testified, "I agreed to have this property conveyed to the plaintiff until I could pay her back and so that she would be protected in the event of my death, so that if I should die while this property was in her name, she would be able to take it. I did this for her own protection, so that in the event of my death my adopted daughter would not be able to contest any of plaintiff's right and to save her trouble. I left the deed recorded in her name even though I held a deed from her to the property. It is normal for any man who wants to leave his wife property at his death to protect her from anyone else coming in and making a claim to it."

The defendant further assigns as error the ruling of the court below, as a matter of law, that the deed from the plaintiff to her husband, the defendant, during coverture, without complying with the statutory provisions of G.S. 52-12, is null and void. The ruling of the court below is in accord with the decisions of this Court and will be upheld. *Davis v. Vaughn*, 243 N.C. 486, 91 S.E. 2d 165; *Honeycutt v. Bank*, 242 N.C. 734, 89 S.E. 2d 598.

The defendant assigns as error the admission of evidence in the trial below, offered by the plaintiff, to establish certain indebtedness as being due from the defendant to the plaintiff when her pleadings contain no allegations setting forth either the amount or details as to such indebtedness. In fact, as we interpret the complaint in this action, the plaintiff seeks only to remove the recorded deed from her to the defendant as a cloud upon her title to the property described in said deed. This assignment of error will be sustained.

In light of the conclusions we have reached on both appeals, the judgment entered below is hereby set aside and the cause is remanded to the end that judgment be entered setting aside the deed dated 18 September 1951 from the plaintiff to the defendant and which is recorded in the office of the Register of Deeds of Mecklenburg County, in Book 1889, page 20, and removing the same as a cloud on plaintiff's title to the property described therein.

However, if the defendant desires to pursue his efforts to establish a parol trust in connection with the conveyance of the property involved from Thomas P. Perkins and wife to the plaintiff, he must do so upon appropriate pleadings in this or in a separate action. Likewise, if the defendant is indebted to the plaintiff in any amount, by reason of the matters and things growing out of this controversy, then the plaintiff should accurately and concisely allege her cause of action in that respect.

Error and Remanded.

PARKER, J., not sitting.

CECIL NORMAN SMITH v. CITY OF KINSTON, NORTH CAROLINA, A MUNICIPAL CORPORATION.

(Filed 19 November, 1958.)

1. Negligence § 11—

In order to bar recovery it is not necessary that contributory negligence be the sole proximate cause of the injury, but it is sufficient for this purpose if it is one of the proximate causes thereof.

2. Evidence § 3—

The courts will take judicial notice, as facts within common knowledge, of the characteristics of a hurricane and that a particular hurricane passing through the State was of great intensity, wreaking destruction in the area through which it passed.

3. Municipal Corporations § 14a— Evidence held to disclose contributory negligence as matter of law on part of motorist hitting tree lying in the street.

Evidence tending to show that plaintiff knew that a violent hurricane had passed through the area less than three days previously, that plaintiff was traveling along a street with his lights on dim shortly before day, and ran into a limb protruding from a large tree lying in the street, and that there was no other traffic or obstructions to plaintiff's view, *is held* to disclose contributory negligence barring recovery as a matter of law even if it be conceded that the municipality was negligent in having its agents saw off the top of the tree and smaller limbs for the

purpose of opening up a lane of traffic, leaving the pointed limb about three feet from the ground in the street.

4. Automobiles § 7—

Even in the absence of statutory requirement, a motorist must exercise the care of an ordinarily prudent person under like circumstances to avoid injury, and in the exercise of such care, to keep a reasonably careful lookout and keep his vehicle under proper control.

PARKER, J., not sitting.

APPEAL by plaintiff from *Bundy, J.*, at February 1958 Term of LENOIR.

Civil action to recover for alleged personal injury "solely and proximately caused by the actionable negligence of defendant as alleged in his complaint."

Defendant, answering the complaint, denies that it was negligent in any respect alleged, and it pleads as contributory negligence the conduct of plaintiff under the existing circumstances in bar of plaintiff's right to recover in this action.

These matters appear of record to be uncontroverted:

1. The city of Kinston, North Carolina, is now, and was at the times mentioned herein "a municipal corporation duly created, chartered, organized and existing under and by virtue of the laws of the State of North Carolina, with such powers and duties as are conferred by law."

2. "In the exercise of the authority conferred upon it as a municipal corporation under its charter and pursuant to the provisions of law pertaining to municipal corporations generally in this State," the city of Kinston "maintains streets and sidewalks within its corporate limits and that it has authority over and control and supervision of such streets and sidewalks in the manner and to the extent as authorized and provided by law."

3. "Shine Street is one of the streets of the city of Kinston and the right of control and supervision of said street by said city and the duties of the city in respect to its maintenance are such as are imposed by law."

4. "On the 15th day of October, 1954, winds of hurricane strength and velocity occurred in and around the streets of Kinston, and in fact all over eastern North Carolina as well as along the Atlantic Seaboard, it being a hurricane designated by the United States Weather Bureau as Hurricane Hazel."

5. "Shine Street is one of the streets of defendant city, running approximately east and west, and one of the trees blown down by said hurricane had set in or near the south edge of Shine Street just west of its intersection with Tiffany Street, and this tree had blown in

such manner as to reach entirely across the vehicular portion of Shine Street so as to fall and lie in a northwestern direction from its base, completely blocking the street as to vehicular traffic." And "as soon as reasonable thereafter and prior to the time complained of, defendant's employees had with axes and saws cut away a sufficient portion of said tree so as to open approximately one-third of the vehicular portion of said street."

6. And "On the 18th day of October, 1954, sometime shortly after 6 o'clock A. M., plaintiff was driving his wife's 1954 Ford automobile eastwardly along the south side of East Shine Street and was approaching the intersection of Shine Street and Tiffany Avenue."

7. And "after traversing the intersection of Shine Street and Davis Street, an automobile so driven and operated by the plaintiff, as aforesaid, collided with 'the' tree which had been blown down by Hurricane Hazel, and was lying on the south side of Shine Street," and "a limb of said tree penetrated the front of said automobile, and emerged through its left front door" * * * as a result of which "plaintiff received some injury."

And upon the trial in Superior Court plaintiff offered in evidence portions of the pleadings tending to show the above matters.

Moreover, plaintiff also alleges in his complaint "that the defendant City of Kinston knew or, by the exercise of reasonable care, should have known that the said Shine Street was obstructed as aforesaid, but notwithstanding the city of Kinston was negligent in the following particulars and respects:

"(a) That the defendant carelessly and negligently failed to remove or cause to be removed from said Shine Street the obstruction to travel along the southern portion of said street;

"(b) That the defendant negligently failed to maintain lights or other warning devices to indicate to persons using Shine Street that said street was obstructed and negligently failed to take any action to prevent injury to motorist using that street under said condition;

"(c) That the defendant carelessly and negligently permitted said street to remain obstructed contrary to the laws of the State of North Carolina and particularly G.S. 160-54."

Defendant, for further defense, avers: That the injuries of which plaintiff complains "were solely and proximately caused by the careless, negligent and unlawful conduct of * * * himself in that at said time and place, he," among other things,

"(a) was driving a motor vehicle upon a public highway carelessly and heedlessly, in willful and wanton disregard of the rights and safety of others, and with reckless disregard for his own safety, and without due caution and circumspection and at a speed and in a

manner so as to be likely to endanger persons and property, and particularly his own person and property;

"(b) Was operating a motor vehicle upon a public highway while under the influence of intoxicating liquor;

"(c) Was operating a motor vehicle upon a public highway in a residential district at a rate of speed in excess of 35 miles an hour;

"(d) Was operating a motor vehicle upon a public highway at a speed greater than was reasonable and prudent in the circumstances in that he knew, or by the exercise of reasonable diligence, would have known that as a result of Hurricane Hazel an unprecedented and unavoidable condition had existed and was then existing in Kinston and that such a condition as did exist at the time and place complained of was likely to be found on almost any street in the city outside the business district; and

"(e) Was operating a motor vehicle upon a public highway at a speed greater than that at which he could stop within the radius of his headlights, assuming, though not admitting, light and atmospheric conditions at the time and place complained of to be as alleged by plaintiff."

And also upon the trial in Superior Court plaintiff offered his own testimony and that of others substantially as follows:

Plaintiff testified in pertinent part: " * * * I reside at Grifton, Route 2.* * * the accident. The night before it happened I was out with some friends until 11:00 or 11:30, and went home; got up about 5 or a little after to pick up my brother-in-law to go squirrel hunting before we went to work, and I was going down Shine Street when this happened, roughly about 5:30 or 6 o'clock. As to the condition of light, it wasn't dark; it wasn't day. The condition of the automobile was good, the lights were on with the headlights on dim.

"I was operating the car not over 30 miles per hour down Shine Street * * * somewhere near 30 * * * When I realized it, I had hit something, something came through the car * * * I did not see the tree or any portion of it before it struck my car. I was going east * * * The accident occurred Monday morning, the 18th of October, 1954. The hurricane occurred October 15 * * * preceding the date of the accident.

"The tree that I say I struck was on the portion of Shine Street about two-thirds of the way down the last block of Shine Street; it is a dead end there going west. The buildings on that entire block * * * are used for residences. There might be one little store on the end. * * * At the end of the block where this tree was located * * * Shine Street comes to a dead end * * * the limb * * * it was 8 or 10 inches, roughly guessing, stuck right through the right headlight,

through the motor, through the steering gear, struck my knee and out the door * * * As I went down Shine Street toward the place where the accident occurred, I did not see any lights or warning devices of any kind. There weren't any. There were no barriers erected of any kind * * * I did not see the limb going through the car until it was in there * * * I don't remember any other limbs protruding westwardly."

Then under cross-examination plaintiff continued in pertinent part: " * * * I entered Shine Street at Main, that is Queen Street out here. * * * It is * * * nearly a quarter of a mile from Queen Street to where this tree was * * * I went up that street traveling with my dimmer-lights on. I didn't see a thing until I ran into the limb of that tree. I did not know the tree was there until I hit it * * * I never saw a thing until I hit it * * * I did not have any drinks that morning * * * At the time of the accident I was not under the influence of alcohol * * * ."

T. R. Jones testified in pertinent part: "I live at 511 E. Shine Street. My house is on the last block. I recall Hurricane Hazel that went through there, and I recall the accident that has been referred to in the testimony * * * My house is about 200 yards from the tree that was blown down. * * * I recall seeing the tree immediately after it was blown down; it went straight across the street at sort of an angle up Shine Street and they cut the top out so they could pass on the left, and on the side we live on they had the limbs cut pointing in this direction, toward Queen Street. They would cut off part of the limb and leave a naked limb 40 or 50 feet long from the trunk of the tree. This tree was like that before the accident. I saw the tree like that the day before; it was like that when I left and went to work early that morning before * * * It seems like before I went to work they had just cut the tops out. With regard to Hurricane Hazel it was the next day, I think I saw any cutting on the tree. The big limb that I referred to was cut at that time * * *."

And the witness Jones continued: " * * * I did not see the accident. I was up in the yard * * * I saw the car when it passed my house * * * In my opinion it was going about 30 miles per hour * * * I did not hear any brakes squeal, I just heard it slam * * * It was dark; It wasn't day. When the car went by, I saw that the lights of it were on. It was being operated on the right-hand side of the road * * * right straight along the right-hand side * * * The color of the street * * * was kind of dark, damp, just like the tree and the warehouse * * * Going back to Hurricane Hazel * * * we didn't get lights ourselves for three days." And in response to the question: "Were any smudge pots or things of that kind put up?", the witness continued:

"It was after the accident. I did not see any before the accident. I did not see any warning benches put out in the road until the time of the accident * * * The trunk of the tree that blew down was pretty large— I reckon about two feet through the bottom."

Then the witness continued: "When the tree fell or blew down it was pointed back up sort of toward Queen Street * * * Relating to the ground * * * the trunk of the tree was up 3 or 4 feet from the pavement. The limb * * * was just cleaned; they cut the branches off. It was kind of sharp at the end, sticking out that angle * * * There were small branches along that limb prior to the accident and they had been trimmed off * * * There were no other limbs out there the length of that large limb. They weren't as long as that * * * There were no others extending down the street like it did."

Then on cross-examination the witness Jones continued: " * * * He had plenty of room to go around it. I came around it there that day * * * I don't know there were many trees down all over the city, and that the City had Barrus Construction Company and the Telephone people removing trees day and night. I guess they did * * * Electric lights were out on the street we lived on * * * for three or four days * * * I do 't know who trimmed the trees out in front so people could get by. I didn't do it * * * The limb that I referred to had been cut off right sharp at the end, the top cut off."

The witness Wilbur Nathaniel Croom, Sr., testified: "I live at 505 E. Shine Street, that is, the last block on the street * * * I saw the tree when it first fell down * * * From the time the tree blew down until Mr. Smith's car struck it, there were no lights or flares in the street * * * ."

Then under cross-examination the witness was asked this question: "Q. There wasn't anything to keep anybody from seeing a tree in the street if they had on their automobile lights?", to which he replied: "A. It depends on what it takes to keep a person from seeing it. There wasn't anything between the driver of the automobile and the tree that I can recall; nothing to obstruct his view * * *."

And John Henry Daughety testified: "I live at 525 E. Shine Street * * * My house is located at the corner of Shine and Tiffany * * * I recall Hurricane Hazel * * * On the second day after Hurricane Hazel there was some cutting done on the tree * * * before the accident. It was trimmed up * * * I passed there every day * * * I saw the automobile right after the accident and the limb of the tree that it struck * * * With respect to the tree and the heavier portions of the tree and the pavement the color was dark gray * * * about the color of the tree, streets and everything mostly the same * * * At that time * * * I had been going all the way up and down Shine Street, before

the accident. Q. "Were any other trees blown down in that Street?" A. "I think one more small one between Davis and Queen, but it didn't interfere with traffic much, I don't think."

And on cross-examination the witness said: "I don't know of a single thing in the world between Mr. Smith and that tree from the time he turned the corner at Queen Street until he ran into it. Some leaves were kind of yellow-brown, some of them shedded off * * *."

At the close of plaintiff's evidence, defendant moved for judgment of nonsuit. Motion was allowed and plaintiff excepted, and from the judgment appeals to the Supreme Court and assigns error.

Wallace & Wallace, William F. Simpson for plaintiff, appellant.
Sutton & Greene for defendant, appellee.

WINBORNE, C. J. Passing without deciding the question as to whether defendant was negligent as alleged in the complaint, it is manifest from the evidence that plaintiff failed to exercise due care at the time and under the circumstances of his injury, and that such failure on his part contributed to, and was a proximate cause of his injury and damage. It need not be the sole proximate cause. It is sufficient to defeat recovery if plaintiff's negligence is one of the proximate causes of the injury. *Moore v. Boone*, 231 N.C. 494, 57 S.E. 2d 783, and many other cases.

A hurricane is defined as a storm of great violence or intensity, of which the particular characteristic is the high velocity of the wind. A hurricane is properly a circular storm in the nature of a cyclone. Black's Law Dictionary.

And it is a matter of general knowledge that "Hurricane Hazel" was of great and violent proportions, wreaking destruction upon buildings, houses, and trees throughout the area in which it occurred as hereinabove related. This is a fact of which the Court may properly take judicial notice.

"Courts take judicial notice of subjects and facts of common and general knowledge." See *Dowdy v. R.R.*, 237 N.C. 519, 75 S.E. 2d 639, and cases cited.

In this connection the evidence in case in hand shows that plaintiff resided at Grifton, which is in North Carolina, eleven miles from the city of Kinston. And the evidence is that he was out with friends on the night before the accident. Hence it may be fairly inferred that he knew of the hurricane and of the devastation wrought by it. And with this knowledge at the time of the accident in question, he was driving his automobile at thirty miles per hour with lights dimmed to such an extent that he did not see an obstruction of the size of a tree two feet in diameter at the trunk in the street on his line of

travel, when his evidence shows there was nothing to prevent him from seeing. Moreover it appears that the lights of the city which had been put out of commission by the hurricane had not been restored to service. Indeed, there was no other traffic on the street.

Under these extraordinary circumstances, the evidence offered by plaintiff clearly shows that he was not exercising proper care for his own safety.

And it is a general rule of law, even in the absence of statutory requirement, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep a reasonably careful lookout and to keep same under proper control. *Marshall v. R.R.*, 233 N.C. 38, 62 S.E. 2d 489. See also *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884 in respect to the statute G.S. 20-129 and G.S. 20-131, pertaining to requirements as to headlights.

For reasons stated the judgment as of nonsuit entered below is Affirmed.

PARKER, J., not sitting.

CROSLAND-CULLEN COMPANY, A CORPORATION, V. MATILDA H. CROSLAND.

(Filed 19 November, 1958.)

1. Judgments § 32: Constitutional Law § 24—

While public policy demands that every person have his day in court to assert his own rights or defend against their infringement, public policy equally requires that there be an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred.

2. Judgments § 32—

In order for a party to be barred by the doctrine of *res judicata*, it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him.

3. Same— Plaintiff, after unsuccessful litigation against one party, may not seek to litigate identical question in action against another.

In a prior action by a corporation against insurer to collect the proceeds of a policy on the life of the corporation's deceased president, judgment was rendered for insurer upon adjudication that the assignment of the policy by the corporation to the wife of the president was

valid. This action was instituted by the corporation against the widow to recover from her the amount received from the proceeds of the policy on the ground that the assignment to her of the policy was void. *Held*: The identical issue as to the validity of the assignment was determined adversely to the corporation in the prior action, and the corporation is not entitled to relitigate the same question in the subsequent action, notwithstanding the difference in the parties defendant, and the corporation's demurrer to the widow's plea of *res judicata* and motion to strike the plea should have been overruled.

PARKER, J., not sitting.

APPEAL by defendant from *Pless, J.*, June 16, 1958 Civil B Term of MECKLENBURG.

This action was begun in June 1956 by Crosland-Cullen Company, a domestic corporation, to recover $15,000 paid to defendant by Philadelphia Life Insurance Company, hereafter designated as insurer.

The complaint alleges: Insurer, on 3 June 1947, issued its policy of insurance in the sum of $25,000 on the life of David B. Crosland, plaintiff corporation's president; it was named as beneficiary in and paid the premiums on the policy of insurance; on 31 October 1950 insured and defendant, husband and wife, were president and secretary and two of the three stockholders and directors of plaintiff corporation; on that date defendant and her husband executed a separation agreement by the terms of which the husband obligated himself to make payments to defendant as there detailed; the separation agreement also provided that defendant's stock should be transferred to her husband when he had completed payments as provided for, and she would resign as secretary of the corporation; it also provided that the policy of insurance to the extent of $15,000 should be assigned to defendant to secure performance by the husband of its provisions; an assignment of the policy was accordingly made and filed with the insurer; the assignment was made solely for the benefit of the two officers, defendant and her husband, and was, therefore, *ultra vires* and void; the insured David B. Crosland died on 19 May 1953 at which time insurer became obligated under its policy to pay $22,360.45, the face of the policy less a loan thereon; insurer paid $15,000 to defendant with knowledge of plaintiff's assertion that the assignment was *ultra vires* and void, and paid the balance to plaintiff.

After the complaint was filed, a receiver was appointed for plaintiff corporation in another action instituted in Mecklenburg County. The receiver was on his motion made a party plaintiff. He adopted the complaint theretofore filed by the corporation.

Defendant answered. She admitted the execution of the separation agreement, issuance and assignment of the policy, death of the insured, and payment of $15,000 to her by insurer in accordance with

the provisions of the separation agreement, and the assignment. She asserted the validity of the assignment based on a valuable consideration.

As a further defense and in bar of plaintiff's right to recover she pleaded a judgment rendered by the United States District Court for the Western District of North Carolina as directed by the decision of the Circuit Court of Appeals for the Fourth Circuit in an action begun in December 1953 entitled *Crosland-Cullen Company v. Philadelphia Life Insurance Company*, 234 F 2d 780. Plaintiff in that action sought to recover from the insurer the $15,000 it paid defendant. The basis of the claim was the invalidity of the assignment.

Plaintiff demurred to the plea of *res judicata* for failure to state a valid defense and moved to strike the plea. The demurrer was sustained, the motion to strike was allowed, and defendant appealed.

William H. Abernethy for plaintiff, appellee.
Carswell and Justice for defendant, appellant.

RODMAN, J. Plaintiff's cause of action is based on the assertion that defendant, by virtue of a void assignment, has received from insurer monies which should have been paid to plaintiff, the beneficiary in the policy of insurance.

Defendant admits receipt of the money pursuant to the provisions of the assignment. She affirmatively asserts that plaintiff's right to question the validity of this assignment has been foreclosed by a decree of a court of competent jurisdiction in an action brought by plaintiff against the insurer. As a part of her plea of *res judicata* she attaches a complete transcript of the record in the Federal court.

That court said with respect to plaintiff's right to attack the assignment: "These authorities require the conclusion that in the instant case plaintiff corporation and its present stockholders, who received their stock from or through David B. Crosland, are estopped to question the validity of the assignment." Plaintiff does not question the binding force of the judgment in that action as a bar to her right to again question the validity of assignment where the insurer is a party. Its position is that defendant was not a party to that action, hence there is no mutuality and for that reason the judgment is not good as a plea of *res judicata*, is *res inter alios acta*, and could not be offered in evidence and was, therefore, properly stricken.

Devin, C. J., said: "Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues. It is also a well established principle that estoppels must be mutual, and as a rule only parties and privies are bound

by the judgment. These rules are subject to exception." *Light Co. v. Ins. Co.*, 238 N.C. 679, 79 S.E. 2d 167.

Is this case an exception to the general rule of identity of parties and mutuality usually applied to determine the right to plead *res judicata*? Logic and decided cases call for an affirmative answer.

Public policy demands that every person be given an opportunity to have a judicial investigation of the asserted invasion of complainant's rights. "It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement." *Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688. But public policy is equally as adamant in its demand for an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred. *Ludwick v. Penny*, 158 N.C. 104, 73 S.E. 228.

To make the plea effective it is necessary not only that the party have an opportunity for a hearing but that the identical question must have been considered and determined adversely to the complaining party.

Where both of these factors exist, sound public policy dictates that the court should refuse permission for further litigation on that question.

Frequent application of this public policy is found in those cases where complainant, having failed to establish a wrong done by one primarily liable, thereafter seeks to hold another liable on the basis of respondeat superior or as an indemnitor. The different results reached in *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570, *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, and *Coach Co. v. Burrell, supra; Garrett v. Kendrick*, 201 N.C. 388, 160 S.E. 349, and *Morgan v. Brooks*, 241 N.C. 527, 85 S.E. 2d 869, clearly illustrate the correct scope of the doctrine of *res judicata*.

Current v. Webb, 220 N.C. 425, 17 S.E. 2d 614, well illustrates the rule with respect to identity of issue. That action was one for wrongful death. The deceased and one Bangle were occupants of an automobile involved in a collision with an automobile operated by Webb. Bangle brought suit in Mecklenburg County for personal injuries. Mrs. Current's administrator brought suit in Gaston County for wrongful death. Identical motions were made to dismiss in each case for the reason that the defendant Webb was not a resident of the State and was not amenable to service of process. The motion in the *Bangle case* was heard first. The trial court there found that Webb was not a resident and hence not amenable to service of process. Thereafter on identical evidence the motion to dismiss in the *Webb case* was heard

in Gaston. The trial court there found that Webb was a resident, and hence subject to process. Both cases were appealed to this Court and heard at the Fall Term 1941. The Court, in its opinion, quoted Freeman on Judgments: "It is not necessary that precisely the same parties were plaintiffs and defendants in the two suits; provided the same subject in controversy, between two or more of the parties, plaintiffs and defendants in the two suits respectively, has been in the former suit directly in issue, and decided." The Court then proceeded to say: "The judgment in the *Bangle case, supra,* was rendered upon the same preliminary motion as in this case. This motion squarely presented for adjudication the status of defendant Webb, whether a resident of Georgia or North Carolina, whether exempt from the service of process under the statute, or not. Thus the judgment was in the nature of a judgment *in rem,* by a court having jurisdiction not only of the parties and of the cause of action, but also of the *res* —the power and duty to determine the particular fact presented for adjudication. This fact the court conclusively established in that case. Its judgment as to that fact was binding upon the parties to that suit and upon all those who have an interest in the subject matter of the action under the maxim *res judicata pro veritate accipitur.*" See also *Dillingham v. Gardner,* 222 N.C. 79, 21 S.E. 2d 898.

Commercial Nat. Bank v. Allaway, 223 N.W. 167, involved the validity of an assignment of a note. Defendant in that action executed a note to Iowa Savings Bank. That bank transferred and assigned it to Commercial National Bank as security for a loan made by the latter bank to payee bank. Defendant paid his note to Iowa Savings, the payee bank, before maturity and when Commercial held possession. Payee promised to subsequently deliver the note to defendant. It failed to do so. A receiver was appointed for Iowa Savings and he brought suit against Commercial, challenging the transfer and assignment of defendant's note for want of consideration and lack of authority of the officer making the transfer. That litigation was decided adversely to the receiver of Iowa Savings. The validity of the transfer was affirmed. Thereafter Commercial brought suit against defendant Allaway. He asserted the invalidity of the assignment by Iowa Savings for the same reasons asserted by the receiver of that bank in its litigation against Commercial; and hence satisfaction of the note by his payment made to Iowa Savings. The Supreme Court of Iowa held that the validity of the assignment had been previously adjudicated and could not thereafter be questioned by the maker of the note.

Israel v. Wood Dolson Company, decided by the Court of Appeals of New York, 134 N.E. 2d 97, involved the right of plaintiff to re-

cover damages from the defendant for inducing the breach of a contract of employment. In a prior action brought by plaintiff on the asserted contract of employment a court of competent jurisdiction had ascertained that the contract of employment had not been breached. The court said: "Israel's second cause of action must fail if there was no such breach in his suit against Wood Dolson in a court of competent jurisdiction. That court has found no breach and, under the principle mentioned above, plaintiff may not relitigate that issue. Our holding here is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule."

In *Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A 260, plaintiff sued to recover a reward offered by defendant "for information leading to the detection of any dealer substituting Pepsi-Cola for any other five cent drink." Plaintiff alleged that three named dealers had substituted Pepsi-Cola for Coca-Cola. It claimed the reward. Defendant asserted that as to two of the named dealers it had been theretofore adjudged that there was no substitution. Those adjudications were pleaded as *res judicata*. The court said: "The present defendant pleading *res judicata* was not a party to the former proceeding and the judgment in the former proceeding did not bind it so there is no mutuality. The present plaintiff, against whom the *res judicata* is pleaded is alleged to have been the unsuccessful plaintiff in the former proceedings where the issues were alleged to have been identical with those here involved. We are not now passing upon the actual existence, as a fact, of the identity of the issues in the two proceedings, for that identity must be proven. But assuming the identity of the issues, we are of the opinion that a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to reopen and re-try all the old issues each time he can obtain a new adversary not in privity with his former one."

In *E. I. Du Pont de Nemours & Co. v. Richmond Guano Co.*, 297 F 580, plaintiff sued to recover the value of fertilizer converted by defendant. Defendant asserted *res judicata* alleging that plaintiff had previously brought a suit against a third party to whom defendant had sold the fertilizer for the purpose of recovering from that defendant the value of the fertilizer, and in that action it had been determined

that plaintiff was not the owner of the fertilizer. Plaintiff insisted that defendant's plea of *res judicata* could not be sustained because of want of identity of parties in the two suits and hence lack of mutuality. The court held the plea good.

That the plea is a valid defense under factual situations similar to the facts of this case has been repeatedly stated in well-considered opinions by other courts. *Bernhard v. Bank of America,* 122 P 2d 892; *Gammel v. Ernst & Ernst,* 72 N.W. 2d 364; *Jenkins v. A.C.L. R. Co.,* 71 S.E. 1010 (S.C.); *American Button Co. v. Warsaw Button Co.,* 31 NYS 2d 395; *Sawyer v. City of Norfolk,* 116 S.E. 245; *Brobston v. Burgess,* 138 A 849; *Harding v. Carr,* 83 A 2d 79; *Hardware Mut. Ins. Co. v. Valentine,* 259 P 2d 70; *Eagle S. & B. D. Ins. Co. v. Heller,* 140 S.E. 314, 57 A.L.R. 490; *Good Health Dairy Products v. Emery,* 112 A.L.R. 401; *Riordan v. Ferguson,* 80 F Supp 973; *Bruszewski v. U. S.,* 181 F 2d 419; *Perkins v. Benguet Consol. Mining Co.,* 132 P. 2d 70; *Hawley v. Davenport R. & N. W. Ry. Co.,* 45 N.W. 2d 513.

The rule is similarly stated in encyclopedias and textbooks. 50 C.J.S. 294; 2 Freeman, Judgments, 5th ed., p. 1319.

The demurrer to the plea should have been overruled. The plea should not have been stricken. Defendant is entitled to offer the record in the Federal court to foreclose plaintiff's right to attack the validity of the assignment.

The Federal court passed only on the validity of the assignment. The complaint in this action only challenges the validity of the assignment. Hence we are not called upon to interpret the assignment. The parties have not put in issue the amount which defendant is entitled to retain by virtue of the assignment.

Reversed.

PARKER, J., not sitting.

MARGARET FULLER PORTER v. THE CITIZENS BANK OF WARRENTON, INC., MRS. ALICE SOUTHERLAND, TRADING AS THE STYLE SHOP, E. E. GILLAM, TRADING AS GILLAM AUTO COMPANY, AND J. B. MARTIN.

(Filed 19 November, 1958.)

1. Divorce and Alimony § 20—

A decree of divorce on the ground of two years separation in an action instituted by the wife terminates the wife's right to alimony without divorce under a prior decree. G.S. 50-11, as amended by Ch. 872, Session Laws of 1955.

2. Same: Appeal and Error § 55: Attachment § 6— Where findings are insufficient to determine rights of parties, cause must be remanded.

In this special proceeding to determine the respective rights of the wife and an attaching creditor of the husband in funds deposited in the hands of the clerk as surplus after foreclosure sale of lands theretofore held by the husband and wife by the entireties, the wife claiming such funds under provisions of an order entered on motion in the cause in her suit for alimony making his share of the funds liable for the alimony therein decreed, the record implied that the wife had remarried and that therefore an absolute divorce had been decreed. *Held:* In the absence of findings sufficient to determine whether a decree of absolute divorce terminated the right to alimony under G.S. 50-11, as amended, judgment must be vacated and the cause remanded.

PARKER, J., not sitting.

APPEAL by respondent J. B. Martin from judgment dated March 31, 1958, entered by *Clark, J.*, after hearing, by consent, in Chambers in Henderson, N. C. From WARREN.

Special proceeding instituted October 2, 1957, by petitioner, "Margaret Fuller Porter, formerly Margaret Fuller Comer, wife of Geo. S. Comer," under G.S. 45-21.32, to determine ownership of a fund of $9,382.34 deposited July 20, 1957, with the Clerk of the Superior Court of Warren County by Frank Banzet, Trustee, under G.S. 45-21.31.

The $9,382.34 so deposited was part of $17,795.00 paid to Frank Banzet, Trustee, as purchase price for real estate sold in foreclosing a deed of trust dated February 14, 1953, executed and delivered by George S. Comer and wife, Margaret Fuller Comer, to Frank Banzet, Trustee, securing an indebtedness to The Citizens Bank, Warrenton, North Carolina.

The foreclosure sale was held June 26, 1957; and by deed dated July 12, 1957, Frank Banzet, Trustee, conveyed the real estate to the purchasers.

On February 14, 1953, when they executed and delivered said deed of trust to Frank Banzet, Trustee, George S. Comer and Margaret Fuller Comer, then husband and wife, owned the real estate in fee simple as tenants by entirety. Petitioner (Margaret Fuller Porter, formerly Margaret Fuller Comer) used the real estate as her place of residence until she vacated the premises on or about July 1, 1957.

The $9,382.34 was the balance or surplus after payment by Frank Banzet, Trustee, of the debt secured by the deed of trust, the expenses of foreclosure, and these two items: (1) $837.00 to petitioner, "in payment of alimony in arrears"; (2) $450.00 to Banzet & Banzet, attorneys for petitioner, "for attorneys' fees awarded them in the alimony case."

The judgment of Judge Clark sets forth the *stipulated facts* constituting the basis of petitioner's claim as follows:

"1. In the year 1956 an action for alimony without divorce was instituted in the Superior Court of Warren County by Margaret F. Comer (now Porter), against her husband, George S. Comer, pursuant to which an order for alimony *pendente lite* and counsel fees was rendered by Honorable Hamilton H. Hobgood, Resident Judge of the Ninth Judicial District.

"2. The said George S. Comer departed this County in or about the month of February 1957, and since said date his whereabouts have been unknown.

"3. On June 4, 1957, on motion of Margaret F. Comer in said pending cause, an order was entered by Honorable C. W. Hall, Judge holding the courts of the Ninth Judicial District, as follows:

> " '1. The interests estate and equity of the defendant George S. Comer in and to the real property described in paragraph 6 of plaintiff's motion, together with surplus of the sale thereof to which the defendant George S. Comer would otherwise be entitled, is secured to the plaintiff Margaret Fuller Comer for the satisfaction of the award of alimony heretofore entered by the Honorable Hamilton H. Hobgood and any person, firm or corporation having custody or control over the same shall pay to the plaintiff the sum of $837.00 and shall pay to the firm of Banzet & Banzet, attorneys, the sum of $450.00 and thereafter to pay to plaintiff the sum of $354.00 on the 29th day of each month hereafter commencing on the 29th day of June 1957, to be reduced by $75.00 per month so long as the plaintiff shall occupy the premises described in paragraph 6 of plaintiff's motion.
>
> " '2. The Clerk of Superior Court of Warren County is directed to file, index and cross-index in the Judgment Docket of Warren County the substance of this order insofar as the same pertains to the surplus of any sale under foreclosure of the real estate described in paragraph 6 of plaintiff's motion to the end that all persons dealing with said surplus shall be bound by the terms of this order.'

"4. Said order was issued without notice, actual or constructive, to said George S. Comer, petitioner contending that notice was unnecessary in view of the facts stated in paragraph 2 above."

The judgment of Judge Clark sets forth the *stipulated facts* constituting the basis of respondent J. B. Martin's claim as follows:

"8. On July 10, 1957, an action was filed in the Recorder's Court of Warren County by J. B. Martin, trading as Martin's Plumbing & Heating, against George S. Comer, and on said date a warrant of at-

tachment was issued by said Court against the property of said defendant. Pursuant to said warrant of attachment, the Sheriff of Warren County, on July 20, 1957, attached the interest of said defendant in the surplus proceeds of the foreclosure sale referred to above, in the amount of $9,382.34, which on said date had been paid to the Clerk of Superior Court of Warren County by Frank Banzet, Trustee. On September 26, 1957, judgment was entered in said action by the Recorder's Court of Warren County in favor of said plaintiff and against said defendant, George S. Comer, in the amount of $605.81, with interest on $583.85 from June 1, 1953 and interest on $21.96 from the date of said judgment, and for costs in the amount of $22.20. Said judgment was declared a specific lien on the funds in the hands of the Clerk of Superior Court which had been attached by the Sheriff pursuant to said warrant of attachment. Said judgment was on said date docketed in the Superior Court of Warren County and is recorded in Judgment Docket 11, page 39. No amount has been paid on this judgment."

The matter was first heard by the clerk upon the petition and the answer of respondent J. B. Martin. Upon his findings of fact, substantially in accord in respect of matters now material with the stipulated facts set forth in Judge Clark's judgment, the clerk made the following "Conclusions of Law," viz.: "1. The petitioner Margaret Fuller Porter is entitled to receive from the surplus of said sale, one-half thereof, to-wit: the sum of $5,333.21. 2. The Citizens Bank of Warrenton, Inc. is entitled to receive the sum of $426.97 in satisfaction of its judgment docketed in Judgment Docket No. 11, pages 35 and 28. 3. The defendant E. E. Gillam, trading as Gillam Auto Company, is entitled to receive the sum of $79.20 in satisfaction of the judgment docketed in Judgment Docket No. 9, page 446. 4. The defendant Mrs. Alice Southerland is entitled to receive the sum of $25.74 in satisfaction of the judgment docketed in Judgment Docket No. 9, page 434. 5. The defendant J. B. Martin is entitled to a specific lien on the share of the proceeds of George S. Comer. 6. The said George S. Comer is a necessary party to this action and it is hereby ordered that he be made such party hereto. 7. The Commissioner of Revenue of the State of North Carolina is a necessary party to this action and thus ordered that said Commissioner of Revenue be made party hereto. 8. The balance of the proceeds remaining in the hands of the Clerk of Superior Court of Warren County shall be paid to the petitioner Margaret Fuller Porter at the rate of $354.00 per month beginning on the 29th day of June 1957, the total accumulated installments to be made after the said George S. Comer and Commissioner of Revenue are served process as provided by law."

According to the stipulated facts set forth in Judge Clark's judgment, the said judgments for $426.97, $79.20 and $25.74 were paid to The Citizens Bank of Warrenton, E. E. Gillam, trading as Gillam Auto Company, and Mrs. Alice Southerland, respectively, prior to the hearing by Judge Clark.

According to the clerk's findings of fact, the Gillam and Southerland judgments were against petitioner alone and the bank's judgment was against both George S. Comer and Margaret Fuller Comer. Petitioner *alleged* that it had been adjudged that George S. Comer was obligated as principal and that she was obligated only as surety in respect of the bank's judgment.

Respondent J. B. Martin did not except to the clerk's judgment or appeal therefrom. Petitioner excepted to "conclusions of law Nos. 5, 6 and 7" and appealed to the superior court judge.

The conclusions of law and judgment of Judge Clark were as follows:

"Upon the foregoing findings of fact, the Court is of the opinion that the order of Honorable C. W. Hall, Judge, securing to petitioner the estate and equity of George S. Comer constitutes a lien in favor of petitioner superior to the attachment and judgment of the respondent J. B. Martin, that petitioner is entitled to have paid to her by the Clerk of Superior Court of Warren County alimony in the sum of $354.00 per month beginning as of the 29th day of June 1957, and that so much of the judgment of the Clerk of Superior Court of Warren County as is inconsistent herewith is erroneous.

"It is therefore, considered, ordered, adjudged and decreed as follows:

"1. The Clerk of Superior Court of Warren County is directed to pay from the surplus funds in his hands by reason of payment into Court by Frank Banzet, Trustee in the deed of trust executed by George S. Comer and Margaret F. Comer, dated February 14, 1953, recorded in the Public Registry of Warren County in Book 176, page 13, the sum of $354.00 per month beginning as of the 29th day of June 1957, and continuing until said fund is exhausted or the order of payment for alimony in the action entitled '*Margaret Fuller Comer v. George S. Comer*' is modified.

"2. The respondent J. B. Martin, by virtue of his attachment and judgment recorded in Judgment Docket 11, page 39, in the office of the Clerk of Superior Court of Warren County, is entitled to a lien on said fund after payment and satisfaction of petitioner's lien, if any part of said fund shall remain in the hands of the said Clerk of Superior Court."

Respondent J. B. Martin excepted and appealed.

Banzet & Banzet for petitioner, appellee.

William W. Taylor, Jr., and Charles T. Johnson, Jr., for respondent, J. B. Martin, appellant.

BOBBITT, J. It was expressly adjudged that the judgment obtained by respondent J. B. Martin, pursuant to attachment proceedings, was a lien on George S. Comer's share of the $9,382.34 deposit. Whether petitioner, by virtue of Judge Hall's order of June 4, 1957, entered in the separate action for alimony without divorce, has a lien thereon superior to Martin's lien, is the only question discussed in the briefs and on oral argument.

The stipulated facts set forth in paragraphs numbered 1, 2, 3 and 4 of Judge Clark's judgment provide our only information relating to the separate action for alimony without divorce entitled *"Margaret Fuller Comer v. George S. Comer."* Whether jurisdiction therein was obtained by personal service on defendant or otherwise is not disclosed. Too, the record is silent as to whether George S. Comer answered the complaint or otherwise appeared in person or by counsel.

Judge Hall's order of June 4, 1957, was entered, on motion of Margaret Fuller Comer, after the foreclosure sale had been advertised by Frank Banzet, Trustee, but prior to the date of sale. Whatever the provisions of Judge Hobgood's prior order, the order of Judge Hall provided that "any person, firm or corporation having custody or control over" *the share in the surplus,* after payment of the secured debt and foreclosure expenses, *to which George S. Comer would otherwise be entitled,* "shall pay to the plaintiff the sum of $837.00 and shall pay to the firm of Banzet & Banzet, attorneys, the sum of $450.00 and thereafter to pay to plaintiff the sum of $354.00 on the 29th day of each month hereafter commencing on the 29th day of June 1957, to be reduced by $75.00 per month so long as the plaintiff shall occupy the premises . . ." Whether the $837.00, referred to as "in arrears," constituted payment to June 4, 1957, or to June 29, 1957, does not clearly appear. It does appear that the first of the monthly payments of $354.00 each was to fall due on the 29th day of June, 1957. Thus, disregarding the small deduction on account of her occupancy until July 1, 1957, four payments of $354.00 each fell due prior to the institution of this special proceeding, to wit, the payments of June 29, 1957, July 29, 1957, August 29, 1957, and September 29, 1957, a total of $1,416.00.

It appears that Frank Banzet, Trustee, before he deposited the $9,382.34 with the clerk, paid from "George S. Comer's one-half of the net proceeds of sale" the items of $837.00 and $450.00, a total of $1,287.00. Thus, it appears that the surplus, after payment of the

secured debt and foreclosure expenses, was $10,669.34; and that the share to which George S. Comer "would otherwise be entitled" was $5,334.67. (Note: The clerk's judgment fixes petitioner's share as $5,333.21.)

It appears that the judgments for $426.97, $79.20 and $25.74, respectively, a total of $531.91, were paid in accordance with the clerk's judgment.

Thus, assuming the $1,287.00 paid on account of "alimony in arrears" ($837.00) and counsel fees ($450.00), and the $531.91 paid to satisfy the three judgments, and the four payments of $354.00 each, a total of $1,416.00, were properly charged against the share to which George S. Comer "would otherwise be entitled," there remained *in said share* on October 2, 1957, when petitioner instituted this special proceeding, a balance of $2,099.76, an amount substantially in excess of the amount due respondent J. B. Martin under his said judgment against George S. Comer.

The record raises but does not answer questions of vital importance. In her petition filed October 4, 1957, petitioner identifies herself as "Margaret Fuller Porter, formerly Margaret Fuller Comer, wife of Geo. S. Comer." She alleged: "On February 14, 1953, the petitioner (*then* Margaret Fuller Comer, wife of George S. Comer) and the said George S. Comer executed and delivered to Frank Banzet, trustee," etc. (Our italics) The stipulated facts refer to her as "Margaret F. Comer (now Porter)." George S. Comer left Warren County "in or about the month of February 1957, and since said date his whereabouts have been unknown." Judge Hall's order of June 4, 1957, was entered "on motion of Margaret F. Comer. . ."

While the fact may be otherwise, petitioner's identification of herself, as well as other references to her, imply that she was not the wife of George S. Comer on October 2, 1957, when she instituted this special proceeding. Did she, prior to October 2, 1957, obtain an absolute divorce from George S. Comer in an action initiated by her on the ground of separation for the statutory period? If so, her right to alimony ceased and determined immediately upon the entry of such decree of absolute divorce. G.S. 50-11, as amended by Ch. 872, Session Laws of 1955.

We deem it inappropriate to discuss the questions raised as to the legal effect of Judge Hall's order of June 4, 1957, until the facts relating to petitioner's marital status as of October 2, 1957, are clarified and established. These facts *may* have legal significance determinative of the controversy between petitioner and Martin, the only parties to this appeal.

The judgment of Judge Clark is vacated and the cause remanded

for hearing *de novo* in which a determination may be made as to whether a decree of absolute divorce has dissolved the bonds of matrimony once subsisting between petitioner and George S. Comer and, if so, as to when, by whom and on what ground such action for absolute divorce was initiated. Upon further hearing, additional facts may be stipulated or otherwise established relating to material features of the separate action for alimony without divorce.

It is noted that the action for alimony without divorce was instituted by Margaret Fuller Comer, now Margaret Fuller Porter, in 1956, subsequent to the effective date of said 1955 amendment of G.S. 50-11. Compare *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867.

Each party to this appeal will pay one-half of the costs incident thereto.

Judgment vacated and cause remanded.

PARKER, J., not sitting.

F. A. FREEMAN v. HUBERT BENNETT.

(Filed 19 November, 1958.)

1. Evidence § 1—

The courts will take judicial notice of the date of the commencement of a term of the Superior Court and who is the presiding judge at such term.

2. Courts § 8—

Where appeal from a judgment of a justice of the peace is not filed in the Superior Court within ten days as required by G.S. 7-181, but is filed during the term at which the appeal would have stood regularly for trial had the record been timely filed, appellee's motion at the next succeeding term to dismiss the appeal presents, in like manner as a petition for *recordari*, the question of fact whether the failure of the justice of the peace to comply with the statute was caused by defendant's default, and when there is no evidence or finding in regard thereto, judgment denying the motion is not supported by the record, and the cause must be remanded.

3. Appeal and Error § 49—

While findings of the lower court are conclusive when supported by evidence, and in the absence of exception to the findings there is a presumption that the findings are supported by the evidence and thus are conclusive, where there is an exception to each material finding of fact, such findings cannot stand in the absence of evidence in the record tending to support them.

4. Appeal and Error § 3—

While the better practice may be for a party to enter exception to the

granting of appellant's petition for writ of *recordari*, and present the exception on appeal from final judgment, an appeal lies immediately from judgment entered in the Superior Court denying appellee's motion to dismiss a purported appeal from a justice of the peace on the ground that the record was not filed in the Superior Court in apt time, or from the granting of appellant's motion for a writ of *recordari*. Rule of Practice in the Superior Courts No. 14.

PARKER, J., not sitting.

APPEAL by plaintiff from *Thompson, J.*, May 26, 1958, Civil Term, of RANDOLPH.

In two civil actions tried before a justice of the peace, plaintiff obtained separate judgments for $200.00 and $50.00, respectively, plus interest and costs. On March 15, 1958, when said judgments were pronounced, defendant gave notice of appeal in open court and further notice was waived. It appears from said judgments that defendant was present and testified, also that he was represented by counsel, in the trials before the justice of the peace.

On May 26, 1958, in the superior court, plaintiff filed a written motion in each case that defendant's purported appeal be dismissed and the judgment of the justice of the peace affirmed. As the basis for each motion, plaintiff asserted that the next term of Randolph Superior Court after March 15, 1958, convened April 7, 1958, but that defendant had not docketed his appeal or filed any motion based on alleged excusable neglect.

In each of his said motions, plaintiff asserted that his judgment was docketed March 18, 1958, in the office of the Clerk of the Superior Court of Randolph County; that execution was issued on March 19, 1958; that on April 14, 1958, pursuant to said execution, the sheriff took into possession an automobile of defendant; and that thereafter, to wit, on April 14, 1958, when defendant posted a bond to stay execution, the clerk signed an order staying further proceedings.

Defendant filed no answer to plaintiff's said motions.

In a single order, Judge Thompson denied plaintiff's said motions. The order is based on these findings of fact: ". . . and the Court finding as a fact *that the defendant appellant did on the 14th day of April, 1958, docket his appeal from the March 15, 1958, judgments entered by Walter V. Roberts, Justice of the Peace; that all fees to docket said appeals were paid on this date; that said cases were not docketed prior to said date due to the ill health of the defendant, and due to remissness of counsel; it further appearing to the Court that the defendant has a meritorious defense.* The Court further finds that the next term of Superior Court held in Randolph County after the date of March 15, 1958, was on April 7, 1958."

Plaintiff excepted, separately, to each italicized finding of fact, and to the order denying his said motions, and appealed.

Ottway Burton and Don Davis for plaintiff, appellant.
No counsel (in this Court) contra.

BOBBITT, J. We take judicial notice of the fact that the next term of Randolph Superior Court after March 15, 1958, convened April 7, 1958, ("the fifth Monday after the first Monday in March to continue two weeks for the trial of civil cases only," G.S. 7-70, as amended by Ch. 1373, Session Laws of 1955,) and that the presiding judge was the regular superior court judge then holding the courts of the Nineteenth Judicial District.

Nothing in the record indicates that defendant moved at said April 7th Term for a writ of *recordari* or otherwise brought to the attention of the presiding judge any matter relating to the status of his purported appeals.

In *Electric Co. v. Motor Lines*, 229 N.C. 86, 47 S.E. 2d 848, *Winborne, J.* (now C. J.), reviews the statutes and cites the prior decisions of this Court relevant to the procedure for perfecting an appeal to the superior court from a judgment of a justice of the peace.

Judge Thompson found as a fact that defendant docketed his appeal during said April 7th Term, to wit, on April 14, 1958. However, plaintiff excepted specifically to this finding of fact and to each of the other findings of fact upon which Judge Thompson's order was based; and the agreed case on appeal, signed by counsel for the respective parties, does not include the evidence, if any, upon which these findings were based.

Assuming defendant's appeal was docketed on April 14, 1958, the justice of the peace did not make a return to the superior court and file with the clerk thereof the papers, proceedings and judgment in the case within ten days after defendant's notice of appeal in open court as required by G.S. 7-181. Had he done so, the appeal would have been docketed more than ten days prior to the commencement of said April 7th Term. Compare *Electric Co. v. Motor Lines, supra.* While docketing on April 14, 1958, if such occurred, would obviate the necessity of having the papers sent up under compulsion of a writ of *recordari*, there would remain for decision the question as to whether the failure of the justice of the peace to comply with G.S. 7-181 was caused by defendant's default. This would present a question of fact for the court, determinable on the basis of the evidence presented, as in case of a hearing on a petition for writ of *recordari.*

Nothing appears to indicate that defendant either pleaded or offered evidence tending to show that he was not in default in respect of the

failure of the justice of the peace to make return, etc., as required by G.S. 7-181.

When a question of fact is presented for decision, the court's findings are conclusive on appeal if supported by competent evidence. *Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 465, 98 S.E. 2d 871. Moreover, it is presumed that findings of fact are supported, hence conclusive on appeal, unless challenged by appropriate exceptions. *Wyatt v. Sharp*, 239 N.C. 655, 658, 80 S.E. 2d 762. Even so, when, as here, each material finding of fact is challenged by specific exception, such findings cannot stand in the absence of evidence in the record tending to support them. *Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E. 2d 219.

While, upon this record, it appears that the order of Judge Thompson cannot be sustained, the question arises as to whether plaintiff had the right of immediate appeal therefrom. This question was not discussed in plaintiff's brief. No brief was filed in behalf of defendant.

Bynum, J., in *Perry v. Whitaker*, 77 N.C. 102, stated: "An appeal lies from an order of the judge either granting or refusing to grant the writ (*of recordari*), . . ." In accord: *Collins v. Gilbert*, 65 N.C. 135; *Barnes v. Easton*, 98 N.C. 116, 3 S.E. 744; *Hunter v. R. R.*, 161 N.C. 503, 77 S.E. 678; S. c., 163 N.C. 281, 79 S.E. 610.

Rule 14, Rules of Practice in the Superior Courts, 221 N.C. 574, 577, in pertinent part, provides: "The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases;. . . " See *Barnes v. Easton, supra.*

The cases cited below either decide or contain expressions to the effect that an immediate appeal does not lie from an order granting the writ of *recordari.*

1. In *Merrell v. McHone*, 126 N.C. 528, 36 S.E. 35, plaintiffs' appeal to this Court was from a final judgment in favor of defendant after trial on the merits in the superior court. Plaintiff had obtained a judgment before a justice of the peace. A superior court judge had denied plaintiffs' motion to dismiss defendant's purported appeal therefrom and had granted defendant's motion for writ of *recordari.* Plaintiffs excepted to this ruling but proceeded to trial. This Court, upon plaintiffs' appeal from said final judgment, held that the writ of *recordari* had been properly issued. The opinion contains the following: "No appeal lay from such refusal (*Perry v. Whitaker*, 77 N.C. 102), and it was properly entered as an exception. The final judg-

ment being against the plaintiff, it now comes up for review. Had the final judgment been in favor of the plaintiff, the exception would then have become immaterial, and an appeal unnecessary." The decision would seem to be *direct* authority only for the proposition that a plaintiff *may* except to such ruling and bring his exception forward on his appeal from a final adverse judgment after trial in the superior court.

2. In *Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981, plaintiff's appeal to this Court was from the denial of his motion in the superior court to dismiss defendant's purported appeal from a judgment in plaintiff's favor rendered in the Harnett County Recorder's Court. It appeared that the defendant had not docketed his appeal or moved for *recordari* or *certiorari* within the prescribed time. While this Court stated that the defendant's appeal should have been dismissed on plaintiff's motion, the decision was "Appeal dismissed." The statement in the opinion, pertinent to this feature of the case, is the following: "Under our decisions it seems that an appeal to the Supreme Court does not lie from a ruling of this character, *the better practice* being to note an exception and proceed to a further disposition of the cause." (Our italics) No decisions are cited in support of the quoted statement.

3. In *Bargain House v. Jefferson*, 180 N.C. 32, 103 S.E. 922, plaintiff obtained a judgment before a justice of the peace. Defendant did not docket his appeal or move for *recordari* within the prescribed time. Later, without notice to plaintiff, defendant obtained a writ of *recordari*. The hearing was on plaintiff's motion to dismiss the writ of *recordari*, which motion was denied and plaintiff appealed. This Court said: "The writ of *recordari* was improvidently granted, and the motion to dismiss should have been granted." However, the decision was "Appeal dismissed." The statements in the opinion, pertinent to this feature of the case, are the following: "An appeal lies from the dismissal of an action, or of an appeal, for that is final, but it does not lie from the refusal to dismiss, for an exception should be noted and an appeal lies from the final judgment. *Clements v. R. R.*, 179 N.C. 225. If the party loses, then the whole case will come up for review." The cited case *(Clements v. R. R.)* did not involve an appeal from a justice of the peace. In the superior court action, defendant entered a special appearance and moved to dismiss on the ground that there had been no valid service of process. Plaintiff appealed from an order allowing defendant's said motion and dismissing the action; and, upon such appeal, the said order was reversed.

4. In *Stewart v. Craven*, 205 N.C. 439, 171 S.E. 609, plaintiff obtained a judgment before a justice of the peace. Defendant applied within the prescribed time for a writ of *recordari*, which was granted,

presumably without notice to plaintiff. The hearing was on plaintiff's motion to set aside the writ of *recordari*. Upon findings of fact, the superior court judge approved the issuance of the writ of *recordari* and denied plaintiff's said motion to have it set aside. Plaintiff excepted and appealed. The decision was "Appeal dismissed." The opinion stated: "It was held in *Perry v. Whitaker*, 77 N.C. 102: No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of *recordari*." Further, the opinion quotes the excerpt from *Merrell v. McHone, supra,* quoted above. The opinion cites both *Hunter v. R.R., supra,* and *Bargain House v. Jefferson, supra.* As to whether an appeal presently lies from such order, it would seem that *Hunter v. R. R., supra,* and *Bargain House v. Jefferson, supra,* are in direct conflict.

It is noted that *Hunter v. R. R., supra,* cites *Perry v. Whitaker, supra,* and also *Barnes v. Easton, supra,* in support of the proposition stated in the first headnote as follows: "An appeal presently lies from an order of the Superior Court granting a motion for a writ of *recordari* to a justice's court and directing that the cause be set down for trial *de novo,* and the trial judge should find and declare the facts upon which he based the order, when it is appealed from to the Supreme Court."

It is noted further that *Stewart v. Craven, supra,* cites *Perry v. Whitaker, supra,* and *Merrell v. McHone, supra,* in support of the proposition stated in the headnote as follows: "No appeal lies from the refusal of the Superior Court to set aside a writ of *recordari* granted in the cause."

To resolve the conflict, it becomes necessary to examine closely the decision in *Perry v. Whitaker, supra.*

It is first noted that Whitaker, plaintiff, obtained a judgment before a justice of the peace against G. W. Perry and W. R. Perry, hereinafter called Perry, defendants. Apparently, contrary to the usual practice, the case is styled *"W. R. Perry v. J. D. Whitaker"* because Perry *petitioned* for writ of *recordari* and Whitaker *answered* and moved to dismiss Perry's petition.

While not presently material, it is next noted that the first sentence in the opinion of *Bynum, J., in the reprint,* is: "This is a petition for a writ of *certiorari.*" This is an error. *In the original Report,* the first sentence reads: "This is a petition for a writ of *recordari.*"

The following excerpt from the opinion of *Bynum, J.,* which includes the portion quoted above, shows clearly the nature of the order held nonappealable, viz.: "An appeal lies from an order of the judge either granting or refusing to grant the writ, *but no appeal lies where the judge has done neither the one nor the other, which is our*

case. When the plaintiff filed his petition, the defendant moved to dismiss it, and upon the refusal of the judge to dismiss, he appealed to this Court. A refusal to dismiss *at that stage* of the case *was by no means the same as or equivalent to granting the writ.* Before final action, the judge desired, and it was his duty, to ascertain the facts; hence he ordered the defendant to answer the allegations *of the petition.* The defendant did answer, notwithstanding his appeal, denying many of the allegations of the petition, and thus raising questions of fact for the decision of the court. But without awaiting the finding of the judge upon these issues *or any judgment granting or refusing the writ,* and without predicating any motion upon the petition and answer, the defendant prosecuted and relied upon his previous appeal. The appeal was precipitate and from no appealable order or judgment. Whether a writ of *recordari* ought to have been issued depends upon the facts. No facts are found by his Honor, and we cannot, therefore, see whether he ought or ought not to have issued the writ. But owing to the hasty appeal, his Honor was prevented from either finding the facts or giving a judgment *granting or refusing* the *recordari.*" (Our italics)

The foregoing excerpt from the opinion of *Bynum, J.*, impels the conclusion that this Court in *Perry v. Whitaker, supra,* expressly recognized and declared that an appeal did lie from an order which *either granted or refused* a petition for a writ of *recordari.*

After considering our prior decisions, together with Rule 14, Rules of Practice in the Superior Courts, supra, we are constrained to follow the rule stated in the first headnote in *Hunter v. R. R., supra.* Hence, expressions in the later cases, whether *dicta* or the basis of decision, to the extent in conflict therewith, may be considered as withdrawn as authoritative statements of this Court. However, this should be noted: If, with reference to a purported appeal by defendant from a judgment of a justice of the peace, defendant's petition for writ of *recordari* is granted and plaintiff's motion to dismiss the appeal is denied, plaintiff *may* reserve exception to this ruling and bring it forward in the event he appeals from a final adverse judgment after trial in the superior court. Ordinarily, this would be *the better practice.*

The order of Judge Thompson is vacated and the cause remanded to the end that a further hearing may be had on plaintiff's motion to dismiss defendant's said appeals and on such motions, if any, as defendant may see fit to make relative to its right, if any, to trials *de novo* in the superior court.

Order vacated and cause remanded.

PARKER, J., not sitting.

STATE v. BROOKS WHEELER, WALTER ENGLISH, ALIAS TONY GENO, AND MYRTLE OLIVER, ALIAS THELMA OLIVER.

(Filed 19 November, 1958.)

1. **Criminal Law § 173—**

The Post Conviction Hearing Act is not a substitute for appeal, but provides procedure to determine as questions of law whether petitioners were denied the right to be represented by counsel, to obtain witnesses and to have a fair opportunity to prepare and present their defense.

2. **Same—**

While the Supreme Court is bound by the findings of fact made by the court below in proceedings under the Post Conviction Hearing Act if supported by evidence, it is not bound by the court's conclusions of law based on the facts found.

3. **Same—**

Findings in a proceeding under the Post Conviction Hearing Act disclosing that petitioners, although jointly tried, were not allowed to communicate with one another prior to trial, and that their attempts to contact witnesses and friends were unsuccessful, held not to support the court's conclusion of law that petitioners had not been denied any rights guaranteed to them by the Constitution of North Carolina, Art. I, secs. 11 and 17, and the 14th Amendment to the Constitution of the United States.

4. **Same—**

Where all of the affirmative evidence tends to show that after petitioners' arrest, their respective attempts to contact relatives and a material witness were thwarted by failure of an SBI agent to fulfil his promises to deliver the messages or find the witness, and the only evidence that any of petitioners actually got a message beyond the confines of the jail was that one of them was permitted to talk to her sister by phone, with testimony of the jailer that he did not know whether the phone call was permitted before or after the trial, *is held* insufficient to support the court's finding that petitioners were not denied the right to communicate with counsel or friends.

5. **Arrest and Bail § 7—**

Persons confined to jail on criminal charges have the right to communicate with counsel and friends and reasonable opportunity to exercise such right. G.S. 15-47.

6. **Constitutional Law § 31—**

Due process of law implies the right and opportunity to be heard and to prepare for the hearing.

7. **Same—**

Where three defendants are jointly indicted for an offense, they are entitled to confer together as to their joint defense to the joint charge, and each is entitled to know what facts and circumstances the others can contribute to the defense, and the denial of opportunity to exercise such right is a denial of their constitutional right to prepare for the hearing.

8. Criminal Law § 173—

Where it appears that three defendants indicted for a joint offense were not allowed to communicate with each other prior to trial, but were led into court, each without attorney, relative or friend, and confronted by the State's prosecutor, ready for trial with his investigators and witnesses, it cannot be held that petitioners waived their rights to prepare for their defense by failing to complain to the court at the time of their arraignment, notwithstanding that they were mature persons not altogether strangers to court proceedings.

PARKER, J., not sitting.

Certiorari to review order of *Bone, J.*, February, 1958 Term, ONSLOW Superior Court.

This is a proceeding under the North Carolina Post Conviction Hearing Act, G.S. 15-217, *et seq.*

At the January Term, 1957, Superior Court of Onslow County, the petitioners were tried under a bill of indictment charging robbery with firearms. The offense is alleged to have occurred in Onslow County on November 9, 1956, within a few minutes of four o'clock in the afternoon. At the trial the victim identified petitioners Wheeler and English as the men who entered her home and at the point of a pistol took from her $1,000 in cash and valuable jewelry.

The State offered other evidence tending to identify the petitioner Oliver as the owner of and passenger in the getaway automobile, or one similar thereto; and, further, to place the petitioners and the automobile in the vicinity of the victim's home near the time of the robbery.

At the trial the petitioners were without counsel or witnesses. They did not testify. All were found guilty and prison sentences of 25 years for Wheeler and English and of 15 years for Oliver were imposed. They did not take exceptions during the trial. They did not appeal.

In this proceeding the petitioners, seeking to have their conviction set aside, allege in substance: Immediately after arrest they were relieved of all valuables, including $300 from Wheeler and $140 from English. They were placed in different jails and moved from one county jail to another on numerous occasions between the date of the arrest on November 10, 1956, and date of the trial in January, 1957. They were not permitted to see or communicate with each other, or with relatives or friends who were able and would have been willing to employ counsel to represent them. They were forced to go to trial without counsel, without any opportunity to identify and interview witnesses, or to have this necessary function performed for them. Two allegations of the petition and the solicitor's answer thereto are quoted:

"5. That although the defendants, your petitioners, were accused of a joint crime they were not permitted to communicate with one

another; that the first they saw or in any manner communicated with one another was the day upon which they were put upon their trial."

Answer: "That article five of the petition is admitted."

"9. Your petitioner Walter English was arrested about one-thirty o'clock, P. M. on November 10, 1956, near Rocky Mount, North Carolina, together with the other two defendants, Brooks Wheeler and Myrtle Oliver; he was then put in the Rocky Mount City Jail; he was stripped of all money he had—about $140; he was then carried to the Onslow County Jail where he stayed for several days; immediately upon getting there he asked to use the telephone to call his sister, Mrs. Frances Crabtree, in Washington, D. C.; his request was denied; he then asked for paper to write a letter; the jailer said he had order from the Sheriff not to permit your petitioner to communicate with anyone; he was then taken to Burgaw and put in the Pender County Jail where he stayed about two weeks; he again asked to be allowed to communicate with his sister in Washington; the jailer thereupon told your petitioner that he could not communicate with anyone; he again asked for paper and was again refused; he was then taken back to Jacksonville where he stayed for about two weeks; he was then carried back to the Pender County Jail; Mr. Thomas, the SBI officer, saw your petitioner while he was there; Your petitioner gave him the name of certain witnesses in Raleigh and asked him to interview these witnesses for him; Mr. Thomas said that he would do so, but he failed to interview them; your petitioner was later carried back to Jacksonville for trial; the first time he heard from his co-defendants was when he was brought to the Court Room for trial; your petitioner's money had been taken from him; he had not been allowed to communicate with his family; he went to trial penniless and was unable to secure counsel."

Answer:

"9. That as to the allegations contained in Article 9 of the petition your respondent is without sufficient information to form a belief and therefore the same is neither admitted nor denied."

The petitioners testified according to and in amplification of the allegations in the petition. They offered corroborating evidence by Harry Karagelen, the hatter, and by the manager and clerk of the Andrew Johnson Hotel in Raleigh and supporting exhibits from their records tending to show that English, alias Geno, was in Raleigh some time between 3:00 p. m. and 6:00 p. m. on November 9th.

On the hearing, the State called as witnesses J. P. Thomas, SBI agent, and Herbert Taylor, the Onslow County jailer. Thomas testi-

fied: "Geno gave me the name of Harry who operated a dry cleaning place in Raleigh. I did not try to find him; didn't think there was any such person; stated on former trial that I was tied up with other matters and was too busy to look for Harry's place."

Taylor testified: "I am jailer in Jacksonville; defendants have been confined in Jacksonville jail at different times; don't know whether any attorney talked to them or not. Miss Oliver made a telephone call to her sister; can't say whether before or after the trial." The State offered transcript of the evidence taken at the trial.

The court, therefore, had before it the verified petition, supporting affidavits, and evidence of witnesses, tending to support, in part at least, the petitioners' allegations. On the other hand, the court had the verified answer of the solicitor, the testimony of Thomas and Taylor, and the transcript of the State's evidence at the trial. At the conclusion of the hearing the court entered findings of fact, conclusions of law, and judgment as follows:

"1. The petitioners were arrested near Rocky Mount, North Carolina, on November 10, 1956, and subsequently charged with the armed robbery of Myrtle Conway in Onslow County about 4:00 o'clock P. M. on November 9, 1956. A Bill of Indictment was returned against the defendants at the January Term 1957 of Onslow County Superior Court charging the defendants jointly with the commission of said offense which is defined by G.S. 14-87. They were tried, convicted, and sentenced at said term of Court and are now imprisoned in the State Penitentiary as the result of said trial.

"2. At the time of the arrest of the petitioners the officers took from them their money and other personal belongings.

"3. Petitioners being unable to give bond, were imprisoned continuously from the time of their arrest until their trial. They were kept in separate jails and not allowed to communicate with one another. They were moved from jail to jail several times between the date of arrest and the date of trial.

"4. Petitioners were not denied the right to communicate with counsel nor were they denied the right to communicate with their relatives, but J. P. Thomas, an agent of the State Bureau of Investigation, was requested by petitioner, Brooks Wheeler to contact his brother, and although he promised to do so, did not contact him.

"5. Petitioners were not denied the right to summon witnesses for their defense. They did not request that any witness or witnesses be summoned on their behalf.

"6. Petitioner Walter English asked said J. P. Thomas to check on 'a dry cleaners in Raleigh where I had clothes' but said Thomas did not do so. Harry Karagelen, who operated a hat cleaning service

in Raleigh, North Carolina, would have testified that on November 8, 1956, a man, giving his name as Tony Geno, left a shirt, a suede jacket, and a pair of pants with him to be cleaned and returned the next afternoon, to the best of his recollection, at about 2:30 or 3:00 p. m. to get them and they were not ready to deliver.

"7. Petitioner Walter English told J. P. Thomas when interviewed on November 12, 1956, that he and the other two petitioners left Raleigh some time during the afternoon of Friday, November 9, 1956, and went to Columbia, South Carolina, and suggested that police officers in Columbia, South Carolina, and people at Club Diamond near that City might remember seeing them.

"8. None of the petitioners were represented by counsel at their trial at the January Term 1957 of Onslow Superior Court. None of them requested the presiding judge to appoint counsel for defense. None of them made any complaint to the Court at that time that they had been denied the privilege of communicating with counsel or relatives or that they had not been given an opportunity to have witnesses summoned for their defense.

"9. All the petitioners are mature adult persons and petitioners English and Wheeler have been tried in Court for serious crimes several times before and upon conviction thereof have served prison sentences.

"Upon the foregoing facts the Court concludes as a matter of law that none of the petitioners have been deprived of any rights guaranteed to them under the Constitution of North Carolina, or under the Constitution of the United States.

"NOW, THEREFORE, it is by the Court ORDERED, ADJUDGED, AND DECREED that petitioners are not entitled to any relief under the provisions of G.S. 15-217 et seq., and further that the petition be dismissed. This 8th day of March, 1958."

The petitioners excepted and appealed.

Malcolm B. Seawell, Attorney General, T. W. Bruton, Ass't. Attorney General, for the State.

John W. Hinsdale for petitioners, appellants.

A Jeffery Bivins for Myrtle Oliver, appellant.

HIGGINS, J. By this proceeding the petitioners seek a new trial under the North Carolina Post Conviction Hearing Act, claiming that during imprisonment and trial their fundamental rights under Article I, Sections 11 and 17, Constitution of North Carolina, and under the Due Process Clause of the 14th Amendment to the Constitution of the United States had been denied them.

The Post conviction Hearing Act is not a substitute for appeal. It

cannot be used to raise the question whether errors were committed in the course of the trial. The inquiry is limited to a determination whether the petitioners were denied the right to be represented by counsel, to have witnesses, and a fair opportunity to prepare and to present their defense. *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513; C.J.S. 16A Sec. 579, p. 617 et seq., and cases cited; Am. Jur. 12, Sec. 573, p. 267. The question whether these rights have been denied, is one of law. *State v. Hackney*, 240 N.C. 230, 81 S.E. 2d 778; *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520; *State v. Farrell*, 223 N.C. 321, 26 S.E. 2d 322; *State v. Whitfield*, 206 N.C. 696, 175 S.E. 93; *State v. Garner*, 203 N.C. 361, 166 S.E. 180.

While this Court is bound by the findings of fact made by the court below if supported by evidence, it is not bound by that court's conclusions of law based on the facts found. *Miller v. State, supra.*

The petitioners were arrested together the day following the robbery and after arrest were deprived of all money and other personal effects. According to the court's finding, "being unable to give bond (petitioners) were imprisoned from the time of their arrest until their trial. They were kept in separate jails and not allowed to communicate with one another. They were moved from jail to jail several times between the date of the arrest and the date of their trial."

In Paragraph 9 the petitioner English alleges he was denied the right to phone or write his sister in Washington, D. C. "The jailer said he had orders from the sheriff not to permit your petitioner to communicate with anyone." The solicitor "neither admitted nor denied." The jailer and the sheriff did not answer. The only evidence in the record that either petitioner actually got a message beyond the confines of the jail was that Oliver was permitted to talk to her sister by phone and the jailer admitted he did not know whether that was before or after the trial. The attempt by Wheeler to get a message to his brother in Wake Forest by SBI Agent Thomas was thwarted by the failure of Thomas to deliver the message. The attempt of English to identify the hatter produced nothing except two unfulfilled promises made by SBI Agent Thomas to look for him.

So the court's conclusion, "Petitioners were not denied the right to communicate with counsel nor were they denied the right to communicate with their relatives," is not supported by evidence. All affirmative evidence is to the effect that the opportunity was denied them. The rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. In this connection attention is called to the provisions of G.S. 15-47: ". . . it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and

friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied." The denial of the opportunity to exercise a right is a denial of the right.

This Court realizes the difficulty attending any attempt to lay down and apply general rules dealing with such constitutional rights as are here involved. After all, each case must be decided on its own facts. In this particular setting, however, we think the court's finding of fact No. 3 is sufficient within itself to require that the case go back for a new trial. The State has elected to prosecute the three defendants in a single bill of indictment containing one count charging a joint offense. The victim testified as to the identity of Wheeler and English as the actual perpetrators, and other witnesses offered testimony tending to show that the three defendants were together both before and after the offense. While the indictment does not contain a conspiracy count, nevertheless, we may assume the State emphasized the petitioners' associations together both before and after the robbery as proof they acted together in committing the offense. Such being the background, evidence tending to show English was in Raleigh at the time of the offense would tend materially to weaken the State's case.

In the light of the foregoing circumstances, it follows as a matter of course the three petitioners were entitled to confer together as to their joint defense to the joint charge. Each was entitled to know what facts and circumstances the others could contribute to the defense. The record shows this right was denied. Each was given a separate hearing. The bill of indictment charging a joint offense was not returned until the term at which the trial took place. Nothing in the record indicates either defendant was advised of the joint charge until the case was called for trial. The court's finding No. 3 furnishes proof that the right to prepare for trial was denied. Due process of law implies the right and opportunity to be heard and to prepare for the hearing. *Holding v. Hardy,* 169 U.S. 366, 16 C.J.S., p. 578; *Mooney v. Holohan,* 294 U. S. 103.

Did the petitioners waive their rights by failing to complain to the court at the time of arraignment? Neither had been "allowed" to communicate with the others since their arrest two months previously. As they were led into court they were confronted by the State's prosecutor, ready for trial with his investigators and witnesses. Each defendant was in ignorance of what the others were able to offer in defense. Each was without an attorney, relative, or friend. It is scarcely surprising, therefore, that all were overwhelmed at the prospect of facing trial upon a charge which carried the same maximum punishment as murder in the second degree. Even though they were mature

persons and the men not altogether strangers to court proceedings, nevertheless, their failure at the time of arraignment to complain to the court was not a waiver of their constitutional rights.

We suggest that it is the duty of officers of the law, upon request, to make a reasonable effort to notify relatives of persons held in jail charged with serious offenses. Likewise, persons jointly charged have the constitutional right, as a part of their trial preparations, to confer together as to their joint defense. This right is neither withdrawn nor abridged by reason of fear on the part of the investigating officers that from a conference they may evolve a bogus defense.

We have admiration and respect for the able and painstaking judge who conducted the post conviction hearing in this case. However, on the record as it comes to us we are unable to join in the view that the petitioners' constitutional rights have been afforded them. We think the records and his own findings require decision to the contrary. For the reasons herein set forth, it is ordered that the verdict and judgment be set aside and that there be a

New Trial.

PARKER, J., not sitting.

CARL F. SPAUGH, SR., AND WIFE, OPAL SPAUGH v. CITY OF WINSTON-SALEM.

(Filed 19 November, 1958.)

1. Appeal and Error § 51—

Where defendant introduces evidence, only the correctness of the denial of its motion for judgment of nonsuit at the close of all the evidence is presented for decision. G.S. 1-183.

2. Trial § 23f—

Nonsuit is properly allowed when there is a material variance between plaintiff's allegation and proof, and whether there is such fatal variance must be resolved in the light of the facts of each case. G.S. 1-168.

3. Pleadings § 3a—

A cause of action consists of the facts alleged in the complaint. G.S. 1-122.

4. Municipal Corporations § 14b—

Where plaintiffs sue for permanent damages to their lands resulting from the discharge of sewage into a stream by defendant municipality, and offer evidence that their land was being damaged therefrom, there is no variance between plaintiff's allegation and proof so as to justify nonsuit, notwithstanding that the court, upon defendant's evidence that

the nuisance would be abated by a definite date, submits the issue as to temporary rather than permanent damage.

PARKER, J., not sitting.

APPEAL by defendant from *Gwyn, J.*, April 21, 1958, Term, of FORSYTH.

In two separately stated causes of action, plaintiffs alleged the facts summarized in the following three numbered paragraphs.

1. The first cause of action relates to damages to their home place, containing about 42 acres, located in Forsyth County, south of Winston-Salem, about 100 yards from Salem Creek. The second cause of action relates to damages to a different tract, containing about 33½ acres, located partly in Forsyth and partly in Davidson Counties, which includes a part of the bed of Salem Creek. The basis of each cause of action is the pollution by defendant of Salem Creek by emptying therein raw and partly and inadequately treated sewage.

2. *First cause of action.* Their home place, by reason of the noxious, offensive and nauseating odors emanating from the sewage emptied by defendant into Salem Creek, had become unfit for use and human habitation. The acts of defendant created and caused a continuing and recurring nuisance, constituting a taking of their property, whereby its market value was destroyed. Plaintiffs were damaged thereby in the sum of $25,000.00.

3. *Second cause of action.* Plaintiffs had used the part of the bed of Salem Creek included in their 33½ acre tract for many years for the purpose of pumping sand out of the creek and selling it to the public, principally for use in construction work. The sand in the creek bed on their property, by reason of said pollution of Salem Creek by defendant, had become unusable and unmarketable. On account of said continuing and recurring nuisance, constituting a taking of their property, plaintiffs were damaged in the amount of $5,000.00.

Answering, defendant admitted (1) that its sewage disposal or treatment plant then in use had been in operation since 1926; and (2) that since August, 1956, it had been necessary, as a temporary measure only, to empty small and limited amounts of untreated sewage, from a new outfall sewer line, into Salem Creek. Defendant denied that plaintiffs' properties had been damaged as alleged.

In its further answer and defense, defendant alleged, in substance, that it had become necessary, by reason of the extension of its city limits and the increase in population, to enlarge its sewage treatment facilities; that it was then constructing a new and modern sewage treatment plant on land purchased for that purpose; that construction thereof was commenced in 1956 and would be completed in May, 1959, at which time all sewage collected by defendant would flow

through said plant and be treated in a highly efficient and satisfactory manner; and that the use of the new outfall sewer line, through which a small and limited amount of untreated sewage flowed into Salem Creek, would cease upon completion of the new plant in May, 1959.

In addition, defendant pleaded (1) G.S. 1-53, the two year statute of limitations, in bar of plaintiffs' right to recover "for any and all such conduct on its part, and any damages therefrom which accrued or occurred more than two years prior to the presentation of claim therefor by plaintiffs on June 2, 1957"; and (2) Sec. 115 of the Charter of the City of Winston-Salem, requiring that all claims or demands against the City of Winston-Salem be presented within 90 days after such claim accrued, in bar of plaintiffs' right to recover "for any and all such conduct on its part, and any damage therefrom which accrued or occurred prior to about the first day of April, 1957."

Both plaintiffs and defendant offered evidence in support of their respective allegations.

At the close of the evidence, the court overruled defendant's motion for judgment of involuntary nonsuit. Thereupon, the court submitted the following issues, answered by the jury as indicated, to wit:

"1. Is the plaintiffs' cause barred by the three-year statute of limitations, as alleged in the Answer? Answer: Yes, except from June 24, 1954.

"2. Has the defendant damaged the home tract of the plaintiffs by operation and maintenance of its sewer system? Answer: Yes.

"3. What amount, if any, is the defendant indebted to the plaintiffs because of temporary damages to the home tract? Answer $1500.00.

"4. Did the defendant damage the sand producing lands of the plaintiffs by the operation and maintenance of its sewer system? Answer: Yes.

"5. What amount, if any, is the defendant indebted to the plaintiffs because of the temporary damage to their sand producing lands? Answer: $1200.00."

The court entered judgment in accordance with the verdict. Defendant excepted and appealed.

Deal, Hutchins & Minor for plaintiffs, appellees.

Womble, Carlyle, Sandridge & Rice for defendant, appellant.

BOBBITT, J. Defendant's only assignments of error are based on its exceptions to the overruling of its motions for judgment of nonsuit. The only motion to be considered is that made by defendant at the close of all the evidence. G.S. 1-183; *Murray v. Wyatt,* 245 N.C. 123, 128, 95 S.E. 2d 541.

While the record is silent as to the ground(s) on which defendant based its motion for judgment of nonsuit when it was considered and overruled by Judge Gwyn, defendant asserts here a fatal variance between plaintiffs' *allegata* and *probata* as the ground on which its motion should have been allowed, citing *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786, and similar cases. The rule is well established that judgment of nonsuit is proper when there is a fatal variance between a plaintiff's *allegata* and *probata*. Whether the variance is to be deemed material (fatal) must be resolved in the light of the facts of each case. G.S. 1-168; *Dennis v. Albemarle*, 242 N.C. 263, 87 S.E. 2d 561.

The gist of defendant's argument is that plaintiffs alleged a cause of action to recover permanent damages based on "a permanent and continuing and recurring nuisance upon the plaintiff's lands"; and that, since plaintiffs did not seek or allege damages of a temporary nature, the court erred in overruling defendant's motion for nonsuit.

To consider defendant's position in proper perspective, it should be noted that defendant did not bring forward any exception relating to what transpired prior or subsequent to the overruling of its motion for judgment of nonsuit. Whether there was a fatal variance between plaintiffs' *allegata* and *probata* was determinable at the conclusion of all the evidence. Errors, if any, occurring thereafter, have no bearing upon the correctness of the court's ruling on defendant's motion for judgment of nonsuit.

As stated by *Barnhill, J.* (later C. J.), in *Clinard v. Kernersville*, 215 N.C. 745, 748, 3 S.E. 2d 267: "An action by a landowner against a municipality or corporation possessing the right of condemnation for the maintenance of a continuing nuisance which adversely affects the value of plaintiffs' land is, by a demand for permanent damage either by the plaintiff or by the defendant, converted into an action in the nature of a condemnation proceedings for the assessment of damages for the value of the land or easement taken. The assessment of permanent damages for the maintenance of a continuing nuisance as here alleged and the payment of such damages vests the defendant with an easement entitling it to a continued use of the property in the same manner." Whether permanent damages may be awarded does not depend upon the consent of *both* parties as in a similar action against a private manufacturing corporation. *Aydlett v. By-Products Co.*, 215 N.C. 700, 2 S.E. 2d 881.

A cause of action consists of the facts alleged in the complaint. G.S. 1-122; *Lassiter v. R. R.*, 136 N.C. 89, 48 S.E. 642. Plaintiffs alleged damages to their lands on account of the pollution of Salem Creek by defendant. True, plaintiffs alleged and sought to recover permanent damages and offered much evidence in support of these

allegations. (Note: Defendant abandoned all its exceptions to the admission of such evidence.) Nothing else appearang, plaintiffs were entitled to recover permanent damages for the partial taking of their lands, vesting in defendant a permanent easement, in accordance with legal principles declared and applied in *Clinard v. Kernersville, supra;* S. c., 217 N.C. 686, 9 S.E. 2d 381, and in *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; S. c., 244 N.C. 529, 94 S.E. 2d 478.

We need not determine whether plaintiffs, when all the evidence is considered, were entitled to have submitted an issue as to permanent damages. Suffice to say, there was no variance between plaintiffs' *allegata* and *probata.*

Defendant, in support of its allegations, offered evidence tending to show that the damage, if any, to plaintiffs' lands caused by the pollution of Salem Creek *would be abated* upon completion of its new and modern sewage treatment plant. The court, *(not the jury,)* accepted such assurances, and in reliance thereon limited plaintiffs' recovery to temporary damages. Nothing in the record suggests that this was done at the instance of plaintiffs or that plaintiffs at any time changed *their theory* of the action. Rather, the clear implication is that the court adopted defendant's theory of the action and submitted issues appropriate thereto. Under such circumstances, defendant may not, after trial, defeat plaintiffs' right to recover on the ground that they did not specifically allege and seek to recover temporary damages.

Whether plaintiffs were entitled to recover permanent damages or temporary damages, the basis of recovery was the damage to their lands on account of the pollution of Salem Creek. When the court, under the circumstances here disclosed, limited *the extent* of plaintiffs' recovery to temporary damages, it was not inappropriate for the court to proceed on the theory that plaintiffs' allegations of damages resulting from a permanent taking embraced a lesser claim for damages if plaintiffs were restricted by the court to the temporary damages they sustained during a limited period. *Virginia Ry. & Power Co. v. Ferebee,* 115 Va. 289. 78 S.E. 556.

City of Austin v. Bush, Court of Civil Appeals of Texas, Austin, 260 S.W. 300, and *Ehlert v. Galveston H. & S. A. Ry. Co.,* Court of Civil Appeals of Texas, Galveston, 274 S.W. 172; cited by defendant, contain statements to the effect that a landowner is not entitled to have his case submitted to the jury on an issue as to temporary damages when his allegations assert permanent damages and nothing else. Since the cited cases are not controlling in this jurisdiction, we need not explore the factual distinctions between them and the case at

hand. In *City of Austin v. Bush, supra,* these facts are noted: The landowner alleged permanent damages on account of a nuisance caused by the operation of the city's sewage disposal plant. The court submitted issues relating solely to permanent damages. The city, under its general denial, had offered evidence tending to show that *it had abated* the nuisance and that the matters of which the landowner complained were occasioned by carelessness of its employees or by accident and were therefore temporary in character. The error for which a new trial was awarded was the court's failure to submit *to the jury* an issue as to whether the alleged nuisance was of a permanent or temporary character.

True, as defendant contends, citing *Oates v. Mfg. Co.,* 217 N.C. 488, 8 S.E. 2d 605, in actions to recover temporary damages the rule as to the measure of damages is different from that applicable in actions to recover permanent damages. But plaintiffs, in addition to their evidence relating to permanent damages, offered evidence relevant to temporary damages; and it is presumed that the court correctly instructed the jury as to the evidence and the measure of damages relevant to the recovery of temporary damages. *Moore v. Humphrey,* 247 N.C. 423, 432, 101 S.E. 2d 460.

Defendant brought forward no exception which, if allowed, would constitute a ground for a new trial. It would appear that plaintiffs' recovery was not excessive.

No error.

PARKER, J., not sitting.

HAROLD L. BELL, ADMINISTRATOR OF THE ESTATE OF MARCIA JEANETTE BELL, DECEASED v. J. BANKS HANKINS.

(Filed 19 November, 1958.)

1. Death § 3—

Right of action for wrongful death is solely statutory, and the statute gives but one cause of action for damages for the death of a person, and ordinarily the administrator may not sue successively different parties upon allegations that their wrongful acts, respectively, produced the death of his intestate. G.S. 28-173.

2. Death § 6: Executors and Administrators § 8—

A personal representative has the right to negotiate and compromise a statutory cause of action for wrongful death.

3. Torts § 9a: Physicians and Surgeons § 14: Negligence § 15—

A negligent injury gives rise to but a single cause of action for all

damages, past and prospective, suffered in consequence of the wrongful or negligent acts, including damages for negligent treatment by a physician or surgeon if the injured person exercises due care in selecting his physician or surgeon and in procuring treatment, and therefore a release of the original tort-feasor bars an action for malpractice.

4. Death § 3: Judgments § 32: Physicians and Surgeons § 14—

Where the administrator institutes action for wrongful death against persons alleged to be solely responsible therefor and compromises the action by a consent judgment for a substantial sum, such judgment is a bar to the administrator's right to institute a subsequent action for wrongful death against a physician or surgeon for negligent treatment of the original injuries, the administrator having knowledge, actual or constructive, regarding the action for malpractice at the time of the institution of the action against the original tort-feasors.

PARKER, J., not sitting.

APPEAL by plaintiff from *Preyer, J.*, March 31, 1958 Civil Term of DAVIDSON.

This is an action instituted by the plaintiff, as administrator of the estate of Marcia Jeanette Bell, to recover damages for the wrongful death of his intestate, against the defendant, who is a physician and surgeon.

The plaintiff alleges in his complaint that his intestate was injured in an automobile accident on 23 November 1955 at about 10:25 p.m.; that subsequent to the accident and on the night thereof she was taken to the Lexington Memorial Hospital where the defendant, who was the physician and surgeon on duty at the time, undertook the examination and treatment of the decedent's injuries; that after a short examination plaintiff's intestate was advised to go home. Several hours later she began to suffer severe headaches. She was carried back to the hospital about 3:30 a.m. on the morning of 24 November 1955, where, upon examination by another physician, it was found she had sustained a fracture of the skull and a cerebral concussion, neither of which had been discovered or treated by the defendant. She died at 5:00 p.m., 24 November 1955, from respiratory failure caused by cranio-cerebral injuries.

Prior to the institution of the case at bar, the plaintiff in this action, on 26 April 1956, instituted an action against the drivers and owners of the cars involved in the accident to recover for the wrongful death of his intestate. He alleged that her death was due solely to and was the result of the joint and several negligent acts of said defendants. The plaintiff prayed for judgment in the amount of $106,380.00.

At the September Civil Term 1957 of Davidson County, pending the trial in said action, a consent judgment was entered into award-

ing the plaintiff the sum of $11,833.34. The judgment was consented to by the plaintiff and his attorneys of record and by the attorneys for the defendants, and was approved by the Presiding Judge. The judgment has been paid and satisfied in full and the plaintiff has received the proceeds therefrom.

Among other things, the aforesaid judgment provided, "It is further understood and agreed that, upon the payment of said amounts by the respective defendants, the same shall operate as a full, final and complete settlement of all matters and things between the plaintiff and said respective defendants, and particularly in settlement of all matters and things set forth in the pleadings filed in this cause."

Approximately two months after the above judgment had been entered in the original action for wrongful death, and two days before the statute of limitations would have run, the plaintiff instituted this action. The defendant filed an answer to the plaintiff's complaint and set up the judgment in the former action as a plea in bar. The court sustained the plea in bar and dismissed the action.

The plaintiff appeals, assigning error.

Hall & Thornburg for plaintiff, appellant.
Charles W. Mauze, Walser & Brinkley for defendant, appellee.

DENNY, J. The question posed for our consideration and determination is simply this: Where a plaintiff institutes an action to recover damages for the wrongful death of his intestate against persons alleged to be solely responsible for her injuries and death and thereafter the action is compromised by the entry of a consent judgment for a substantial sum, is said judgment a bar to the plaintiff's right to maintain a subsequent action for the wrongful death of his intestate against a physician or surgeon for negligent treatment of the original injuries?

The right to maintain an action to recover damages for the wrongful death of a human being, occasioned by the negligent or other wrongful act of another, did not exist at common law. *Colyar v. Motor Lines,* 231 N.C. 318, 56 S.E. 2d 647; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922; *Hinnant v. Power Co.,* 189 N.C. 120, 126 S.E. 307, 37 A.L.R. 889; 16 Am. Jur., Death, section 44, page 35. The right to maintain such an action is given by statute, patterned after Lord Campbell's Act, passed in England in 1846, our statute being G.S. 28-173. However, we know of no statutory authority or judicial decision which authorizes a party to maintain a second cause of action for wrongful death, after such party has brought an action therefor bottomed on the alleged negligence of the joint tort-feasors who caused the original injuries and has obtained a judgment or made

a compromise settlement in his favor with one or more of the joint tort-feasors in the first action.

It is said in 16 Am. Jur., Death, section 151, page 103, "It is frequently held that statutes authorizing an action for damages for wrongful death contemplate only one cause of action for damages for the death of a person and that, in the absence of fraud, if an action is brought and a judgment recovered by any of those entitled to sue, the judgment is conclusive upon other persons and the right given by the statute is exhausted."

It is likewise said in 25 C.J.S., Death, section 47 (a), page 1144, "In the absence of statute, a release or compromise and settlement with one of the several wrongdoers is a bar to an action for death against the others."

Furthermore, a personal representative has the right to negotiate and compromise a statutory cause of action for wrongful death. *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438.

The weight of authority in this country is to the effect that a general release executed in favor of the one responsible for the plaintiff's original injury precludes an action against the physician or surgeon for damages incurred by the negligent treatment of the injury. See 40 A.L.R., 2d Anno—Physician—Original Tort-feasor—Release, page 1079, where the authorities from twenty-one jurisdictions are collected, including North Carolina.

The case of *Smith v. Thompson,* 210 N.C. 672, 188 S.E. 395, cited and relied upon by the defendant, seems to support his position. There, plaintiff had been injured in a motorcycle accident and had given the driver and owner a release which expressly covered medical expenses in consideration of payment to her of a stated sum of money. She then brought suit against the physician who had treated her for malpractice, in which suit judgment was entered on the pleadings. Upon defendant's plea that the release barred any action against him, upon appeal to this Court the ruling of the lower court was affirmed. This Court said: "The rule of law in actionable negligence cases of this kind for damages is well settled. In *Ledford v. Lumber Co.,* 183 N.C. 614 (616-17), is the following: 'In cases like the one at bar, if the plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses * * *.' In *Sircey v. Rees' Sons,* 155 N.C. 296 (299), we find: 'A plaintiff is entitled to but one satisfaction of his cause of action, whether but one or many may be liable, or whatever the form of action may be.'" The court also

quoted *inter alia* from *Edmundson v. Hancock,* 40 Ga. App. 587, 151 S.E. 114, wherein the Georgia Court was quoting from *Martin v. Cunningham,* 93 *Wash.* 517, 161 P 355, " ' * * * It is a well settled doctrine of the law that complete satisfaction for an injury received from one person in consideration of his release operates to discharge all who are liable therefor, whether they be joint or several wrongdoers.' "

In *Lane v. R. R.,* 192 N.C 287, 134 S.E. 855, *Connor, J.,* speaking for the Court, said: "In the case of torts, the general rule is that the wrongdoer is liable for any injury which is the natural and probable consequences of his misconduct. Such liability extends not only to injuries which are directly and immediately caused by his act, but also to such consequential injuries, as according to the common experience of men, are likely to result from such act. * * * If the injured person exercises due care to have the injury properly treated, the reuslt of the treatment, if not beneficial, cannot affect the damages, which he would otherwise be entitled to recover of the wrongdoer, by whose wrongful act he was injured. If the treatment of the injury, procured by the injured party, in the exercise of due care, is beneficial, and reduces the damages resulting from the act of omission of the wrongdoer, such reduction relieves the wrongdoer *pro tanto;* if such treatment is not beneficial, and results in increased or additional damages, the wrongdoer whose act or omission made the treatment necessary or proper must be held liable for such additional or increased damages."

In Restatement of the Law of Torts, Volume 2, section 457, it is said: "If the negligent actor is liable for another's injury, he is also liable for any additional bodily harm resulting from acts done by third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner." *Thompson v. Fox,* 326 Pa. 209, 192 A 107, 112 A.L.R. 550; *Feinstone v. Allison Hospital, Inc.,* 106 Fla. 302 143 So. 251; *Wells v. Gould,* 131 Me. 192, 160 A 30; *Adams v. DeYoe,* 11 N.J. Misc. 319, 166 A 485; *Milks v. McIver,* 264 N.Y. 267, 190 N.E. 487; *Hooyman v. Reeve,* 168 Wis. 420, 170 N.W. 282.

It is said in *Feinstone v. Allison Hospital, Inc., supra,* "Complete satisfaction for an injury received from one person in consideration for his release operates to discharge all who are liable therefor, whether joint or several wrongdoers."

In *Wells v. Gould, supra,* the Court held: " * * * a settlement with, and release of, all rights to recover against the original tort-feasors by the injured person, operates as a bar to another action for mal-

practice against the physician or surgeon who treated and aggravated the injury. (Citations omitted.)

"The result is the same, we think, when the injured person brings suit on his claim against the original wrongdoer and receives satisfaction of his judgment. His cause of action there is single and indivisible, and includes all damages which naturally result from the original injury or any part of it. (Citations omitted.) His acceptance of satisfaction of the judgment recovered has the same effect as a release. It extinguishes his cause of action against other tort-feasors liable for the same injury and bars action against them."

In the case of *Milks v. McIver, supra,* the Court said: "The rule is now well established that a wrongdoer is liable for the ultimate result, though the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong. * * * In such case satisfaction by the original wrongdoer of all damages by his wrong bars action against the negligent physician who aggravated the damage. The law does not permit a double satisfaction for a single injury."

In the instant case, the plaintiff knew or had a reasonable opportunity to know all about the defendant's conduct in connection with the examination and treatment of his intestate at the time he instituted his original action for her wrongful death. More than five months elapsed between the death of his intestate and the institution of that action. With full knowledge of the existing facts, the plaintiff elected to sue the drivers and owners of the cars involved in the accident, and alleged in his complaint "That the death of the said Marcia Jeanette Bell, the plaintiff's intestate, was due solely to and was the result of the joint and several negligent acts of the defendants concurring and proximately causing the said death of plaintiff's intestate * * *"

We hold that the consent judgment pleaded in bar of plaintiff's right to maintain this action constitutes a general release, and is a bar to the maintenance of this action.

The ruling of the court below will be upheld.

Affirmed.

PARKER, J., not sitting.

STATE v. R. F. McGRAW.

(Filed 19 November, 1958.)

1. Criminal Law § 1: Municipal Corporations § 40—

Notwithstanding the broad provisions of G.S. 14-4, the violation of a municipal ordinance cannot be a criminal offense if the ordinance is invalid.

2. Municipal Corporations § 5—

Municipal corporations are creatures of the General Assembly and can have only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given.

3. Municipal Corporations § 8g: Cemeteries § 1—

A municipal corporation has no power to provide by ordinance that a fee be charged for the setting of a marker at a grave in the municipal cemetery when such marker is not purchased from nor set by the municipality, and no part of the charge for such setting is to be used in the perpetual care fund of the cemetery, and such charge is not an inspection fee. G.S. 160-2(3), G.S. 160-200(22), G.S. 160-200(23), G.S. 160-258, G.S. 160-259. Grave constitutional questions would be raised by a statute giving a municipality such advantage in a business engaged in for economic gain in its proprietary capacity.

4. Municipal Corporations § 8a—

While the General Assembly may authorize a municipal corporation to engage in a business for public benefit and to extend such power beyond its corporate limits, such authority does not confer upon the municipality the right to exclude competition in the territory served.

PARKER, J., not sitting.

APPEAL by defendant from *Preyer, J.*, May 1958 Term of IREDELL.

Defendant was tried and convicted in the recorder's court on a warrant which charged violation of an ordinance of Mooresville. He appealed to the Superior Court where a special verdict was returned. Summarized, the facts found by the special verdict are: Mooresville, a municipal corporation, on 4 March 1957 adopted an ordinance with respect to public and private cemeteries and particularly Glenwood Memorial Cemetery owned by the town. The ordinance prohibits monuments or stones of any kind but permits bronze tablets and markers, which are required to be set level with the ground at the head or foot of a grave except family markers which may be set in the center of the plot. The ordinance specifically provides: "WORK TO BE DONE BY TOWN. All grading, landscape work and improvements of any kind; all care on graves; all planting, trimming, cutting and removal of trees, shrubs and herbage; all openings and closings of graves, all interments, disinterments and removals, and all memorial settings and monument foundations shall be made by the Town." It also provides: "DUTY OF TOWN TREASURER. It shall

be the duty of the Town Treasurer to deposit and distribute all sums in payment of lots, memorials and cemetery services to the General Fund and to the Perpetual Care Fund according to the schedule given in Section VI of this ordinance."

Section VI of the ordinance fixes the price of lots dependent on location and grave capacity. One-half of the sale price of each lot is allocated to a perpetual care fund and the other one-half to the town general fund. It also fixes the price charged by the town for various types of markers sold by it, which price includes the cost of setting. Thirty per cent of the sales price is set aside for the perpetual care fund and approximately fifteen per cent is set aside for the town's general fund. A scale of charges for setting memorials is prescribed when they are not purchased from the town. For setting a memorial of the kind involved in this case the charge is $40, $12 of which is allocated to the perpetual care fund and $28 to the town's general fund. That section further provides: "When the memorial is not furnished by the Town, the setting charge shall be remitted before setting." Section XVI of the ordinance entitled "Perpetual Care" provides in subdivision 3: "The term 'Perpetual Care' shall in no case be construed as meaning the maintenance, repair or replacement of any grave markers placed upon lots or graves . . ."

Subsequent to the adoption of the ordinance, R. W. Howard purchased from the town a lot in Glenwood Cemetery. Howard, to mark his father's grave, purchased a bronze marker from defendant, who set the marker, without paying or tendering the charges for setting as set out in the ordinance.

Defendant has been engaged in the business of selling cemetery markers and setting foundations therefor for a period of ten years. He is qualified to do such work and was licensed by the State of North Carolina to engage in the business of a marble yard.

Defendant appeals from the adjudication of guilt based on the special verdict.

Attorney General Seawell and Assistant Attorney General Bruton, for the State.

Baxter H. Finch and Raymer & Raymer for defendant, appellant.

RODMAN, J. Acting contrary to the provisions of a municipal ordinance is made a misdemeanor by statute, G.S. 14-4. Notwithstanding the all-inclusive language of the statute, guilt must rest on the violation of a valid ordinance. If the ordinance is not valid, there can be no guilt. *S. v. Abernethy,* 190 N.C. 768, 130 S.E. 619; *State v. Prevo,* 178 N.C. 740, 101 S.E. 370.

Defendant admits he acted as charged. He denies the power of

the town to declare such act a crime because (1) the Legislature has not delegated such authority to the town, and (2) if delegated, such delegation would do violence to sections 7, 17, and 31 of Art. I of our Constitution.

We need only consider the question of the authority to enact the provisions which reserve to the town the exclusive right to set memorial markers and require the payment of a special charge for setting such markers not purchased from the town.

"A municipal corporation is a creature of the General Assembly. *Ward v. Elizabeth City,* 121 N.C. 1, 27 S.E. 993. Municipal corporations have no inherent power but can exercise such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given. *S. v. Ray,* 131 N.C. 814, 42 S.E. 960; *S. v. McGee,* 237 N.C. 633, 75 S.E. 2d 783." *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406; *Laughinghouse v. New Bern,* 232 N.C. 596, 61 S.E. 2d 802; *Madry v. Scotland Neck,* 214 N.C. 461, 199 S.E. 618; *S. v. Gulledge,* 208 N.C. 204, 179 N.C. 883; G.S. 160-1.

The Town of Mooresville was created by c. LXXI, Private Laws of 1872-73. There is nothing in that Act relating to cemeteries. We have found no amendment to the charter of the town which expressly or impliedly authorizes the enactment here in question. None has been called to our attention.

Since no special authorization has been given to Mooresville, we look to statutes of statewide scope to ascertain if the power is included in the authority granted to all municipal corporations. An examination of pertinent statutes shows no specific authorizations.

If the power is to be implied, it must come from G.S. 160-2(3), 160-200(22), 160-200(36) which permit towns to acquire lands for cemetery purposes, prohibit burials in any other places with authority to "maintain cemeteries" and "regulate the manner of burial in such cemetery," or from G. S. 160-258 and 160-259 which authorize the creation of a fund for perpetually caring for and beautifying cemeteries.

Defendant does not challenge the power of the town to prescribe reasonable rules and regulations relating to the management of the cemetery including interment and disinterment of the dead, size of lots, location and number of graves on a particular lot, kinds, types and sizes of memorial monuments and markers, types and character of foundation for such monuments as may be erected, kind and size of shrubbery and other means used to beautify and sanctify the lots. He does not question the right of the town to engage in competition with him in selling memorial markers. He merely says that it is not necessary to the proper exercise of the power given for the town to

exercise a monopoly in the business of setting memorial markers, a purely commercial enterprise, or by legislative fiat penalize its commercial competition.

That the charge is not an inspection fee required to insure compliance with rules fixing the manner of setting is evident from the testimony of the city manager, a witness for the State. He said: "In addition to selling grave lots, the Town of Mooresville is in the business of selling bronze markers and is in competition with other sellers of bronze markers. The Town is also in the business of setting markers in the cemetery . . . If a dealer in memorials other than the Town sells a marker or memorial to an individual for a lot in this cemetery, the Town charges such dealer or the owner who purchases from that dealer, a setting charge for the right to set a marker in the cemetery. The charge is specified in different amounts according to the type of memorial that is sold."

The fact that 30% of such charge is allocated to the Perpetual Care Fund with remainder going to the General Fund cannot change the character of the charge as a method of creating an advantage to the town in its commercial enterprise of selling and setting markers, nor can it gain support from the statute which permits the creation of a Perpetual Care Fund. That statute limits the right to make the charge to the price fixed for the lot, a right which Mooresville has exercised; and this ordinance expressly provides that the Perpetual Care Fund shall not be used for the maintenance of grave markers.

The Legislature may authorize a municipal corporation to engage in a business for public benefit and to extend those services to citizens beyond its corporate limits. *Kennerly v. Dallas*, 215 N.C. 532, 2 S.E. 2d 538. Nonetheless, as said in *Grimesland v. Washington*, 234 N.C. 117, 66 S.E. 2d 794; "But this legislative authority would not be regarded as conferring the right to exclude competition in the territory served. Having the right to engage in this business gives no exclusive franchise . . ."

As said in *Ohio v. Helvering*, 292 US 360, 78 L ed 1307: "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader . . ."

Application of the rule is well illustrated in *Slaughter v. O'Berry*, 126 N.C. 181. There the municipality sought to imply authority to secure an economic advantage from specific authorization to engage in a particular business. Here specific authority to engage in the commercial enterprise has not been granted.

The stringency with which the rule limiting the application of a grant of authority to a municipality to engage in business for econo-

mic gain as generally applied is illustrated by *McRae v. Concord,* 108 A.L.R. 1450 with annotations; *Taylor v. Dimmitt,* 98 A.L.R. 995; notes to *Andrews v. South Haven,* Ann. Cas. 1918B 104.

We find no statute which in our opinion impliedly gives the town the authority claimed. Grave constitutional questions would be raised by any such statute.

Since the town was without authority to enact the challenged portion of the ordinance, it follows that noncompliance with this provision is not criminal.

Reversed.

PARKER, J., not sitting.

STATE v. MATTHEW PHILLIP BASS.

(Filed 19 November, 1958.)

1. Criminal Law § 42—

In a prosecution for rape, articles of clothing identified by the prosecutrix as wearing apparel removed from her person and later found in the building are competent.

2. Same—

A knife used by defendant in cutting prosecutrix, properly identified, is competent in evidence.

3. Criminal Law § 84—

Where articles of clothing worn by prosecutrix and a knife used by defendant are properly identified and admitted in evidence, corroborative testimony of other witnesses in regard thereto is competent.

4. Criminal Law § 43—

Photographs, testified to be accurate representations of the areas surrounding the scene of the crime, are properly admitted for the limited purpose of explaining the testimony of the witnesses.

5. Criminal Law § 109: Rape § 27—

Where, in a prosecution for rape, there is testimony that defendant also cut the prosecutrix with a knife, the court properly instructs the jury upon the question of defendant's guilt of assault with a deadly weapon as an offense included within the offense charged.

PARKER, J., not sitting.

APPEAL by defendant from *Paul, J.,* at July 1958 "Assigned" Term of WAKE.

Criminal prosecution upon a bill of indictment, No. 3724, charging, summarily stated, that Matthew Phillip Bass, at and in the

county of Wake, North Carolina, on the 12th day of June, 1958, did rape a certain named female person.

The defendant Matthew Phillip Bass, upon arraingment at the Bar of the court, then and there present and represented by counsel, theretofore assigned by the courts to defend defendant, pleaded not guilty, and "for good and for evil puts himself upon God and his country."

And upon trial in Superior Court the State offered evidence tending to show that defendant committed the crime charged in all of its elements,—details of which would not serve any useful purpose and, hence, may rest in the record of case on appeal. Defendant offered no evidence. And the case was submitted to the jury under the charge of the court.

Verdict: The jurors for their verdict say that the defendant Matthew Phillip Bass is Guilty of Rape as charged.

Judgment: Death by inhalation of lethal gas as provided by law.

Defendant, through his counsel, excepts thereto and appeals to the Supreme Court of North Carolina, and assigns error.

Attorney General Seawell, Assistant Attorney General, Harry W. McGalliard, for the State.

Herman L. Taylor, Samuel S. Mitchell for defendant, appellant.

WINBORNE, C. J. The record fails to show that defendant moved to dismiss the action or for judgment as of nonsuit when the State had introduced its evidence and rested its case, or at the close of all the evidence in accordance with the provisions of G.S. 15-173. Nor does the defendant contend here on this appeal that the evidence is insufficient to take the case to the jury on the charge laid, and to support the verdict rendered against him.

But defendant does set forth in the case on appeal assignments of error covering eighty-four exceptions to matters occurring in the course of the trial in Superior Court, and to portions of the charge as given by the trial judge to the jury, and to his failure to charge in other aspects.

The exceptions brought forward in large measure relate to (1) direct testimony of prosecutrix in identifying wearing apparel removed from her person, and later found in the building, and as to knife of defendant with which prosecutrix was cut, all introduced in evidence; (2) corroborative testimony of other witnesses pertaining thereto; and (3) photographs admitted in evidence for the purpose of illustrating the testimony of prosecutrix and of other witnesses as to areas surrounding the scene of the crime charged.

The action of the court in admitting such evidence finds approval

in decisions of this Court. *S. v. Wall,* 205 N.C. 659, 172 S.E. 216; *S. v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; *S. v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234; *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294.

In the *Speller case,* in opinion by *Ervin, J.,* it is said: "The articles of clothing produced at the trial by the prosecution were rightly received in evidence. They were identified as the garments worn by the accused and prosecutrix at the time named in the indictment, and bore tears and stains corroborative of the State's theory of the case," citing *S. v. Wall, supra,* and other cases. The same principle would apply as to the knife of defendant with which, prosecutrix testified, he threatened her and actually cut her hands, face and throat.

Moreover, the decisions of this Court uniformly hold that while in the trial of cases, civil or criminal, in this State, photographs may not be admitted as substantive evidence, *Honeycutt v. Brick Co.,* 196 N.C. 556, 146 S.E. 227; *S. v. Perry,* 212 N.C. 533, 193 S.E. 727, where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy. See *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, and cases cited. Also *S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916.

Testing the matters of testimony in respect to photographs by the principle here stated, error in the rulings of the trial judge is not made to appear.

Furthermore defendant contends that the court erred in charging the jury in respect to verdicts that may be rendered by the jury.

In this connection it is provided in pertinent part by statute G.S. 15-169, formerly C.S. 4639, that: "On the trial of any person for rape * * * when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding * * *." And speaking to the subject of this statute in *S. v. Williams,* 185 N.C. 685, 116 S.E. 736, this Court, in opinion by *Walker, J.,* had this to say: "It is a well recognized principle that where one is indicted for a crime, and under the same bill he may be convicted of a lesser degree of the same crime, and there is evidence tending to support the milder verdict, the prisoner is entitled to have this view presented to the jury under a correct charge, and an error in this respect is not cured by a verdict convicting the prisoner of a higher offense, for in such case it cannot be determined that the jury would not have convicted of the lesser crime if the view had been correctly presented by the judge, upon evidence." And the Court went on to say, as in the instant case, "defendant, as stated, is indicted for

the crime of rape. Under such an indictment, and by express provision of our statute law, a verdict of assault with a deadly weapon, or even of simple assault, could be rendered if there is evidence to support such a finding * * *." Hence it is clear that the trial judge was not in error in charging the jury in the present case, there being evidence tending to show such assault, that if the jury acquit defendant of the charge of assault with the intent to commit rape, the jury will then consider and determine whether he is guilty or not guilty of assault upon the prosecutrix with a deadly weapon.

In conclusion, all other assignments of error have been given careful consideration, and we fail to find cause for disturbing the judgment on the verdict rendered against defendant. Hence the judgment will be, and is hereby affirmed— there being

No Error.

PARKER, J., not sitting.

STATE v. SOPHRONIA SMITH .

(Filed 19 November, 1958.)

1. Intoxicating Liquor § 13—

Where there is no evidence tending to show that the container of less than one gallon of liquor found in defendant's possession did not bear revenue stamps of the Federal Government or any county board, and the only testimony tending to show that the whiskey was nontaxpaid is testimony of the officer that it had the odor of nontaxpaid whiskey, defendant's motion to nonsuit in a prosecution for illegal possession of intoxicating liquor should have been allowed. *S. v. Pitt*, 248 N.C. 57, cited and distinguished in that the testimony in that case was that the liquor was not ABC whiskey, and the witness in that case had been qualified as an expert.

2. Criminal Law § 136—

Where it is held that defendant's motion for nonsuit should have been allowed, the provision of the judgment invoking a prior suspended sentence must also be reversed.

PARKER, J., not sitting.

APPEAL by defendant from *Olive, J.*, April Term 1958 of RANDOLPH.

This is a criminal action tried upon a warrant charging the defendant with possession and possession for the purpose of sale of a quantity of nontaxpaid liquor. The warrant was returnable to the Randolph County Recorder's Court.

The defendant was tried and convicted in said court and from the

judgment imposed she appealed to the Superior Court of Randolph County.

In the Superior Court the defendant was tried upon the original warrant. At the close of the State's evidence the court dismissed the count of possession for the purpose of sale and only submitted the count for unlawful possession of nontaxpaid liquor.

The evidence of the State tends to show that W. W. Wilson, Sheriff of Randolph County, and Deputy Sheriff Bowman, on 20 February 1958, about 10:00 p.m., went to the residence of the defendant in Ramseur; that they had a warrant for the arrest of the defendant. Mr. Bowman went to the front door of the residence and the witness Wilson walked to the rear. While the witness was standing looking in the window of the kitchen, he saw the defendant and a colored man come into the kitchen. The defendant, Sophronia Smith, had a quart fruit jar in her hand about three-fourths full of some clear liquid. The colored man had a small glass in his hand with about one inch of clear liquid in it. Sophronia poured the contents of the fruit jar into a slop bucket. "I did not see what she did with that jar." The man set the glass down in a coca-cola crate. The witness then went to the back door and knocked; the door was opened. Defendant and Deputy Sheriff Bowman and the colored man were in the kitchen. There was a strong odor of disinfectant in the kitchen. There was nontaxpaid whiskey in the small glass in the coca-cola crate. There was an odor of nontaxpaid whiskey in the slop bucket. The witness further testified that he dug into the slop bucket, pulled out a quart fruit jar, smelled of it and it had the odor of nontaxpaid whiskey in it.

On cross-examination the witness identified the fruit jar as the one he took out of the slop bucket and the glass as the one the colored man set in the coca-cola crate. He then testified: " • • • this is the one that had colored liquid in it (this being the jar he had identified as the one he took out of the slop bucket); that glass had approximately an inch; it had the odor of disinfectant and this had the odor of nontaxpaid. I can tell by the whiskey that nobody had paid any tax on it. The government sells white whiskey; 'white lightning' has a different smell; * • • this is the glass and the container I found."

The glass and fruit jar were admitted in evidence.

The defendant offered no evidence.

The jury returned a verdict of guilty of possession of nontaxpaid liquor. From the judgment entered on the verdict the defendant appeals, assigning error.

Attorney General Seawell, Asst. Attorney General Love, for the State.

Hammond & Walker for defendant, appellant.

DENNY, J. The defendant assigns as error the refusal of the court below to sustain her motion for judgment as of nonsuit.

We have heretofore held that testimony to the effect that the liquor seized was white liquor was insufficient to sustain a count charging the defendant with the unlawful possession of "illegal nontaxpaid liquor." *S. v. Wolf*, 230 N.C. 268, 52 S.E. 2d 920.

We have likewise held "the court cannot take judicial notice that 'bootleg whiskey' is nontaxpaid liquor." *S. v. Tillery*, 243 N.C. 706, 92 S.E. 2d 64.

In the instant case the liquor is described by the State's witness as "nontaxpaid liquor" simply because it had the odor of nontaxpaid whiskey, or because "the government sells white whiskey; (and) 'white lightning' has a different smell."

In the American Thesaurus of Slang, by Berrey and Van Den Bark, "white lightning" is defined as "raw alcohol" or as "any colorless whiskey or alcohol." Sections 100.2 and 100.12.

The writer of this opinion is not an expert with respect to the smell of various whiskies. Even so, in the event a tax had been paid on "white liquor" or "bootleg whiskey" or on "white lightning," it is submitted that the payment of such tax did not and could not change the smell of such liquor or whiskey one whit. After all, the only question involved in the trial below was whether or not the defendant had in her possession a quantity of nontaxpaid liquor.

In the case of *S. v. Pitt*, 248 N.C. 57, 102 S.E. 2d 410, an ABC officer undertook to testify as follows: "I can smell of it and tell the difference. * * * It (the whiskey introduced in evidence) is not ABC whiskey." The trial court refused to admit this testimony until the officer was examined as to his qualifications and experience to testify as to such matters. He testified that he had been an ABC officer for eleven years and "knew the difference between whiskey sold in ABC stores and whiskey made illegally and not under government supervision." His testimony was then admitted. We held this evidence competent. Its weight was for the jury. Moreover, in that case there was a stipulation to the effect that the containers of the whiskey which had been introduced in evidence, bore no stamps.

The General Assembly of North Carolina has made it so easy and simple to make out a *prima facie* case in such cases as the one now before us, it is difficult to understand why the statutory procedure is so often and well-nigh universally ignored. In cases like this, all the State has to prove to make out a *prima facie* case is to show that the container or containers seized contained an alcoholic beverage and that the container or containers bore no revenue stamp of the federal

government or a stamp of any of the county boards of the State of North Carolina. G.S. 18-48.

We have reached the conclusion that upon the evidence adduced in the trial below, the court should have sustained the defendant's motion for judgment as of nonsuit, and we so hold.

Therefore, the judgment entered below is reversed, including the portion thereof that invoked by reason of the conviction herein a previous judgment, entered at the December Term 1957 of the Superior Court of Randolph County, which had been suspended for three years upon condition that the defendant not violate any penal law of the State.

Reversed.

PARKER, J., not sitting.

EDGAR LEE HOLT (EMPLOYEE) v. CANNON MILLS COMPANY (EMPLOYER) SELF-INSURER

(Filed 19 November, 1958.)

Master and Servant § 40g—

Judgment awarding compensation for hernia without evidence that at the time the employee suffered the injury he was performing the work in any other than the usual manner, reversed on authority of *Hensley v. Cooperative*, 246 N.C. 274.

PARKER, J., not sitting.

APPEAL by defendant from *Olive, J.*, June Term 1958 of CABARRUS.

This proceeding was instituted by the plaintiff employee to recover compensation under the North Carolina Workmen's Compensation Act from his employer, the defendant, a duly qualified self-insurer.

It was admitted that the parties are subject to the provisions of the Workmen's Compensation Act; that the average weekly wage of the employee was $68.02; that the employee sustained a hernia; that an operation for repair of the hernia has been performed; and that he was temporarily totally disabled for a period of eight weeks.

The plaintiff's regular job was "doffing twisters." This required the taking off of yarn filled bobbins from the spinning frames and the placing of empty bobbins in the frames; the full bobbins were then placed in boxes and transported on a manually pushed truck to a room for storing where they were then lifted from the truck and placed on a shelf by the plaintiff. While at work the plaintiff usually made seven trips to the storage room each day, carrying on the truck eight boxes of bobbins at a time, 56 boxes a day.

The hearing Commissioner found, "That on November 16, 1956, at approximately 9:30 a.m., plaintiff was moving full bobbins of yarn from the spinning room to the storeroom; that he reached to the lower level of the truck, approximately two feet from the floor, and got a full box of yarn bobbins, weighing approximately 100 pounds, to place them on a shelf in the storeroom, approximately four feet high; that while he was in a stooped and bent position in the act of moving the box from the truck to the shelf, he experienced a stinging pain in his right groin.

"That in the way and manner set out above, plaintiff sustained an injury by accident arising out of and in the course of his employment resulting in hernia; that the hernia appeared suddenly, was accompanied by pain, immediately followed an accident, and did not exist prior to the accident for which compensation is claimed."

Based on the foregoing facts, the hearing Commissioner concluded as a matter of law that the plaintiff suffered an injury by accident, arising out of and in the course of his employment, and entered an award of $32.50 per week for eight weeks, beginning 7 December 1956, for temporary total disability. The award was approved by the Full Commission and upon appeal was affirmed by the Superior Court.

The defendant appeals, assigning error.

H. T. Barnes, W. H. Beckerdite for defendant, appellant.
No counsel contra.

PER CURIAM. There is no evidence disclosed on this record to show that the work of the employee at the time he suffered the hernia was being performed in other than the usual and customary manner. Hence, the conclusion that the plaintiff suffered an injury by accident arising out of and in the course of his employment, resulting in a hernia, is not supported by the evidence.

Therefore, the judgment of the court below is reversed on authority of *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289. and similar decisions of this Court.

As pointed out in the cited case, the interpretation so consistently given to the statute, G.S. 97-2 (r), should be followed. However, if an employee ought to recover upon facts like those revealed on the present record, or upon substantially similar facts, then in our opinion it is within the province of the Legislature rather than the courts to authorize recovery under such circumstances.

Reversed.

PARKER, J., not sitting.

CLYDE HENRY HERNDON v. T. A. MELTON.

(Filed 19 November, 1958.)

Libel and Slander § 7b—

An official report by an investigator of a church, published in the official organ of the church, is qualifiedly privileged, and in the absence of evidence of express or actual malice, nonsuit is proper.

PARKER, J., not sitting.

APPEAL by plaintiff from *Olive, J.*, at April 8, 1958, Civil Term of RANDOLPH.

Civil action to recover for alleged libelous article written by defendant, who was chairman of the Board of Foreign Missions of the Pentecostal Holiness Church, to be published in the "Pentecostal Holiness Advocate", the official organ of the Pentecostal Holiness Church, published and circulated to the entire church both clergy and laity, with circulation of several thousand copies.

The article, of which complaint is made, is set forth in the complaint and purports to be a report by defendant of conditions in Hong Kong in the missionary work of the Pentecostal Holiness Church, under plaintiff. While no names are called, plaintiff alleges that by *innuendo* he is named, it being specifically stated that there has been a rift in the church's work there, etc., to his great damage.

Defendant, answering, admits the publication, but avers that the report of his investigation in the church's work of Hong Kong was official, and that the publication is privileged.

Upon trial in Superior Court motion of defendant entered at close of plaintiff's evidence for judgment as of nonsuit was allowed, and to judgment in accordance therewith plaintiff excepts and appeals to the Supreme Court, and assigns error.

Ottway Burton, Don Davis for plaintiff, appellant.

L. P. McLendon, C. T. Leonard, Jr., Richard S. Clark for defendant, appellee.

PER CURIAM. Upon consideration of the evidence offered by plaintiff in the light of his pleading it is clear that the alleged libelous article was written by defendant as a report of his investigation on visit to the Hong Kong Mission of the Pentecostal Holiness Church pursuant to directive of the church. Thus the rule of qualified privilege is applicable. And there being no evidence of express or actual malice, the judgment as of nonsuit is deemed proper. See *Gattis v. Kilgo*, 128 N.C. 402, 38 S.E. 931; s. c. 140 N.C. 106, 52 S.E. 249.

Affirmed.

PARKER, J., not sitting.

J. R. HINSHAW v. CHARLES C. JOYCE.

(Filed 19 November, 1958.)

1. Trial § 21½—

Where plaintiff offers evidence for the purpose of defeating defendant's counterclaim, plaintiff waives his motion to nonsuit the counterclaim made at the close of defendant's evidence.

2. Sales § 27—

Defendant's allegations and evidence to the effect that the tractor sold him was represented as manufactured in a certain year and to be in good condition and serviceable, whereas it was manufactured more than five years previously and was not serviceable, but was worn out and useless for practical purposes, *held* to support defendant's counterclaim for fraudulent representations in the seller's action on the note for the purchase price.

3. Trial § 49—

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and its refusal to exercise the discretion is not appealable.

PARKER, J., not sitting.

APPEAL by plaintiff from *Thompson, J.*, May-June Term of RANDOLPH.

This action was instituted to enforce payment of a note in the sum of $400 given plaintiff by defendant as part of the purchase price of a 1940 Mack truck with low-boy trailer and a 1945 model D6 Caterpillar bulldozer. Payment of the note was secured by chattel mortgage on the bulldozer.

Defendant admitted execution of the note and nonpayment after demand. For affirmative relief he asserted a counterclaim in the sum of $3,241.37 arising because of false and fraudulent representations with respect to the age and condition of the equipment sold. The allegations as they related to the bulldozer were that plaintiff represented it to be a 1945 model D6 in excellent condition and entirely serviceable whereas it was manufactured prior to 1940, was an RD6 with much less horsepower than a D6, was not serviceable and in good condition but was worn out and for practical purposes was useless. Defendant alleged his lack of knowledge or experience with equipment of that character and reliance on the assurances given him by plaintiff.

The court submitted issues based on the allegations in defendant's counterclaim. These issues were answered in favor of defendant and judgment was rendered on the verdict. Plaintiff appealed.

Archie L. Smith and Deane F. Bell for plaintiff, appellant.

Miller & Beck and John Randolph Ingram for defendant, appellee.

PER CURIAM. The only assignments of error are the refusal to allow plaintiff's motions to nonsuit the counterclaim and the refusal to set aside the verdict as contrary to the weight of the evidence.

The motion to nonsuit made at the close of defendant's evidence was waived when plaintiff offered evidence for the purpose of defeating the counterclaim. G.S. 1-183.

There is evidence in the record to support each averment of the counterclaim. It is apparently conceded that the bulldozer was not a 1945 model as described in the bill of sale but was in fact manufactured prior to 1940. The truth of the evidence was a matter for the jury.

Whether a court should set aside a verdict as contrary to the weight of the evidence is a matter of discretion, and the refusal to exercise the discretion is not appealable. *Walston v. Greene,* 246 N.C. 617, 99 S.E. 2d 805.

Affirmed.

PARKER, J., not sitting.

STATE v. JOSEPH H. STRICKLAND.

(Filed 19 November, 1958.)

APPEAL by defendant from *Hall, J.,* April Term, 1958, of JOHNSTON.

Under an indictment charging rape, defendant was put on trial for and found guilty of an assault with intent to commit rape; and judgment, imposing a sentence of fifteen years in the State's Prison, was pronounced.

Defendant excepted and appealed, assigning as error the overruling of his motions for judgment of nonsuit.

Attorney General Seawell and Assistant Attorney General Bruton, for the State.

Harry E. Canaday for defendant, appellant.

PER CURIAM. The State offered evidence tending to show that on Saturday, December 28, 1957, about 8:30 p.m., near Clayton, North Carolina, defendant committed an assault with intent to commit rape upon the person of the prosecutrix. No good purpose would be served by setting forth in detail the circumstances of such assault.

Defendant testified and offered evidence tending to establish an alibi; and, on this appeal, he contends that the State's evidence was insufficient to identify defendant as the perpetrator of the crime.

Defendant's said contention is plainly without merit. The State's evidence was amply sufficient to warrant a finding by the jury that defendant was the man who committed the alleged criminal assault. Apart from other evidence tending to identify defendant, a State's witness testified that, in a conversation with defendant concerning the alleged criminal assault, defendant stated: "Well, I did it; I am the one."

No error.

PARKER, J., not sitting.

STATE v. LIVINGSTON BROWN.

(Filed 19 November, 1958.)

APPEAL by defendant from *Olive, J.*, June, 1958 Criminal Term, RANDOLPH Superior Court.

Criminal prosecutions originally instituted on affidavits and warrants returnable to the Recorder's Court of Randolph County. The charges were: (1) Unlawful possession of intoxicating liquors; (2) Unlawful possession of intoxicating liquors for the purpose of sale; and (3) Carrying a concealed weapon. In the recorder's court the defendant demanded a jury trial, whereupon "the cases were sent over to the superior court" for trial before a jury. Grand jury indictments were returned for the three offenses, which were consolidated and tried together in the superior court. The jury returned verdicts of guilty on charges 1 and 3, but failed to return a verdict on 2. The court imposed a jail sentence of two years on counts 1 and 3 and provided the two sentences should run concurrently. The defendant appealed, assigning errors.

Malcolm B. Seawell, Attorney General, Harry W. McGalliard, Asst. Attorney General, for the State.

Ottway Burton, Don Davis for defendant, appellant.

PER CURIAM. The defendant assigns as error the refusal of the court to sustain his motions for nonsuit. The evidence, though not strong, nevertheless was sufficient to justify its submission to the jury.

The court's charge as set out in the record with respect to the unlawful possession of whisky is technically incorrect; however, the defendant has not shown that he is prejudiced by the judgment. The sentence on the charge of carrying a concealed weapon must be sustained. The sentence on the unlawful possession charge runs concur-

rently and imposes no additional punishment. The failure to return a verdict on the charge of unlawful possession for the purpose of sale was equivalent to a verdict of not guilty on that charge.

No Error.

LULA H. HERRING, WIDOW; FOREST HERRING AND WIFE, DOROTHY B. HERRING; JASTEEL H. FIELDS AND HUSBAND, JESSE FIELDS, EUNICE W. HODGES, WIDOW; PERSIS H. CRAWFORD AND HUSBAND, P. H. CRAWFORD, JR.; AND MARY H. WARREN AND HUSBAND, A. D. WARREN, JR. v. VOLUME MERCHANDISE, INC., A CORPORATION; AND EFIRD'S DEPARTMENT STORE OF KINSTON, N. C. INC., A CORPORATION; JOHN M. BELK; R. L. MANSFIELD; AND GIBSON L. SMITH.

(Filed 10 December, 1958.)

1. Trial § 20—

Issues of law raised by the pleadings are to be decided by the court; issues of fact must be determined by a jury in the absence of waiver of jury trial. G.S. 1-172.

2. Pleadings § 25—

In determining whether an issue of fact is raised by the pleadings, the pleadings must be liberally construed to effect substantial justice between the parties.

3. Frauds, Statute of, §§ 1, 3—

While our statute of frauds will be liberally construed to effect its purpose, contracts coming within its purview are voidable and not void, and the statute must be pleaded and cannot be taken advantage of by demurrer.

4. Same—

The statute of frauds acts to prevent enforcement of executory contracts and does not affect contracts which have been consummated.

5. Same—

The Connor Act, G.S. 47-18, supplements the statute of frauds, G.S. 22-2, and both were designed to accomplish the same purpose.

6. Frauds, Statute of, § 6c—

While G.S. 22-2 makes no declaration with respect to the assignment or surrender of leases when the unexpired term exceeds three years, an assignment or surrender of such lease must be in writing G.S. 22-2, and in order to protect against creditors or subsequent purchasers must be recorded. G.S. 47-18.

7. Same: Frauds, Statute of, § 6f—

While an executory parol offer to surrender a leasehold estate having more than three years to run is within the statute of frauds and cannot be specifically enforced, such parol surrender, when consummated, is not invalid, and further a lessee may by his conduct be estopped to deny the termination of his lease.

8. Frauds, Statute of, § 6f—

Where, in lessor's action for possession of the premises, the allegations of the complaint are sufficient, liberally construed, to allege a consummated parol agreement by lessee to surrender the premises or equitable matters *in pais* sufficient to raise the question of estoppel of lessee and those claiming under him from denying the termination of the lease, lessor is entitled to show facts establishing such allegations, and judgment dismissing the action on the ground that the parol agreement to surrender the lease came within the statute of frauds and was void as a matter of law, is error.

9. Tenants in Common § 10—

A lease executed by only some of the owners is not binding on the owners not parties thereto.

PARKER, J., not sitting.

APPEAL by plaintiffs from *Bundy, J.*, May 1958 Civil Term of LENOIR.

This action was instituted to obtain possession of a lot in Kinston owned by plaintiffs and occupied by defendant Volume Merchandise, Inc. The court, being of the opinion that the only question presented by the pleadings was the application of the statute of frauds to a parol offer to surrender a lease having more than three years to run, held that the statute was an effective bar to the claim of plaintiffs. He dismissed the action and plaintiffs appealed.

White & Aycock for plaintiff appellants.

Dawson & Cowper for Volume Merchandise, Inc.

David M. McConnell and John L. Green, Jr., for other defendant appellees.

RODMAN, J. The court has authority to decide issues of law raised by the pleadings, but when the pleadings present disputed factual questions a party who has not waived his rights is entitled to have a jury decide the controversy. G.S. 1-172. *Phillips v. Gilbert,* 248 N.C. 183, 102 S.E. 2d 771; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

Pleadings must be liberally construed to permit substantial justice between the parties. G.S. 1-151. We examine the pleadings and the law with this injunction in mind.

Plaintiffs sued Volume Merchandise, Inc. in December 1956. The

complaint then filed merely alleged plaintiffs were the owners of a described lot in Kinston which was wrongfully possessed by defendant. The answer admitted plaintiffs were the owners of the lot but asserted defendant's possession was rightful. Defendant based its assertion of rightful possession on a lease from plaintiffs to Efird's Department Store of Kinston (hereafter called Efird's) and an assignment of the lease to defendant.

In November 1957 Efird's and the individual defendants were made parties on motion of plaintiffs and an amended complaint was filed. The allegations of ownership and wrongful possession as made in the original complaint were then reiterated. The amended complaint also alleged that "certain of plaintiffs" in January 1950 leased the lot to Efird's for a term of five years with an option to renew or extend for an additional term of five years, which option had been duly exercised. It alleged defendant Belk had acquired control of Efird's through Belk Stores, which had purchased the stock of Efird's, that defendants Mansfield and Smith were agents of Belk Stores and of Efird's. Belk Stores and Efird's were engaged in the same kind of business and in competition in Kinston. Efird's, in September 1956, acting through the individual defendants, in order to eliminate this competition and to relieve Efird's of the payment of rent and the other burdens imposed on it by the lease, made a request that Efird's be permitted to surrender and cancel the lease. This offer was not then accepted. Section 18 of the amended complaint reads:

"That on or about the 6th day of October 1956, agents and representatives of the defendant, Efird's Department Store of Kinston, N. C., Inc., including the defendants, R. L. Mansfield and Gibson L. Smith, conferred with the said representative of the plaintiffs and again represented to the plaintiffs, through their representative, that the defendant Efird's Department Store of Kinston, N. C., Inc., and its officers and directors desired that said lease be cancelled and desired further that defendant be permitted to surrender possession of said premises, and stated that said defendant, upon cancellation of said lease, would surrender possession of said premises on or before November 30, 1956. That on November 8, 1956, the plaintiffs accepted the offer of the defendant, Efird's Department Store of Kinston, N. C., Inc. to surrender possession of the said leased land and premises on or before November 30, 1956, and entered into a mutual oral agreement with said defendant for the cancellation of said lease executed by certain of the plaintiffs herein to the defendant, Efird's Department Store of Kinston, N. C., Inc., which lease is dated January 31, 1950."

Following this allegation the complaint states plaintiffs accepted

the offer to surrender. Relying on the surrender and cancellation, plaintiffs, with knowledge of defendants, leased the property to Miles Shoe Store. After plaintiffs leased to Miles Shoe Store defendants wrongfully put Volume Merchandise in possession, that Volume Merchandise knew of the surrender and cancellation effected on 8 November and participated in the fraud perpetrated on plaintiffs.

Volume Merchandise answered the amended complaint. It again admitted plaintiffs were the owners of the lot and its possession which it asserted was lawful by virtue of the assignment made in writing which was duly recorded. It denied any fraud, denied that lessee had surrendered the premises on 8 November 1956, and asserted if Efird's on that day orally agreed "that the lease herein involved would be surrendered, and *was surrendered that day,* then such agreement was void and of no effect, for that the lease on 8 November 1956 did not expire until February 1960 . . ." (Emphasis added.) It expressly pleaded the statute of frauds.

The answer of Efird's and the individual defendants admitted plaintiffs were the owners of the land in controversy and the lease to it by certain of plaintiffs. They admitted they informed plaintiffs of their desire to cancel and surrender. They admitted conferring with representatives of plaintiffs on 5 October 1956, then expressing a willingness to cancel and surrender by 1 November. They denied they offered to surrender by 30 November as alleged by plaintiffs or that they in fact surrendered, asserting they were legally in possession when they assigned the lease to Volume Merchandise. They expressly pleaded the statute of frauds.

The English statute of frauds, 29 Car. 2, declares void parol assignments or surrenders of leases, but the English statute was not adopted by us as a part of our common law. *Foy v. Foy,* 3 N.C. 131.

Our statute, G.S. 22-2, adopted in 1819, declares void when not in writing all leases and contracts for leasing lands for a period exceeding three years. It makes no declaration with respect to the assignment or surrender of leases when an unexpired term exceeds three years. Does the statute apply to parol contracts to surrender such leasehold estates and if so, may the statute be avoided by estoppel or a consummated surrender?

The statute has not been given a literal or narrow construction. Our decisions have consistently given that interpretation which would accomplish the purpose declared in the English statute. Even though the statute declares leases and conveyances void, that word has been regularly interpreted to mean voidable. *Walker v. Walker,* 231 N.C. 54, 55 S.E. 2d 801; *Real Estate Co. v. Fowler,* 191 N.C. 616, 132 S.E. 575; *Herndon v. R.R.,* 161 N.C. 650, 77 S.E. 683; *Wilkie v. Womble,*

90 N.C. 254. A party who claims protection from the statute must take affirmative action. He cannot avail himself of its provisions by demurrer. *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196.

The statute acts to prevent enforcement of executory contracts, not contracts which have been consummated. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *Herndon v. R.R., supra; Hall v. Fisher,* 126 N.C. 205; *Choat v. Wright,* 13 N.C. 289.

The statute of frauds (G.S. 22-2) and the Connor Act (G.S. 47-18) requiring registration of deeds and leases were designed to accomplish the same purpose. The latter act supplements the earlier act. *Mauney v. Norvell,* 179 N.C. 628, 103 S.E. 372.

Though not mentioned in either act, an assignment of a lease for more than three years must, to be enforceable, be in writing and to protect against creditors or subsequent purchasers, must be recorded.

Ruffin, C. J., writing in *Briles v. Pace,* 35 N.C. 279, and speaking with reference to the assignment of a lease for more than three years, said: "The words in these statutes (frauds), in truth, embrace the transfer of terms, as well as the creation of them. They are, that all contracts to sell or convey land or any interest in or concerning it shall, with one exception, be void unless in writing. Now, a term for years is not only an interest, but it is an estate, in land, and, therefore, a contract to assign a term is a contract to sell and convey land. Besides, it is a mistake to suppose that the statute, in respect to the creation of terms, embraces only those created immediately out of the inheritance; for it speaks of all contracts for lands, which includes, of course, all leases created in any manner other than those of three years or under, which are expressly excepted. Therefore, if a termor underlets the premises, or a part of them, for part of the term, so as to leave a reversion himself, that is a new term created out of the former, and is within the words of the act; and if it be for more than three years, it must clearly be in writing. The inference, then, seems irresistible that such a long termor cannot assign without writing; for it would impute an absurdity to the Legislature to suppose a writing indispensable for a termor to pass a part of his estate, while he is allowed to pass the whole by an assignment by word of mouth."

Brown, J., said in *Alexander v. Morris,* 145 N.C. 22: "The verbal assignment of the lease made to plaintiff was absolutely void, because, at the date thereof, 30 August, 1904, the lease had more than three years to run, and, therefore, such an interest in land could only have been assigned in writing."

Gaston, J., writing in *Gwyn v. Wellborn,* 18 N.C. 313, referred to the English case of *Earl v. Rogers,* and after quoting therefrom said:

"In the year 1815 we had no statute of frauds, and a surrender of a term might have been made wholly by parol."

Title which is passed by an unrecorded deed or by an assignment cannot be reinvested in the grantor by a promise to return the deed or cancel the assignment. *Walker v. Walker, supra; Maxwell v. Wallace,* 45 N.C. 251. Dower may not be surrendered by parol, *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345, nor may a remainderman acquire the preceding life estate by parol lease from the life tenant which permits the remainderman to occupy without the payment of rent during the life of the life tenant. *Houston v. Smith,* 88 N.C. 312.

Covenants limiting the use of real property are within the scope of the statute of frauds and the registration act. *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697; *Moore v. Shore,* 206 N.C. 699, 175 S.E. 117. Speaking with reference to parol releases of easements and restrictive covenants, *Seawell, J.,* said in *Miller v. Teer,* 220 N.C. 605, 18 2d 173: "Perhaps an easement of this sort, acquired as this was, could not be made the subject of parol release, except upon the principle of estoppel, since it is an interest in lands within the statute of frauds. *Combs v. Brickhouse,* 201 N.C. 366."

We reach the conclusion that a parol offer to surrender a leasehold estate having more than three years to run is within the statute of frauds and cannot be specifically enforced.

Because performance cannot be enforced so long as the contract is executory, that does not mean that a consummated surrender is invalid or that lessee may not by his conduct be estopped to deny the termination of his lease. Our decisions clearly establish the right of lessor to show facts establishing his right of possesion. The rule is, we think, aptly stated in *Faw v. Whittington,* 72 N.C. 321. *Bynum, J.,* said: "Such a renunciation, however, would seem to operate not as passing an estate or interest in land, which cannot be done strictly under the act without writing, but to operate as an equitable estoppel in the vendee to assert a claim to specific performance where his conduct has misled the vendor intentionally. Assuming the law to be that a vendee can abandon by a matter *in pais* his contract to purchase, it is clear that the acts and conduct constituting such abandon must be positive, unequivocal, and inconsistent with the contract."

Connor, J., said in *Moore v. Shore, supra:* "In *Combs v. Brickhouse, supra,* the rule that an easement cannot ordinarily be extinguished or released by mere unexecuted parol agreement (19 C.J. 949) is recognized and approved It was held, however, in that case that an easement may be abandoned by the owner of the dominant tenement by unequivocal acts showing a clear intention to abandon and terminate the right, and that such owner may be estopped to assert

the right by his conduct relied on by the owner of the servient tenement. The rule that a parol agreement between the owners of the dominant and servient tenements may operate to extinguish an easement where such agreement has been acted upon by the owner of the servient tenement, was applied in that case. This is a just rule, and in proper cases will be applied to prevent injustice."

Shepherd, J. (later C.J.), writing in *Miller v. Pierce,* 104 N.C. 389, said. "The sole question for our consideration is whether a written contract for the sale of land can be discharged by matter *in pais.* This subject has been very much debated by the judges of England, and for a long time their opinion upon the question was left in doubt. It is now, however, regarded as settled. Mr. Brown, in his work on the 'Statute of Frauds,' says: 'And this opinion, that a parol discharge of a written contract within the statute of frauds is available in equity to repel a claim upon that contract, to which the mind of Lord Hardwicke came so reluctantly is since firmly established by many authorities.' . . . While we are of the opinion that the contract may be discharged by matter *in pais,* there must, however be something more than the mere oral agreement of the parties."

Other illustrations of the application of the principles may be found in *Bell v. Brown,* 227 N.C. 319; *Miller v. Teer, supra; Combs v. Brickhouse, supra; Gorrell v. Alspaugh,* 120 N.C. 362; *Taylor v. Taylor,* 112 N.C. 27; *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12; *Barber v. Smythe,* 143 P 2d 565; *McNeill v. Harrison & Sons,* 2 N.E. 2d 959; *Elliott v. Gentry,* 60 P 2d 203; *Selimos v. Marinos,* 54 N.E. 2d 836; *Hesseltine v. Seavey,* 16 Me. 212; 37 C.J.S. 607, 620, 621; 3 Thompson on Real Property, Perm. ed., 751, 752, 757.

Notwithstanding seeming inconsistencies in plaintiff's pleadings, enough is, we think, alleged to permit plaintiffs to offer evidence to show an actual surrender, as distinguished from an offer to surrender, or conduct sufficient to constitute an estoppel. That being true, the court could not hold as a matter of law that plaintiffs were not entitled to recover. Even if plaintiffs failed to show a completed surrender or estoppel, the lease would not be binding on any owners who were not parties thereto. We understand the admitted allegation that the lease was executed by "certain of plaintiffs" to imply that it was not executed by all of the owners.

Reversed.

PARKER, J., not sitting.

EMMA PRIMM v. LATHA EUGENE KING AND HILDA WARD.

(Filed 10 December, 1958.)

1. Automobiles § 41g—

Evidence tending to show that the operator of a motor vehicle on the servient highway failed to stop before entering the intersection with the dominant highway is sufficient to take the issue of his negligence to the jury in a suit involving a collision at the intersection with an automobile traveling along the dominant highway.

2. Automobiles § 27—

Whether a speed within the statutory maximum is lawful on the part of a motorist traveling along a dominant highway approaching the intersection with a servient highway depends upon the circumstances, since under the provisions of G.S. 20-141(c) a motorist is required to decrease speed upon approaching a crossing or intersection when special hazards exist, and a motorist is required at all times to drive with due caution and circumspection and at a speed and in a manner so as not to endanger or be likely to endanger any person or property.

3. Automobiles § 46—

An instruction to the effect that a speed within the statutory maximum on the part of a motorist traveling along a dominant highway toward an intersection with a servient highway, would be lawful, is error, and such error is not cured by another portion of the charge which applies the common law rule of the prudent man without reference to the statute.

4. Trial § 22a—

Plaintiff is entitled to have the evidence on the entire record considered in the light most favorable to her, and she is entitled to the benefit of every reasonable inference to be drawn therefrom.

5. Automobiles § 41g— Evidence that a motorist along dominant highway failed to use due care to avoid collision with motorist on servient highway held sufficient.

Evidence tending to show that a motorist, traveling along the dominant highway at a speed of 65 miles per hour, with testimony on her part fixing her speed at not less than 40 or 45 miles per hour, saw a motorist approaching from her left along the servient highway at a very slow speed some 150 feet from the intersection, that she took her foot off the accelerator when she was about 250 feet from the intersection, did not apply her brakes until within 50 or 60 feet from the intersection, with some evidence that she did not do so until within 10 or 15 feet from the intersection, is sufficient to be submitted to the jury on the issue of such motorist's negligence.

6. Automobiles § 17—

A motorist traveling along the dominant highway does not have the absolute right of way in the sense that he is not bound to exercise due care toward approaching traffic along the servient highway, but remains

under duty to drive at a speed no greater than is reasonable and prudent under the existing conditions, to keep his motor vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered.

7. Automobiles § 43—

In this action by a passenger in an automobile, injured in a collision between the car in which she was riding, traveling along the dominant highway, and a car entering the intersection from a servient highway, the evidence *is held* sufficient to carry the case to the jury on the theory of concurrent negligence of both defendants.

8. Automobiles § 46—

Where the evidence discloses that a motorist traveling along the servient highway, upon which stop signs had been erected, entered an intersection with a dominant highway, an instruction to the effect that where two vehicles approach an intersection at the same time, both of them observing the law, the motorist first in the intersection has the right of way notwithstanding that one of the highways is a dominant highway, is error. G.S. 20-158(a).

9. Automobiles § 17—

A motorist traveling on a servient highway on which a stop sign has been erected may not lawfully enter an intersection with a dominant highway until he has stopped and observed the traffic on the dominant highway and determined in the exercise of due care that he may enter such intersection with reasonable assurance of safety to himself and others, but his failure to do so is not negligence or contributory negligence *per se* but is to be considered with other facts in the case upon the issue.

10. Appeal and Error § 42—

Ordinarily, when erroneous instructions are given in a charge, such error will not be cured although the court may have given correct instructions in other parts thereof, since it cannot be presumed that the jury was able to distinguish at which time the court was laying down the correct rule.

PARKER, J., not sitting.

APPEAL by defendants from *Pless, J.*, 16 January 1958 Regular Civil Term of MECKLENBURG.

This is a civil action instituted by the plaintiff, Emma Primm, on 14 February 1957, against the defendants, Latha Eugene King and Hilda Ward, to recover damages resulting from injuries sustained when the car owned and driven by Hilda Ward, in which the plaintiff was a guest passenger, collided with the automobile driven by the defendant King at the intersection of Wilmont Road and Steele Creek Road, in Mecklenburg County, near Charlotte, North Carolina, on 16 December 1956.

The plaintiff alleges the joint and concurrent negligence of the defendants as the proximate cause of the collision which resulted in serious and permanent injuries to her. Each defendant filed answer denying his or her own negligence and alleging that the collision was the result of the sole negligence of the other.

At the intersection where the collision occurred Wilmont Road runs approximately east and west, and Steele Creek Road runs approximately north and south. Hilda Ward was driving east on Wilmont Road. The defendant King was driving south on Steele Creek Road. There was a stop sign facing the defendant King as he approached the intersection from the north. The stop sign was located about 48 feet north of the intersection.

The plaintiff's evidence tends to show that the Ward car was being driven at a speed of not less than 65 miles per hour at the time the plaintiff first saw the King car and she was, at that time, about 250 feet from the intersection; that the King car was being driven at a speed of about 10 to 15 miles per hour and did not stop at the stop sign but continued into and across the intersection. The plaintiff testified that she said, "Look out, he is not going to stop"; that the defendant Ward took her foot off the accelerator but did not apply the brakes; that she turned her car to the right and the collision occurred off the intersection. The King car had gotten over Wilmont Road on to Steele Creek Road; and that the defendant Ward's car hit the King car about the front door; that her car traveled about 75 feet after it struck the King car; that there was nothing to obstruct the view of either Mrs. Ward or Mr. King as they entered the intersection.

On cross-examination this witness testified: "After we crossed the bridge, just across the bridge, I saw Mr. King's car coming out into the intersection. It was driving very slowly. * * * I saw the King car coming across the intersection when I estimated the car I was riding in was about 250 feet from the intersection."

The defendant King testified that he pulled up to within two or three feet of Wilmont Road and stopped; that he looked to his right and his left. "I looked to the right and it was clear, I did not see anything in sight. I looked to the left, there were two cars down the road about two blocks away and I immediately looked ahead and put my car in low gear and went across Wilmont Road, and when I got across the road, Mrs. Ward's car struck me in the right front side in the front door and front wheel. From the time I stopped until I was hit, I had traveled about 40 feet. Wilmont Road is 22 feet wide. * * * With reference to Wilmont Road at the time my car was hit, I was just off of Wilmont Road on the south side. I did not see the car that hit

my car, I did not know there was a car anywhere around me because I did not see anything in sight when I looked to the right. * * * As to how fast I was going across this intersection, I went across I imagine about 10 miles an hour."

The defendant Hilda Ward testified, "I was working at the Airport 77 Restaurant in December 1956. I worked there as a waitress along with Mrs. Primm. I was driving the auto that was involved, that is one of the cars in this wreck. * * * We had been working and were on our way home. * * * I was on Wilmont Road, going east. As you drive east on Wilmont Road there is a bridge some distance west of this intersection. In my opinion that bridge is about two-tenths of a mile from the intersection. As I passed that bridge and approached the intersection of Steele Creek Road and Wilmont Road, I was driving about 55 at the bridge. * * * Then as I came on down towards the intersection I was driving about 45. I saw the auto operated by Mr. King. * * * When I first saw his car, I could see the top of his car from 150 feet back, the embankment goes up a little. You can see the top of the car, I know the car approached very slow. When I first saw his car it was about 50 feet from the intersection. As I came on towards the intersection this other car approached the side of the street so slow, I just knew he was stopping and then I realized he was * * * not going to stop; to keep from hitting him in the side I go to my right, hoping that he would see me then and go to his left. When it first became apparent that he was not going to stop before entering the intersection, I was around 50 to 60 feet from the center of the street or the intersection. When I realized he was not going to stop, I applied my brakes and went to the right."

On cross-examination this witness testified that Mr. King was not driving more than 10 miles per hour; that when she first saw his car it was about 50 feet from the intersection; that from where she first saw it to the place of the collision it was about 75 feet. She further testified that when the policemen came to see her in the hospital after the accident she told them that the first time she saw the King car it was 150 feet from the intersection.

A member of the Mecklenburg County police who investigated the accident testified that an automobile approaching from the west on Wilmont Road could be seen from the intersection with Steele Creek Road as it came across the bridge, and that the distance from the east end of the bridge on Wilmont Road to the intersection with Steele Creek Road is 1,350 feet. The testimony of this witness tends to show that the defendant Ward's car left tire marks for 100 feet before the collision.

Issues of negligence and damages were answered in favor of the plaintiff and against both defendants.

From the judgment entered on the verdict both defendants appeal, assigning error.

Henry L. Strickland for plaintiff.
Carswell & Justice for defendant King.
Helms, Mulliss, McMillan & Johnston for defendant Ward.

DENNY, J. The defendant King assigns as error the refusal of the court below to grant his motion for judgment as of nonsuit made at the conclusion of all the evidence.

In our opinion, the evidence adduced in the trial below was sufficient to carry the case to the jury as to the defendant King, and we so hold.

Among other things, however, this defendant excepts to and assigns as error the following portion of the charge to the jury: "Incidentally, let me say here, ladies and gentlemen, there being no evidence as to what kind of zone or district this was, that the 55 miles an hour speed law would apply here, and that a speed under 55 miles an hour would not be in violation of the speed law, and one above that would be."

We think this instruction may have misled the jury in light of the fact that the collision involved in this case occurred at an intersection of highways.

G.S. 20-140 provides: "Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, * * *."

G.S. 20-141 further provides: "(a) No person shall drive a vehicle on a highway at a speed greater than is reasonably prudent under the conditions then existing. (b) Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds: 1. Twenty miles per hour in any business district; 2. Thirty-five miles per hour in any residential district; * * * 4. Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars, * * *. (c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * when special hazard exists with respect to pedestrians or other traffic * * * and speed shall be decreased as may be necessary to avoid colliding with any person,

vehicle or other conveyance on or entering the highway and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

In light of the provisions of the foregoing statutes it is clear that whether or not a speed of 55 miles an hour is lawful depends upon the circumstances at the time. These statutes provide that a motorist must at all times drive with due caution and circumspection and at a speed and in a manner so as not to endanger or be likely to endanger any person or property. At no time may a motorist lawfully drive at a speed greater than is reasonable and prudent under the conditions then existing.

Conceding that 55 miles per hour was the legal rate of speed on Wilmont Road, the defendant King was entitled to have the jury instructed that notwithstanding the fact that the speed of a vehicle may be lower than 55 miles per hour, "that shall not relieve the driver from the duty to decrease speed when approaching or crossing an intersection * * *, when special hazard exists with respect to pedestrians or other traffic * * * and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

The fact that the court in its charge stated and applied the common law rule of the prudent man is not sufficient to remedy the failure to explain and apply the applicable statutory provisions. The charge contained no reference to the applicable provisions of G.S. 20-141(c). *Barnes v. Teer,* 219 N.C. 823, 15 S.E. 2d 379; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Bowen v. Schnibben,* 184 N.C. 248, 114 S.E. 170.

For the reasons stated the defendant King is granted a new trial.

Appeal by defendant Ward.

This defendant also assigns as error the refusal of the court below to sustain her motion for judgment as of nonsuit. She is relying upon *Edwards v. Vaughn,* 238 N.C. 89, 76 S.E. 2d 359; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *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, and similar cases.

In many instances it is a difficult task to determine whether or not a case falls within and should be governed by one line or another of our decisions. We think, however, the evidence in this case is sufficient to take it out of the line of cases cited and relied upon by this defendant.

The plaintiff is entitled to have the evidence on the entire record considered in the light most favorable to her and she is likewise entitled to the benefit of every reasonable inference to be drawn therefrom. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251.

As we interpret the testimony of the defendant Ward, she admits that she saw the top of her co-defendant's car for 150 feet as it approached but before it entered the intersection. She further testified that King was not driving over 10 miles per hour, and she never fixed her own speed at less than 40 or 45 miles per hour, while the plaintiff's testimony fixed her speed at 65 miles per hour before she took her foot off the accelerator when she was about 250 feet from the intersection. Moreover, the plaintiff testified, "I saw the King car coming across the intersection when the car I was riding in was about 250 feet from the intersection."

The defendant Ward does not contend that she made any effort to slow down other than to remove her foot from the accelerator until she was within 50 or 60 feet of the intersection. There is some evidence tending to show that after the accident the defendant Ward stated she did not apply her brakes until she was within 10 or 15 feet of the intersection. On the other hand, the testimony of one of her witnesses tends to show that skid marks led back from the Ward car from the point of impact for approximately 100 feet.

In *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373, *Johnson, J.*, in speaking for the Court, said: " * * * the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered."

In light of the facts disclosed on this record, we conclude that the evidence against this defendant is sufficient to carry the case to

the jury on the theory of concurrent negligence of both the defendants. *Blalock v. Hart, supra, and cited* cases.

The defendant Ward also assigns as error the following portions of the charge to the jury: "Now, there is also in the law, ladies and gentlemen, a provision to the effect that where two vehicles approach an intersection at the same time, both of them observing the law, then the person that gets in the right of way first has the right of way, and it is up to the other one to yield to him. * * *

"On the other hand, a person, regardless of previous conditions, a dominant highway being on the left or right, etc., a person who first enters an intersection then has the right to proceed through that intersection, without interference and to that extent he has the right of way."

The above instructions are obviously erroneous. The law with respect to entering an intersection under the circumstances pointed out in the first portion of the charge, to which this defendant excepted, is set forth in G.S. 20-155 as follows: "(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in G.S. 20-156 and except where the vehicle on the right is required to stop by a sign erected pursuant to the provisions of G.S. 20-158 * * *."

Likewise, as to the second portion of the charge to which this defendant excepted, G.S. 20-158 provides: "(a) The State Highway Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right of way to vehicles operating on the designated main traveled or through highway and approaching said intersection. 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. * * *"

Therefore, a motorist traveling on a servient highway on which a stop sign has been erected at an intersection with a dominant highway may not lawfully enter such intersection until he has stopped and observed the traffic on the dominant highway and determined

in the exercise of due care that he may enter such intersection with reasonable assurance of safety to himself and others. The failure of a driver, however, on a servient highway, to stop before entering an intersection with a dominant highway is not to be considered contributory negligence *per se* but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether or not under all the facts and circumstances involved such driver was guilty of negligence or contributory negligence. *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Edwards v. Vaughn, supra; Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239; *Matheny v. Motor Lines, supra.*

Ordinarily, when erroneous instructions are given in a charge, such error will not be cured although the court may have given the correct instructions in other parts thereof. It cannot be presumed that the jury was able to distinguish at which time the court was laying down the correct rule. *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767; *Godwin v. Johnson Cotton Co.,* 238 N.C. 627, 78 S.E. 2d 772; *S. v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519; *S. v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658; *Rogers v. Construction Co.,* 214 N.C. 269, 199 S.E. 41.

There are other assignments of error which are not without merit; even so, we deem it unnecessary to discuss them since there must be a new trial and the additional errors complained of may not recur thereon.

As to the defendant King: New Trial.

As to the defendant Ward: New Trial.

PARKER, J., not sitting.

LEE BRADSHER v. EULA MORTON, WIDOW, JAMES H. MORTON, ARTHUR C. SMITH AND BEATRICE MORTON, ADMINISTRATOR AND ADMINISTRATRIX OF THE ESTATE OF JAMES MORTON, DECEASED.

(Filed 10 December, 1958.)

1. Reference § 10—

In reviewing exception to the referee's findings of fact and conclusions of law, it is the duty of the judge of the Superior Court to consider the evidence and make his own findings and conclusions, which he may do by affirming or modifying the findings and conclusions of the referee.

2. Appeal and Error § 40—

On appeal to the Supreme Court from judgment of the Superior Court in reference proceedings, the sole questions presented are whether the facts found by the judge are supported by competent evidence and whether such findings are sufficient to support the judgment.

3. Bailment § 3— Evidence held sufficient to support finding that gratuitous bailee had repaid all money entrusted to his care.

Evidence tending to show that deceased, over a period of years, was permitted to deposit and withdraw monies from plaintiff's safe, receiving receipts therefor, that upon withdrawals, the receipt corresponding to the sum withdrawn was removed and stuck on a filing wire, that the sum remaining after subtracting the total of the perforated receipts from the total receipts, was paid to the administrator of deceased, that such sum was substantially the same as shown to be due by an account book, kept by plaintiff's son in the course of the transactions, with other corroborative evidence, *is held* sufficient to support the referee's finding that nothing was due from plaintiff to the estate.

4. Money Received §§ 1, 3— Evidence held sufficient to support finding that payment was not voluntary.

Evidence tending to show that plaintiff paid the total balance he acknowledged to be due intestate to intestate's personal representatives, that the beneficiaries of the estate claimed a large additional amount to be due, and made repeated demands upon plaintiff and threatened to "take further steps" if the additional amount were not paid, that plaintiff, who was unlettered, old and ill, was greatly worried by the demands, and paid the additional sum to maintain peace in the family, stating that he did not owe the money but for defendants to take it and bring it back after they had found out it wasn't their money, *is held* sufficient to support the referee's finding that the payment of the additional sum was not voluntary.

5. Same: Duress—

An unjust payment loses its voluntary character if it is brought about by fraud, duress or undue influence, and the health, age and mental condition of the person making the payment are properly considered in determining whether the payment was made under duress.

6. Appeal and Error § 49—

The referee's findings of fact, approved by the trial court, are conclusive on appeal if supported by competent evidence even though incompetent evidence may also have been admitted, since it will be presumed that the findings were based on the competent evidence. It is only when all of the evidence supporting a finding is incompetent that such finding should be set aside on appeal.

7. Evidence § 11—

Where the personal representative introduces evidence as to a personal transaction with decedent, he opens the door for the admission of evidence relating otthe transaction by the adverse party.

PARKER, J., not sitting.

APPEAL by defendants from *Hobgood, J.*, in Chambers, April 5, 1958, PERSON Superior Court.

Civil action to recover $20,000.00 alleged to have been paid under duress. The pleadings consist of the complaint, the answer and counterclaim, and the reply.

In subsections (b) and (c) under Paragraph 15 of the complaint, the plaintiff stated the essence of his cause of action:

"(b) That by the aforesaid acts of undue influence, fraud and deceit, practiced in concert against the plaintiff who was unable to resist such acts because of his age and physical condition, the defendants extorted $20,000.00 from the plaintiff without just cause or reason and that equity should not allow these defendants to retain said $20,000.00, or any part of it, no money being due and owing by the plaintiff to said defendants for any reason whatsoever.

"(c) That the consideration which the plaintiff sought, and which the defendants agreed to give, for his payment of said $20,000.00 to defendants was relief from the harassment to which he had been subjected, as set out hitherto, and a discharge in full from the defendants' wrongful claims; that by continuing such harassment, undue influence, threats, and prosecution, the defendants have failed to render the consideration for which the plaintiff paid them the said $20,000.00, and that in equity these defendants should not be allowed to retain said $20,000.00, or any part of it."

The defendants, by answer, admitted the receipt of $20,000.00, but denied the payment was wrongfully exacted. They set up a counterclaim, the substance of which is:

"(1) That the said decedent, James Morton, and Lee Bradsher, brothers-in-law, having been friends over a long and continuous length of time, agreed for the decedent James Morton to deposit such monies as he wished to save in Lee Bradsher's safe located on his premises; that, following this agreement and for a period of approximately over 30 years, the decedent made deposits in Lee Bradsher's safe with the plaintiff, Lee Bradsher, in the total sum of $63,668.35, of which the defendants have received $31,600.00, which sum the defendants allege, on information and belief, was the only amount ever received by the decedent James Morton or by his administratrix and administrator, or any member of his family, both during his lifetime or since his demise."

The defendants pray judgment on the counterclaim for $32,068.85. The plaintiff, by a reply, denied the counterclaim.

Upon the defendants' motion, the court referred the case to L. H. Mount, referee, who conducted hearings for several days. The record contains 250 pages. The referee's findings of fact are in great detail. The following excerpts from them will serve to show the heart of the controversy:

"3. That the plaintiff, Lee Bradsher, is a colored man 76 years

of age, who resides in Bushy Fork Township, Person County; that he has no formal education and is unable to read or write except to a very limited degree; that he has resided in Bushy Fork Township all of his life, owns approximately 500 acres of land with a 34-acre tobacco allotment and has reared 13 children of his own and several children other than his own; that he has an outstanding reputation for truth, honesty and influence in his community.

"5. That the plaintiff, Lee Bradsher, and James Morton, deceased, were lifelong friends; were married to sisters and throughout the years enjoyed a relationship of the greatest trust and confidence.

"8. That about the year 1918, the plaintiff purchased a small safe and it became the custom of James Morton, deceased, the brother-in-law of the plaintiff, to deposit sums of money in the safe for safekeeping; that about the year 1938, the plaintiff, Lee Bradsher, purchased a larger safe; that the plaintiff did not learn the combination to this safe but placed it in the exclusive control of his eldest son, Walter Bradsher; that James Morton, deceased, continued to deposit money from time to time and to make periodic withdrawals from the safe; that the plaintiff, Lee Bradsher, requested his son Walter Bradsher to cease accepting deposits of James Morton's money; however, throughout the years he was aware that James Morton continued to make deposits and withdrawals of money; that when James Morton made a deposit of money in the safe, Walter Bradsher would customarily give him a receipt on which he would sign the name of the plaintiff, Lee Bradsher, and his own name as witness;

"9. That James Morton died suddenly on Saturday, February 25, 1956, and on Sunday or Monday following, the defendant Eula Morton and members of the Morton family came to the home of the plaintiff, Lee Bradsher, together with the defendant Arthur C. Smith, to ascertain the amount of the deceased's money there was in the safe owned by the plaintiff; that a count of the money revealed the amount to be $11,600.00; that the defendant Arthur C. Smith withdrew the amount of $5,100.00 and left in the custody of the plaintiff the amount of $6,500.00; that the plaintiff's son Walter Bradsher gave the defendants a receipt in the sum of $6,500; that subsequently, on or about the 19th day of March, 1956, the defendant Arthur C. Smith, with others of the Morton family, returned and obtained the remaining $6,500.

"12. That at the time of the meeting set forth in paragraph 10 and during the period of demands and negotiations, Lee Brad-

sher, an illiterate, colored man, 76 years or age who, ill, irrational and worried, was willing to do anything to keep peace in the family and his good reputation in the community; the plaintiff had not actively engaged in his business for more than ten years and all his business affairs had been handled by his son Walter Bradsher.

"18. That further demands were made by the defendants through the defendant Arthur C. Smith and that on or about the 16th day of April, 1956, the plaintiff paid to the defendants the sum of $10,000.00 in cash and $10,000.00 in cash on the 18th day of April, 1956, over his protest that he did not owe it and with the admonition to the defendants 'for them to bring it back after they got there and seed it wasn't their money.' "

The referee further found, in substance, that all told James Morton deposited in the plaintiff's safe the sum of $50,048.85; and that Morton had withdrawn $38,418; and that the difference between the deposits and the withdrawals accounted for the $11,600 belonging to Morton and taken from the safe by the defendants immediately after his death; that the plaintiff was unlettered, old, and ill, and that under pressure he paid $20,000.00 to the defendants, no part of which was due.

Upon the facts found, the referee adjudged that the plaintiff is entitled to recover $20,000 from the defendants, who were not entitled to recover anything on their counterclaim; and that each party should pay half the costs. Both parties filed exceptions.

The plaintiff excepted to the referee's failure to find (1) that the defendants by continuous pressure and threats so deprived the "ill, worried, and irrational old man" of his judgment, reason, and discretion as to amount to undue influence, thus causing him to pay $20,000.00 he did not owe; and (2) that the plaintiff only paid the $20,000.00 conditionally, with the understanding that after full accounting, if found not to be due it would be returned. The plaintiff further objected to being charged with one-half the costs.

The defendants filed detailed exceptions to the introduction of evidence, especially the book account kept by Walter Bradsher. They also excepted to all material findings of fact in the plaintiff's favor and to the referee's refusal to allow their counterclaim.

At the hearing on the exceptions to the referee's report, Judge Hobgood sustained the plaintiff's exceptions, made findings in accordance with his request as to conditional payment of $20,000.00, and as to the undue influence and pressure under which it was paid. The court overruled defendants' exceptions on all matters material to the result. The court rendered judgment in the sum of $20,000.00 for the

plaintiff, and adjudged that the defendants pay the costs. Subsequent to the hearing on the referee's report, the parties stipulated: (1) That defendants had receipts showing deposits of $50,048.85; (2) that all except $11,360.00 showed perforations; (3) that plaintiff's evidence as testified to by Walter Bradsher was that $38,418.00 had been withdrawn by James Morton.

From the judgment, the defendants appealed.

Charles B. Wood, R. P. Burns, R. B. Dawes for plaintiff, appellee.

M. Hugh Thompson, Donald J. Dorey, William A. Marsh, Jr., for defendants, appellants.

HIGGINS, J. This appeal comes to us from a judgment of the superior court which, after review, modified and affirmed findings of fact and conclusions of law made by the referee. Based on the findings, the trial judge ordered the defendants to pay to the plaintiff the sum of $20,000.00, and the court costs.

The referee held hearings over a period of several days. His findings of fact are in great detail. Upon exceptions filed thereto, the trial judge carefully reviewed them and the evidence upon which they were based. He modified some in minor detail and made the additional findings referred to in the statement of facts. "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion both upon the facts and upon the law." *Anderson v. McRae*, 211 N.C. 197, 189 S.E. 639.

In passing on the judgment from which this appeal was taken it becomes the duty of this Court to determine two things: (1) Are the facts found supported by competent evidence? (2) Are the facts found to have been thus supported sufficient to support the judgment?

The first essential inquiry relates to the question whether at the time he paid $20,000.00 to the defendant the plaintiff was actually indebted to the defendants' intestate. A number of separate findings of the referee, when combined, answer this question. The evidence in support of the referee's findings that nothing was due comes from different sources. Walter Bradsher, who had charge of his father's safe, testified that at the time of James Morton's death he had $11,600.00 in the safe. He further testified that during the many years he had charge of the safe he kept a book account of all amounts paid to James Morton during his lifetime, and that he had thus paid the sum of $38,418. (The defendants objected to this evidence.) The plaintiff introduced before the referee two disinterested witnesses who testified that shortly before Morton's death he made the statement he had about $11,000.00 in the plaintiff's safe. The

plaintiff also introduced evidence that Morton took receipts for all deposits and from time to time when he made withdrawals he removed a receipt representing the amount of the withdrawal from the other receipts and "stuck" it on a filing wire he kept for that purpose. All receipts showed total deposits of $50,048.85. The receipts with wire perforations amounted to $38,688.85. Thus the unperforated receipts kept for the purpose of showing what was still in the safe amounted to $11,360.00 — slightly less than the amount shown by Walter Bradsher's books and slightly less than the amount turned over to the defendants after the death of their intestate.

Another circumstance tending to show that nothing was due the estate was the failure (as appears from the clerk's records) on the part of the defendants to include the payment in the list of assets belonging to the estate. The evidence is ample to support the findings that the plaintiff, at the time he made the payment which he seeks to have returned to him, was not indebted to the Morton estate.

In order to permit recovery, the plaintiff is required to show that the payment was involuntary. On this question the referee heard much evidence as to the effect the defendants' demands for money had upon the illiterate and worried old man, especially the defendants' claim that they had receipts which showed deposits of more than $50,000.00. With respect to the contested payment, the plaintiff testified: "Yes, I did that because I wanted to relieve this burden. It was not the money burden because I knowed I didn't owe it. The burden was the family and the union that we might have between each other. I was not feared of the people as far as that part goes, but I didn't know what might arise. You take this like I was, then some folks kill folks for a quarter. . . . After he died, I wasn't thinking about nobody going to kill me, and I didn't think I was going to kill nobody, but I had them eight or nine boys and she had two or three. . . . but what I was studying about was hereinafter. I didn't want to die and leave them fighting and me and Jim brothers, . . . It said (the letter from the defendants) we want $18,000, and if you don't pay it . . . we will take further steps . . . That frightened me because I knowed they had my papers."

Members of the plaintiff's family testified he was so worried over the defendants' demands that he was unable to eat. He stated unless he got the trouble settled he would go crazy. The evidence before the referee and the court was sufficient to support the finding the payment here involved was not voluntary, but was made under duress.

In determining whether one acts under duress, "The mental condition of the person acted on must always be taken into consideration. The law does not leave the old, the weak, the ignorant, and the timid

at the mercy of those who would operate on their fears to secure the payment of an unlawful demand." Am. Jur., 40, Sections 161, 162, pp. 825, 826. "Whatever be the cause of the mental weakness—whether it arises from permanent injury to the mind, or temporary illness, or excessive old age — it will be enough to make a court scrutinize the contract with a jealous eye; and any unfairness or overreaching will be promptly redressed." *Bolich v. Ins. Co.*, 206 N.C. 144, 173 S.E. 320. "Undue influence is frequently employed surreptitiously, and is chiefly shown by its results." *In re Thompson's Will*, 248 N.C. 588, 104 S.E. 2d 280.

From the foregoing and other authorities, it may be gathered that an unjust payment loses its voluntary character if it is brought about by fraud, duress, or undue influence. The evidence is sufficient to sustain the findings of the referee, as amended by the court, that the payment of $20,000.00 was obtained by undue influence and pressure which deprived the plaintiff of his "reason and discretion, and caused him to act to his detriment."

Finally, the defendants contend they are entitled to another hearing because the referee and the court considered incompetent evidence admitted over their objection. They say, especially, the book account of Walter Bradsher should have been excluded. While there may be technical objection to some of the evidence, it must be borne in mind that the hearing was being conducted before a referee appointed by the court to make inquiry, to hear evidence, make findings of fact, and state conclusions of law arising thereon—a situation quite different from that which arises in a hearing before a jury. In the nature of things the referee must hear the evidence before he can rule on its competency, whereas the jury is not permitted to hear incompetent evidence. The law recognizes this distinction and only requires that the findings by the referee and by the court be supported by competent evidence. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668; *Reid v. Johnston*, 241 N.C. 201, 85 S.E. 2d 114; *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E. 2d 749; *Cameron v. Cameron*, 232 N.C. 686, 61 S.E. 2d 913.

We are not unmindful of the holding of this Court in *Thompson v. Smith*, 156 N.C. 345, 72 S.E. 379: "If there is any evidence to support the findings and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury." And in *Pack v. Katzin*, 215 N.C. 233, 1 S.E. 2d 566, in passing on a referee's findings, this Court said: "Thereupon, the adoption of these findings by the county court, approved by the superior court, would render the facts so found conclusive and not

open to review upon appeal, unless it be shown the findings were based upon testimony which was incompetent and prejudicial."

"It is settled by all of 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." *Kenney v. Hotel Co.*, 194 N.C. 44, 138 S.E. 349; *Dorsey v. Mining Co.*, 177 N.C. 60, 97 S.E. 746.

In passing on the referee's findings of fact, the correct rule seems to be to approve them if they are supported by competent evidence. However, if the only evidence upon which they are based is incompetent, they must fail for lack of support, and should be set aside on appeal. If both competent and incompetent evidence is introduced, it will be presumed the findings were based on the competent evidence, and if it is sufficient to support them, the findings will stand.

Questions whether Walter Bradsher's evidence, because of his relationship to the plaintiff, is admissible in his father's suit against the dead man's estate, and whether his book account is admissible as a record under *Flippen v. Lindsey*, 221 N.C. 30, 18 S.E. 2d 824, are immaterial. Both personal representatives testified in detail with respect to the transactions here involved, thus opening the door. *Highfill v. Parrish*, 247 N.C. 389, 100 S.E. 2d 840; *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540; *Peek v. Shook*, 233 N.C. 259, 63 S.E. 2d 542.

For the foregoing reasons, the judgment of the Superior Court of Person County is

Affirmed.

PARKER, J., not sitting.

FLORENCE HARRELL, A WIDOW, v. H. EMMETT POWELL AND WIFE, MILDRED F. POWELL; WAYNE RE-DEVELOPMENT COMPANY, INCORPORATED, AND N. E. MOHN, JR.

(Filed 10 December, 1958.)

1. Vendor and Purchaser § 4—

Ordinarily, in the absence of inquiry by the vendors, the purchaser is not under duty to disclose facts materially affecting the value of the property when no fiduciary relationship exists between them, certainly when such facts are a matter of public record, and the purchaser does not, by word or deed, divert full investigation by vendors.

2. Cancellation and Rescission of Instruments § 2— Allegations held insufficient predicate for action to rescind instrument for fraud.

Allegations to the effect that an official of a housing authority which managed property under lease to the Federal Government had knowledge of proposed legislation which would materially affect the value

of the property (Federal Housing Act of 1950) and with such knowledge obtained an option from the owners of the fee, without disclosing the fact of the pendency of such legislation, *is held* insufficient to state a cause of action to set aside the option and deeds pursuant thereto on the ground of fraud in the absence of allegations sufficient to show any fiduciary relationship existing between the parties or any action by the purchaser diverting vendors from making full inquiry, or that vendors made any inquiry of the purchaser and that he denied the facts or remained silent in regard thereto in the face of such inquiry.

3. Fiduciaries—

While a public official occupies a fiduciary relationship to the governmental agency or unit which he serves, it does not follow that he occupies a fiduciary relationship to a private citizen from whom he, as an individual, purchases property, and therefore he is not under duty to disclose to the vendor the pendency or passage of legislation affecting the value of the property when the facts in regard thereto are of public record.

4. Appeal and Error §§ 7, 1[illegible]—

Certiorari granted under Rule 4(a) brings to the Supreme Court for immediate review only the petitioner's exceptions to the rulings made by the court below and is insufficient basis for a demurrer *ore tenus* in the Supreme Court.

PARKER, J., not sitting.

On writ of *certiorari*, granted on petition of plaintiff, to review order of *Parker, J.*, entered June 10, 1958, in WAYNE Superior Court.

Civil action instituted March 19, 1958, to set aside certain conveyances relating to a tract of land in Goldsboro Township, Wayne County, containing approximately 93.25 acres and to recover rents and profits.

Judge Parker's order, now reviewed, allowed defendants' motion to strike designated portions of paragraph 8 and all of paragraphs 9-17, both inclusive, of the complaint.

Unchallenged portions of the complaint, summarized, alleged these facts:

Plaintiff and L. J. Harrell, her husband, who then owned the land as tenants by entirety, executed two paper writings, both recorded in the Wayne County Registry, (1) one dated December 21, 1949, to H. Emmett Powell (hereinafter called Powell), purporting to be an option and contract to convey, and (2) the other dated September 7, 1950, to Wayne Re-Development Company, Incorporated, (hereinafter called Re-Development Company), assignee of Powell, purporting to be a deed.

Powell caused the Re-Development Company to execute two conveyances, both recorded in said registry, (1) a deed of trust dated December 18, 1956, securing (undescribed) notes payable to Powell

and N. E. Mohn, Jr., (hereinafter called Mohn), and (2) a deed dated December 20, 1956, made subject to said deed of trust, purporting to convey an undivided interest of 89% to Powell and an undivided interest of 5% to Mohn and the remaining undivided interest of 6% to five (unnamed) individuals.

Defendants, since 1950, have collected, and they are now collecting, substantial rentals for said land.

Plaintiff's husband, L. J. Harrell, died in January, 1955.

At the time of the execution, acknowledgment and delivery of the purported contract to convey (1949) and the purported deed (1950), L. J. Harrell did not have mental capacity sufficient to execute a valid contract or deed or to give his assent to the execution of a valid contract or deed by plaintiff; and, on account of said mental incapacity of L. J. Harrell, the said contract and deed are void.

The stricken portions of the complaint comprise some six pages of the printed record. A summary of these extended allegations is set forth below.

In 1943, the federal government, by condemnation proceedings, acquired a leasehold interest in said land. It caused to be erected thereon about ninety (90) multiple dwelling units for rental to personnel stationed at or connected with Seymour Johnson Field, a temporary U. S. Army Air Force installation.

The federal government, by its leasehold interest, acquired the exclusive possession and use of said land "for a period of one year with the right to renew from year to year for the term of the War Emergency, as determined by the President, and for three years thereafter, and with the right to remove at the termination of such use all improvements constructed or placed thereon by the Government or any of its agencies."

The Eastern Carolina Regional Housing Authority (hereinafter called the Authority), organized under the North Carolina "Housing Authority Law," under contract with an appropriate federal agency, managed and rented said dwelling units during the World War II emergency and thereafter until the present time.

Powell was Executive Director of the Authority from its organization in 1941 until March, 1958. During this period, Mohn was an employee of the Authority and is now Acting Director thereof. Powell exercised a dominant influence and control over the business, operations and policy of the Authority, and over Mohn, until March, 1958.

Both Powell and Mohn were "fully advised of Federal and State legislation and trends relating to temporary war-time housing and Housing Authorities," particularly the housing facilities erected on said land; and they were "well informed of Federal legislation pro-

posed in the First Session of the 81st Congress of the United States, and . . . knew that the proposed legislation would permit the relinquishment of buildings of a masonry type, such as the buildings on the land in question, which had been erected by Federal Government Agencies on plaintiff's and her husband's land, then in possession of the Government, under condemnation for use and occupancy, . . ."

In August, 1949, Powell well knew "that a Committee of the Congress had made a favorable report to the Congress and had recommended the enactment of pertinent amendments to the Federal Housing Act under which the Administrator could make disposal of the housing projects, similar to the one . . . described herein, to the owner of the land without monetary consideration"; and Powell knew "that such disposal could and would increase the value of the land underlying the housing project by many hundred per cent . . ."

The Housing Act of 1950, proposed in the First Session of the 81st Congress, was enacted on April 20, 1950, in the Second Session thereof; and shortly thereafter, to wit, in July, 1950, Powell caused to be organized the said Re-Development Company, causing 89% of its capital stock to be issued to Powell and 5% thereof to Mohn.

On January 24, 1950, after the said favorable committee report, Powell procured from plaintiff and L. J. Harrell, for a nominal consideration, the purported option and contract dated December 21, 1949; and on September 7, 1950, after the enactment of the Housing Act of 1950, Powell procured from plaintiff and L. J. Harrell, for the grossly inadequate consideration of $27,397.00, the purported deed to said Re-Development Company.

The condemnation judgment provided for the payment to plaintiff and L. J. Harrell of an annual rental of $269.00; but the Housing Act of 1950 "provided a method of obtaining a much larger rental for said land."

Powell, when dealing with plaintiff and L. J. Harrell, "was occupying a public position of trust," to wit, Executive Director of said Authority, and knew that plaintiff and L. J. Harrell, "by reason of his official position, trusted him and had confidence in him." It was his duty, under the circumstances, "to inform the owners, at the time of his negotiations to buy the land, of the change in the status of the property and the impending relinquishment of the interest of the Government therein to the owner of the fee in the land. His failure to disclose these facts, his silence in relation thereto, and his concealment of the facts from the owners of the land, his purpose to procure the land as a part of his scheme to enrich himself, constituted a fraud on the plaintiff and her late husband and induced and caused the purported conveyance of their land to the Agency of the defendants

Powell and Mohn for an unfair, unreasonable and grossly inadequate consideration, when such conveyance would not and could not have been procured for such consideration had the defendant Powell not remained silent concerning the facts then existing, and the changing status of plaintiff's property then known to him but, to his knowledge, unknown to the plaintiff and her husband."

Wherefore, plaintiff prayed judgment.

Dees & Dees, George N. Vann and Lucas, Rand & Rose for plaintiff.

Hubbard & Jones, McLendon, Brim, Holderness & Brooks and Hubert Humphrey for defendants.

BOBBITT, J. We do not consider the clause and sentence stricken from paragraph 8. Plaintiff's petition, filed under Rule 4(a), 242 N.C. 766, on which *certiorari* was granted, related only to paragraphs 9-17, both inclusive.

Plaintiff's only exception and assignment of error is to the entire order of Judge Parker.

The questions presented in plaintiff's brief relate to whether paragraphs 9-17, both inclusive, considered as a whole, allege facts sufficient to constitute a cause of action for fraud. Whether any of the stricken allegations include facts germane to an action to set aside the contract and deed on the ground of the alleged mental incapacity of L. J. Harrell is not presented or considered.

An analysis of the long and complicated federal statute cited as the "Housing Act of 1950," 64 Stat. (Part I) 48 *et seq.*, is unnecessary. We assume, for present purposes, that the proposal and enactment of the federal legislation materially affected *the market value* of the land underlying the housing project.

Bills introduced, committee reports thereon and legislation enacted in the Congress, are public records, available for inspection by any interested person. The Harrells, through counsel or otherwise, could have obtained full and accurate information concerning the proposed and enacted legislation.

However, plaintiff alleged that the Harrells *in fact* had no knowledge or information concerning the proposed or enacted legislation; that, if they had had such knowledge or information, they would not have sold and conveyed their property for $27,397.00; and that Powell, having such knowledge, in his dealings with the Harrells, undertook ("schemed") to purchase and did purchase the property at a price substantially less than its fair market value.

It is *not alleged* that Powell (or any defendant) made a false representation to the Harrells or by word or deed diverted them from full inquiry or investigation concerning any matter pertinent to the market

value of their property. The gravamen of the alleged fraud is Powell's silence, that is, his failure, on his own initiative, to advise the Harrells as to such matters. Plaintiff alleged that it was his *legal duty* to do so.

In the Annotation, "Duty of purchaser of real property to disclose to the vendor facts or prospects affecting the value of the property," 56 A.L.R. 429, the annotator, citing decisions, states the rule as follows: "In the absence of any fiduciary relationship between the parties, the prospective purchaser of land is under no legal obligation to disclose to the vendor facts, much less prospects, within his knowledge, which materially affect the value of the property, where the vendor does not specifically question him in reference thereto, . . ." In accord: 55 Am. Jur., Vendor and Purchaser Sec. 87; 91 C.J.S., Vendor and Purchaser Sec. 57.

In *Smith v. Beatty*, 37 N.C. 456, *Daniel, J.*, for this Court, marked the distinction in these words: "A vendee, who knows that there is a gold mine on the land, is not compelled to disclose that fact to the vendor. But if he is interrogated as to his knowledge of such a thing, and he then denies any knowledge of the mine, this denial will make the transaction fraudulent."

Suffice to say, it is not alleged that the Harrells addressed any question to Powell (or any defendant) or that Powell (or any defendant) made any statement to the Harrells relevant to the market value of the Harrell property.

Plaintiff's position is that Powell's relationship to the Harrells was that of a fiduciary or quasi-fiduciary. The asserted basis for this position is that the Harrells "trusted him and had confidence in him," because Powell "was occupying a public position of trust," to wit, Executive Director of said Authority.

If a fiduciary relationship existed, plaintiff would have sound ground for her further contention that it was Powell's legal duty to affirmatively disclose all relevant facts concerning the market value of the Harrell property; but, in our opinion, the facts alleged do not establish a fiduciary relationship between Powell and the Harrells. The facts alleged by plaintiff are quite different from the factual situations considered by this Court in *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896, and *Speight v. Trust Co.*, 209 N.C. 563, 183 S.E. 734, cited by plaintiff. Here, under the facts alleged, the only relationship between the Harrells and Powell was that of vendor and purchaser.

Admittedly, as asserted by plaintiff, public office is a public trust. But it should be noted that *Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E. 2d 496, and *S. v. Williams*, 153 N.C. 595, 68 S.E. 900, cited by plaintiff, involved, respectively, (1) the relationship of

a person who was chairman of its board of commissioners *to Davidson County, and* (2) the relationship of a person who was a member of its board of aldermen *to the City of New Bern.*

We are concerned only with the relationship of Powell to the Harrells, not with the relationship of Powell to said Authority. The facts alleged are that Powell, in his transactions with the Harrells, was acting solely as an individual. Unquestionably, a public official occupies a fiduciary relationship to the governmental unit or agency which he serves; but it does not follow therefrom that his relationship to a private citizen from whom he, as an individual, purchases property, is that of a fiduciary.

Having reached the conclusion that paragraphs 9-17, both inclusive, considered as a whole, do not allege facts sufficient to constitute a cause of action to set aside said conveyances on the ground of fraud, the order of *Judge Parker* is affirmed.

By demurrer *ore tenus* (filed) in this Court, defendants assert that the complaint fails to state facts sufficient to constitute a cause of action and that the facts alleged show that plaintiff's right to bring this action "is barred by laches and otherwise." Suffice to say, *certiorari* granted under Rule 4(a) brings to this Court for immediate review only the petitioner's exceptions to rulings made by the court below.

Affirmed.

PARKER, J., not sitting.

WILLIAM B. HOWZE v. JAMES L. McCALL AND JAMES O. LYONS

(Filed 10 December, 1958.)

1. Judgments § 11—

A judgment by default and inquiry establishes a right of action of the kind properly pleaded in the complaint, determines the right of plaintiff to recover at least nominal damages and costs, and precludes defendant from offering any evidence, in the execution of the inquiry, to show that plaintiff has no right of action.

2. Same—

While a judgment by default and inquiry precludes defendant from showing that plaintiff has no right of action, the default admits only the averments of the complaint, and if the allegations of the complaint are insufficient to state facts constituting a cause of action, judgment on the inquiry is erroneous and may be set aside upon demurrer *ore tenus* while the action is pending.

3. Appeal and Error § 7—

Demurrer *ore tenus* on the ground that the complaint fails to state

facts sufficient to constitute a cause of action may be filed in the Supreme Court. G.S. 1-134.

4. Pleadings § 15—

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, giving the pleader every reasonable intendment, and admitting for the purpose of the demurrer the truth of the allegations contained in the complaint, but the demurrer does not admit conclusions of law.

5. Automobiles §§ 10, 35, 48— Allegations held to show that negligence of one defendant was sole proximate cause, exonerating other defendant.

Allegations to the effect that the first defendant had left his car parked at nighttime without lights in the southbound lane of traffic in violation of statute, that plaintiff, traveling south, when suddenly confronted with the parked car, applied his brakes and was struck from the rear by an automobile driven by the other defendant in a negligent manner in violation of statute, disclose that the collision was independently and proximately produced by the negligence of the second defendant, and the demurrer *ore tenus* of the first defendant is sustained in the Supreme Court, the allegations of the complaint that the collision was due to the joint and concurrent acts of negligence of both defendants being a mere conclusion of law.

PARKER, J., not sitting.

APPEAL by plaintiff from *Pless, J.*, at June 2, 1958, Schedule "B" Regular Civil Term of MECKLENBURG.

Civil action to recover for personal injury and property damage arising out of an automobile collision allegedly sustained by plaintiff as result of actionable negligence of defendants in way and manner described in the complaint, heard in Superior Court upon inquiry pursuant to judgment by default and inquiry against defendant Lyons.

Plaintiff alleges in his complaint substantially the following: The collision occurred in Mecklenburg County, North Carolina, on or about March 5, 1957, at about 7 o'clock P. M., on the York Road, a two-lane paved highway, which runs in general north-south direction, one lane for southbound traffic, and one for northbound traffic. Plaintiff was driving his 1947 Ford automobile in a southerly direction along said road, keeping a careful lookout and doing all things required by law of a reasonably prudent person in the exercise of due care for the rights of others using said highway. And the plaintiff alleges the following:

"7. That as the plaintiff was driving his said automobile during the nighttime along the said two-lane highway, on his right-hand and proper side of the said highway, there suddenly and without any warning whatsoever appeared immediately in front of him in his lane of travel a parked Chevrolet automobile, which the plaintiff is inform-

ed and believes and therefore alleges belonged to and was parked on the said highway by the defendant Lyons; and that the plaintiff immediately applied his brakes to bring his vehicle to a stop; that * * * the defendant Lyons' automobile was parked at a standstill; completely in and blocking the southbound lane of the said two-lane highway.

"8. That the defendant McCall was to the rear and traveling in the same direction upon the highway that the plaintiff was traveling and did immediately thereafter run into and collide with the rear of the plaintiff's automobile, which collided with the rear of the defendant Lyons' parked Chevrolet automobile.

"9. That the defendant Lyons was negligent on the occasion in question in that:

(a) he parked his said automobile on the said highway obstructing the traveled portion of said highway, including the portion being properly traveled by the plaintiff, in direct violation of North Carolina General Statutes, Sec. 20-161;

(b) he negligently and carelessly parked the said automobile and left it standing upon and obstructing passage on the said highway and negligently and carelessly failed to display red flares or lanterns not less than 200 feet in either direction thereof in direct violation of North Carolina General Statutes, Sec. 20-161;

(c) he negligently and carelessly failed and refused to keep a proper lookout for traffic;

(d) he negligently and carelessly failed to give proper warning to traffic traveling along said highway, and in particular to the plaintiff, that his said automobile was parked on the highway obstructing traffic traveling in the direction of the plaintiff;

(e) he negligently and carelessly failed to drive his vehicle off the said highway and onto the shoulder or into an intersecting nearby street where there was ample room for him to do so, but on the contrary, he negligently and carelessly parked it in a heavily traveled highway during the nighttime;

(f) And he otherwise operated his said vehicle in a manner which he knew or in the exercise of due care should have known would be likely to endanger the property and lives of persons lawfully using said street and highway in direct violation of North Carolina General Statutes, Sec. 20-140."

And plaintiff in his complaint further alleges:

"10. That the defendant McCall was negligent on the occasion in question in that:

(a) he drove his said automobile at an unlawful rate of speed and at a speed that was greater than was reasonble and prudent under the conditions and circumstances then and there existing in direct

violation of North Carolina General Statutes, Sec. 20-141;

(b) he violated North Carolina General Statutes, Sec. 20-149, in that in overtaking the plaintiff's automobile, which was proceeding in the same direction, he failed to pass at least two feet to the left thereof, and also in that he failed to give audible warning with his horn or other warning device before doing so;

(c) he violated North Carolina General Statutes, Sec. 20-152, in that he followed the plaintiff's vehicle more closely than was reasonable and prudent;

(d) he failed to keep a proper lookout and failed to observe and avoid colliding with the plaintiff's automobile;

(e) he failed to keep his said automobile under control;

(f) and he otherwise operated his said vehicle in a manner which he knew or in the exercise of due care should have known would be likely to endanger the property and lives of persons lawfully using said highway in direct violation of North Carolina General Statutes, Sec. 20-140."

And the plaintiff further alleges:

"11. That as a direct and proximate result of the joint and concurrent aforesaid acts of negligence of the defendants, and each of them, the plaintiff's Ford automobile was damaged in the amount and to the extent of $100.00.

"12. That as a further direct and proximate result of the joint and concurrent aforesaid acts of negligence of the defendants, and each of them, as hereinabove described, the plaintiff sustained multiple contusions about his body in general, he sustained a severe injury to his neck and the lower part of his back and other parts of his person; that by reason thereof he suffered and is still suffering excruciating pain, had to seek medical care and attention and is highly nervous and believes and alleges that this condition will continue indefinitely and he is greatly disturbed in body to his great damage and that by reason thereof he has been damaged in the sum and to the extent of $15,000.00."

The record shows that defendant James L. McCall filed answer in which he denies in so far as he is concerned, in material aspect, the allegations of the complaint, and (1) as a first further answer and defense, and in bar of the right of the plaintiff to recover of him, pleads the contributory negligence of plaintiff, and (2) as a second further answer and defense and as a counterclaim and cross-action against the plaintiff, this defendant states a cause of action on actionable negligence of plaintiff for which he makes claim of damage to his automobile.

And the record on this appeal shows the following:

(1) Judgment by default and inquiry against defendant James O.

Lyons entered 17 June, 1957 on motion of plaintiff in default of an answer by Lyons within the time allowed by law.

(2) Orders duly made and entered in the discretion of the court denying motions of defendant Lyons (a) to set aside judgment by default and inquiry and to be permitted to file answer; (b) to be permitted to amend proposed answer lodged with his motion to set aside the judgment; and (c) to be permitted to file cross-action against defendant McCall for contribution under G.S. 1-240;

(3) Order overruling demurrer *ore tenus* filed by defendant James O. Lyons to the complaint of plaintiff;

(4) Judgment (a) that plaintiff's motion to take a voluntary nonsuit, without prejudice, on his cause of action against defendant James L. McCall only, and dismissing same, and (b) that motion of defendant McCall to take a voluntary nonsuit, without prejudice, on his counterclaim against plaintiff, be allowed and the counterclaim dismissed—all consented to by attorney for plaintiff and by attorney for defendant James L. McCall.

(5) Order that the action be set for trial during the week commencing Monday, 2 June, 1958, immediately following the peremptory cases theretofore set for trial during that week.

The record shows that defendant Lyons excepted to each of the foregoing orders and judgments and to the signing and entering of each of them.

The case was submitted to the jury upon these issues which the jury answered as indicated, to wit:

"1. What amount, if any, is the plaintiff entitled to recover for personal injuries? Answer: $900.00.

"2. What amount, if any, is the plaintiff entitled to recover for property damages? Answer: $25.00."

And the plaintiff, upon the coming in of the verdict, moved to set the verdict aside as against the greater weight of the evidence and for a new trial, and for errors committed by the court during the progress of the trial and in its charge to the jury and for errors assigned and to be assigned. The motion was denied, and plaintiff in apt time objected and excepted.

And to the signing of judgment in favor of plaintiff in accordance with the verdict plaintiff excepts, and appeals to Supreme Court.

William H. Booe for plaintiff, appellant.
John H. Small for James O. Lyons, appellee.

WINBORNE, C. J. Under decisions of this Court the effect of a judgment by default and inquiry is threefold. "1. It establishes a right of action of the kind properly pleaded in the complaint. * * * 2. It determines the right of the plaintiff to recover at least nominal

damages and costs. * * * 3. It precludes the defendant from offering any evidence, in the execution of the inquiry, to show that the plaintiff has no right of action." So wrote *Stacy, C. J.*, for the Court in *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179, citing cases in support of each.

In keeping with the primary effect as just stated, "the default admits only the averments of the complaint and if these are insufficient to warrant the plaintiff's recovery, no judgment can be given, as where it appears that the court has no jurisdiction or the facts do not constitute a cause of action." McIntosh's N. C. P & P in Civil Cases, Section 712 at p. 713. See also *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661; *Strickland v. Shearon,* 191 N.C. 560, 132 S.E. 462; s. c. 193 N.C. 599, 137 S.E. 803; and *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835.

The question then arises, upon the demurrer *ore tenus* filed in Supreme Court by defendant, as to whether or not the complaint alleges facts sufficient to constitute a cause of action against defendant Lyons. He has the right to file such demurrer. G.S. 1-134. *Warren v. Maxwell,* 223 N.C. 604, 27 S.E. 2d 721; *Hall v. Coach Co.,* 224 N.C. 781, 32 S.E. 2d 325; *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860; *Stamey v. Membership Corp.,* 247 N.C. 640, 101 S.E. 2d 814; *Adams v. College,* 247 N.C. 648, 101 S.E. 2d 809.

A demurrer admits the truth of the allegations contained in the complaint together with relevant inferences of fact necessarily deducible therefrom, but it does not admit conclusions of law. *McLaney v. Motor Freight,* 236 N.C. 714, 72 S.E. 2d 44, and cases cited.

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

In the light of the provisions of the statute, as so interpreted and applied, and in keeping with the primary effect of the default in the judgment by default and inquiry hereinabove set forth, admitting the truth of the facts alleged in the complaint, this Court concludes as a matter of law that the allegations in respect to the defendant Lyons are fatally defective upon the ground that it affirmatively appears upon the face of the complaint that the injury of which plaintiff complains was, as stated by *Stacy, C. J.*, in *Smith v. Sink,* 211 N. C. 725, 192 S.E. 108, "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or respon-

sible third person," to wit: the defendant McCall. See *McLaney v. Motor Freight, supra,* and cases there cited. See also *Hollifield v. Everhart,* 237 N.C. 313, 74 S.E. 2d 706; *Hooks v. Hudson,* 237 N.C. 695, 75 S.E. 2d 758; *Smith v. Grubb and Construction Co. v. Grubb,* 238 N.C. 665, 78 S.E. 2d 598; *Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342; *Potter v. Frosty Morn Meats, Inc.,* 242 N.C. 67, 86 S.E. 2d 780, and others.

And while plaintiff characterizes the individual acts of negligence alleged against defendant Lyons and the individual acts of negligence alleged against defendant McCall as "joint and concurrent", it is patent that this is a conclusion of law which does not follow. For there are no "joint and concurrent" acts of negligence alleged. So then even if it be conceded that defendant Lyons was negligent in parking on the highway, there would have been no collision between the automobile of the plaintiff and the automobile of the defendant Lyons but for the independent intervening acts of defendant McCall.

The controlling principles, as stated in the *Hooks* case, *supra,* have been re-stated and applied particularly in the *McLaney and Hollifield* cases. In each of these, similar in factual situation to the case in hand, the sufficiency of the allegations of the complaint to state a cause of action was challenged by demurrer upon ground similar to those on which defendant Lyons here relies. And what is said there is applicable here. Hence on authority of these cases and those cited above, the demurrer *ore tenus* is sustained, and the judgment entered in Superior Court in favor of plaintiff and involved on this appeal is set aside and the action dismissed.

Demurrer *Ore Tenus*— Sustained.

Appeal by Plaintiff— Action dismissed.

PARKER, J., not sitting.

BYNUM COFFEY, CARRIE E. COFFEY AND VIRGINIA C. BURGESS v. TOM GREER, MARY ANN GREER, AND R. T. GREER, GUARDIAN AD LITEM FOR TOM GREER AND MARY ANN GREER.

(Filed 10 December, 1958.)

1. Appeal and Error § 38—

Assignments of error not brought forward or discussed in the brief will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Boundaries § 5—

Where the beginning point in the description of one deed calls for the corner of the adjacent tract, such deed has the status of a junior deed for the purpose of ascertaining the beginning corner, notwithstanding

that the deeds to the respective tracts were executed at the same time, and the corner must be established, if possible, from the description contained in the deed to the adjacent tract, and may not be established by the calls in the junior deed, there being no question of adverse possession under color of title.

3. Trial § 28—

A peremptory instruction to answer the issue in a designated way will not be held for error when the court immediately thereafter charges the jury to so answer the issue if the jury should find from the greater weight of the evidence the facts to be as all the evidence tended to show.

4. Boundaries § 7—

Where, in an action to establish a dividing line between the respective tracts of the parties, plaintiffs offer no competent evidence tending to support the boundary as contended by them, the court properly gives the jury peremptory instructions to find the boundary in accordance with defendants' contentions.

5. Appeal and Error § 2—

Even though the assignments of error have not been brought forward and discussed as required by the Rules of Court, the Supreme Court may nevertheless consider the questions discussed when title to realty is involved.

PARKER, J., not sitting.

APPEAL by plaintiffs from *Clarkson, J.*, June Civil Term 1958 of WATAUGA.

This proceeding was originally instituted as an action in ejectment, but upon the evidence adduced in the hearings below it became in effect a processioning proceeding. This cause was heard in this Court on a former appeal at the Spring Term 1955 and the opinion is reported in 241 N.C. 744, 86 S.E. 2d 441.

The pertinent facts may be summarized as follows:

1. The parties claim from a common source, to wit, T. F. Greer, who died intestate on 25 March 1946 seized of a tract of land of which the properties described in the complaint and answer are a part.

2. The lands of T. F. Greer were partitioned among his nine heirs by the execution of partition deeds. On 30 May 1952 the heirs of T. F. Greer conveyed the property described in the complaint to Horace Greer, one of the heirs of T. F. Greer, by deed recorded 23 June 1952 in the office of the Register of Deeds of Watauga County, in Deed Book 71, at page 63. On 16 July 1952 Horace Greer and wife conveyed the said property, consisting of twelve acres, more or less, to Virginia C. Burgess and Carrie E. Coffey, plaintiffs in this action, which deed was recorded on 19 July 1952 in Deed Book 71, at page 107, of the Watauga County Registry.

3. On 30 May 1952 Horace Greer and the other heirs of T. F. Greer conveyed the lands described in the answer, consisting of sixteen acres, more or less, to R. T. Greer, by deed recorded on 21 July 1952, in Deed Book 69, at page 480, in the aforesaid Registry. Thereafter, on 16 January 1953, R. T. Greer and wife conveyed said property to the defendants in this action, which deed was duly recorded in Watauga County on 20 January 1953, in Book 71, at page 63.

4. The description of the tract of land partitioned to R. T. Greer and conveyed to him by deed executed by the other heirs of T. F. Greer and conveyed by him to these defendants is described in both the partition deed and in the deed to the defendants as follows:

"BEGINNING on a stake in old Highway No. 321, corner to Mrs. Rosa Ford tract and runs with said old Highway South 30 West 26¼ poles to a stake in said old Highway; thence crossing bottom South 75½ East 20½ poles to new Highway No. 321; thence up said new Highway South 14 West 7 poles to a stake; thence leaving said new Highway and crossing bottom North 75 West 20 poles to a stake in said old Highway; thence up said old Highway South 11 West 12 poles to a stake in old farm road in front of old residence; thence leaving branch South 63 West 24 poles to a stake on top of the ridge, West of old house spring; thence North 24 West 44 poles to a stake on top of the ridge; thence with ridge, South 84 West 15 poles to a stake on main top of the knob; thence North 5 West 11 poles to corner of the Mrs. Rosa Ford Tract; thence with the line of said tract North 70½ East 22 poles to apple tree; thence North 82 East 16 poles to an ash; thence South 81 East 30 poles to the beginning, containing 16 acres, more or less."

5. The description in the deeds from the heirs of T. F. Greer to Horace Greer and from Horace Greer and wife to these plaintiffs is as follows:

"BEGINNING on a stake in New Highway No. 321, just below old house and corner to the R. T. Greer tract, and runs with the line of said R. T. Greer tract North 75 West 18 poles to a stake in old Highway 321, just below rock house; thence South 11 West 12 poles to a stake in said old Highway, corner to R. T. Greer tract; thence South 63 West 24 poles to a stake on top of the ridge, corner to R. T. Greer tract lot; thence South 17 West 22 poles to a stake in the branch; thence down and with the branch 40 poles to a stake in New River at mouth of a large culvert; thence down said river North 9 East 46 poles to a stake at old bridge; thence North 44 West 6 poles to a stake in center of new Highway 321; thence down said new Highway North 14 East 9¼ poles to a stake, the BEGINNING, containing 12 acres, more or less."

6. At the November Term 1955 of the Superior Court of Watauga County the court appointed L. B. Tyson, a registered Civil Engineer, to survey the perimeter of the defendants' tract of land so as to enable him to locate in said lines the beginning corner of the plaintiffs' land; that after locating the beginning corner, then to survey the perimeter calls of the plaintiffs' land. The surveyor was further directed to show the contentions of the parties in different colors on the official court map. This survey was made on 13 May 1957 and nine copies of the map filed with the court. The plaintiffs' contentions are designated by red lines, and the defendants' contentions by blue lines on said map.

7. The plaintiffs offered evidence to the effect that the red lines on the court map represented their contentions; that after these plaintiffs bought the 12-acre tract of land the stakes referred to in the description could not be found in the back lines of the property. The court surveyor, Mr. Tyson, was offered as a witness by the plaintiffs. He testified on direct examination that he began his survey of the plaintiffs' tract of land at a point designated on the court map as N (on new Highway No. 321 where the plaintiffs contend the beginning corner of their land is located); thence North 75 West 288.78 to a point on old Highway No. 321; thence with the various calls in the deed to the beginning. On cross-examination this witness testified that he ran the contentions of the defendants in accord with the calls in their deed; that the beginning corner of the defendants' land was established by beginning at a known corner, a landmark shown as M on the court map, in the line of defendants' land, and called for in their deed; thence 81 East to point A, the beginning corner in the description contained in the defendants' deed; that the beginning corner in the Rosa Ford tract (Rosa Ford being one of the nine heirs of T. F. Greer and her land was partitioned to her out of the original T. F. Greer tract) was verified by beginning at the same point and plotting the calls in her deed with the calls in the defendants' deed; that beginning with point A as shown on the court map and following the calls in defendants' deed, fixes the Southeastern corner of the defendants' land on new Highway No. 321 approximately 60 or 70 feet South of the point on the new Highway, claimed by the plaintiffs as the beginning corner of their land. The lappage involved by the respective contentions as shown on the court map is 0.466 of an acre.

8. The contention of the plaintiffs as to the correct beginning point on the new Highway No. 321 is designated by a red line on the court map from N to P, that is, the line from the old to the new Highway No. 321, while the defendants contend that the line from D to E designated by a blue line on the court map is the correct dividing line between these respective tracts of land, and that the point designated

as E on new Highway No. 321 on the court map is the beginning point of the plaintiffs' tract of land.

The court submitted the following issue to the jury: "Where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants?"

The parties stipulated that the jury might answer the issue, if it answered it favorable to the plaintiffs, by the letters N to P, and that the red line would control as to the rest of the courses and distances; that if the jury answered the issue favorable to the defendants, it would answer it from letters D to E, and the rest of the blue line would then control. The court gave the following instruction to the jury: "The court is giving you what is known as a peremptory instruction, and is instructing you peremptorily to answer this issue: D to E. So the court instructs you now, gentlemen of the jury, that if you find from the evidence the facts to be as all of the evidence tends to show, and you find by the greater weight of the evidence, then you will answer this issue: From point D to point E."

The jury returned to the courtroom several times and asked for additional instructions. The jury later returned to the courtroom with what purported to be its verdict in the following language: "We the jurors have agreed unanimously in favor of the red line."

The court refused to accept the verdict and repeated the peremptory instruction theretofore given. The jury thereafter returned as its answer to the issue, "D to E," without striking out its former answer. The court accepted the latter verdict and entered judgment accordingly. The plaintiffs appeal, assigning error.

Louis H. Smith for plaintiff, appellants.

Bowie, Bowie & Vannoy, Wade E. Brown for defendant, appellees.

DENNY, J. The appellants in the trial below excepted to the rulings of the court in excluding certain proffered evidence, which evidence is set out in the record. Assignments of error Nos. 1 and 2 based on these exceptions are not brought forward or discussed in the appellants' brief. Hence, they will be deemed as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 562.

As a matter of fact, the appellants do not bring forward in their brief a single assignment of error or exception on which their assignments of error are based. They do, however, discuss generally and insist that their title is superior to that of the defendants' because their deed was recorded three days prior to the deed of defendants; that the court committed error in giving peremptory instructions to the jury, and in failing to accept the first verdict returned by the jury.

The validity of the plaintiffs' title or the superiority thereof is not involved in this action. The appellants seem to be disturbed over the

statement in the former opinion in this cause to the effect that, "the fact that the description in the plaintiffs' deed calls for a corner in the defendants' land, as its beginning corner, and runs thence with a line of defendants' land, gives the plaintiffs' deed the status of a junior deed notwithstanding the fact that the respective deeds, from the common source, bear the same date." This statement has no particular legal significance except to point out that where the beginning corner of a tract of land is designated as a corner of another tract of land, such corner cannot be established by the calls in the deed which calls for the beginning corner in such other tract. The beginning corner must be established if possible from the description contained in the deed to such other tract of land. *Coffey v. Greer, supra; Goodwin v. Greene,* 237 N.C. 244, 74 S.E. 2d 630; *Bostic v. Blanton,* 232 N.C. 441, 61 S.E. 2d 443; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Thomas v. Hipp,* 223 N.C. 515, 27 S.E. 2d 528.

We are not dealing with adverse possession under color of title on this appeal. We are dealing only with the required legal method to locate the beginning corner of the plaintiffs' tract of land. Consequently, on this record, the fact that the plaintiffs' deed was registered prior to the defendants' deed has no bearing whatever on the question involved.

Under our decisions, *the calls in the plaintiffs' deed are not competent as evidence* to establish the location of the corner in the defendants' deed, which is the beginning corner of the plaintiffs' tract of land. *Thomas v. Hipp, supra; Hill v. Dalton,* 136 N.C. 339, 48 S.E. 784; *Euliss v. McAdams,* 108 N.C. 507, 13 S.E. 162; *Corn v. McCrary,* 48 N.C. 496; *Pula v. McGhee,* 34 N.C. 332; *Sasser v. Herring,* 14 N.C. 340.

The appellants' challenge to the peremptory instructions of the court, in our opinion, is without merit. It is true the first sentence of the instruction set out hereinabove, standing alone, is not in approved form for a peremptory instruction. *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892. However, such instruction was followed immediately, in the very next sentence, by a proper form for a peremptory instruction, leaving it to the jury to determine the credibility and sufficiency of the evidence. Moreover, the plaintiffs do not challenge the correctness of the peremptory instruction as to form.

It is clear on this record that the plaintiffs are relying solely on the calls in their own deed to establish their contentions, together with the further contention that since their deed was recorded prior to the defendants' deed, it is superior in title to the defendants' deed. They take the position, therefore, that since their deed was registered first, the fact that the description in their deed calls for a corner in the

defendants' land as their beginning corner, may be ignored. This position is untenable.

In our opinion the plaintiffs in the trial below did not offer any competent evidence to establish their contentions. On the other hand, the court surveyor, the plaintiffs' witness, did testify on cross-examination with respect to the location of the beginning corner of the plaintiffs' tract of land according to the contentions of the defendants, supported by the calls in their deed and the survey of the defendants' tract of land as shown on the court map.

The plaintiffs offered no evidence challenging the correctness of the defendants' contentions or the correctness of the survey of their tract of land, as shown on the court map, except the calls in their own deed as shown on said map. As heretofore pointed out, the calls in the plaintiffs' deed are not competent as evidence to establish the beginning corner of their tract of land. Therefore, on this record, the plaintiffs were not prejudiced by the peremptory instructions or the refusal to accept the first verdict of the jury. The defendants, who demurred to the plaintiffs' evidence, were entitled to a directed verdict since the plaintiffs failed to offer any competent evidence upon which a verdict in their favor could be sustained. *Spruill v. Insurance Co.*, 120 N.C. 141, 27 S.E. 39; *Barbee v. Scoggins*, 121 N.C. 135, 28 S.E. 259; *Porter v. Armstrong*, 129 N.C. 101, 39 S.E. 799; *Crenshaw v. Street R.R.*, 144 N.C. 314, 56 S.E. 945; *Greer v. Hayes*, 216 N.C. 396, 5 S.E. 2d 169; McIntosh, North Carolina Practice and Procedure, 2nd Ed., Volume II, section 1516, at page 53.

In *Greer v. Hayes, supra*, this Court, speaking through *Barnhill, J.*, later C.J., said: "If the plaintiff is unable to show by the greater weight of the evidence the location of the true dividing line at a point more favorable to her than the line as contended for by the defendants, the jury, as a matter of law, should answer the issue as to the true dividing line in accord with the contentions of the defendants."

We have considered the questions discussed in the appellants' brief as though the assignments of error had been brought forward and discussed as required by the rules of this Court. We have followed this course because the title to property is involved. *Edwards v. Butler*, 244 N.C. 205, 92 S.E. 2d 922.

In the trial below we find no error in law.

No Error.

PARKER, J., not sitting.

JOHN H. GALES AND WIFE, JULIETTE S. GALES v. J. O. SMITH.

(Filed 10 December, 1958.)

1. Executors and Administrators § 24a— Evidence held sufficient to make out cause of action to recover on quantum meruit for personal services.

The evidence in this case *is held* sufficient to show that plaintiffs, husband and wife, and the father of the feme plaintiff entered into an agreement under which the feme plaintiff was to perform housework and look after her mother, and the male plaintiff was to operate the father's farm in consideration of the father's promise to deed plaintiffs the farm so that they would become the owners at the time of the father's death or would devise same to plaintiffs, and that plaintiffs fully performed their part of the contract, but that the father breached the contract by ejecting plaintiffs without cause and by devising the property to others, and therefore nonsuit was error in plaintiffs' action to recover the reasonable value of their services.

2. Trial § 22—

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit.

3. Frauds, Statute of, § 6b: Wills § 4—

An oral agreement to devise realty is within the statute of frauds and unenforceable.

4. Executors and Administrators § 24c—

Any presumption arising from the family relationship that personal services rendered were gratuitous is rebuttable by proof that the services were performed in consideration of the agreement to pay therefor by conveyance or devise.

5. Executors and Administrators § 24a—

In an action to recover on *quantum meruit* for personal services rendered in reliance on a contract to convey or devise, allegations and evidence as to the alleged contract are relevant, not as a basis for recovery on the contract, but to rebut any presumption that the services were gratuitous.

6. Trial § 23a—

Where plaintiffs' allegations and evidence are sufficient to make out a cause of action entitling them to nominal damages at least on the basis of *quantum meruit*, involuntary nonsuit may not be properly entered, notwithstanding the absence of evidence as to the reasonable value of the services.

PARKER, J., not sitting.

APPEAL by plaintiffs from *McKinnon, J.*, April Term, 1958, of BRUNSWICK.

The appeal is from a judgment of involuntary nonsuit entered at the close of plaintiffs' evidence.

Plaintiffs, husband and wife, instituted this action on October 30, 1956, to recover from J. O. Smith, father of the feme plaintiff, the sum of $15,000.00, alleged to be the reasonable value ($250.00 per month for 60 months) of services performed by them in behalf of the feme plaintiff's parents.

J. O. Smith owned a 90-acre farm in Brunswick County, of which 50 acres were cleared. Plaintiffs lived in J. O. Smith's home, located on said farm, from October, 1951, until October, 1956, when, pursuant to legal proceedings instituted by J. O. Smith, they were ejected from the premises.

Plaintiffs alleged: "3. That during the month of October, 1951, the defendant entered into an agreement with the plaintiffs whereby it was agreed that the plaintiffs would move into the home of the said defendant and live with the defendant and his wife, Olivia Smith, the plaintiff Juliette S. Gales to do all of the housework which consisted of cooking, washing, ironing, taking care of the garden and yard, cleaning and taking care of the house and rendering personal service to the defendant J. O. Smith and his wife, Olivia Smith; and the plaintiff John H. Gales was to work on the farm hereinafter referred to, planting, cultivating and gathering the crops, and it was agreed that the defendant J. O. Smith, in payment for said services, would, prior to his death, convey to the plaintiffs his farm and home or would devise same to them so that they would become the owners of same at the time of the death of the said J. O. Smith. It was further understood and agreed that the terms of said contract were such that the plaintiffs would live in the home of the defendant during the lifetime of the defendant and the defendant's wife and would perform the services hereinbefore set forth and that the defendant would convey or devise said farm and home to the plaintiffs in payment for said services."

Plaintiffs alleged further that on August 20, 1956, "the defendant told the plaintiffs that he had made a will and had devised all of his property, including said farm and home, to all of his children to be equally divided, each to share and share alike, and that he was not going to pay the plaintiffs anything for the five years' service which they had rendered the defendant and his wife in accordance with the agreement between them."

Plaintiffs alleged further that they fully performed their obligations under said contract, but defendant breached said contract (1) by forcing plaintiffs to leave said home and premises without just cause, and (2) by failing to convey or devise said property to plaintiffs.

Answering, J. O. Smith, defendant, after denying the material allegations of the complaint, alleged, in substance, the following: In Oc-

tober, 1951, plaintiff John H. Gales rented defendant's farm on a share-crop basis. While plaintiffs were free to live elsewhere, if they lived in the home with defendant and his wife it was agreed that they would help with the household work. In August, 1956, defendant did tell plaintiff John H. Gales that he was not indebted to said plaintiff but that in fact said plaintiff was indebted to him. Plaintiff John H. Gales became so abusive to defendant, particularly in the summer of 1956, that defendant became fearful of his health and safety; and, since plaintiffs refused to leave his home upon his request, he caused their removal by ejectment proceedings. What he had done for plaintiffs was of substantially more value than what plaintiffs had done for him and his wife.

J. O. Smith, defendant, died in February, 1957; and David C. Smith, Executor of J. O. Smith, substituted as party defendant, adopted the answer J. O. Smith had filed.

Pertinent portions of plaintiffs' evidence will be set forth in the opinion.

Plaintiffs excepted and appealed, assigning as error (1) the exclusion of certain testimony offered in behalf of plaintiffs, and (2) the judgment of involuntary nonsuit.

E. J. Prevatte for plaintiffs, appellants.
Herring & Walton for defendant, appellee.

BOBBITT, J. Evidence offered by plaintiffs tends to show, *inter alia*, that from October, 1951, until October, 1956, plaintiff John H. Gales successfully cultivated and substantially improved the J. O. Smith farm; that, by his efforts, a tobacco barn and a packhouse were built thereon and new and improved farm machinery of substantial value was acquired; and that the feme plaintiff did the housework and cared for her invalid mother until her death on January 13, 1956. In short, plaintiffs' evidence tends to show that they fully performed all obligations imposed on them by their alleged contract with J. O. Smith.

Did J. O. Smith, in October, 1951, enter into an agreement with plaintiffs, *as alleged in the complaint?* This issue was raised by the pleadings. The determinative question now presented is whether plaintiffs' evidence was sufficient to require submission of this issue to the jury.

The testimony of plaintiffs tends to show the following:

Plaintiffs were married on September 2, 1950. The feme plaintiff, youngest child of J. O. Smith, was then living with her parents in the J. O. Smith home. After their marriage, John H. Gales, who had been living with his brother in Shallotte, completed a crop, worked for a month in a fish factory near Southport, and thereafter worked on a dredge, first in Wilmington, then in Georgetown, South Carolina, then

in Brunswick, Georgia. (For his work on the dredge, he "cleared on the average over $60.00 per week.") Meanwhile, except for occasional week-end trips to Wilmington and Georgetown, the feme plaintiff continued to stay in the home of her parents.

In September, 1951, John H. Gales obtained leave to come home. He stayed until their first child was born. After completion of the job at Brunswick, the dredge was to be transferred to Florida for work that would take more than a year. The feme plaintiff wanted to go to Florida with her husband. It was decided that when he got to Florida he would get an apartment and send for her.

When J. O. Smith "found out" that plaintiffs were going to leave, he "talked it over" with John H. Gales. After their conversation, John H. Gales went back to Brunswick; but upon completion of the Brunswick job he notified the Captain that he was going home to farm. He then went to the home of J. O. Smith, where his wife and child were staying, and began farming with J. O. Smith in October, 1951.

Danny Gales, a brother of John H. Gales, testified that, on his way home from Southport, "while John was still on the dredge," he stopped at the home of J. O. Smith. He testified that, in the course of their conversation, Mr. Smith stated: "Danny, I am too old to be working like I am working. Juliette, here, she's here waiting on her mother and tending to her mother. John is supposed to be here. He ought to quit that dredge and come home. At my death I am going to give Juliette the place. John ought to be here working for his interest; it will be something for him in the future; he ought to be here working instead of me working like I am working." Danny Gales testified further that he told Mr. Smith that he agreed with him and that John would be a big help to him and it would mean something to John and Juliette in the future. Whereupon, so Danny Gales testified, Mr. Smith stated: "Well, at my death I'm going to give them the place, if he will come home; he ought to come on home and go to work and help me and do that much for his interest." Danny Gales testified that he visited Mr. Smith again, about three weeks after the conversation referred to, at which time he found that John had quit the dredge and had come in and gone to work at Mr. Smith's.

Danny Gales also testified: "Several months after the death of Mrs. Orin (Mrs. J. O.) Smith, I met Mr. Smith on the highway close to where he lived and I stopped and shook hands with him. I had not seen him in a couple of months and I asked him how they were all getting along and he did not seem to say much, until finally he said 'Danny, I am sorry not to give Juliette and John the place.' I asked him why he had decided not to give them the place, and I said that Juliette was mighty good to her mother and that she and John had worked there with him. Mr. Smith then said: 'Well, I am afraid that

if I go ahead and give the place to John, that he will mortgage the place and destroy it, do away with the place; I want to keep the place in the Smith family; I don't want it to get out of the Smith family.' I then told him that he ought to have thought about that before he made John and Juliette that offer and they could have got out somewhere else and would not have been hooked up there. Mr. Smith dropped his head and did not answer me."

The foregoing evidence, when considered in the light most favorable to plaintiffs, was sufficient to require submission of the case to the jury.

It is noted that discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *White v. Lacey,* 245 N.C. 364, 369, 96 S.E. 2d 1.

An oral agreement to devise realty is within the statute of frauds and therefore unenforceable. *Humphrey v. Faison,* 247 N.C. 127, 134, 100 S.E. 2d 524, and cases cited.

Assuming, without deciding, that the family relationships, nothing else appearing, raise the presumption that the services performed by plaintiffs were gratuitous, *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907, and cases cited, such presumption is rebutted if and when plaintiffs establish that the services were performed in consideration of defendant's agreement to pay therefor by conveyance or devise of his farm, effective as of the date of his death.

The applicable rule is stated by *Stacy, C. J.,* in *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764, as follows: "When services are performed by one person for another under an agreement or mutual understanding (fairly to be inferred from their conduct, declarations and attendant circumstances) that compensation therefor is to be provided in the will of the person receiving the benefit of such services, and the latter dies intestate or fails to make such provision, a cause of action accrues in favor of the person rendering the services."

Plaintiffs do not seek to enforce the alleged contract. They seek to recover on *quantum meruit.* Allegations and evidence as to the alleged contract are relevant, not as the basis of recovery, but to rebut any presumption that the services were gratuitous, *Wells v. Foreman,* 236 N.C. 351, 72 S.E. 2d 765, and as facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other, *Nesbitt v. Donoho,* 198 N.C. 147, 150 S.E. 875.

It is noted that, while plaintiffs offered evidence as to the nature and extent of their services, no evidence was offered as to the reasonable value of such services. However, implied assumpsit (contract) is the basis for recovery on *quantum meruit;* and, if such contract was breached by J. O. Smith, plaintiffs were entitled at least to nominal damages. *Sineath v. Katzis,* 218 N.C. 740, 756, 12 S.E. 2d 671; *Bowen*

v. Bank, 209 N.C. 140, 144, 183 S.E. 266. This is sufficient to eliminate said deficiency in plaintiffs' evidence as a ground for judgment of involuntary nonsuit.

It appears from the testimony of the feme plaintiff that she had three sisters and four brothers, all living except one brother. Although it appears that plaintiffs introduced, without objection, the last will and testament of John Orin Smith, dated August 20, 1956, and probated March 1, 1957, the provisions thereof are not set forth in the record. However, since the arguments in both briefs proceed on the assumption that J. O. Smith did not convey or devise the said realty to plaintiffs, we are disposed, for present purposes, to act on the same assumption.

In holding that the court was in error in granting defendant's motion for nonsuit, we have considered only the *admitted* evidence. It is not necessary to decision, and we deem it inadvisable on the present record, to discuss plaintiffs' assignment of error directed to the exclusion by the court of a portion of the testimony of Mrs. Cora Smith wherein she undertook to testify to declarations made to her by Carmen Smith, a son of J. O. Smith.

The judgment of involuntary nonsuit is reversed.

Reversed.

PARKER, J., not sitting.

STATE v. LEONARD WELBORN.

(Filed 10 December, 1958.)

1. Intoxicating Liquor § 5—

The evidence disclosed that defendant was in possession of five pints of taxpaid whisky in a building used by him as a combination store and dwelling, and that the whisky was found in the room used as a bedroom, with the seal of one of the bottles broken, but it was stipulated by defendant's counsel that defendant had the whisky in his store. *Held:* The evidence is sufficient to support the charge of unlawful possession, and defendant's motion to nonsuit was properly denied. G.S. 18-11.

2. Constitutional Law § 10—

The enactment of law is the function of the General Assembly, and the courts must construe a statute as written.

PARKER, J., not sitting.

HIGGINS, J., concurring.

APPEAL by defendant from *Sharp, S. J.*, April 14, 1958 Criminal Term of GUILFORD.

Defendant was indicted and tried in the Municipal-County Court

of Guilford on a warrant charging (1) unlawful possession of four and one-half pints of taxpaid whisky, and (2) possession of the whisky for sale. He was there found guilty on each count, and from a judgment imposing a prison sentence he appealed to the Superior Court. The jury in the Superior Court returned a verdict of guilty of illegal possession of taxpaid whisky and not guilty on the count charging possession for the purpose of sale.

The facts with respect to the possession are not in controversy. Guilford County has not elected to come under the provisions of Article 3, c. 18, of the General Statutes. Liquor control stores have been established in Greensboro pursuant to provisions of c. 394, S.L. 1951. Defendant occupies a building called Oak Tree Grocery. The building, on Church Street Extension, is about one-quarter of a mile beyond the corporate limits of Greensboro. The building, formerly a filling station, is about twenty by thirty feet. The front portion is used by defendant as a store. There are two rooms in the rear which open into the store; one used as a storeroom, the other as defendant's bedroom. On the date named in the warrant defendant purchased five pints of whisky from a control store in Greensboro. He carried the whisky to the Oak Tree Grocery and put all five pints on a table in the room used by him as a bedroom. He broke the seal on one of the bottles and took a drink. Officers armed with a search warrant went to the store and on entering saw the whisky as described.

The court imposed a prison sentence on the jury's verdict of guilty, and defendant appealed.

Attorney General Seawell and Assistant Attorney General Love, for the State.

J. Owen Lindley and Stedman Hines for defendant, appellant.

RODMAN, J. Counsel for defendant, presumably in deference to the decisions, *S. v. Hardy,* 209 N.C. 83, 182 S.E. 831, *S. v. Lowe,* 209 N.C. 846, 183 S.E. 749, and *S. v. Carpenter,* 215 N.C. 635, 3 S.E. 2d 34, which construe the statute (G.S. 18-11) defining a dwelling where whisky may be lawfully possessed, said: "Your Honor, we will stipulate that is the whiskey he had in his store."

Defendant, by motion to nonsuit and exceptions to the charge, presents this question: Was possession of taxpaid whisky in his store when not possessed for sale illegal? Unless we overrule a consistent line of decisions, the answer must be in the affirmative. *S. v. Shinn,* 238 N.C. 535, 78 S.E. 2d 388; *S. v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Carpenter, supra; S. v. Hardy, supra; S. v. Lowe, supra; S. v. Briscoe,* 194 N.C. 582, 140 S.E. 212; *S. v. Pierce,* 192 N.C. 766, 136 S.E. 121; *S. v. Knight,* 188 N. C. 630, 125 S.E. 406; *S. v. McAllister,* 187 N.C. 400, 121 S.E. 739.

The cases relied on by defendant, *S. v. Ritchie,* 243 N.C. 182, 90 S.E. 2d 301; *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894; *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623, determine the legality of possession in one's residence. They hold that such possession is not *per se* illegal. They do not declare that storage in a place other than a residence is legal.

Defendant committed no crime when he purchased taxpaid whisky from an authorized source and transported it to its destination. G.S. 18-49 and 50. The crime was committed after the transportation was completed and when the whisky found its place of abode in a building declared by statute improper for that purpose. G.S. 18-11. Possession is illegal, G.S. 18-2, if not at an authorized place. The Legislature has the right, if it deems wise, to enlarge the class of places where legally acquired and transported whisky may be kept. We possess no such power.

No error.

PARKER, J., not sitting.

HIGGINS, J., concurring. The evidence disclosed the defendant occupied a building of three rooms. The front room contained a small stock of groceries consisting of canned goods, soft drinks, cigars and cigarettes. The middle room "is where he kept a lot of empty bottles he has thrown away, and in the other room he has a bed and table. We went in the back room . . . where the bed was, . . . on the table . . . there was four pints of taxpaid liquor with the seal unbroken and one pint with the seal broken with about one-half of it gone." The defendant offered evidence that he lived in the back room.

In my opinion the evidence offered was insufficient to go to the jury on the charge of unlawful possession upon the ground the possession was in the defendant's private dwelling. However, the defendant's stipulation, entered as a judicial admission before the court, placed the whisky in the defendant's *store.* The stipulation overrode the evidence and was sufficient to support the conviction.

Some of our cases seem to hold that if a building is occupied in part as a private dwelling, and is used in part for business purposes, that part occupied as a dwelling loses its private character. My view is that if that part of the building used as a private dwelling is entirely cut off and separated by a wall, even though the wall contains a door, its character as a private dwelling is not destroyed. If entirely separated in a manner sufficient to provide privacy where no business is done, the separation may be by wall, by a floor, by two walls, or by two lots. Many people set aside a room in the home for business purposes. That part not so used is still the private dwelling.

The separation for the different purposes and not the size of the building is the test.

Under the law as it is presently written, one has the right to purchase not in excess of one gallon of liquor from an ABC store, provided the taxes due to the United States and to the State of North Carolina have been paid. The purchaser has the right to transport the purchase from the store to his private dwelling, which he occupies as such, and to keep it for the use of himself, his family and his *bona fide* guests. I concur in the result because of the stipulation.

STATE v. LESLIE BROWN, JR.

(Filed 10 December, 1958.)

1. Criminal Law § 99—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable intendment thereon, and every reasonable inference therefrom.

2. Homicide § 4—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

3. Homicide § 13—

The intentional killing of a human being with a deadly weapon raises the presumption of malice, constituting the offense murder in the second degree, nothing else appearing, with the burden upon the State to establish premeditation and deliberation beyond a reasonable doubt in order to establish a case of murder in the first degree.

4. Homicide § 20—

The evidence in this case *is held* sufficient to be submitted to the jury in support of the charge of murder in the first degree.

5. Criminal Law § 84: Homicide § 18— That witness had made like statements prior to trial is competent for purpose of corroboration.

Defendant, in substantiation of his evidence on his plea of self-defense, introduced testimony of a witness as to a conversation between the witness and deceased on the day of the homicide in which deceased stated he was going to kill defendant or defendant was going to kill him. The witness further testified that he had repeated the substance of the conversation to others. *Held:* The exclusion of testimony of another witness that he had heard the first witness on the day of the crime relate his conversation with deceased, must be held for prejudicial error, it not being necessary to the competency of such corroborating evidence that the witness should have identified persons to whom he had made the statements.

PARKER, J., not sitting.

APPEAL by defendant from *Seawell, J.*, at February 1958 Criminal Term of BLADEN.

Criminal prosecution upon a bill of indictment charging defendant with murder in the first degree of one Joe Mitchell Smith.

Defendant pleaded not guilty.

Upon trial in Superior Court the State offered evidence from which the State contends the charge against the defendant is supported. On the other hand, defendant testified and offered testimony of others which he contends supports his plea of self-defense.

Since, as hereinafter stated, there must be a new trial for error shown, a recitation of the evidence set forth in detail in the record is deemed unnecessary.

The case was submitted to the jury under the charge of the court.

Verdict: Guilty of murder in the first degree with the recommendation for life imprisonment as charged in the bill of indictment.

Judgment: Confinement in the State Penitentiary "for the remainder of your natural life."

Defendant excepts thereto and appeals to the Supreme Court, and assigns error.

Assistant Attorney General T. W. Bruton, for the State.
Clark, Clark & Grady for defendant, appellant.

WINBORNE, C. J. This appeal presents in the main two questions:

1. Is the evidence offered upon the trial in Superior Court, when considered in the light most favorable to the State, giving to the State the benefit of every reasonable intendment thereon, and every reasonable inference therefrom, as is done in testing its probative value on motion to nonsuit, sufficient to take the case to the jury on the first degree murder charge in compliance with the statute G.S. 14-17?

In this connection it is appropriate to recur to applicable principles of law.

In *S. v. Hawkins*, 214 N.C. 326, 199 S.E. 284, the principles and authorities in support thereof are set forth as follows:

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. * * * * The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree * * * 'The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner.' * * * 'Premeditation means "thought beforehand" for some length of time, however short.' * * * 'Deliberation means that the act is done

in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' * * * 'In determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the defendant, before and after, as well as at the time of, the homicide, and all attending circumstances.' * * * ."

Subsequent decisions of this Court uniformly follow these principles.

And in the light of these principles applied to the evidence in case in hand, this Court is unable to say that in no view is there no evidence in support of the charge of murder in the first degree. Hence the case was properly submitted to the jury.

2. But as to the second question, do the exceptions taken in the course of the trial in Superior Court, and assigned as error, disclose error prejudicial to defendant, this Court holds that the answer is "Yes", specifically in respect to ruling to which exception No. 3 relates.

This arose in this manner: After testifying as to threats made to him on morning of May 8, 1957, by Joe Mitchell Smith, defendant recalled the witness Neimiah Mitchell, who had testified for the State to the effect that Joe Mitchell Smith appeared to be "a little mad or angry" that morning when he, Smith, took him, Mitchell, his wife and daughter to the farm of "Mr. Joe Lennon" to pull tobacco plants, and that he talked with Smith that morning. And upon such recall Neimiah Mitchell testified: "Mr. Smith come by about 7:30 A.M. on May 8th to get me, my wife and my daughter; I talked with him before the others got to the pickup. Mr. Smith told me he had had some words with my buddy. I asked him who was my buddy; he said Leslie Junior Brown. I asked him what did he do, and he said plowing the road up, and Mr. Smith said he was going to kill Leslie Junior Brown or Leslie was going to kill him; he was going back to get his rifle * * * I am not related to the defendant. I have no interest in this case." And by cross-examination the State undertook to impeach him, and he concluded by saying "What I testified to, I talked about around home."

Then Mary Anna Mitchell, wife of the witness Neimiah Mitchell, who also had testified as witness for the State, was recalled by defendant. She testified: "On the morning of May 8, I got into the cab of Mr. Mitchell Smith's pickup. I did not see anything in the cab of the

pickup. Later I had a conversation with my husband, Neimiah Mitchell, about what had transpired between he and Mr. Mitchell Smith."

Then the case on appeal shows that the following took place:

"Q. What was that conversation? State objects.

"Off. This is purely for corroboration.

"J. No sir, he said he couldn't recall who he had talked it over with.

"Answer put in record as follows: 'He told me that Mr. Mitchell and Junior had some words, and he told me that Mr. Mitchell told him that he was coming back when he leave from carrying us down there and get his rifle and he was going to kill Junior or Junior was going to kill him, and that's all I know.'

"We had that conversation at our house when we came back from pulling the plants."

"J. My ruling is the same. This constitutes Exception No. 3."

In this connection it is competent to corroborate a witness by showing that he has previously made the same statement as to the transaction as that given by him in his testimony, and that it is not necessary to ask the witness to whom such former statement, offered in corroboration, was made. *Burnett v. R.R.*, 120 N.C. 517, 26 S.E. 819, cited in numerous later cases. See Shepherd's Annotations. See also *Gregg v. Mallett*, 111 N.C. 74, 15 S.E. 936; *S. v. McKinney*, 111 N.C. 683, 16 S.E. 235; *S. v. Maultsby*, 130 N.C. 664, 41 S.E. 97.

In the *McKinney case, supra,* in opinion by *Clark, J.*, the Court had this to say: "The second exception is that the State was allowed to corroborate two of its witnesses by showing that soon after the homicide they made the same statement of the occurrence as they had testified to in the trial. This has often been held competent," citing cases.

In the light of these principles, applied to factual situation in hand, it was competent for purpose of bolstering his credibility to show that witness Neimiah Mitchell had made the same statement as he had testified to in the trial. His statement was corroborative of testimony of defendant. Hence the credibility of Neimiah Mitchell was material and pertinent to the case before the jury.

Therefore the exclusion of the proffered testimony of Mary Anna Mitchell was error prejudicial to defendant, for which there must be a new trial.

Other assignments of error need not be treated here, since they may not recur on another trial.

New Trial.

PARKER, J., not sitting.

ROGER A. GALLOWAY, H. A. GALLOWAY AND W. LAWSON GALLOWAY v. ANNIE GALLOWAY HESTER, O. F. GALLOWAY, T. I. GALLOWAY, J. HENRY GALLOWAY, MARY CALDWELL, EXECUTOR OF THE ESTATE OF NELLIE GALLOWAY, DECEASED.

(Filed 10 December, 1958.)

1. Judicial Sales § 4—

An advance bid entered by the owners of a minority interest in the land and not supported by a cash deposit or bond but only by the interest of the advance bidders in the land, which interests are subject to deeds of trust, judgments and tax liens in an undisclosed amount, does not meet, at least technically, the statutory requirements for an advance bid. G.S. 1-339.25(a).

2. Same— Whether court should order resale, thus releasing the cash bidder, calls for exercise of judicial discretion.

Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion, and where it appears that one advance bid after another had caused the property to be resold a number of times until all bidders had retired from the competition, the confirmation of the last sale to the last and highest bidder in the amount of the bidder's upset bid, the cash deposit having been made, and the refusal to order another sale upon an upset bid of the owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land which was subject to liens in an undisclosed amount, will be affirmed as a proper exercise of judicial discretion by the court.

PARKER, J., not sitting.

APPEAL by defendants Annie Galloway Hester and O. F. Galloway from *Nettles, J.*, August 11, 1958 Regular "B" Civil Term, MECKLENBURG Superior Court.

This proceeding was instituted by certain of the heirs of M. A. Galloway against others in which the petitioners seek, among other things, an accounting for rents and profits from two tracts of the M. A. Galloway lands alleged to have been in the exclusive possession of the respondents since Mr. Galloway's death in 1939. It appears from the pleadings that a controversy has been going on among the heirs for more than 15 years.

On December 9, 1957, Judge Dan K. Moore signed a judgment consented to by all parties and their counsel. In the judgment commissioners were appointed and directed to sell two specifically described tracts of land. Only the first tract, containing 72.194 acres, is involved in this appeal. Before proceeding with the sale, the commissioners applied to the Charlotte Board of Realtors, Inc., to have the value of the tract of land estimated. A committee appointed for the purpose placed a value of $64,360 on tract No. 1.

The first attempt at a sale resulted in an offer of $60,000. The bid-

der made a cash deposit to insure compliance with the bid, as provided in G.S. 1-339.25(a). Before confirmation an advance bid accompanied by a cash deposit was filed, and a resale was ordered. The resale resulted in a bid of $69,000. The bidder made the required cash deposit. On April 13, 1958, an advance bid of $72,500, accompanied by a cash deposit, was offered by Parker Whedon, agent. The resale produced no other bids and Parker Whedon was declared the highest bidder at the amount of his advance bid. On May 5, 1958, respondents Annie Galloway Hester, T. Irvin Galloway, Osborne F. Galloway, individually, and as executor, entered into an agreement with the commissioners, authorizing the latter to pay off and disburse from the proceeds of the sale of their interests all deeds of trust, judgments, and taxes which were liens against their interests in the property. On May 8, 1958, respondent Annie Galloway Hester filed a purported upset bid in the amount of $75,000, later amended to $76,175, tendering in lieu of the cash deposit her 1/9 interest in said property. She assigned her bid, as amended, to Triece Construction Company, Inc. On June 16, 1958, at a resale, Triece Construction Company made the highest bid of $79,200, accompanied by the required cash deposit. On June 26, 1958, E. S. DeLaney, agent, filed an upset bid of $83,210, accompanied by a cash deposit. On June 28, 1958, Judge Pless ordered a resale. There were no other bids and E. S. DeLaney, agent, was declared the last and highest bidder at $83,210, the amount of his upset bid. He made the cash deposit required. On July 31, 1958, Annie Galloway Hester and O. F. Galloway filed the following:

> "The undersigned, Annie Galloway Hester and O. F. Galloway, jointly, herewith respectfully tender a bid to you for the lands of the M. A. Galloway Estate described in the Petition in this cause as the First Tract, comprising 72.194 acres, in the amount of $90,000, and agree that in the event said bid is not complied with that their three-ninths interest in said lands valued in relation to this bid in the amount of $5,000 shall be forfeited to the extent of any loss suffered by the remaining parties in interest, said agreement of forfeiture is made for the purpose of insuring performance of this bid on the part of Annie Galloway Hester and O. F. Galloway in the event said bid is the final bid in this matter. It is further agreed that the said Annie Galloway Hester and the said O. F. Galloway, and their husbands and wives, will deed to any parties damaged, in the event of failure to perform, their three-ninths interest in this land to the extent that the said parties may be damaged and for the purpose of indemnifying the

Commissioners herein as well as the remaining parties in interest against such damage.

Annie Galloway Hester (Seal)
O. F. Galloway (Seal)."

Notwithstanding the above purported offer, the commissioners, pursuant to notice, moved before Judge Nettles that the bid of E. S. DeLaney, agent, in the amount of $83,210 be confirmed. After hearing, Judge Nettles confirmed the sale, directed the commissioners to collect the purchase price, and upon the payment thereof to convey title to DeLaney, agent. The court entered the following as a part of the judgment:

"That the Court having access to the court records in this proceeding and having heard the argument of counsel and having received the motion of the Commissioners that the said sale be confirmed, finds as a fact that it is for the best interest of the parties to this proceeding that said sale be confirmed and the Court in its discretion confirms said sale as being the highest bid for said property as provided by the Statutes for judicial sales and by the order of Hon. J. Will Pless of June 28, 1958. That the Court finds further that the sale on the 21st day of July 1958 was held also in accordance with the order of Dan K. Moore of December 10, 1957."

From the order of confirmation entered by Judge Nettles, Annie Galloway Hester and O. F. Galloway appealed.

Ernest S. DeLaney, Agent, filed a petition in the Supreme Court for leave to intervene and file a brief. The petition was allowed and the brief was filed.

Mullen, Holland & Cooke, By: James Mullen, for appellants.

Carswell and Justice, By: James F. Justice, for petitioners, appellees.

Parker Whedon for intervenor.

HIGGINS, J. The facts in this case have been stated somewhat fully because of the nature of the legal questions involved. The appellants contend (1) that Judge Nettles committed error by placing a too literal and too rigid interpretation on the requirement that a cash deposit accompany an advance bid (G.S. 1-339.25(a)), (2) that the offer of the appellants to permit their interests in the land to stand as a guarantee of their compliance with their bid in equity should be considered compliance, and (3) that if a discretionary matter, nevertheless Judge Nettles should have ordered a resale in the interest of all parties. They cite in support the following cases: *Wood v. Fauth,* 225 N.C. 398, 35 S.E. 2d 178; *Creech v. Wilder,* 212 N.C. 162, 193 S.E. 281; *Alexander v. Boyd,* 204 N.C. 103, 167 S.E. 462; *McCormick*

v. Patterson, 194 N.C. 216, 139 S.E. 225; *Perry v. Perry,* 179 N.C. 445, 102 S.E. 772; *Tayloe v. Carrow,* 156 N.C. 6, 72 S.E. 76.

The legal principles approved in the foregoing cases cited by the appellants, in the light of the facts in those cases, tend rather to fortify than to impair the order confirming the sale. One advance bid after another had caused the property to go back to the block until finally all bidders had retired from the competition, leaving DeLaney's bid unchallenged until the appellants, who owned three-ninths of the land, and whose interests therein were subject to deeds of trust, judgments, and tax liens in amounts undisclosed, proposed to raise the bid from $83,210 to $90,000. However, they offered neither cash nor bond to secure compliance with their bid. The court's commissioners recommended the DeLaney bid be confirmed. The plaintiffs, who own three-ninths interest in the land, filed a brief here asking this Court to confirm the judgment of the superior court. Judge Nettles " . . . having access to the court records in this proceeding . . . finds as a fact that it is to the best interest of the parties to this proceeding that said sale be confirmed and the court in its discretion confirms said sale as being the highest bid for said property as provided by the Statutes for judicial sales." It must be conceded the appellants' bid, at least technically, did not meet statutory requirements as to the deposit of cash.

Whether to accept the cash bid or to order another sale, thus releasing the cash bidder, called for the exercise of judicial discretion. In the case of *Thompson v. Rospigliosi,* 162 N.C. 145, 77 S.E. 113, this Court said: "It follows, therefore, that his Honor exercised a discretion vested in him by the law when he refused to accept the advance bid, associated as it was with other unfavorable circumstances, and that his discretion is not reviewable unless there has been an abuse of it, and we find none."

"The question of confirmation rests largely in the sound legal discretion of the lower court and, on the facts stated, we are of the opinion that this discretion has been properly exercised." *Copping v. Mfg. Co.,* 153 N.C. 329, 69 S.E. 250.

" . . . the question of confirming a sale is referred, as stated, to the sound legal discretion of the court, and, in the proper exercise of such discretion, the court, under certain conditions, may reject an increased bid and confirm a sale when it appears from the relevant facts and circumstances such a course is wise and just and for the best interests of all parties whose rights are being dealt with in the suit." *Upchurch v. Upchurch,* 173 N.C. 88, 91 S.E. 702; *Sutton v. Craddock,* 174 N.C. 274, 93 S.E. 781; *Chemical Co. v. Long,* 184 N.C. 398, 114 S.E. 465.

The law and the facts in this case support Judge Nettles, and his judgment is

Affirmed.

PARKER, J., not sitting.

J. ARCHIE CANNON, JR., TRUSTEE FOR MILLER MOTOR LINE OF NORTH CAROLINA, INC., v. H. BRYCE PARKER, ADMINISTRATOR OF THE ESTATE OF ANNIE J. YOUNG, DECEASED, AND CLAUDIE BLACK, ADMINISTRATRIX OF THE ESTATE OF EDGAR McLEE BLACK, DECEASED.

(Filed 10 December, 1958.)

1. Pleadings §15: Trial § 21—

A demurrer to the complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are different in purpose and result; the one challenges the sufficiency of the pleading, the other the sufficiency of the evidence, and the words *ore tenus* have no significance in relation to a demurrer to the evidence or motion to nonsuit.

2. Compromise and Settlement— Settlement between parties of liabilities arising out of collision precludes subsequent action between the parties in regard thereto.

Where the evidence discloses that the corporate plaintiff and the driver of its tractor-trailer had paid to the administrator of the passenger-owner of a car, killed in a collision with the tractor-trailer, a sum of money in full settlement of any and all actions or causes of action arising out of the accident, the evidence justifies nonsuit in the corporation's subsequent action against the administrator of the owner-passenger to recover damages sustained by the tractor-trailer in the collision, there being no evidence to sustain the allegations of the corporate plaintiff in its reply that the settlement was obtained by an insurance adjuster without the knowledge or consent and in direct conflict with the instructions of the corporation.

PARKER, J., not sitting.

APPEAL by plaintiff from *Phillips, J.*, February 24, 1958, Civil Term, Greensboro Division of GUILFORD.

Civil action instituted March 28, 1957, growing out of a collision on December 15, 1956, between a tractor-trailer owned by Miller Motor Line of North Carolina, Inc., operated by Robert Richard Cothran, and an Oldsmobile sedan.

Plaintiff alleged that he was appointed trustee of Miller Motor Line of North Carolina, Inc., on March 4, 1955, and since then has conducted its business and affairs under orders of the United States Court for the Middle District of North Carolina.

Plaintiff alleged further that, at the time of the collision, Edgar McLee Black was operating the Oldsmobile sedan and Annie J. Young, the owner, was riding in the front seat; that the collision was caused

by the negligence of Edgar McLee Black and Annie J. Young; and that the collision caused damages to the tractor-trailer for which plaintiff was entitled to recover $3,500.00 from the Black and Young estates.

No answer was filed by the administratrix of the Black estate.

The administrator of the Young estate, answering, denied the material allegations of the complaint; and, in further answer, pleaded in bar of plaintiff's right to recover (1) the negligence of Cothran, and (2) that *plaintiff*, prior to filing complaint herein, had paid to the Young estate "a sum certain in money . . . as a full and final settlement of any and all actions or causes of action arising out of the accident now in controversy . . ."

Plaintiff, in reply, denied negligence on the part of Cothran and denied that *he* had made any settlement with the Young estate. In substance, plaintiff alleged: He was first informed of the alleged settlement by the allegations of said answer. His investigation disclosed that Carolina Casualty Insurance Company, his liability insurance carrier, through its agent, had paid a sum of money to the administrator of the Young estate for which said administrator had executed a release as per copy (Exhibit A) attached to reply. On or about January 1, 1957, a representative of said insurance company, a representative of Miller Motor Line of North Carolina, Inc., and plaintiff, after a conference with reference to the facts and circumstances of the collision, had unanimously agreed that "there was no liability on the part of Miller Motor Line of North Carolina, Inc., or its driver, and that no action should be taken under the policy," a copy of which (Exhibit B) was attached to reply. Notwithstanding, an agent of said insurance company, acting on his own initiative, outside the scope of his authority, express or implied, without the consent or approval and against the specific instructions of the plaintiff, made the payment and obtained a release signed by the administrator of the Young estate. The said insurance company had no authority to surrender plaintiff's affirmative causes of action; and plaintiff "at no time, agreed to, approved or consented to the payments made by the Insurance Company" or the release thereby secured.

When the case came on for trial, a jury was empaneled and the pleadings were read. The agreed case on appeal, under the caption "PLAINTIFF'S EVIDENCE," states:

"Plaintiff's evidence consisted of introduction of Release, set out above as Exhibit A, and of the Insurance Policy, set out above as Exhibit B.

"Whereupon the defendant demurred *ore tenus* to plaintiff's evidence. The Court ruled that the demurrer was well taken and sustained the demurrer, THE COURT stating: 'The Court finds as a

matter of law that said release is a bar to any action by the plaintiff in this cause.' "

In accordance with said ruling the court entered judgment dismissing the action and taxing plaintiff with the costs. Plaintiff excepted and appealed, assigning as error (1) the said ruling and (2) the said judgment.

Frazier & Frazier for plaintiff, appellant.
James J. Booker for defendant, appellee.

BOBBITT, J. Parker, Administrator, answered. He did not demur to the complaint either in writing or *ore tenus*. He demurred to the evidence. "A demurrer to a complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are different in purpose and result. One challenges the sufficiency of the pleadings, the other the sufficiency of the evidence." *Lewis v. Shaver*, 236 N.C. 510, 512, 73 S.E. 2d 320; *Gantt v. Hobson*, 240 N.C. 426, 431, 82 S.E. 2d 384. The words *"ore tenus"* have no significance in relation to a demurrer to the evidence, i.e., a motion for judgment of nonsuit, under G.S. 1-183.

Copies of Exhibits A and B were attached to the reply. Yet nothing appears in the record to indicate that the demurrer *ore tenus* was directed to the reply or that defendant moved for judgment on the pleadings. The record is explicit that the court's ruling was on defendant's demurrer *to the evidence.*

By the terms of the release (Exhibit A), Parker, Administrator, for and in consideration of $900.00 to him paid by Robert R. Cothran and Miller Motor Line of N. C., Inc., fully released and discharged them from liability on account of the collision referred to in the pleadings, particularly on account of the death of Annie J. Young as a result thereof. A further provision set forth an agreement that the payment of the $900.00 should not be construed as an admission on the part of Robert R. Cothran and Miller Motor Line of N. C., Inc., of any liability whatsoever in consequence of said injuries and accident.

We are confronted by the fact that the release shows on its face that Robert R. Cothran and Miller Motor Line of N. C., Inc., paid the release consideration of $900.00 to Parker, Administrator, and obtained the release. Nothing else appearing, plaintiff's action is barred. *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805, and cases cited; *Houghton v. Harris*, 243 N.C. 92, 89 S.E. 2d 860.

In *Snyder v. Oil Co., supra,* on motion of the original defendants (Kenan Oil Company and Keen, its driver), Dixon was made a party defendant as an alleged joint tort-feasor for the purpose of enforcing contribution as provided by G.S. 1-240. Answering the allegations of the original defendants, Dixon pleaded, *inter alia,* that Kenan Oil Company had settled her claim against it for damages caused by

the collision. It was held that the motion by the original defendants to strike Dixon's allegations as to such settlement was properly denied.

In opinion by *Barnhill, J.* (later C. J.), the Court said:

"The settlement by the corporate defendant of the claim of defendant Dixon against it for personal injuries and property damages resulting from the collision of the truck being operated by Keen, the agent and employee of the oil company, and the automobile being operated by defendant Dixon, as effectually adjusted and settled all matters which arose or might arise out of said collision, as between the oil company and Dixon, as would a judgment duly entered in an action between said parties. By said compromise settlement each party bought his peace respecting any liability created by the collision. The adjustment of said claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the oil company, and the nonliability, or at least a waiver of the liability, of the defendant Dixon."

According to the evidence, Robert R. Cothran and Miller Motor Line of N. C., Inc., discharged their liability (whether admitted or controverted) to Parker, Administrator, on account of said collision, by their payment to him of $900.00 for a full release. They thereby released whatever rights they may have had to recover from Parker, Administrator, on allegations that the collision was caused by the negligence of Annie J. Young. The payment and release extinguished the liabilities of the parties thereto, *inter se*, on account of said collision. Nothing appears to dispel the clear implication that the parties, in reaching said compromise settlement, took into consideration their conflicting contentions as to the cause(s) of the collision.

We do not reach the question as to whether the facts alleged in the reply, if true, are sufficient to exempt plaintiff from the legal consequences which flow, nothing else appearing, from the release offered in evidence by plaintiff. Suffice to say, plaintiff offered no evidence to support the allegations in the reply relating to said release.

The judgment, according to the record, must be considered solely as a judgment of nonsuit under G.S. 1-183. So considered, it must be affirmed.

Affirmed.

PARKER, J., not sitting.

STATE v. ROY FRANKLIN OAKES.

(Filed 10 December, 1958.)

1. Criminal Law § 114: Homicide § 29—

It is error for the court, after giving correct instructions as to the

right of the jury to recommend life imprisonment if they should find defendant guilty of murder in the first degree, to instruct the jury that the State contended that the jury should not recommend that the punishment should be imprisonment for life. G.S. 14-17.

2. Criminal Law § 139—

On appeal in a capital case the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu*.

3. Homicide § 16—

The introduction in evidence of a peace warrant together with affidavit made by the deceased two days prior to her death, is error, and such error *held* not cured in this case by an instruction undertaking to limit the purpose of the introduction of the peace warrant, since the whole was before the jury.

4. Homicide §§ 8, 24—

An instruction on the defense of drunkenness rendering defendant incapable of premeditation and deliberation that the defense of drunkenness is one which is dangerous in its application, is erroneous as an expression of opinion by the court on the evidence prohibited by G.S. 1-180.

PARKER, J., not sitting.

APPEAL by defendant from *Sharp, Special J.*, at April 14, 1958 Criminal Term of GUILFORD (Greensboro Division).

Criminal prosecution upon a bill of indictment charging defendant with the crime of murder in the first degree of Alice Mae Oakes.

Plea: Not guilty.

Upon the trial in Superior Court both the State and the defendant offered evidence, and the case was submitted to the jury under the charge of the court.

Verdict: The jury returned a verdict of guilty of murder in the first degree, as charged in the bill of indictment.

Judgment: Death by inhalation of lethal gas as provided by law.

Defendant excepts and gives notice of appeal, and appeals to Supreme Court and assigns error, and is permitted to appeal without making bond, that is, *in forma pauperis*,—the County to pay costs incident thereto.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard, for the State.

Adam Younce for defendant, appellant.

WINBORNE, C. J. For error in the course of the trial of this case in Superior Court, as revealed on the face of the case on appeal, this Court is impelled, *ex mero motu*, to order a new trial. *S. v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921, and numerous other cases of like import.

The error arises in this manner. The trial judge correctly charged that where a verdict of guilty of murder in the first degree shall have

been reached by the jury, it has the unbridled discretionary right to recommend that the punishment for the crime shall be imprisonment for life in the State's Prison,—instructing the jury that there are no conditions attached to and no qualifications or limitations imposed upon the right of the jury to so recommend, in keeping with the provisions of G.S. 14-17, as amended by Sec. 1 of Chapter 299 of 1949 Sessions Laws of North Carolina. See *S. v. Denny,* 249 N.C. 113, 105 S.E. 2d 446, and cases there cited.

And as stated in the *Denny case, supra,* quoting from *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212, "It is incumbent upon the court to so instruct the jury. In this the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficient to set aside a verdict where no recommendation is made."

But when the trial judge came to state the contentions of the State these statements appear:

"The State says and contends that your verdict should be murder in the first degree. That your verdict should stop there and that you should not recommend that his punishment be imprisonment for life."

And again, "The State says and contends that your verdict should be guilty of murder in the first degree and that you should not recommend that his punishment should be imprisonment for life in the State's Prison * * *."

And even though on appeal to this Court there is no exception to either of the statements of contentions of the State, it is manifest that the statements run counter to the statute G.S. 14-17. Error is clear, and this Court, of its own motion, must declare. For in capital cases the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu.*

Moreover, there are several assignments of error based upon exceptions to matters occurring in the trial below, some of which merit attention since the case goes back for a new trial.

1. Defendant contends that the court erred in permitting the State to offer in evidence a peace warrant together with affidavit of Alice Oakes, the deceased, upon which the warrant was issued. It is argued that the statements and allegations therein are purely hearsay—that they were not made in his presence, and he had no opportunity to confront or to cross-examine the complainant with reference to the matters alleged.

The Court is of opinion that the exception has merit. See Stansbury on North Carolina Evidence, Sections 138-139. True the court, in charging the jury, undertook to limit the purpose of the introduction of the peace warrant; but the whole was before the jury, and it is feared

that the impression was not so easily removed from the minds of the jurors.

2. Defendant also excepts to the action of the court in instructing the jury, as shown by Assignment 6, Exception #8, as follows:

"Now, for obvious reasons, gentlemen, the defense of drunkenness is one which is dangerous in its application and the evidence tending to show the defendant was intoxicated should be carefully scrutinized and weighed with great caution before you accept it. However, if, after having done so, you find from the evidence that by reason of intoxication or by reason of intoxication, plus loss of sleep, the defendant's reason was dethroned and he was utterly incapable of forming a deliberate and premeditated intent to kill or if such evidence raises in your mind a reasonable doubt that he killed the deceased with premeditation and deliberation, it would be your duty to acquit the defendant of the charge of murder in the first degree."

The vice in this instruction, pointed out by defendant, is in the expression that "the defense of drunkenness is one which is dangerous in its application." It appears, seemingly, that this expression was originally made in the opinion in *S. v. Shelton*, 164 N.C. 513, 79 S.E. 883. It does not appear to have been intended for use by a trial judge in instructing the jury. And while the expression has found lodgment in some later cases, it is clearly an expression of opinion by a judge in giving a charge to the petit jury, which is prohibited by statute. G.S. 1-180. Therefore, the use of such expression by a judge in so charging the jury is hereby expressly disapproved. And opinions of this Court in conflict with this holding are, to the extent hereof, overruled.

3. The exception to denial of nonsuit and to matters of evidence require no express treatment.

For reasons stated, let there be a

New Trial.

PARKER, J., not sitting.

PAUL OAKS v. CONE MILLS CORPORATION (EMPLOYER) AND LIBERTY MUTUAL INSURANCE COMPANY (CARRIER).

(Filed 10 December, 1958.)

Master and Servant § 53b(1)—

Compensation for permanent partial disability in the loss of the use of the employee's hand resulting from an accident occurring prior to the effective date of the amendment to G.S. 97-31(t) is the minimum of $10 per week prescribed by G.S. 97-29, for 170 weeks, notwithstanding that the employee had returned to work after the termination of his total temporary disability.

OAKS *v.* MILLS CORP.

APPEAL by defendants from *Phillips, J.*, 6 October Civil Term 1958 of GUILFORD (Greensboro Division).

This is a Workmen's Compensation case. Paul Oaks, an employee of the Cone Mills Corporation, whose compensation insurance carrier was Liberty Mutual Insurance Company, sustained an injury by accident arising out of and in the course of his employment with said employer on 24 April 1957, resulting in a five per cent permanent partial disability or loss of the use of his right hand.

Liability was admitted and the parties entered into an agreement for the payment of compensation which was approved by the North Carolina Industrial Commission on 23 May 1957. Pursuant to said agreement the plaintiff was paid compensation for temporary total disability from 24 April 1957, the date of the accident, up to 16 September 1957, the date of his return to work.

The parties entered into a supplemental agreement dated 9 May 1958 which was submitted to the Industrial Commission for approval. The supplemental agreement between the employee and the defendant employer and its carrier provided that the employee would be paid for a five per cent loss of the use of his right hand at the maximum compensation rate of $32.50 per week for a period of 8½ weeks. This agreement was disapproved by the Industrial Commission on the ground that, the opinion in the case of *Kellams v. Metal Products*, 248 N.C. 199, 102 S.E. 2d 841, held that the correct formula was to multiply the percentage of permanent partial disability for 170 weeks, the period specified in G.S. 97-31 for the loss of a hand, by sixty per cent of the average weekly wage, and apply the minimum of $10.00 per week as provided in G.S. 97-31 (u) resulting in payment for 170 weeks at $10.00 per week.

The hearing Commissioner found the facts and made an award under the terms of which the employee was awarded 170 weeks of compensation at the rate of $10.00 per week beginning 16 September 1957, the date of his return to work, for a five per cent permanent partial disability of his right hand.

The defendants appealed to the Full Commission where the findings of fact and conclusions of law of the hearing Commissioner were in all respects affirmed. Defendants thereupon appealed to the Superior Court of Guilford County upon exceptions and assignments of error duly filed, and the judge of the Superior Court entered judgment affirming in all respects the findings of fact, conclusions of law and the award of the Commission.

The defendants appeal to the Supreme Court, assigning error.

Robert S. Cahoon, Robert L. Scott, George W. Gordon for plaintiff.

Smith, Moore, Smith, Schell & Hunter for defendants.

PER CURIAM. The only question presented for determination on this appeal is: What is the correct method of computing compensation in cases of permanent partial disability under G.S. 97-31 for scheduled partial loss or loss of the use of specific members of the body?

It is conceded by the appellants that the award below must be affirmed unless *Watts v. Brewer,* 243 N.C. 422, 90 S.E. 2d 764 is reconsidered and modified or overruled.

The General Assembly in Chapter 1396 of the 1957 Session Laws of North Carolina amended G.S. 97-31 (t) as the same appeared in the 1955 Cumulative Supplement to Volume 2C of the General Statutes by striking out the word "payment" as the same appeared in line four of said subsection and inserting in lieu thereof the words "periods of payment."

Certainly the statute as amended would warrant the interpretation the defendants seek to have placed upon it prior to the amendment thereof. However, the amendment did not become effective until 1 July 1957, while the injury involved herein occurred on 24 April 1957.

We have carefully considered the record on this appeal and the excellent briefs filed on behalf of the respective parties, but in our opinion *Watts v. Brewer, supra,* and *Kellams v. Metal Products, supra,* should not be modified with respect to an injury sustained prior to 1 July 1957.

Affirmed.

PARKER, J., not sitting.

ROBERTA McMILLIAN MOORE, ADMINISTRATRIX OF THE ESTATE OF JAMES ARTHUR McMILLIAN, v. JOHN H. SINGLETON, ARTHUR E. COX, SR., AND HARRY CARROLL, AND FLORENCE CARROLL

AND

MATTIE ESTELLE HALL, ADMINISTRATRIX OF THE ESTATE OF LILLIE MAE HALL v. JOHN H. SINGLETON, ARTHUR E. COX, SR., AND HARRY CARROLL AND FLORENCE CARROLL.

(Filed 10 December, 1958.)

Automobiles § 35: Trial § 23f— Nonsuit for variance between allegation and proof held proper.

Allegations to the effect that one defendant slowed or stopped without giving the statutory signal, presumably to make a left turn at an intersection, that the driver of the car in which plaintiffs' intestates were riding applied his brakes and skidded to the left into the path of the car of the other defendant, approaching from the opposite direction, resulting in the collision, and evidence that when the driver of the car in which intestates were riding applied his brakes he skidded to

his right and that the car approaching from the opposite direction turned to his left side of the highway to avoid the car of the other defendants in the intersection, and collided with the car in which intestates were riding, constitutes a fatal variance between allegation and proof, and nonsuit was properly entered.

PARKER, J., not sitting.

Upon petition of plaintiffs, this Court granted *certiorari* to review judgments of nonsuit entered by *Craven, S. J.*, at the July, 1958 Civil Term, BUNCOMBE Superior Court.

These two actions for wrongful death were consolidated and tried together. The complaints are substantially identical. The plaintiffs allege their intestates were passengers in an Oldsmobile owned and being driven by Ulysees Moore south on Highway No. 25, near the Town of Fletcher in Henderson County. Immediately in front of the Moore car, and also going south, was a Ford owned by the defendant Florence Carroll, and driven by the defendant Harry Carroll; that Carroll was negligent in that as he approached the intersection of Highway No. 25 and the Airport Road, he caused his automobile to decrease speed and slow down or stop without giving any signal, thereby placing the Moore car, in which plaintiffs' intestates were riding, in a perilous position; whereupon Moore applied his brakes and his car skidded to the left across the center of the highway into the path of a Chevrolet truck belonging to the defendant Cox, and being driven by defendant Singleton north on Highway No. 25; that when Moore applied his brakes to prevent his striking the Carroll car, his Oldsmobile skidded to the left into the path of the Singleton truck, which struck the Oldsmobile, resulting in the death of plaintiffs' intestates; that Singleton was negligent in that he was driving his car 40 or 45 miles per hour in a 35-mile zone, whereas, if he had been observing the speed limit and been alert, he could have discovered the perilous position in which the Moore car and its occupants were placed in time to have left the road and driven off on the shoulder of the highway, and thereby could have avoided the accident and injury.

According to the evidence offered by the plaintiffs, the accident happened substantially in this manner: The Carroll car slowed down without signal, apparently to make a left turn on the airport road, and, in order to avoid striking it, Moore applied his brakes, whereupon his Oldsmobile skidded to his right; and that Singleton, in order to avoid hitting the Carroll car in the intersection, crossed over to the driver's left and struck the Moore car on Moore's right-hand side of the highway. Neither the Chevrolet nor the Oldsmobile ever came in contact with the Carroll car. The plaintiffs' evidence placed the point of collision as 134 feet north of the intersection. This evidence

apparently placed the Carroll car 134 feet from the point of the accident, and, therefore, out of Moore's way.

The court, at the close of all the evidence, entered judgments of nonsuit by reason of variance between the allegations and the proof. The plaintiffs excepted and appealed.

S. Thomas Walton, McLean, Gudger, Elmore & Martin, By: Harry C. Martin for plaintiffs, appellants.

Harkins, Van Winkle, Walton and Buck for defendants Harry Carroll and Florence Carroll, appellees.

Uzzel and Dumont for defendant John H. Singleton, appellee.

PER CURIAM. The judgments of nonsuit were entered because of variances between the plaintiffs' allegations of negligence and their proof. The complaints allege the defendants' Carroll were negligent in that the driver slowed down for the intersection without warning or signals; and that Moore (the driver of the car in which plaintiffs' intestates were riding) applied his brakes to keep from striking the Carroll car from the rear, skidded his car out of control, crossed to his left and into the travel lane of the Singleton truck, with the fatal result. The Carroll car did not come in contact either with the Moore car or the Singleton truck. Plaintiffs' evidence placed the collision between the truck and the Moore car at a point 134 feet from and to the north of the intersection and the Carroll car at or near the intersection. The evidence, therefore, would seem to take the Carroll car out of the danger zone and, if the driver were negligent, proof was lacking that such negligence was one of the proximate causes of the accident.

The plaintiffs allege the defendant Singleton, the driver of Cox's Chevrolet truck, was driving 40-45 miles per hour in a 35-mile zone; and that when Moore applied his brakes, his car skidded out of control across the center of the highway into the path of the Singleton truck and in its travel lane; and that Singleton was negligent in that he could and should have observed the perilous position of the Moore car in time to have pulled his truck off the highway to his right and to have avoided the accident. On the other hand, the plaintiffs' evidence tended to show that Moore skidded his car to his right and never at any time crossed in front of the Singleton truck or into its proper lane of travel, but that Singleton, in order to miss the Carroll car in the intersection, negligently crossed over to his left and into the Moore car, stopped, or nearly so, on its proper side of the highway.

Other variances between allegations and the proof appear in the record. However, enough is here recited to show necessity for the non-

suits under authority of *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387.

Affirmed.

PARKER, J., not sitting.

STATE v. LUTHER KIMMER.

(Filed 10 December, 1958.)

Criminal Law § 111—

A charge that the jury should scrutinize the testimony of defendant's wife in his behalf, without giving the qualifying instruction that if the jury, after scrutiny, should believe her testimony to give it the same weight as the testimony of a disinterested witness, is error.

PARKER, J., not sitting.

APPEAL by defendant from *Crissman, J.*, September Term, 1958, of SURRY.

Criminal prosecution on a three-count indictment charging (1) breaking and entering in violation of G.S. 14-54, (2) larceny, and (3) receiving stolen goods in violation of G.S. 14-71.

The court instructed the jury not to consider the third count.

As to the first and second counts, the jury returned a verdict of guilty; and judgment, imposing a prison sentence, was pronounced.

Defendant excepted and appealed.

Attorney General Seawell and Assistant Attorney General Love for the State.

Frank Freeman for defendant, appellant.

PER CURIAM. The Attorney General rightly concedes that, on authority of *S. v. Davis*, 223 N.C. 57, 25 S.E. 2d 187, defendant is entitled to a new trial on account of error in the charge.

Defendant's wife testified in his behalf. In reviewing the State's contentions, the court called attention to her status as an interested witness whose testimony should be scrutinized in the light of her interest. However, the court inadvertently failed to give an instruction to the effect that if, after such scrutiny, the jury believed her testimony, it should be given the same weight as the testimony of a disinterested credible witness.

Since a new trial must be awarded for the court's failure to give the indicated qualifying instruction, discussion of defendant's other assignments of error is unnecessary. The questions raised therein involve matters that may not recur at the next trial.

New trial.

PARKER, J., not sitting.

STATE v. HALLIE PARTRIDGE.

(Filed 10 December, 1958.)

APPEAL by defendant from *Hall, J.*, March Criminal Term 1958 of LEE.

This defendant was tried and convicted in the County Criminal Court of Lee County upon a warrant charging that on 30 December 1957 the defendant did unlawfully have in her possession a quantity of alcoholic beverage and intoxicating liquor for the purpose of sale, to wit, 12 pints of taxpaid whiskey, 4 pints of vodka, 1 quart of vodka, and 23 cans of beer. From the verdict and judgment the defendant appealed to the Superior Court of Lee County.

The defendant was tried in the Superior Court upon the original warrant. She entered a plea of not guilty. From the evidence offered by the State the jury returned a verdict of guilty. The court imposed a sentence of 7 months in State Prison in quarters provided for women as authorized by G.S. 148-27.

The defendant appeals, assigning error.

Attorney General Seawell, Ass't. Attorney General Bruton, for the State.

Pittman & Staton, Lowry M. Betts for defendant.

PER CURIAM. The defendant appeals only from the refusal of the court below to grant her motion for judgment as of nonsuit.

We have carefully considered the evidence adduced in the trial below and in our opinion it was sufficient to carry the case to the jury. Therefore, the ruling of the court below on the motion for judgment as of nonsuit will be upheld.

Affirmed.

PARKER, J., not sitting.

EARL TOPPING v. THE NORTH CAROLINA STATE BOARD OF EDUCATION AND WILLIAM D. HERRING, J. A. PRITCHETT, GUY B. PHILLIPS, CHARLES G. ROSE, JR., R. BARTON HAYES, GERALD COWAN, CHARLES E. JORDAN, H. L. TRIGG, EDWIN GILL, THE INDIVIDUAL MEMBERS THEREOF, WHO ARE SUED IN SUCH CAPACITY, AND CHARLES F. CARROLL, SUPERINTENDENT OF PUBLIC INSTRUCTION OF NORTH CAROLINA, ORIGINAL DEFENDANTS, AND HYDE COUNTY BOARD OF EDUCATION AND GRATZ SPENCER, WALTER LEE GIBBS, AND CRAWFORD CAHOON, THE INDIVIDUAL MEMBERS THEREOF, ADDITIONAL DEFENDANTS.

(Filed 14 January, 1959.)

1. Injunctions § 13: Judgments § 27c—

If an order continuing a temporary restraining order to the hearing is erroneous, it can be corrected only by appeal, and in the absence of appeal it determines the status of the cause until the hearing.

2. Courts § 9: Injunctions § 13—

Where the court, upon findings of fact and conclusions of law, continues a temporary restraining order to the hearing on the merits, such findings and conclusions are not reviewable by another Superior Court judge upon motion to dissolve the temporary order prior to the final hearing.

3. Eminent Domain § 7—

Chapter 683, Session Laws of 1957, rewrote Art. 15, Sec. 1, Chapter 1372, Session Laws of 1955 (G.S. 115-125), and condemnation proceedings for a school site are controlled by G.S. 40, Art. 2.

4. Eminent Domain § 13—

In proceedings to condemn land for a school site, the payment into court by the county board of education of the amount of damages assessed by the commissioners and the taking of possession by it under order of the clerk while the cause remains pending for trial on exceptions directed both to petitioner's right to condemn and to the adequacy of the damages awarded by the commissioners, G.S. 40-19, does not vest title in the board, since title is not divested from the landowner unless and until the condemnor obtains a final judgment in his favor and pays the landowner the amount of damages fixed by such final judgment.

5. Injunctions § 13— Holding that defendants had complied with conditions for dissolution of temporary restraining order, held error.

Order was entered restraining the State Board of Education and the members thereof and the State Superintendent of Public Instruction from making funds available to the county board of education for the construction of a high school until the county board should have acquired title in fee simple to the entire school site, and no appeal was taken from this order. On motion to dissolve the temporary restraining order prior to the hearing on the merits, another Superior Court judge found that defendants had substantially complied with the conditions of the order in that the county board had obtained possession of the site in the condemnation proceeding upon payment into court of the damages assessed by the commissioners, notwithstanding that the proceeding remained pending for trial on exceptions to the commissioners' report. *Held:* The dissolution of the restraining order was error, since the mere acquisition of possession is not the acquisition of title within the purview of the temporary restraining order.

APPEAL by plaintiff from order dated November 21, 1958, entered by *Paul, J.*, Resident Judge, after hearing in Washington, N. C. From HYDE.

The plaintiff is a resident, freeholder and taxpayer of Hyde County.

The original defendants are the North Carolina State Board of Education, the (named) individual members thereof, and the (named)

Superintendent of Public Instruction of North Carolina.

On April 23, 1958, the original defendants, in response to order to show cause issued April 9, 1958, appeared before Judge Moore, who, after a hearing on plaintiff's application for a temporary restraining order, entered an order, which, after recitals, contained the following provisions:

"AND THIS CAUSE BEING HEARD AND THE COURT HAVING HEARD AND CONSIDERED EVIDENCE AND THE ARGUMENTS OF COUNSEL FINDS THE FOLLOWING FACTS:

"1. That during the year 1957 in the Superior Court of Hyde County a judgment was entered authorizing and requiring the Board of Education of Hyde County to build a consolidated high school at a place near Lake Mattamuskeet, designated in said judgment.

"2. That the State Board of Education allocated for the purpose of constructing the high school building for said consolidated high school $164,484.44 pursuant to provisions of the Session Laws of the General Assembly of North Carolina, 1953, Chapter 1046.

"3. That before allocating the said money aforesaid, the State Board of Education approved plans for said consolidated high school, including a site for said school of 15.15 acres; that the Board of Education of Hyde County acquired title in fee simple to 3.04 acres of said site almost immediately, but have not yet acquired fee simple title to the remainder of said site and there is pending in the Superior Court of Hyde County condemnation proceeding for the remainder of said site, but there has been no report of commissioners who have been appointed to determine the value of the lands being condemned.

"4. That the Board of Education of Hyde County has entered into a contract for the construction of the high school building in question and proposed to build the building on the 3.04 acres which has already been acquired by the Board of Education of Hyde County; that the Court cannot determine at this time whether the said Board of Education of Hyde County would be able to obtain the remainder of the 15.15 acre site in fee or whether they will have funds available for the purpose of purchase of same if it can be condemned.

"5. That the State Board of Education has knowledge that the Hyde County Board of Education only owns 3.04 acres of said site in fee.

"6. That it is proposed to build the high school building on the portion of the site already acquired, but the plans approved by the State Board of Education provide for parking areas, athletic fields, gymnasium and other facilities for the school; and that the plan for the consolidated high school indicates that some of the walks accommodating the proposed high school building would be located on the land yet unacquired.

"AND THE COURT BEING OF THE OPINION:

"1. That the State Board of Education could not and would not have made an allotment of funds for the construction of said high school building if the plan for the consolidated high school had shown only a site of 3.04 acres, and that according to the rules of the State Board of Education, as appears in the Hand Book for Elementary and Secondary Schools issued by the State Superintendent of Public Instruction in 1953, it is the Policy of the State Board of Education to require a sufficient site for high schools to accommodate not only the buildings for instruction, but for playgrounds, athletic fields, gymnasium, parking and other necessary facilities.

"3. That in entering into the contract for the construction of said building without first having obtained the site planned for and approved, the County Board of Education of Hyde County was acting unlawfully and without authority and all of the facts and circumstances of the acts of said Board is (*sic*) and has (*sic*) been known to the defendants herein.

"4. That it would be injurious to the school officials and to the general public of Hyde County if the allotted funds should be disbursed to the Hyde County Board of Education and expended for the building of said consolidated high school before the entire site has been obtained for the reason that it is possible that additional site may not be acquired and the school would be left without sufficient land to accommodate a proper high school for Hyde County and for the further reason that the construction of said building will cause an increase in the values of surrounding property and will make the site more difficult to acquire in the future than at the present.

"IT IS, THEREFORE, ADJUDGED AND DECREED that the defendants herein be restrained and enjoined from disbursing and making available to the Board of Education of Hyde County the sum of $164,484.44 heretofore allotted until the final hearing of this cause or until title to the full site of 15.15 acres shall have been acquired in fee simple by the Board of Education of Hyde County; and that the demurrer filed by the defendants is OVERRULED.

"IT IS FURTHER ADJUDGED that when the Board of Education of Hyde County shall have acquired legal rights, either by deed or by operation of law or otherwise to the site of 15.15 acres that the defendants herein shall upon five days' notice move to dissolve the injunction hereby issued and upon a showing that title and right to said land have been acquired by deed by operation of law or otherwise, this injunction shall be thereupon immediately dissolved, provided, of course, that if this has not occurred before the final hearing

that the matter may be disposed of at the final hearing as the Court shall find proper."

The original defendants excepted to Judge Moore's said order of April 23, 1958, and gave notice of appeal to the Supreme Court, but did not perfect their appeal.

When said order of April 23, 1958, was issued, construction of the school building on the 3.04 acres had started. On March 24, 1958, in a prior action by this plaintiff against the Hyde County Board of Education, the (named) individual members thereof, and the (named) Superintendent of Public Instruction of Hyde County, Judge Paul had denied plaintiff's application for an order temporarily restraining said defendants from entering into a contract for the erection of a consolidated high school on the site here involved. Plaintiff's appeal therefrom to this Court was dismissed as academic because, pending the appeal, defendants had entered into the contract. *Topping v. Board of Education*, 248 N.C. 719, 104 S.E. 2d 857.

It appears from a judgment of Judge Moore dated June 27, 1958, included in this record, entered in contempt proceedings, that, in violation of said order of April 23, 1958, the Chairman of the Hyde County Board of Education and the Superintendent of Public Instruction of Hyde County, in his capacity of secretary ex officio of the Hyde County Board of Education, signed a requisition dated May 12, 1958, which was honored by the State Board of Education on May 19, 1958, and that the State Board of Education deposited the amount of said requisition, to wit, $19,184.28, to the credit of the Hyde County Board of Education, which disbursed said $19,184.28 to the general contractor, the architect, and other contractors, for work incident to said construction. Said judgment of June 27, 1958, adjudged Tommie Gaylor, Superintendent of Public Instruction of Hyde County, guilty of wilful contempt; and he excepted and gave notice of appeal. However, no question relating to the contempt proceedings or Judge Moore's judgment of June 27, 1958, is presented on the present appeal; and further facts incident to these matters need not be stated.

On November 15, 1958, Judge Paul, in Chambers, conducted a hearing on the original defendants' motion to dissolve (prior to final hearing) Judge Moore's restraining order of April 23, 1958. Prior to November 15, 1958, upon their application, the Hyde County Board of Education and the (named) individual members thereof were made *additional* parties defendant.

Prior to the *institution* (April 10, 1958) of this action, the title status of the 15.15 acre school site was as follows: The Hyde County Board of Education owned 3.04 acres thereof in fee simple. On Feb-

ruary 17, 1958, it had instituted a condemnation proceeding entitled "THE HYDE COUNTY BOARD OF EDUCATION, Petitioner, v. EUGENE D. MANN AND WIFE, BEATRICE L. MANN; CARROLL D. MANN AND WIFE, GENEVA F. MANN, Respondents," before the Clerk of the Superior Court of Hyde County, for the sole purpose of acquiring title to the remaining 12.11 acres thereof, subject to "a perpetual easement and right of ingress and egress ..... feet in width on the Westward and Southward sides of said land sought to be acquired," in favor of respondents Eugene D. Mann and wife, Beatrice L. Mann, their heirs and assigns.

As to the status of said condemnation proceeding on November 21, 1958, these facts are pertinent:

Commissioners, appointed by the clerk, filed their report on September 17, 1958. They assessed damages against petitioner as follows: to Carroll D. Mann and wife, Geneva F. Mann, for their 4.62 acres and damages to their adjoining lands, the sum of $1,848.00; to Eugene D. Mann and wife, Beatrice L. Mann, for their 7.49 acres and damages to their adjoining lands, the sum of $3,370.50. In each instance, they found no special benefits. They located, fixing the width thereof at 30 feet, an easement of right of way in favor of Eugene D. Mann and wife, Beatrice L. Mann, as an appurtenance to their remaining land, over and along the west and south sides of the 4.62 acres.

On September 18, 1958, the clerk, upon payment by petitioner into his office of the respective damages so assessed, a total of $5,218.50, signed an order "that the Hyde County Board of Education be, and it is let into possession of the lands appraised as provided by law."

On October 22, 1958, the clerk, at a hearing on respondents' exceptions to the commissioners' report and to said order of September 18, 1958, overruled "each and every" of respondents' said exceptions and "approved and affirmed" the commissioners' report and his prior order of September 18, 1958.

The respondents excepted to the clerk's order of October 22, 1958, and appealed. By reason of respondents' said appeal, the condemnation proceeding awaits trial in the superior court at term.

After full recitals (1) as to prior proceedings herein, and (2) as to the status of said condemnation proceeding on November 21, 1958, including a finding that the Hyde County Board of Education "has now acquired right to possession and has by order of Clerk of Superior Court of Hyde County been let into possession and is in possession of 12.11 acres of land adjacent and contiguous to the said 3.04 acres of land and is in the process of acquiring by operation of law the fee simple title thereto," Judge Paul, by his order of November

21, 1958, dissolved Judge Moore's restraining order of April 23, 1958. "being of the opinion that the conditions imposed in the temporary restraining order . . . as precedent to the contemplated dissolution of said order, have been completely or substantially complied with by said Hyde County Board of Education."

Plaintiff excepted "to the conclusions of the Court and the judgment entered" and appealed; and, upon appeal, "assigns as error the signing of said order by Judge M. C. Paul, which appellant contends is contrary to law."

Grimes & Grimes, LeRoy Scott and Wilkinson & Ward for plaintiff, appellant.

Attorney General Seawell and Assistant Attorney General Love for original defendants, appellees.

O. L. Williams and White & Aycock for additional defendants, appellees.

BOBBITT, J. Judge Moore's order of April 23, 1958, entered after notice and hearing, restrained *the original defendants* "until the final hearing of the cause or until title to the full site of 15.15 acres shall have been acquired in fee simple by the Board of Education of Hyde County."

The original defendants were entitled, by perfecting an appeal from Judge Moore's said interlocutory order, to a review by this Court of his findings of fact and conclusions of law. *Roberts v. Cameron,* 245 N.C. 373, 376, 95 S.E. 2d 899, and cases cited. Judge Moore's order, if *erroneous,* was subject to *correction* only by this Court. *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409, and cases cited; *Dail v. Hawkins,* 211 N.C. 283, 189 S.E. 774, and cases cited. Upon their failure to appeal therefrom, Judge Moore's order determined the status of the case until final hearing. (Note: There has been no final hearing.)

This is an appeal by plaintiff from Judge Paul's order of November 21, 1958. It presents no question as to whether Judge Moore's order was erroneous in any respect.

Judge Paul was without judicial power to modify or reverse either the findings of fact or the conclusions of law theretofore made by Judge Moore. It is well settled that the findings and decisions of one superior court judge are not subject to review by another superior court judge. *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407; *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163; *Fertilizer Co. v. Hardee,* 211 N.C. 56, 188 S.E. 623. Certain well defined exceptions to this basic rule have no application here.

Advertent to this well established rule, Judge Paul based his decision on the ground that, subsequent to April 23, 1958, the Board of

Education of Hyde County had completely or substantially *complied with the conditions prescribed by* Judge Moore as prerequisite to the dissolution of his order prior to final hearing.

The findings of fact and conclusions of law set forth therein disclose clearly, in our opinion, that Judge Moore's order of April 23, 1958, was based upon his ruling that the original defendants had no legal right to pay over the $164,484.44 to the Board of Education of Hyde County unless and until it acquired the fee simple title to the full site of 15.15 acres. Acquisition of *the fee simple title* to the full site of 15.15 acres was the condition prescribed by Judge Moore for the dissolution of his restraining order prior to final hearing. Nothing therein suffices to show that Judge Moore contemplated or intended that his restraining order was to be dissolved (prior to final hearing) upon a showing that the Board of Education of Hyde County had acquired a mere right to possession of the 12.11 acres pending final determination of the condemnation proceedings.

Hence, we are concerned with the title status as of November 21, 1958. Whether the Board of Education of Hyde County could or would *thereafter* acquire fee simple title to the 12.11 acres by condemnation or otherwise is beside the point.

Decision herein must be based on the legal significance of what occurred after April 23, 1958, and prior to November 21, 1958, in the condemnation proceeding; and, in this connection, our first inquiry is to determine the applicable statutory provisions.

All of the provisions of Ch. 115 of the General Statutes of North Carolina as contained in Vol. 3A and the 1953 Supplement thereto were rewritten by Ch. 1372, Session Laws of 1955, entitled "AN ACT REWRITING, REARRANGING, RENUMBERING AND AMENDING CHAPTER 115 OF THE GENERAL STATUTES, AND REPEALING CERTAIN OBSOLETE SECTIONS THEREOF." Article 15, Section 1, of said 1955 Act, as amended by Ch. 1335, Session Laws of 1955, was codified as G.S. 115-125 in the *1955 Supplement* to (recompiled) Vol. 3A of the General Statutes. Principally, it brought forward the provisions theretofore codified in Vol. 3A as G.S. 115-85 and considered in *Brown v. Doby,* 242 N.C. 462, 87 S.E. 2d 921. G.S. 115-125, as codified in said *1955 Supplement,* was considered in *Board of Education v. Allen,* 243 N.C. 520, 91 S.E. 2d 180.

Ch. 683, Session Laws of 1957, is entitled, "AN ACT TO REWRITE G.S. 115-125 RELATING TO THE ACQUISITION OF SCHOOL SITES." Sec. 1 thereof amends "G.S. 115-125" by rewriting it as therein set forth, providing, *inter alia,* that a county board of education may acquire a school site by condemnation proceedings instituted by it under the provisions of G.S. Ch. 40, Art. 2. Sec. 2

thereof repeals all laws and clauses of laws in conflict therewith.

The 1957 Act now appears as G.S. 115-125 in the *1957 Supplement* to Vol. 3A of the General Statutes.

While not so denominated in Ch. 1372, Session Laws of 1955, Sec. 1, Art. 15, thereof, is the 125th *section* of said chapter. It seems clear that, in enacting the 1957 Act, the legislative intent was to rewrite Art. 15, Sec. 1, of Ch. 1372, Session Laws of 1955, and we so hold. See *Board of Education v. Allen, supra.*

Consequently, the condemnation proceedings must be considered as instituted under the provisions of G.S. Ch. 40, Art. 2, pursuant to authority conferred by Ch. 683, Session Laws of 1957.

It is noted that the provisions of G.S. Ch. 40 apply equally to all bodies politic, corporations and persons (enumerated in G.S. 40-2) possessing the power of eminent domain.

The condemnation proceeding instituted by the Hyde County Board of Education against the Manns is now pending in the Superior Court of Hyde County, awaiting trial at term on exceptions directed both to the petitioner's right to condemn and to the adequacy of the damages awarded by the commissioners. G.S. 40-19. Present comment on the validity of these exceptions is not necessary or appropriate.

The determinative question is this: Did the payment into court by the Hyde County Board of Education of the amount of damages assessed by the commissioners and its possession of the 12.11 acres as authorized by the clerk's order vest the fee simple title to the 12.11 acres in the Hyde County Board of Education? Explicit provisions of G.S. 40-19 impel a negative answer.

While payment into court of the amount of damages assessed by the commissioners entitled the Board of Education of Hyde County to possession of the 12.11 acres "notwithstanding the pendency of the appeal, and until final judgment rendered on said appeal," in the event of a final adverse judgment it would be required to surrender possession thereof to the landowners. G.S. 40-19; *R. R. v. R. R.,* 148 N.C. 59, 61 S.E. 683. In such event, the court would make appropriate orders with reference to the refund of its deposit. G.S. 40-19. Temporary possession, *pendente lite,* subject to removal by final adverse judgment, is quite different from a final judicial determination that the condemnor is entitled as a matter of right to permanent possession. The title of the landowner is not divested unless and until the condemnor obtains *a final judgment* in his favor *and* pays to the landowner *the amount of the damages fixed by such final judgment.* G.S. 40-19; *Light Co. v. Manufacturing Co.,* 209 N.C. 560, 184 S.E. 48. True, a condemnor may not, as a matter of right, take a voluntary nonsuit, *over the landowner's objection,* after obtaining temporary

possession by payment of the amount of damages assessed by the commissioners, *R. R. v. R. R., supra,* but this is because the landowner may, if he elects to do so, assert his claim for damages on account of the condemnor's possession *pendente lite.*

Having reached the conclusion that the Board of Education of Hyde County, as of November 21, 1958, had not acquired the fee simple title to the full site of 15.15 acres, it follows that Judge Paul's order of November 21, 1958, is erroneous. Hence, Judge Paul's said order is vacated; and Judge Moore's order of April 23, 1958, continues in full force and effect.

Order vacated.

NANTAHALA POWER AND LIGHT COMPANY, PETITIONER v. OZE E. HORTON AND WIFE, BESSIE G. HORTON; J. G. STIKELEATHER, JR. AND WIFE, DOROTHY STIKELEATHER; RUTH LANE ATKINSON AND HUSBAND FRANK C. ATKINSON; HERMAN G. NICHOLS AND WIFE, ELIZABETH SHUFORD NICHOLS; AND ANDREW GENNETT, EXECUTOR OF THE ESTATE OF CARTER T. GENNETT, DECEASED, RESPONDENTS.

(Filed 14 January, 1959.)

1. Deeds § 14—

A deed to land excepting all mineral interest and reserving same to grantors severs the mineral and mining rights from the surface rights.

2. Reference § 14a—

Even though a party to a compulsory reference by proper exceptions and tender of issues preserves his right to jury trial upon the written evidence taken before the referee, if such evidence is insufficient to raise issues of fact, exception to the refusal of a jury trial is untenable.

3. Eminent Domain § 14— Claimant failing to offer evidence as to value of their interests taken by the condemnation are entitled to nominal damages only.

Condemnor paid the amount of damages assessed by the jury into court, and the conflicting claims of respondents in the fund was referred to a referee. One group of respondents claimed as successors to the grantee in the deed from the common source of title, and the other group claimed under the reservations of the mineral and water power rights set forth in that deed. *Held:* It was incumbent upon the contestants to establish their respective interests in the fund, and upon failure of the claimants under the reservations and exceptions in the deed to offer any evidence as to the value of the mineral rights or the water power rights lost by reason of the condemnation or evidence upon which the jury based its verdict in the condemnation proceeding, judgment that they should recover only nominal damages and that the balance of the recovery should be paid to the owners of the land is without error.

4. Deeds § 14—

The reservation of the water power rights by grantors vests in grantors and their successors at most such water rights as are susceptible of development within the boundaries of the tract conveyed, and cannot entitle them to any part of the compensation paid for the condemnation of a part of the tract of land for the ponding of water incident to the development of a power site some distance downstream from the tract.

5. Appeal and Error § 40—

Where both parties appeal, the exceptions of the successful party need not be considered when no prejudicial error is found on the appeal of the other party.

Cross appeals by respondents Horton and respondents Stikeleather, et al., from *Campbell, J.*, February Term, 1958, of JACKSON.

Nantahala Power and Light Company (hereafter called Power Company), petitioner, is not a party to or interested in the disposition of this appeal.

The controversy is between respondents Oze E. Horton and wife, Bessie G. Horton (hereafter called respondents Horton), on the one hand, and respondents J. G. Stikeleather, Jr., and wife, Dorothy Stikeleather, Ruth Lane Atkinson and husband, Frank C. Atkinson, Herman G. Nichols and wife, Elizabeth Shuford Nichols, and Andrew Gennett, Executor of the Estate of Carter T. Gennett (hereafter called respondents Stikeleather, et al.), on the other hand, and involves their respective claims to a fund of $11,500.00 now held by the Clerk of the Superior Court of Jackson County.

On April 4, 1952, the Power Company instituted this condemnation proceeding under G.S. Ch. 40, Art. 2. In separate answers respondents Horton and respondents Stikeleather, et al., made conflicting allegations as to their respective interests in a tract of 557 acres in Canada Township, Jackson County, which included the 90.4 acres referred to below.

When the proceeding came on for trial at February Term, 1954, before *Judge Patton* and a jury, all respondents stipulated ". . . that the only question involved and for trial in the action, was the amount of compensation the respondents were entitled to recover of the petitioner, Nantahala Power and Light Company, for the taking and condemnation of the lands described in the petition filed herein, for the uses and purposes stated in said petition, . . ." The court submitted one issue, to wit: "What compensation are respondents entitled to recover of the petitioner on account of the taking of the land described in the petition, and as compensation for the injury, if any, to the remaining land?" The jury answered: "$11,500.00."

The judgment entered at February Term, 1954, in accordance with said verdict, adjudged that, upon payment thereof: (1) The Power Company had acquired by condemnation and owned, for the duration of its corporate existence, an easement in the four parcels or tracts of land on the East Fork of Tuckaseegee River described in its petition, a total of 90.4 acres, for the following uses and purposes: "To flood and inundate said lands with the lake or reservoir of the petitioner, and to use said lands for any other necessary and essential hydro-electric power purpose or purposes, . . . in order that the petitioner may construct, operate and conduct said Bear Creek Hydro-Electric Development or Project on the East Fork of Tuckaseegee River and its tributaries in River and Canada Townships, Jackson County, North Carolina, and carry on its business in generating, distributing and selling electric current and electric power to its customers and the general public; . . ." (2) ". . . that the respondents, and each of them, shall be divested and barred, as provided by law, of all right, estate and interest in the real estate described in the petition for the uses and purposes aforesaid."

The judgment ordered that, upon payment by the Power Company, the clerk hold the $11,500.00 "pending the settlement and determination of the rights of each of the respondents respectively to said funds," and retained the cause for adjudication of the respective rights of the rival claimants to said $11,500.00 fund.

After payment by the Power Company, respondents Stikeleather, et al., by petition dated April 23, 1955, and respondents Horton, by answer thereto, made conflicting allegations as to their respective interests in said $11,500.00 fund.

In said pleadings, respondents Stikeleather, et al., prayed that the court award to them, to the exclusion of respondents Horton, and respondents Horton prayed that the court award to them, to the exclusion of respondents Stikeleather, et al., the entire fund of $11,500.00.

It was admitted that the Power Company's dam across the East Fork of Tuckaseegee River, which impounded the waters thereof and inundated the 90.4 acres, was *downstream* from the 557-acre tract.

It was admitted that the inundation of the 90.4 acres caused the remainder of the 557-acre tract "to be severed from road and highway connections." Respondents Stikeleather, et al., alleged that this completely isolated and rendered "almost completely worthless" the remainder of said 557-acre tract, while respondents Horton averred that it "greatly decreased" its value.

The rights of all respondents in the 557-acre tract depend upon the legal effect of a deed dated May 10, 1938. The grantors in said deed conveyed to the grantees, their heirs and assigns, "subject to the ex-

ceptions, limitations and reservations made below," the said 557-acre tract. Following the description, said deed provides:

"There is excepted from the provisions of this deed, and the parties of the first part reserved to themselves, their heirs, executors and assigns, all the mineral interest of any and every kind with full mining privileges in and upon said boundary of land, with the rights to the parties of the first part, their heirs and assigns, of ingress, egress and regress, and with the full right to do and perform each and every act necessary for the enjoyment of the mineral rights reserved, and for the proper mining and marketing of said minerals; there is further excepted from the provisions of this deed, and the parties of the first part reserved to themselves, their heirs, executors and assigns, all water power with full rights of storage of water on said boundary, including the right to build such dams on said boundary as they may care to build and to raise said dams, or lower same at their pleasure, and further reserve the right to divert the water on said property so as to pass above the ground, or upon the surface of the ground, or beneath the surface of the ground, as they may desire, and further reserve the right to the natural flowage of the water running through and along said property in its accustomed channel, undiminished in quantity, and unimpaired in quality; the parties of the first part, for themselves, their heirs and assigns, further reserve the right to build, maintain, alter, and rebuild on said property all power houses, shops, tenant houses and other buildings on said property necessary to the enjoyment of the right reserved, and reserve the right to build, maintain, alter and rebuild on said property all roads, bridges, transmission lines, telephone lines, and all other devices necessary to the enjoyment of the right reserved herein, and further reserve the right to use from said property such stone and dirt as may be reasonably necessary in the building or maintaining of said dams, buildings, bridges, and roadways, and to remove from said land any trees or other obstacles which may in any way obstruct the parties of the first part, their heirs and assigns, in the proper enjoyment of their rights herein reserved, and the parties of the first part and administrators, and assigns, and successors in title shall never be required to pay anything for the exercise of the rights reserved.

"This deed conveys a certain interest above described to the parties of the second part without warranty."

Prior to said deed, the grantors therein owned the 557-acre tract in fee simple.

It was admitted that respondents Horton succeeded to all rights reserved to the grantors in said deed and that respondents Stikeleather,

et al., succeeded to all rights conveyed to the grantees therein.

The conflicting allegations relate (1) to the legal significance of said "exceptions, limitations and reservations," and (2) to the value of the mineral and water power rights.

At October Term, 1955, *Judge Dan K. Moore,* reciting that he acted under G.S. 40-23, entered an order of compulsory reference wherein T. M. Jenkins, Esq., was appointed as referee "to ascertain the facts, to hear the evidence and respective claims of the respective parties, and report his findings of fact and conclusions of law to this Court." All respondents objected and excepted to said order of compulsory reference and demanded a jury trial upon issues tendered.

After hearing evidence offered by the respective parties, the referee, on May 21, 1956, reported his findings of fact and conclusions of law.

Respondents Horton filed exceptions numbered 1-12, inclusive, to designated findings of fact, and exceptions numbered 1-4, inclusive, to designated conclusions of law; and they prayed that the referee's report be set aside and that the cause be submitted to and determined by a jury on the issue theretofore tendered.

Respondents Stikeleather, et al., did not except to any of the referee's findings of fact but filed exceptions numbered 1-3, inclusive, to the referee's conclusions of law. They prayed that the conclusions of law to which their three exceptions were directed be set aside and that the report of the referee, in all other respects, be adopted and confirmed by the court.

At February Term, 1958, *Judge Campbell,* being of opinion that "only questions of law are presented for determination by the Court," denied request by respondents Horton for a jury trial on their tendered issue; and, after consideration of the evidence offered before the referee, including the exhibits, entered judgment embracing the matters set out below.

Judge Campbell sustained exceptions numbered 1, 5, 11 and 12, filed by respondents Horton to the referee's findings of fact, but overruled each and every of their exceptions to the referee's conclusions of law. Also, he overruled each and every of the three exceptions of respondents Stikeleather, et al., to the referee's conclusions of law.

Thereupon, "having confirmed that portion of the Referee's Report holding that Oze E. Horton and wife, Bessie G. Horton, are entitled to a nominal sum from the proceeds of said recovery, and which nominal sum the Court hereby fixes in the amount of Five ($5.00) Dollars, the Court concludes and holds that the balance of said recovery over and above the sum of $5.00 herein awarded to Oze E. Horton and wife, Bessie G. Horton, to wit, $11,495.00 less the sum of $350.00, heretofore paid . . . to the Referee for his services . . . should be paid

to" respondents Stikeleather, et al. Judgment was entered directing said clerk to disburse the $11,500.00 in accordance therewith.

Respondents Horton excepted and appealed, assigning as error (1) rulings on evidence admitted by the referee, (2) each and every adverse ruling on their exceptions to the referee's findings of fact and conclusions of law, (3) the refusal of a jury trial on their tendered issue, and (4) the conclusion of law quoted above.

Respondents Stikeleather, et al., excepted and appealed, assigning as error each and every adverse ruling on their exceptions to three of the referee's conclusions of law.

Morgan, Ward & Brown for respondents, Horton, appellants and appellees.

Ward & Bennett for respondents, Stikeleather, et al., appellants and appellees.

BOBBITT, J. Whatever rights the grantors in said deed of May 10, 1938, reserved by the "exceptions, limitations and reservations" therein set forth, vested in respondents Horton when the condemnation proceeding was instituted. Subject thereto, respondents Stikeleather, et al., owned the 557-acre tract in fee simple.

Unquestionably, said reservations and exceptions severed the minerals and mining rights from the surface rights. *Vance v. Guy*, 223 N.C. 409, 27 S.E. 2d 117, and cases cited; *English v. Clay Co.*, 225 N. C. 467, 35 S.E. 2d 329.

Respondents Stikeleather, et al., on their appeal, challenge the validity of said "exceptions, limitations and reservations" in respect of water power rights. We accept, for purposes of this appeal, the referee's conclusion of law, adopted by the court, to which respondents Horton did not except, to wit, that said reservations and exceptions were sufficient, "in form and substance, in law, to withdraw from the grant and to reserve in the grantors the water power on said land, within its boundaries, and together therewith the easements recited in connection therewith."

At February Term, 1954, all respondents, by stipulation, deferred their controversy, *inter se*, and made common cause against the Power Company in the trial that resulted in jury award of $11,500.00. It is noted that the evidence upon which the jury based its verdict is not before us, nor was it before the referee or court below. What elements of damages were considered by the jury? The record provides no answer.

Under these circumstances it was incumbent upon the contestants to establish their respective interests in the $11,500.00 fund.

Upon plenary competent and uncontradicted evidence, the referee found, *inter alia*, that the remainder of the 557-acre tract, after excluding the 90.4 acres, consisted of forest lands with marketable timber of the fair market stumpage value of $24,000.00 and with wood of the fair market stumpage value of $10,704.00, and that the only means of access thereto had been destroyed by the flooding of roads within the 90.4 acres. Based largely on these particular findings, the referee found that the damage to the fee in the remaining 466.6 acres caused by the condemnation of the 90.4 acres was $37,280.00. (Note: The referee found that there was no marketable timber on the 90.4 acres but made no finding as to the fair market value of the 90.4 acres.)

The referee found "that the taking and appropriating of the 90.4 acres and it inundation" by the Power Company destroyed all mineral and water power rights of respondents Horton therein. But the referee also found: (1) ". . . there is no evidence of any actual value of the mineral interest condemned and appropriated or on the remainder of the 557-acre tract." (2) ". . . the portions of the East Fork Tuckaseegee River and Robinson Creek, either separately or jointly, within the boundaries of the 557-acre tract alone, was not susceptible of practical economical hydro-electric water power development and . . . as such had no actual marketable value."

Respondents Horton complied carefully with all procedural requirements to reserve their right to a jury trial. *Bartlett v. Hopkins*, 235 N.C. 165, 69 S.E. 2d 236; *Brown v. Clement Co.*, 217 N.C. 47, 6 S.E. 2d 842; *Booker v. Highlands*, 198 N.C. 282, 151 S.E. 635. They were entitled to a jury trial "upon the written evidence taken before the referee" (G.S. 1-189) *if* it contained evidence that the easement condemned by the Power Company caused more than nominal damages in respect of mineral and water power rights.

1. As to minerals and mining rights, the only evidence offered in behalf of respondents Horton was the testimony of respondent Oze E. Horton. He testified that he had leased a mica mine, "located on a little knob not far below the Island Ford," (within the 90.4 acres) to one R. G. Parker "about 1939 and 1940"; that he thought Parker "had it about two years," but did not know how long it was actually operated or whether the operation was profitable or unprofitable; that he received a straight rental; and that he received such rental (no amount stated) during the years "1938, 1939 or 1940."

He testified: "I testified today that there had been no operation at all on mica since approximately 1939, and that I didn't know how much mica they got out. It is correct that I don't know anything about how long they mined there and didn't find any mica. It is correct that

I said that I didn't know whether or not there was any mica up there that could be found on April 4, 1952." Again: "I said that I don't know that there was a stick of mica in that mine that could be gotten out." Again: "I have not tested elsewhere on the place for minerals."

There was no evidence that the Island Ford Mine contained a mica deposit of value or that the mine had ever been operated profitably or was susceptible of profitable operation.

Booth Wood, a witness for respondents Stikeleather, et al., testified that he worked for Parker when he had the lease but "we quit on account of we couldn't get any mica."

2. No evidence was offered in behalf of respondents Horton as to the value of their water power rights. Evidence offered by respondents Stikeleather, et al., tended to show the course and fall of the East Fork of the Tuckaseegee River and of Robinson Creek, the character of the terrain, etc., within the boundaries of the 557-acre tract. T. A. Cox, witness for respondents Stikeleather, et al., whom the court found to be an expert hydro-electrical engineer, testified that in his opinion there was "no practical commercial water power that could be developed on the Horton tract on the Tuckaseegee River."

Careful scrutiny of the evidence impels the conclusion that there was no evidence sufficient to support a finding that respondents Horton sustained more than nominal damages on account of the destruction of their mineral and water power rights.

Even so, respondents Horton stress their contention that, since they owned the water power rights within the 557-acre tract, all that the Power Company acquired by condemnation were *the identical* rights they owned. Hence, their argument runs, they should receive all of the $11,500.00 the Power Company was required to pay. While ingenious, this contention rests on a false premise.

The said "exceptions, limitations and reservations," when considered in the light most favorable to them, vested in respondents Horton only such water rights as were susceptible of development *within the boundaries* of the 557-acre tract. The easement condemned gave the Power Company the right to build a dam on its property downstream from the 557-acre tract and thereby impound waters which would flood the 90.4 acres and other upstream lands. Respondents Horton owned no such property and had no such rights. In this connection, it is noted that respondents Horton were entitled to compensation solely on the basis *of the loss* they sustained by reason of the condemnation. *Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E. 2d 10.

In the absence of evidence sufficient to support a finding that respondents Horton sustained *more than nominal damages*, respondents

Stikeleather, et al., owners of the fee, were entitled to the $11,500.00 fund.

Each assignment of error made by respondents Horton has been carefully considered. None discloses prejudicial error. It is noted that respondents Horton, in their brief, do not direct their argument to each of their several assignments of error but generally to the matters discussed in this opinion.

It is noted that none of the assignments of error raise, hence we do not pass upon, this interesting question: Whether, under the circumstances, the adjudication of the rights of the respective respondents to the $11,500.00 should have been based on the evidence on which the jury at February Term, 1954, based its verdict.

The basis of decision obviates discussion and decision of serious questions raised on the appeal of respondents Stikeleather, et al., as to the validity of said "exceptions, limitations and reservations," in respect of water power rights; for the judgment, which is in their favor, is affirmed.

Affirmed.

PARK TERRACE, INC. v. R. G. BURGE AND LAWSON LESTER, JR.

(Filed 14 January, 1959.)

1. Corporations § 18—

Where the directors of a corporation are the owners of all of its A and B stock, neither the corporation nor the holders of its A stock can complain of the repurchase by the corporation for retirement of all of its B stock, since the only effect of such repurchase is to decrease the value of the equity represented by the A stock, the rights of creditors not being involved.

2. Corporations § 12—

A purchaser of stock in a corporation cannot complain of alleged mismanagement of the corporation occurring prior to his purchase.

3. Same: Corporations § 1—

This suit was instituted by a corporation against its prior stockholders and directors for alleged wrongful repurchase and retirement by the corporation of its stock. *Held:* There being no creditors whose rights were affected, recovery by the corporation would inure to the benefit of its present stockholders only and since the present stockholders may not recover for alleged mismanagement occurring prior to the time of their purchase of the stock, equity will look to the substance and not the form, and will not permit a recovery in the name of the corporation for their benefit.

PARK TERRACE, INC., *v.* BURGE.

APPEAL by plaintiff from *Johnston, J.*, 10 February Term, 1958, of FORSYTH.

This is an action instituted to recover $221,000 with interest at six per cent from 4 November 1950, by reason of the alleged improper and illegal sale by the defendants to the plaintiff of certain shares of stock issued by the plaintiff and held by the defendants.

The facts essential to the disposition of this appeal are hereinafter stated.

1. Sometime in October 1949 the defendants, together with one W. B. Pollard, as incorporators, caused to be incorporated a corporation known as Park Terrace, Inc. for the purpose of developing a housing project, to be financed through a loan insured under the Federal Housing Act by the Federal Housing Administration.

2. At the time of the organization of Park Terrace, Inc., each of the incorporators as hereinabove set out subscribed for 100 shares of its Class A common stock, hereinafter referred to as A stock, of the par value of $1.00 per share, and 41,097 shares of the Class B common stock, hereinafter referred to as B stock, of the par value of $1.00 per share, each agreeing to pay to the corporation the sum of $100.00 for his 100 shares of the A stock; and each agreeing to pay to the corporation the sum of $41,097 for his 41,097 shares of B stock; and Leif Valand, who was employed as architect for the housing project, according to the evidence admitted in the hearing below, was to receive $79,151 for his services, of which amount $9,000 was to be paid in cash and the balance by issuing to him 70,151 shares of B stock.

3. Immediately after the defendants and W. B. Pollard completed the organization of Park Terrace, Inc., the incorporators caused to be issued to themselves, W. B. Pollard and Leif Valand, A stock and B stock as hereinabove set out. No payments were made by any of these parties to the plaintiff in connection with the issuance of the B stock, but the defendants did cause an account receivable to be set up and charged to the defendants and to Pollard and Valand for the purchase price of the B stock issued to each of them.

4. Thereafter, Leif Valand was paid the sum of $9,000 in cash on his fee for services to the corporation as architect. The said Leif Valand, on 15 October 1949, three days after the B stock was issued to him, offered to sell his 70,151 shares of B stock to the corporation for the sum of $500.00 cash, stating that the sum of $500.00, together with the $9,000 already paid to him, would fully compensate him for his services; that the directors of the corporation, consisting of the two defendants and the said W. B. Pollard, at a duly called meeting of the said directors, passed a resolution in which they declined

to accept the offer to purchase the stock by the corporation on the ground that the corporation was not in financial position to make the purchase, but the two defendants agreed to purchase the said stock in their own names for the total sum of $500.00, and directed the secretary, who was the defendant R. G. Burge, to transfer the said 70,151 shares of B stock on the corporation's books to the defendants in equal shares.

5. In March or April 1950, the defendants approached the said W. B. Pollard and suggested that he transfer the 41,097 shares of B stock held by him to the defendants in equal shares; that the said 41,097 shares held by W. B. Pollard were transferred to the defendants in equal shares by the said W. B. Pollard; that the said W. B. Pollard had never paid the corporation for any part of said stock, and the said W. B. Pollard at that time owed the corporation for said stock the sum of $41,097.

6. Pursuant to this transaction the obligation of the said W. B. Pollard to the corporation in the sum of $41,097 for the purchase price of this stock was canceled by a credit to his account with the said corporation for that amount, and the indebtedness to the corporation of W. B. Pollard was transferred to the accounts of the defendants by charging one-half of said amount to each of the defendants herein.

7. That the acquisition of the B stock originally issued to Leif Valand and W. B. Pollard by the defendants made them the sole holders of all the B stock of the corporation, aggregating 193,442 shares.

8. After these defendants purchased the Valand stock the corporation caused the transfer of $70,151 from accounts receivable to the cost of building, thereby, in effect, canceling the charge against Valand but charging the construction cost of the project as though Valand had been paid the balance of $70,151 in B stock for his services, as originally contemplated.

9. The preferred stock authorized by the charter of the plaintiff consisted of only 100 shares of the par value of $1.00 per share and was issued to and still belongs to the Federal Housing Administration, hereinafter designated as FHA. This stock was a device by which the FHA, in the event of default in the mortgage executed by the plaintiff on its apartment housing development to secure a construction loan in the sum of $1,632,000, insured by the FHA, could step in and control the corporation.

10. On 4 November 1950, the defendants owed the plaintiff corporation for the B stock issued directly to them, and by reason of their assumption of the obligation of W. B. Pollard for the purchase of his B stock transferred to them, the total sum of $123,291.

11. All the B stock issued and outstanding, being 193,442 shares.

and having a par value of $1.00 per share, was purchased by the corporation from the defendants Lester and Burge, pursuant to the approval of the board of directors of the corporation at a meeting held on 4 November 1950. Mr. Pollard, the president of the corporation, presided at the meeting, and Mr. Lester and Mr. Burge were present; these three constituted the board of directors of the plaintiff corporation. The B stock was purchased by the corporation for $221,000 and retired by the unanimous action of the board. The board of directors ordered the capital account to be reduced pursuant to the retirement and cancellation of the 193,442 shares of B stock. At the time of this meeting the defendants and W. B. Pollard not only constituted the board of directors of the plaintiff corporation but they owned all the A stock of the corporation. The only stockholders authorized to vote at a meeting of the stockholders were those who held A stock, unless the corporation should default in its payments on the mortgage insured by the FHA.

12. The charter of the corporation provided that the B stock could be retired without notice to the preferred stockholders after completion of the project and when other conditions had been met in connection with the FHA loan, the details of which are immaterial here.

13. After deducting from the purchase price the amount due the plaintiff corporation by the defendants on the purchase price of the B stock in the sum of $123,291, and other items due the corporation by the defendants in the sum of $6,339, making a total of $129,630, the corporation paid the defendants in cash the balance of $91,370.

14. The plaintiff stipulated in the court below, " * * * that as of November 3, 1953, there was no stockholder, aside from FHA's preferred stock, who was a stockholder on November 4, 1950, and that there is no stockholder of Park Terrace, Inc. today, except FHA, who was a stockholder on November 4, 1950; that as of today, except for the mortgage, there is no outstanding obligation carrying over from November 4, 1950, no outstanding indebtedness existed on the day this suit was brought, November 3, 1953, carried over from November 4, 1950, except the mortgage indebtedness."

15. M. P. McLean, Jr. purchased from these defendants and W. B. Pollard and J. A. Bolich, Jr., all of the shares of the A stock of the plaintiff corporation, on or about 15 February 1951. (For a full statement of the circumstances surrounding the purchase of this stock see *Lester v. McLean* and *Burge v. McLean,* 242 N.C. 390, 87 S.E. 2d 886.)

16. The record discloses that the FHA has been furnished a financial statement of the plaintiff corporation annually, which statements after 4 November 1950 disclosed the retirement of the B stock and

the capital adjustment made pursuant thereto. There is no evidence tending to show that the FHA ever protested or objected to the retirement of the B stock or that it has ever asserted its right to control the corporation through or by virtue of its ownership of all the preferred stock of the corporation, or that any creditor of the corporation has ever objected to the transaction upon which the plaintiff corporation bases its right to recover in this action.

At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit. The motion was sustained and judgment entered accordingly. The plaintiff appeals, assigning error.

Dallace McLennan; Spry, White & Hamrick, and Fletcher & Lake for plaintiff.

Womble, Carlyle, Sandridge & Rice; Wade M. Gallant, Jr., and Broaddus, Epperly & Broaddus for defendants.

DENNY, J. As we construe the facts revealed on the record before us, the question to be determined is not whether these defendants acted in bad faith as officers and directors of the plaintiff corporation in connection with the transactions of which the plaintiff complains; the determinative question, in our opinion, is whether or not the plaintiff corporation, in light of all the facts and circumstances revealed by the record, may maintain an action to recover the consideration paid to these defendants for the purchase and retirement of the B stock. It is difficult to understand how the payment of $221,000 for the purchase and retirement of this stock could have been for the best interest of the plaintiff corporation. Even so, we must consider the factual situation as it existed at the time of the sale of this stock to the plaintiff corporation for retirement.

These defendants and W. B. Pollard owned all the outstanding shares of A stock at the time the B stock was sold to the plaintiff corporation. Therefore, the plaintiff corporation had no stockholders with voting rights other than those who as officers and directors authorized the purchase by the corporation of the B stock from these defendants. Consequently, it would seem that neither the plaintiff corporation nor the holders of the A stock could thereafter attack the validity of the transaction unless the corporation in doing so was acting in behalf of creditors.

The A stock, upon the purchase and retirement of the B stock, represented the total value of all the assets of the plaintiff corporation, subject to the obligation of the plaintiff to the holder of its mortgage, which was insured by the FHA, and the value of the preferred stock issued to and held by the FHA, which consisted of 100 shares of the

par value of $1.00 per share or a total value of only $100.00, and other creditors of the corporation, if any.

These defendants and W. B. Pollard being the owners and holders of all the A stock of the plaintiff corporation at the time of the transaction complained of, the value of their equity in the plaintiff corporation as represented by the A stock was substantially reduced in value as a result of the purchase and retirement of the B stock. Even so, these defendants could not complain since the reduction in value of the A stock was brought about by their own acts.

Certainly, the creditors of the corporation at the time of the transaction would have had just cause for complaint and would have had the right to require the payment by the defendants of the purchase price of the B stock as originally agreed upon if such payment by the defendants had been necessary to meet the obligations of the plaintiff corporation to them. G.S. 55-65; *Foundry Co. v. Killian,* 99 N.C. 501, 6 S.E. 680, 6 Am. St. Rep. 539; *Clayton v. Ore Knob Co.,* 109 N.C. 385, 14 S.E. 36; *Cotton Mills v. Cotton Mills,* 115 N.C. 475, 20 S.E. 770; *Hobgood v. Ehlen,* 141 N.C. 344, 53 S.E. 857; *Pender v. Speight,* 159 N.C. 612, 75 S.E. 851; *Whitlock v. Alexander,* 160 N.C. 465, 76 S.E. 538. However, the stipulation entered into in the court below eliminates the necessity for any further discussion or consideration of the rights of the creditors.

Since there is no creditor of the plaintiff corporation whose claim was outstanding on 4 November 1950, except the holder of the mortgage executed by the plaintiff to secure its original construction loan, and there is no evidence indicating the mortgage was or is now in default, it is quite clear that a recovery by the plaintiff corporation would inure entirely to the benefit of the present stockholders. This being true, the plaintiff is not entitled to recover unless the present stockholders could maintain an action for prior mismanagement against the defendants and W. B. Pollard. *Home Fire Ins. Co. v. Barber,* 67 Neb. 644, 93 N.W. 1024, 60 L.R.A. 927.

To allow the plaintiff corporation to recover the consideration it paid to the defendants for the B stock would, in substance, allow the present stockholders of the plaintiff corporation to recover an amount in excess of the sum M. P. McLean, Jr., paid these defendants, W. B. Pollard and J. A. Bolich, Jr., for the A stock on 15 February 1951, to wit, the sum of $182,500. See *Lester v. McLean* and *Burge v. McLean, supra.*

In the case of *Home Fire Ins. Co. v. Barber, supra,* an individual purchased all of the corporation's outstanding capital stock, the sellers being stockholders, directors and officers of the corporation. After ownership and control had passed to the purchaser, a suit was brought

by the corporation to recover from one of the sellers on the ground of alleged prior mismanagement of the corporation's affairs. The opinion of the Court by *Pound, C.*, says: "Sound reason and good authority sustain the rule that a purchaser of stock cannot complain of the prior acts and management of the corporation (citing numerous authorities, including *Hawes v. Oakland*, 104 U.S. 450, 26 L. Ed. 827). * * * It appears to be well settled * * * that stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoer and through the prior mismanagement have no standing to complain thereof. (Citations omitted) * * * Conceding, then, that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of equity, may the corporation recover, notwithstanding? We think not. Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders. If they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name. (Citations) It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance, and not the form, would be very much limited in its application. 'It is the province and delight of equity to brush away mere forms of law.' *Post, J.*, in *Fitzgerald v. Fitzgerald & Mallory Construction Company*, 44 Neb. 463, 492, 62 N.W. 899. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly, courts and textwriters have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results."

The distinguished jurist (later known to us as Dean Pound), concludes: "To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is perversion of equity. It turns principles meant to do justice into rules to be administered strictly with-

out regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and, if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporation individuality, and apply the principles of equity to reach an inequitable result."

In view of the fact that none of the present stockholders of the plaintiff corporation was a stockholder at the time of the transactions of which the plaintiff complains; the further fact that they obtained their shares through voluntary purchase or transfer, *Park Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584, and not by operation of law, and since the action was not brought in behalf of creditors or for the purpose of "asserting or endeavoring to protect a title to property," but solely as a suit in equity as the representative of its stockholders, it cannot be maintained. *Home Fire Ins. Co. v. Barber, supra; Hawes v. Oakland, supra; Moore v. Mining Co.*, 104 N.C. 534, 10 S.E. 679; *Park Terrace, Inc. v. Indemnity Co., supra.* Hence, the judgment of the court below is

Affirmed.

HELEN URBAN LAMBETH v. J. WALTER LAMBETH.

(Filed 14 January, 1959.)

1. Divorce and Alimony § 21—

In the wife's action for alimony without divorce, a receiver appointed therein to take possession of the husband's property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. G.S. 50-16.

2. Courts § 3—

The Superior Court, in its general equitable jurisdiction has inherent power over property in *custodia legis* and may order the sale of such property when necessary for the proper protection of the interests involved.

3. Receivers § 1—

Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require.

4. Divorce and Alimony § 21: Receivers § 4—

A court of equity has the power to order the receiver of the husband's

realty, appointed to enforce the payment of alimony decreed, to sell certain non-income producing realty for the purpose of investing the proceeds in accordance with G.S. Chapter 53, Article 6, so as to produce an income sufficient to enable the receiver to pay the expenses of the receivership and the alimony awarded.

5. Divorce and Alimony § 21: Judgments § 19—

Order for the sale of realty to produce income for the payment of alimony decreed by the court should be entered at term and not in chambers if the defendant husband is not given notice thereof.

6. Divorce and Alimony § 21—

Where non-income producing realty of the husband is ordered sold and the proceeds invested in order to provide income for the payment of alimony decreed, the proceeds of such sale are subject to the doctrine of equitable conversion and retain their character as realty.

APPEAL by plaintiff from *Preyer, J.*, 2 June Civil Term, 1958, of DAVIDSON.

This action was instituted in the Superior Court of Davidson County on 17 December 1957 for alimony without divorce, alimony *pendente lite*, suit money, counsel fees, and custody of child. Ancillary to the principal action, complaint prayed an attachment of the defendant's real property in Davidson County and the appointment of a Receiver therefor.

The plaintiff and the defendant were married on 29 May 1949 in Dade County, Florida. One child, Diane Lambeth, was born of the marriage on 13 February 1954.

From the facts found by the court below, it appears that on 27 July 1957 the defendant abandoned his wife and minor daughter, failing to provide them with the necessary subsistence according to his means and station in life. Thereafter, in August 1957, the defendant left the State of North Carolina carrying with him large quantities of stocks, bonds, and other intangible securities, having a value in excess of $750,000, the income from which is being received by him. The defendant's net worth in February 1958 was approximately $1,800,000, and his average adjusted gross income for the years 1950 through 1956 was $50,529.17 per year. In addition to the improved real estate in Thomasville, which yields gross rentals of $1,035.54 per month, the defendant owns three tracts of farm land in North Carolina, containing a total of 1,686.47 acres and having a value of not less than $400,000.

The defendant was duly served by publication, his properties in Davidson County attached and levied upon on 17 December 1957, and on 3 January 1958 a Receiver was appointed and directed to take possession of all the defendant's properties, both real and per-

sonal, tangible and intangible, located in the State of North Carolina. On the same date the custody, care and tuition of Diane Lambeth, the minor child of the plaintiff and defendant, was granted and conferred upon the plaintiff *pendente lite,* and the defendant was directed to pay the plaintiff the sum of $7,800 to enable her to repay sums she had borrowed and expended for necessary living expenses since 27 July 1957. The defendant was likewise ordered to pay $2,000 per month alimony *pendente lite.* The possession of the homeplace of the defendant in Thomasville, located at 19 East Main Street, was allocated to the plaintiff for occupancy by her and the minor child of the parties as their home *pendente lite.* Suit money and attorneys fees *pendente lite* were also awarded to the plaintiff and her attorneys. Various other orders were entered from time to time pending the hearing of this cause on its merits, the contents of which are not essential to the disposition of this appeal.

This cause came on for hearing on its merits at the March Civil Term 1958 of Davidson County. The jury answered each of the issues submitted in favor of the plaintiff and the court entered judgment in accord with the verdict on 9 April 1958 in which the custody of the minor child of the parties was awarded to the plaintiff, permanent alimony for the support of the plaintiff and her minor child in the sum of $1,600 per month, and attorneys fees. The plaintiff was likewise allotted, pending further orders of the court, the use and possession of the homeplace referred to hereinabove, together with the furnishings therein, as a home for the plaintiff and the aforesaid minor child.

In June 1958 the plaintiff petitioned the court to direct the Receiver to sell the defendant's farm properties and invest the proceeds therefrom in such legal investments as are permitted by Article 6 of Chapter 53 of the General Statutes of North Carolina, and, in turn, use the income from such investments for the purpose of paying alimony to the plaintiff, defraying the expenses of the receivership, and such other payments as the Receiver should be authorized to make.

This cause came on for hearing before his Honor upon the verified petition of the plaintiff, and being heard and the court having considered the pleadings, the petition, and the several reports of Hubert E. Olive, Jr., Receiver heretofore appointed in this cause, found as a fact that the allegations of the petition are true. The court made additional findings of fact and conclusions of law, the essential parts of which are stated below:

1. That it is for the best interest of both the plaintiff and the defendant and the minor child of the parties that the corpus of the defendant's estate located in North Carolina, which is in the possession

and control of said Receiver, should be, so far as possible, preserved unimpaired, but that the income which can be obtained therefrom is and will continue to be insufficient to enable the Receiver to pay the expenses of the receivership, expenses of upkeep and maintenance of the properties in the possession of the Receiver, *ad valorem* city and county taxes, insurance premiums upon the improved property, taxes and insurance premiums upon the homeplace, the alimony payments which the plaintiff is entitled to receive under the judgment heretofore entered, and Federal and State fiduciary income taxes;

2. That the Receiver has no other personal property of the defendant of any appreciable value which could be sold for the purpose of raising funds to meet the obligations enumerated hereinabove;

3. That the properties known as the "Gray Farm," "Cedar Lodge Farm," and "Silver Valley Mining Tract," do not produce any appreciable income and that it would be financially hazardous, impractical and uneconomical for the Receiver to attempt to operate said farm properties; that if rented to tenants the income therefrom would be trivial in comparison with the income which would be obtained by investment of the proceeds of the sale of said properties, and the rental of said properties would tend to depreciate them in value; that in any event it would be impossible to derive sufficient income from any use of said properties, when added to the other income of the Receiver, to enable the Receiver to pay said taxes, expenses and alimony installments;

4. That the properties described in paragraph 5 of said petition (being the farms designated by name in the preceding paragraph) will yield at a sale thereof net proceeds of not less than $400,000, and that such net proceeds invested in such legal investments as are permitted by Article 6 of Chapter 53 of the General Statutes of North Carolina (together with the interest income from any deferred portion of such sales price secured by first lien purchase money deeds of trust), will, when added to the rental income which the Receiver is collecting from the improved business properties now in the possession of tenants who are paying the rents to the Receiver, provide the Receiver with sufficient income so as to enable him to meet the obligations heretofore enumerated;

5. That the Receiver does not have on hand sufficient funds to pay the claims which have been filed with him and to meet the other legal obligations of the receivership and will not have sufficient funds to do so unless the farm lands referred to herein are sold and the proceeds invested in legal investments, and unless the properties are sold and the proceeds so invested it will become necessary for the corpus of the defendant's estate to be depleted and invaded by sales of por-

tions of his real property from time to time in order to raise the funds which the Receiver must have to pay the aforesaid obligations.

6. The court further found that the farm properties described in paragraph 5 of the petition should be sold for the purpose of investing the proceeds of such sales in legal investments, but concluded as a matter of law that the court was without authority to authorize a sale by the Receiver for the purpose of investing the proceeds thereof in income producing legal investments, and declined to sign the order directing such sale.

The plaintiff appeals, assigning error.

Walser & Brinkley, and Jordan, Wright & Henson for plaintiff.
No counsel contra.

DENNY, J. The question posed on this appeal is this: Does a judge of the superior court have the power and authority to order a Receiver of the defendant husband's property, located in North Carolina, to sell certain non-income producing real estate for the purpose of investing the proceeds derived therefrom in legal investments so as to produce an income sufficient to enable the Receiver to pay the expenses of the receivership and alimony payments awarded the plaintiff by the final judgment entered upon the jury's verdict that the defendant had abandoned his wife and child?

It appears from the record on this appeal that since the defendant abandoned his wife and child on 27 July 1957 he has not contributed anything to their support. Moreover, he has not paid anything pursuant to the orders heretofore entered in this cause in the court below. All that has been paid for the maintenance and repair of defendant's property, taxes, insurance, suit money, attorneys fees and alimony, has been paid by the Receiver.

It is well settled in this jurisdiction that a Receiver of the defendant husband's property in a case in which the wife has been awarded alimony may sell the husband's real estate to raise money to pay the alimony. *Bailey v. Bailey,* 127 N.C. 474, 37 S.E. 502; *White v. White,* 179 N.C. 592, 103 S.E. 216; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555; *Pennington v. Fourth National Bank,* 243 U.S. 269, 61 L. Ed. 713.

It has likewise been held in this jurisdiction that a Receiver may collect the income from the husband's real property for the purpose of paying therefrom the alimony awarded the wife. *Gobble v. Orrell,* 163 N.C. 489, 79 S.E. 957; *Perkins v. Perkins,* 232 N.C. 91, 59 S.E. 2d 356.

The plaintiff herein has obtained a judgment for alimony without

divorce pursuant to the provisions of G.S. 50-16, and such statute, among other things, provides, " * * * it shall be lawful * * * to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife * * *."

G.S. 1-505 (1957 Cumulative Supplement) provides: "The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina, upon such terms as appear to be to the best interests of the creditors affected by said receivership * * *."

It is likewise said in 75 C.J.S., Receivers, section 221 page 856, et seq., "Since the usual power and duty of a receiver are to collect and take possession of the assets of the estate and hold them for disposition as the court may direct, * * * a sale by him is ordinarily improper, but the property, unless it is perishable, should be preserved intact for the benefit of the party ultimately entitled. There are, however, instances in which a sale of real or personal property of the estate is expedient and proper, and, pursuant to the general rule justifying the appointment of a receiver when necessary to preserve property from loss or destruction, * * * where the character of the property or surrounding circumstances are such as to render a sale necessary for the adequate protection of the rights of the parties, the court may direct and empower its receiver to sell such property, to the end that its value may be preserved, although the parties have not requested such sale, * * *. Thus, where property or a business cannot be administered by a receiver except at a loss, it is clearly within the power of the court to stop the loss by ordering the sale of such property or the assets of such business; * * *."

It is said in 27 C.J.S., Divorce, section 251, page 1024, "Alimony is not strictly a debt due to the wife, but rather a general duty of support made specific and measured by the court. It is generally held, however, that alimony decreed to a wife is as much a debt until the decree is recalled or modified, as any judgment for money is, that the wife is a judgment creditor and as such is entitled to avail herself of all the remedies given to judgment creditors, and that the decree operates to cause an indebtedness to arise in her favor as each installment of alimony falls due. So, it has been held that a decree for alimony is a 'debt,' * * * within the meaning of a statute authorizing the appointment of a receiver of the estate of an absentee and the application of his property to the discharge of such debts as may be

proved against him * * *." See also 17 Am. Jur., Divorce and Separation, section 784, page 806.

In *Walton v. Walton,* 178 N.C. 73, 100 S.E. 176, the holding of the court is succinctly stated in the third headnote as follows: "The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of his abandonment, which puts everyone on notice of her claim and her priority over other creditors of her husband." *Hagedorn v. Hagedorn,* 211 N.C. 175, 189 S.E. 507.

The superior court is a court of general jurisdiction, both in law and equity. Consequently, such court has inherent power over property in *custodia legis* and may order the sale of such property when such sale is necessary for the proper protection of the interests involved. *Commonwealth v. Nestler,* 312 Pa. 484, 167 A 354; *McClatchey v. Marquis,* 203 Iowa 76, 212 N.W. 374; 30 C.J.S., Equity, section 81, page 439.

In the case of *Blades v. Hood,* 203 N.C. 56, 164 S.E. 828, this Court said: "There are numerous cases in which courts of competent jurisdiction apply equitable remedies which have for their object the prevention, rather than the redress, of injuries. * * * The receiver is an officer of the court and is amenable to its instruction in the performance of his duties; and the custody of the receiver is the custody of the law. *Simmons v. Allison,* 118 N.C. 761; *Pelletier v. Lumber Co.,* 123 N.C. 596; *Greenleaf v. Land Co.,* 146 N.C. 505. Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require. *Skinner v. Maxwell,* 66 N.C. 45; *Lasley v. Scales,* 179 N.C. 578."

In light of the findings of the court below, and the authorities cited herein, we hold that a judge of the superior court does have the power to order the sale of the defendant's non-income producing real estate for the purpose of investing the proceeds derived from such sale in legal investments as provided in Article 6 of Chapter 53 of the General Statutes of North Carolina, so as to produce an income sufficient to enable the Receiver to pay the expenses of the receivership and alimony awarded the plaintiff wife. It would seem upon the facts found by the court below, that within the foreseeable future, the investment of the proceeds as contemplated by such a sale would protect the defendant from any further use of any portion of the corpus of his estate in order to carry out the orders of the court below and to meet the financial requirements of the receivership. Unless the defendant is given notice thereof, all orders of this character should be entered at a term of the superior court and not in chambers. The proceeds from such sale should be subjected to the doctrine of equitable

conversion and retain its character as realty, and it is so ordered in the event such sale is authorized and consummated.

Error and Remanded.

J. A. PERRY AND EULA D. PERRY v. ALBERT DOUB, TRUSTEE, L. A. DOUB, TRUSTEE, AND CAREY N. ROBERTSON.

(Filed 14 January, 1959.)

1. Reference § 1—

The reference statutes are to be liberally construed to effectuate their purpose of facilitating the work of the court and simplifying the issues to be submitted to a jury when right to trial by jury is preserved.

2. Reference § 3—

When the pleadings show that a long and complicated accounting is necessary in order to answer the ultimate issue, the trial judge, after the filing of both the complaint and the answer, is vested with authority to order a compulsory reference.

3. Same—

Where the pleadings and escrow agreement between the parties disclose a controversy in regard to numerous items making up an account, the trial court is authorized to order a compulsory reference, and it is immaterial to the validity of the order of compulsory reference that the items relate to the consideration for only two notes or that the controversy later is narrowed to only a few of the items controverted in the pleadings.

4. Same—

The fact that both parties except to the order of compulsory reference and demand a jury trial does not demonstrate that a compulsory reference was improvidently ordered.

5. Appeal and Error § 45—

Where the jury answers the issue as to breach of contract by defendant in the negative, the refusal of the court to submit issues as to special and punitive damages for the alleged breach cannot be prejudicial.

6. Usury § 8—

The statutory penalty for usury is imposed only when a corrupt intent exists to take more than the legal rate of interest. G.S. 24-2.

7. Trial § 49—

The action of the trial court in setting aside the verdict on one of the issues is sustained, the record failing to show any abuse of discretion with respect thereto. Further, in this case plaintiffs were not prejudiced thereby in view of the fact that defendant later conceded the amount due and judgment was entered thereon.

8. Judgments § 17b—

Where defendant tenders judgment placing plaintiffs in the same position as if the jury had answered the issue in plaintiffs' favor, the matters in controversy are settled by concession and the court properly enters judgment thereon, and plaintiffs may not object thereto, plaintiffs being entitled to an adjudication of their rights, but not being entitled to insist on how their rights should be ascertained.

9. Bills and Notes § 18—

The burden is on the makers to show alleged want of consideration for their note.

APPEAL by plaintiffs from *Sharp, S. J.*, February 1958 Assigned Civil Term, of WAKE.

This action was begun 22 January 1952 when summons issued at the instance of plaintiffs. An order was then entered allowing them time to file their complaint. The complaint was filed 15 February 1952 and served on defendant Robertson on 20 February 1952. (Defendant Albert Doub is a stakeholder. Defendants Doub are not interested in the result.) Robertson filed answer 14 March 1952. On 21 June 1952 plaintiffs filed a reply to Robertson's answer. On 18 September 1952 plaintiffs, asserting that they had inadvertently omitted "certain matters and causes of action relating to cause alleged and arising out of the same transaction," were granted permission to file an amended complaint. An amended complaint was filed. At the November Term 1952 an order was entered requiring plaintiffs to reform their complaint and state their asserted causes of action separately. Plaintiffs were allowed thirty days in which to redraft their pleadings. On their motion this time was later extended. On 5 January 1953 an amended complaint was filed. It lists twenty-four items paid to or for plaintiffs by defendant Robertson and alleges balances owing them on two loan contracts. This pleading was analyzed on plaintiff's appeal from an order sustaining a demurrer to a portion thereof at the Fall Term 1953 of this Court. See 238 N.C. 233.

Following that decision, Robertson answered. He admitted his agreements to make loans to plaintiffs to be secured by the two deeds of trust referred to in the complaint. He alleged he had complied with his contracts. He admitted a controversy arose in the fall of 1951 with respect to the amount owing by plaintiffs; payment to him of $17,415.41, the amount plaintiffs admitted owing; and a deposit with Doub of $7,677.18, the additional amount claimed by Robertson to be owing, to be by Doub held pursuant to the agreement referred to in the factual summary appearing 238 N.C. 233. He asserted he had, in conformity with the agreement of 11 December 1951, furnished plaintiffs a statement of the various payments made to or for

them. A copy of this statement is attached to and made a part of defendants' answer. It lists thirty-one items of advances made by Robertson. Some of the items listed in this statement appear in the complaint. Several do not appear in the complaint, and, as to some listed in the complaint, the parties are not in agreement as to which note and deed of trust the advance is applicable.

When the cause was called for trial at the February Term 1954 Judge Stevens, after an examination of the pleadings, ordered a reference. Plaintiffs and defendants excepted and preserved their rights to jury trial.

The referee held hearings and on 29 January 1957 filed his report. Plaintiffs and Robertson filed exceptions and tendered issues arising on their exceptions. The cause was heard on the exceptions filed by Carr, J., and a jury at the May Term 1957. At the conclusion of the evidence Judge Carr sustained defendants' motion for nonsuit as to plaintiffs' fifth cause of action which asserts special and punitive damages for failure to make the loans as agreed upon.

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

"1. Did the plaintiff J. A. Perry fail to receive from the defendant Carey N. Robertson the sum of $3863.73 as a part of the consideration for the note given by plaintiff to defendant in the sum of $22,000?

"ANSWER: *No.*

"2. In what amount, if any, is the defendant Robertson indebted to the plaintiffs by reason of a partial failure of consideration for the note in the sum of $3,000 given by plaintiffs to defendant Robertson?

"ANSWER: *None.*

"3. Did the defendant Robertson knowingly and intentionally charge or reserve on the loan evidenced by the $22,000.00 note and deed of trust a greater rate of interest than allowed by law?

"ANSWER: *Yes.*

"4. Did the defendant Robertson knowingly and intentionally charge or reserve on the loan evidenced by the $3,000 note and deed of trust a greater rate of interest than allowed by law?

"ANSWER: ....."

Plaintiffs moved to set aside the verdict as to issues 1 and 2. Their motion was denied. Defendant moved to set the verdict aside as to the third issue. This motion was allowed. The court thereupon entered judgment that plaintiffs were not entitled to recover on the first, second, and fourth causes of action. The cause was retained for the submission of the third issue to a jury and for final judgment based on the jury's finding with respect to that issue. Plaintiffs excepted to the judgment.

At the November Term 1957 the question presented by the third issue was again submitted to a jury. Because of the inability of the jury to agree, a mistrial was ordered.

The cause was next calendared for trial at the February Term 1958. Judge Sharp made this finding:

"This cause was duly calendared for trial on February 10th 1958, the first day of this term, as the first case for a jury trial; that upon the call of the calendar on the morning of February 10th 1958 it was the concensus of counsel for both the plaintiffs and defendants that this case, if tried, would consume the entire week or a minimum of five days; that the plaintiffs announced their readiness for trial, whereupon counsel for the defendants informed the Court that they desired to tender to the plaintiffs a judgment which would place them in the same position financially as if the jury had answered issue No. 3 in plaintiffs' favor, or Yes; that counsel for the plaintiffs announced that the plaintiffs would refuse the tender of any judgment unless the defendants agreed that issue No. 3 be answered Yes and the defendant Robertson confess of record that he had charged usury."

Based on the jury's verdict as to the first and second issues, and defendant's concession with respect to the usurious charge covered by the third issue, there was due to Robertson on 11 December 1951 $23,847.56, which includes interest on the $3,000 loan but excludes interest on the larger loan. The $17,415.41 paid by plaintiffs to Robertson left a balance owing him of $6,432.15. This deducted from the $7,677.18 left a balance in Doub's hand to which plaintiffs were entitled of $1245.03. Judge Sharp, on the tender made by defendant, adjudged that he was not entitled to recover interest on the larger sum, that plaintiffs were entitled to recover from the moneys deposited with Doub the sum of $1235.03 with interest on that sum at the rates provided in the certificate of deposit held by Doub in accordance with the stipulation of the parties. She taxed the costs against defendant Robertson and directed payment of the balance to Robertson. The amount adjudged to be owing to plaintiffs is incorrect by the sum of $10. The judgment recites that the amount of the deposit was $7,667.18 whereas the pleadings and admissions fix the amount deposited and held in escrow as $7,677.18. The judgment was entered 19 February 1958. Plaintiffs were permitted to appeal as paupers. The case on appeal was certified 6 October 1958, docketed here, and heard on oral argument on 29 October 1958.

Stanley Winborne, Vaughan S. Winborne, and Samuel Pretlow Winborne for plaintiff appellants.

Mordecai, Mills & Parker for defendant, appellee.

RODMAN, J. The chronological history of this litigation clearly indicates the desirability of bringing it to a conclusion as early as that is practicable without prejudice to the rights of any of the parties.

Plaintiffs' first assignment of error challenges the right of the court to order a compulsory reference.

The trial judge is by statute, G.S. 1-189, authorized to order a compulsory reference where the examination of a long account is necessary to settle the controversy. Our statutes authorizing trial by referees are liberally construed to facilitate the work of the court and to simplify the issues to be submitted to a jury when the right to trial by jury is preserved. *Haywood County v. Welch,* 209 N.C. 583, 183 S.E. 727; *Cotton Mills v. Maslin,* 200 N.C. 328, 156 S.E. 484; *Murchison Nat. Bank v. Evans,* 191 N.C. 535, 132 S.E. 563; *Jones v. Beaman,* 117 N.C. 259.

The pleadings show what matters are in controversy. No reference can be ordered before the complaint and answer are filed. *Lumber Co. v. McPherson,* 133 N.C. 287; *Kerr v. Hicks,* 131 N.C. 90. When the pleadings show that a long or complicated accounting is necessary in order to answer the ultimate issue, the trial judge is vested with authority to order a compulsory reference. *Texas Co. v. Phillips,* 206 N.C. 355, 174 S.E. 115; *Kagey v. Fox West Coast Theatres Corp.,* 92 A.L.R. 286; 45 Am. Jur., 549, 550.

Plaintiffs contend the reference was not authorized because, as they say, only two items were in dispute, one amounting to $3,863.73, and the other amounting to $1,354.49. They concede the latter amount is not a single item but a total of several items; but it was not the mere fact that the controversy ultimately narrowed down to what plaintiffs say was at most some six or seven items. It was the manner in which plaintiffs formulated the complaint. In December 1951 an escrow agreement had been entered into. The amount plaintiffs conceded to be owing was paid by them. The additional sum sufficient to cover the amount claimed by defendant was deposited in escrow. This agreement obligated Robertson to furnish plaintiffs with a statement of the advances claimed to have been made by him. On 17 December 1951 Robertson complied with the agreement and filed a statement showing some thirty-one charges to plaintiffs' account. With this statement of the account in their possession plaintiffs elected not to directly challenge the items they now contend they should not be held liable for, but, exercising their right, constructed their own statement of the account. Some of the items not in dispute are nevertheless disputed as to which loan they are properly chargeable to. We are convinced from our examination of the pleadings that such a complicated accounting was indicated as authorized the trial judge in

his discretion to order a reference. The fact that both plaintiffs and defendant excepted and each demanded a jury trial does not, as plaintiffs suggest, demonstrate that a compulsory reference was improvidently ordered.

Plaintiffs' second assignment of error is to the judgment nonsuiting their fifth cause of action. The facts there stated are not a cause of action, but, as held on plaintiffs' prior appeal, a mere basis on which to award special and punitive damages for breaches of the contracts set out as the first and second causes of action. It may well be doubted if plaintiffs offered any evidence which would support an award of special or punitive damages; but if it be conceded that such evidence was offered, no harm has come to plaintiffs in not submitting the question to the jury. When the jury answered the first and second issues and thereby found defendant had performed his contracts, no damages of any character could be awarded against him.

It is conceded that a trial judge in the exercise of his discretion may set a verdict aside, *Walston v. Greene*, 246 N.C. 617, 99 S.E. 2d 805; *Frye & Sons, Inc. v. Francis*, 242 N.C. 107, 86 S.E. 2d 790, but plaintiffs insist the record here shows an abuse of discretion with respect to the third issue. A critical examination of the record fails to disclose anything which supports the assertion. The statutory penalty (G.S. 24-2) for charging usurious interest is imposed only when a corrupt intent exists to take more than the legal rate. *Bailey v. Inman*, 224 N.C. 571, 31 S.E. 2d 769. Each side offered evidence supporting their position with respect to defendant's intent in making the charge. The judge manifestly thought plaintiffs had failed to carry the burden imposed on them. A subsequent jury was unable to agree on that question.

The tender made by defendant authorizing the entry of judgment placing plaintiffs "in the same financial position as if the jury had answered issue No. 3 in plaintiffs' favor, or Yes" left no controverted fact for determination. Since all controverted issues had been settled by jury verdict or by concession, Judge Sharp was authorized and under the duty to enter a final judgment. The concession made by defendant and the judgment based thereon, rendered by Judge Sharp, effectively eliminated the exception taken by plaintiffs to the order of Judge Carr setting aside in his discretion the verdict on the third issue.

Plaintiffs were entitled to an adjudication of their rights. They were not entitled to insist on how their rights should be ascertained. They were not entitled to require the court to sit for a week and hear evidence to establish a fact which, if established, would give them no greater right than defendant was willing to accord. Plaintiffs' exception to the rendition of the judgment based on defendants' stipu-

lation is without merit. The amount which plaintiffs are entitled to receive from the fund on deposit is $1245.03, and the clerical error noted by us will be corrected accordingly.

Our examination of the charge and the several exceptions thereto fails to show prejudicial error. The court properly placed the burden of proof on plaintiffs to establish their allegations that the notes given are wanting in consideration.

The judgment will be amended to correct the clerical error herein noted and as so amended is

Affirmed.

JIMMY CARTER BY HIS NEXT FRIEND FRED CLAP v. CITY OF GREENSBORO.

(Filed 14 January, 1959.)

1. Municipal Corporations § 46—

Where plaintiff fails to allege and prove the giving of notice of a claim in tort against a municipality within the time prescribed by its charter, nonsuit is ordinarily proper, but if plaintiff alleges and proves that his failure to give such notice was due to such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice and that he actually gave notice within a reasonable time after the disability was removed, the failure to give such notice does not bar his action.

2. Same—

Plaintiff's evidence that when he was three years old he was seriously injured, requiring more than six months hospital treatment, that he was without guardian, that his mother was of limited education, was separated from his father and later divorced, and that notice of his claim against the municipality was given immediately after he was advised of his legal rights, requires the submission to the jury of an issue of whether the giving of timely notice was impossible because of plaintiff's physical and mental incapacity, and the jury's affirmative answer to the issue is conclusive.

3. Municipal Corporations § 6—

Activity of a municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, is a governmental function; activity of a municipality which is commercial or chiefly for the private advantage of the compact community, is private or proprietary.

4. Same—

Activity of a city in managing a temporary, low-cost housing project for a special and limited class of tenants under contract with the Federal Government, under which the city receives substantial ground rental

and other benefits and is entitled to salvage upon removal of the structures, is a proprietary activity, and the city may not escape liability for the negligent acts of its employee in the discharge of such function on the ground of governmental immunity.

5. Courts § 18—

A municipality, in managing a housing project under contract with the Federal Government, is not an "employee of the government" within the meaning of USCA Title 28, 1346(b), and therefore in an action to recover for injuries sustained as a result of the negligence of a municipal employee in the discharge of its duty in the management of such project, nonsuit on the ground that the municipality was an agent of the United States under the terms of the contract and that the action was in the exclusive jurisdiction of the Federal court, is properly denied.

APPEAL by defendant from *Johnston, J.*, March 10, 1958 Civil Term, GUILFORD Superior Court (Greensboro Division).

The plaintiff, a minor 12 years of age, by his Next Friend, instituted this civil action on February 29, 1956, to recover damages for injuries alleged to have been caused by the actionable negligence of the defendant. In material substance the plaintiff alleged that on December 2, 1946, he lived with his parents in one of several housing units owned and maintained for rent on a specifically described tract of land; that the defendant's agents, in maintaining the grounds surrounding the housing units, negligently kindled and left unattended a trash and rubbish fire in violation of the ordinance of the City of Greensboro; that the defendant knew small children living in the rental units were in the habit of playing on the grounds where the defendant left the fire open and unguarded; that plaintiff was attracted to the fire, his clothing was ignited, and he suffered horrible burns to his great damage; that at the time of his injury he was three years old; that on September 13, 1955, he gave written notice of his claim to the proper authorities of the City of Greensboro; that prior to the date upon which plaintiff filed his claim he was under such physical and mental incapacity as to make it impossible for him, by any ordinary means at his command, to give written notice required by the provisions of the City Charter. The claim was denied and this suit instituted.

The defendant filed answer, stated ". . . the defendant is the owner of a tract of land described . . . subject to a written contract entered into on February 21, 1946, . . . between the United States, acting by the Commissioner of the Federal Public Housing Authority, and the defendant." A copy of the contract was by express reference made a part of the paragraph. The defendant admitted "there were located on the land described certain temporary dwelling units owned and

managed by and under the control and supervision of the United States of America . . . under the contract . . . referred to." The defendant denied all allegations of negligence and by way of further defense especially pleaded the plaintiff's failure to file his claim within the six months after the injury as required by the City Charter. Both parties introduced evidence. That which is pertinent to the appeal is discussed in the opinion. The defendant made timely motions for nonsuit, and excepted to the court's refusal to allow them. The court submitted three issues which the jury answered as indicated:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint?

Answer: Yes."

"2. Prior to September 13, 1955, was the plaintiff under such physical or mental incapacity as to make it impossible for him, by any ordinary means at his command, to give written notice of his claim to the Council of the defendant, as alleged in the Complaint?

Answer: Yes."

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant?

Answer: $35,000.00."

From the judgment on the verdict, the defendant appealed.

Jordan, Wright & Henson, By: Welch Jordan for plaintiff, appellee.

H. J. Elam, III, City Attorney, H. L. Koontz, Holt, McNairy & Harris for defendant, appellant.

HIGGINS, J. The legal dispute involves the question of law whether the facts in evidence make out a case for the jury. The defendant contends the cause should have been withdrawn from the jury upon either of three grounds: (1) The plaintiff failed to file his claim within the time required by the city charter as a condition precedent to the institution of this action; (2) the defendant is immune from liability for negligence in this case in that the injury occurred incident to the performance of a necessary governmental function; (3) the defendant was the local managing agent for the United States under the terms of the contract and, therefore, any action for tort must be brought in the Federal court which is given exclusive jurisdiction. The defenses interposed do not involve the question of negligence, the character of the injuries, or the amount of the verdict.

1. The evidence discloses the plaintiff was horribly burned on December 2, 1946, under the circumstances alleged in the complaint. He was then three years old, living with his father and mother in one of the rental units. Later the father and mother separated, then were

divorced. The plaintiff remained with the mother. She was a witness in the case. It is apparent from her testimony that she was of very limited education. She testified the plaintiff had difficulty in remembering things; that "he can work around the house; he waters and feeds dogs, and he helps in the garden a little." From the time of the injury until the last day of December he was treated in the hospital at Greensboro and then transferred to Duke Hospital in Durham where he remained until June, 1947. At Duke Hospital he underwent six different skin grafting operations; was given 17 blood transfusions; and submitted to anesthesia 41 times during the course of his treatment. He testified he goes to school, is in the 7th grade, but is crippled and handicapped in his movements. One of his school teachers, called as a witness by the defendant, testified: "He is below average — a dull, slow student." He was without guardian. His family consisted of his mother, his stepfather, and a sister two years older than he. He remembers very little about the accident, his stay in the hospital, or his return home. So far as the record discloses, he was first advised of his legal rights by Mr. Jordan, now of counsel, who immediatley gave notice and filed his claim. The plaintiff was then twelve.

Ordinarily, the giving of timely notice is a condition precedent to the right to maintain an action, and nonsuit is proper unless the plaintiff alleges and proves notice. *Wallace v. Asheville,* 208 N.C. 74, 179 S.E. 18; *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827; *Pender v. Salisbury,* 160 N.C. 363, 76 S.E. 228. However, there is an exception to the rule. The plaintiff may relieve himself from the necessity of giving notice by alleging and proving that at the time notice should have been given he was under such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice; and that he actually gave notice within a reasonable time after the disability was removed. *Barnett v. Elizabeth City,* 222 N.C. 760, 24 S.E. 2d 264; *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d 900; *Foster v. Charlotte,* 206 N.C. 528, 174 S.E. 412; *Hartsell v. Asheville,* 166 N.C. 633, 82 S.E. 946; *Terrell v. Washington,* 158 N.C. 281, 73 S.E. 888.

In this case the plaintiff, as a part of his cause of action, alleged his failure to file the notice within the time fixed by the defendant's charter and at the same time he alleged facts which, if true, brought his case within the exception. The evidence offered was sufficient to support the finding the plaintiff, the three-year-old son of one of the distressed tenants, was horribly burned; that he spent more than six months in the hospital, underwent six skin grafting surgical operations, was given 17 blood transfusions, and submitted to anesthesia 41 times. He was without guardian; his mother of limited education,

later divorced, and his father in parts unknown. Under such circumstances is it not the policy of the law and the duty of judges to guard his rights with jealous care and to see that the door of the courthouse is not closed to him when he is without fault? The evidence required the court to submit the second issue to the jury. Its answer is conclusive. Failure to give earlier notice does not justify nonsuit.

In order properly to understand the defendant's second and third grounds for nonsuit, we quote a few pertinent provisions of the contract between the United States (FPHA) and the defendant (the Local Body): "This contract entered into this 21st day of February, 1946, by the United States (FPHA), . . . and the City of Greensboro . . . The FPHA will provide . . . 96 family dwelling units . . . all of which undertakings . . . shall be at its cost and expense. The local body . . . shall select and provide a site . . . deemed suitable by FPHA. . . . The local body shall prepare a plan of management for the project . . . consisting of standards for . . . adjustment of rents and an estimate of . . . income and expense. . . . The Project Management Plan shall be prepared (by the local body) in accordance with a form prescribed by FPHA . . . and submitted . . . for review and approval. . . . The local body shall manage and operate the project . . . in accordance with the provisions of this contract (including the approved Project Management Plan) and in accordance with such further rules . . . as may be deemed appropriate by the local body . . ."

The project was made possible by the Act of Congress known as the Lanham Act. The purpose was to furnish temporary low rent housing accommodations for distressed families of servicemen in congested areas. The contract provided that the local body should collect the rent, retain a fixed amount per unit for ground rental, for water, for taxes, for insurance, for management expenses, and to account to the FPHA for any balance. "Notwithstanding any other provisions hereof (contract) . . . any annual deficit, resulting from the operation and management of the project . . ." shall be the sole obligation of the local body. This contract required the local body (Greensboro) to remove the (dwelling accommodations) units two years after the termination of the emergency. " . . . such disposition and removal . . . shall be at the sole cost . . . of the local body and any salvage or proceeds . . . may be retained by the local body." Under the terms of the contract the city received a substantial sum of money, all of which was charged against and deducted from rents received from the tenants.

The question presented by the defendant's second ground for nonsuit is whether the defendant acted in its governmental or in its

proprietary capacity in carrying out its contract with the FPHA. If the city, in operating the housing project for a limited class of tenants in which it received a substantial ground rental and other benefits, and the salvage upon removal of the structures, was engaged in one of its governmental activities, then the motion for nonsuit upon the second ground should have been sustained. If the city acted in its proprietary capacity, it would be liable for the negligent act of its employees, and motion for nonsuit upon the second ground was properly denied.

Whether specific acts of a city are governmental or proprietary has been the subject of many of this Court's decisions. *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371; *Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411; *Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325; *Parks-Belk Co. v. Concord,* 194 N.C. 134, 138 S.E. 599; *Henderson v. Wilmington,* 191 N.C. 269, 132 S.E. 25. "Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary." *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289. The cases of *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252; *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693; and *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377, do not help the defendant in its attempt to classify the activities here involved as governmental and not proprietary.

The duties the city assumed and the purposes it sought to accomplish, the special and limited class of tenants who could qualify for occupancy, and the substantial financial returns the city received under the contract placed the city's management of the project in the category of proprietary activity. The employees of the city who ignited and abandoned the trash fire were not engaged in cleaning streets or disposing of garbage. They were engaged in maintaining the housing project. The defendant's motion for nonsuit on the ground the injury resulted from the acts of an employee engaged in one of the city's governmental functions was properly denied.

The defendant contends the City of Greensboro was the local managing agent of the FPHA project and as such agent is immune from suit except in the Federal court, and the motion to nonsuit on the third ground should have been allowed. The specific contention is: ". . . being merely a managing agent for the Federal Government under the

contract, . . . the persons employed to maintain and operate the housing project, such as the workmen who allegedly set the fire, are employees of the Federal Government and not of the City of Greensboro. . . . and the United States and not the City of Greensboro is liable, if there is any liability . . ."

Title 28 USCA(s), 1346(b), gives Federal courts exclusive jurisdiction in tort cases resulting in injury or loss caused by employees of the government. Section 2671 provides: " 'Employee of the government' includes officers or employees of any federal agency, . . . and persons acting on behalf of a federal agency in an official capacity, . . . in the service of the United States . . ." The same section provides: " 'Federal agency' includes the executive departments, and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States *but does not include any contractor with the United States.*" (emphasis added)

There was evidence the employees of the defendant serviced the housing project, cleaned up the grounds, destroyed the rubbish which in some cases was carried off and in some cases burned on the ground. There was evidence the employees were using the city's trucks and equipment, set the fire, left it, and that they were paid for their services by the city, probably from the operating fund charged against the rents from the project.

Defendant's motion to dismiss on the ground the action should have been brought in the Federal court against the United States, or against the defendant as its agent, was properly denied.

The charge is omitted from the record. It must be assumed, therefore, that the court gave the defendant the full benefit of accurate instructions as to the principles of law applicable to the evidence in the case. No valid reason is made to appear why the verdict and judgment should be disturbed.

No Error.

EQUIPMENT FINANCE CORPORATION v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES, AND THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA.

(Filed 14 January, 1959.)

1. Carriers § 2: Taxation § 30—

Where the owner of trucks leases them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right

to use same exclusively for the transportation and delivery of lessee's goods, the lessor is not a contract carrier within the meaning of G.S. 20-38 (r) (1) and G.S. 20-38 (t), since the lessor merely leases its vehicles and is not a carrier of any kind, and lessee is solely a private carrier, and therefore lessor is not liable for additional assessment at the "for hire" rates under the statute.

2. Statutes § 5a—

Whenever the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act.

3. Same—

Where the caption of a statute declares as its purpose the clarification of a prior statute, the fact that the later statute for the first time sets forth an exemption in specific terms does not perforce negate the existence of such exemption under the prior statute, since to clarify does not mean to add to or take from, but to make clear.

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

APPEAL by plaintiff from *Mallard, J.*, 16 June Civil Term, 1958 of WAKE.

This is an action instituted by the plaintiff to recover an assessment of additional truck license taxes. Plaintiff paid taxes for the calendar years 1950, 1951 and 1952 in the sum of $7,101.00, and in June 1952 the North Carolina Department of Motor Vehicles advised the plaintiff that an additional assessment at the "for hire" rates had been made against it for the aforesaid years in the sum of $6,407.03, under Section 20-38 (r) (1) and Section 20-38 (t) of the General Statutes of North Carolina, upon the ground that during the years involved the motor vehicles (trucks) of the plaintiff were used for transportation of property of another for hire. The additional assessment was paid under protest, and in apt time this action was instituted for the recovery thereof.

According to the stipulated facts, the plaintiff is a Delaware corporation, with its principal office and place of business in Chicago, Illinois, and was authorized to own trucks and to lease the same. Plaintiff corporation is an affiliate of the Curtiss Candy Company, an Illinois corporation with its principal office in Chicago. Plaintiff corporation was formed for the purpose of owning trucks to be leased to the parent corporation, the owner of all its capital stock. The plaintiff did lease to the Curtiss Candy Company, for a period of three years, certain trucks to be used by the candy company to deliver its own products to its customers. The terms of rental were set forth in the lease agreement. The amount of rental depended on the size of the truck and its use. The full rental applied if the truck was used during any part of four days or more in any week, ending at midnight on Saturday of

each week; if used less than the above time, a lower rental, called "idle rate," was charged.

The plaintiff during the years involved was not a domesticated corporation in the State of North Carolina, carried on no operations and conducted no business, maintained no offices, had no employees, and had no property in this State except the trucks involved in this action which were brought into North Carolina by the lessee, Curtiss Candy Company, under the terms of its lease agreement. The plaintiff had no control over the operation of the leased trucks and no power to designate into what states they might be sent. The plaintiff was required to carry certain insurance on the trucks, to maintain them, to reimburse Curtiss Candy Company for repairs made to the trucks, and to pay the license fees.

The Curtiss Candy Company operated said trucks on the highways of North Carolina during the years involved solely for the transportation of its own property, and at no time did it transport within the State of North Carolina the property or goods of any other person, firm or corporation, nor did Curtiss Candy Company at any time hold itself out as a carrier of property for others or permit the trucks to be used in North Carolina by any other person, firm or corporation. Curtiss Candy Company as lessee of the trucks from the plaintiff was permitted to operate said trucks anywhere in the United States. The plaintiff leases no trucks to any person, firm or corporation except to the Curtiss Candy Company.

The cause came on for trial and was heard by his Honor Raymond B. Mallard, Judge Presiding, at the June Civil Term 1958 of the Superior Court of Wake County, without a jury, pursuant to stipulation of the parties. His Honor, being of the opinion that upon the agreed statement of facts the tax had been properly levied, rendered judgment for the defendants. The plaintiff appeals, assigning error.

Attorney General Seawell, Lucius W. Pullen, Staff Attorney for the State.

D. Newton Farnell, Jr., for plaintiff.

DENNY, J. It is conceded that the only question for determination on this appeal is whether or not the plaintiff was a contract hauler or contract carrier within the meaning of G.S. 20-38 (r) (1) and G.S. 20-38 (t), and subject to contract hauler or contract carrier rates during the calendar years 1950, 1951 and 1952.

G.S. 20-38 (r) Property-Hauling Vehicles,—(1) Contract carrier vehicles, as of 1949, in pertinent part, read as follows: "Motor vehicles used for the transportation of property for hire, but not licensed as

common carrier of property vehicles under the provisions of sections 62-121.5 through 62-121.79: Provided, it shall not be construed to include the transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forests to the first or primary market, nor to perishable foods which are still owned by the grower while being delivered to the first or primary market, by an operator of not more than one truck or trailer for hire, nor to merchandise hauled for neighborhood farms incidentally and not as a regular business in going to and from farms and primary markets. Provided further, that the term "for hire" as used herein shall include every arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the exemptions aforesaid. * * *"

G.S. 20-88 (b) sets out the schedule of charges to be paid for the registration and licensing of trucks according to their classification and weight, the classifications being Private Hauler, Contract Hauler, and Franchise Hauler. The only amendment to this section since the date of its enactment was made by Chapter 819 of Session Laws of 1951, in which the words "contract carrier" were substituted in lieu of the words "contract hauler," and the words "common carrier of property" were substituted for the words "franchise hauler." However, these amendments have no legal bearing or effect on the question now before this Court.

In Chapter 831 of the 1953 Session Laws of North Carolina the General Assembly passed "AN ACT TO AMEND CHAPTER 20 OF THE GENERAL STATUTES TO REWRITE THE DEFINITION OF OWNER OF MOTOR VEHICLES AND CONTRACT CARRIER VEHICLES SO AS TO CLARIFY THE LICENSING PROCEDURE FOR LEASED VEHICLES." This Act listed as an exemption in various subsections, items set out in the text of the above statute and included in the list of exemptions the following: "(g) Vehicles which are leased for a term of one year or more to the same person, firm or corporation when used exclusively by such person, firm or corporation in transporting its own property."

G.S. 20-38 (t) in 1949 provided: "Owner. — A person who holds the legal title of a vehicle or, in the event a vehicle is subject to an agreement for conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the original vendee or lessee; or, in the event a mortgagor of a vehicle is entitled to possession, then such additional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article; except that in all

such instances when the rent paid by the lessee includes charges for services of any nature and/or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle, and said vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation."

G.S. 62-121.7, paragraph (14), defines a contract carrier as follows: " 'Contract carrier by motor vehicle,' means any person which, under individual contracts or agreements, engaged in the transportation, other than transportation referred to in paragraph (13), by motor vehicle of property in intrastate commerce for compensation." Transportation referred to in paragraph (13) is that of a "common carrier by motor vehicle."

A private carrier or hauler is defined in paragraph (16) of G.S. 62-121.7, as follows: " 'Private carrier' means any person not included in definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation."

Certainly, under the above definitions, it would seem clear that if the Curtiss Candy Company had agreed to pay the license fees on the trucks leased from the plaintiff and operated in North Carolina, it could not be construed to be other than a private carrier or hauler. Its use of the trucks was purely an incidental adjunct to its established private business owned and operated by such corporation other than for the transportation of property for compensation.

In *Interstate Commerce Com'n. v. Woodall Food Prod. Co.* (U.S. C.A. 5th Cir.), 207 F 2d 517, the defendant was engaged in buying and selling poultry, in which business it used leased trucks. The Court held that within the meaning of the Motor Carrier Act, the defendant was a "private carrier" and not a "contract" or "common" carrier. In this connection it will be noted that the provisions contained in 49 U.S.C.A., section 303 (a) (17), cited by the Court in the above case, are essentially the same as those in G.S. 62-121.7 (16). See *Interstate Commerce Commission v. Tank Car Oil Corporation* (U.S.C.A. 5th Cir.), 151 F 2d 834, and *Allaman v. Pennsylvania Public Utility Commission,* 149 Pa. Supr. 353, 27 A 2d 516.

In our opinion, the plaintiff during the years involved in this action was not a contract carrier within the meaning of our statutes. It never engaged in the business of transporting the goods of another for com-

pensation. Neither the plaintiff nor its lessee ever carried a single piece of merchandise in intrastate commerce in North Carolina for another for compensation. Curtiss Candy Company transported its own merchandise exclusively in connection with its established business, which business was unrelated to the transportation of property for compensation. On the other hand, the plaintiff did not engage in the transportation of goods for any purpose, it only leased its trucks to the Curtiss Candy Company for the limited purpose of transporting its goods only. Moreover, there is nothing in the leases under consideration that authorized the lessee to transport the good of another for compensation.

In the case of *People v. Hertz Driveurself Stations, Inc.*, 338 Mich. 139, 61 N.W. 2d 113, the defendant was charged with the violation of the Michigan Criminal Code in that it had leased and permitted the use of vehicles registered in its name without having first obtained a "contract carrier" permit, as required by the Michigan statute. It appeared that at least one vehicle of the defendant had been leased to a Produce Company under a long term lease; that the vehicle was operated by the lessee, carrying only the goods of the lessee; that the vehicle was maintained, insured and serviced by the lessor; that the driver of the vehicle was employed and paid by the lessee; and that the driver received all instructions from the lessee. The Michigan statute under which defendant was charged made it unlawful for a "contract motor carrier of * * * property to operate any motor vehicle for the transportation of * * * property for hire" without first having obtained a permit to do so. In holding the defendant not guilty, the Court said: "Hertz neither transported passengers nor property for hire: it simply leased its trucks." *Bridge Auto Renting Corporation v. Pedrick*, (U.S.C.A. 2d Cir.), 174 F 2d 733.

In *Interstate Commerce Commission v. Tank Car Oil Corporation, supra*, the defendant: (a) was the owner of property transported; (b) was transporting it for sale; and (c) was transporting it in furtherance of its commercial enterprise as a dealer at wholesale and retail in the products which it transported. The Court said: "We agree with the contention of the Commission that the ownership of property is not necessarily controlling in determining whether the transportation by such owner constitutes carriage for hire or private carriage. * * * We think that Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in furtherance of his own commercial enterprise he is a private carrier and, therefore, is not subject to the provisions of the Act."

In *Michigan Public Utilities Com. v. Duke*, 226 U.S. 570, 69 L. Ed. 445, 36 A.L.R. 1105, the Court said: " * * * it is beyond the power

of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation * * *." 37 Am. Jur., Motor Transportation section 23, page 536, et seq.

In light of the facts disclosed on the record before us, it is our opinion, and we hold, that the rent paid by the Curtiss Candy Company to the plaintiff did not constitute the plaintiff a carrier of any kind within the meaning of our statutes. Moreover, if the Curtiss Candy Company was only a private carrier—and in our opinion it was that, and that only—it would be untenable to hold that the lessor of the trucks used by the Curtiss Candy Company in its capacity as a private carrier, was a contract carrier for compensation.

Moreover, we think there is merit in the contention of the appellant with respect to Chapter 831 of the Session Laws of 1953. While it is true that paragraph (g) hereinabove referred to, was set out for the first time among the list of exemptions, it is also true that the Act in its caption spells out the intent and purpose of the Act, which was to "rewrite the definition of owner of motor vehicles and contract carrier vehicles so as to clarify the licensing procedure for leased vehicles." To clarify does not mean to add, or to take from, but, according to Webster's New International Dictionary (2nd Edition), it means, "to make clear."

Whenever the meaning of a statute is in doubt, reference may be had to the title and context as to legislative declarations of the purpose of the Act. *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278; *S. v. Keller,* 214 N.C. 447, 199 S.E. 620; *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51, 174 A.L.R. 643; *In re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129. Even so, in our opinion, the levy of the additional assessment which the plaintiff seeks to recover was levied without statutory authority. Hence, the judgment of the court below is

Reversed.

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

LEVY L. OVERTON v. R. O. TARKINGTON AND WIFE, MARY MARSH TARKINGTON, (ORIGINAL DEFENDANTS) AND STARLITE THEATRES, INC. (ADDITIONAL DEFENDANT)

(Filed 14 January, 1959.)

1. Assignment § 4—

An assignee of a chose in action may maintain an action thereon in

his own name, G.S. 1-57, but the defendant is entitled to set up against him any offset or other defense existing at the time of the assignment.

2. Usury § 8—

The penalty for usury may be asserted affirmatively in an action to recover twice the amount of usurious interest paid, and defensively, in an action on the indebtedness, to have the debt reduced by twice the amount of interest paid, and also for forfeiture of the entire interest charged.

3. Assignment § 4—

In an action by the assignee of a chose in action, the defendant is entitled to set up as an offset for the reduction of the debt the penalty of twice the amount of interest paid to the assignor and the reduction of the debt by the forfeiture of the entire interest, and the striking of the allegations of the answer setting up such defense on the ground that the penalty for usurious interest collected by the assignor could not be asserted against the assignee, is error.

4. Parties § 1—

When a complete determination of the controversy cannot be made without the presence of other parties, they are necessary parties and must be joined. G.S. 1-73.

5. Same—

The only statutory exception giving a party a legal right to the joinder of another party who is not necessary to the determination of the controversy is the right to bring in a party for contribution as a joint obligor under G.S. 1-240.

6. Parties § 2—

The joinder of a proper but not a necessary party is addressed to the discretion of the trial court in the absence of statutory provision to the contrary.

7. Same—

In an action by the assignee on a debt in which defendant sets up as an offset the penalty for usury, whether the assignor should be joined for the purpose of permitting defendant to seek to recover from him double the amount of usurious interest paid to the assignor rests in the discretion of the court, the assignor being a proper but not a necessary party to the determination of the assignee's cause of action.

8. Same: Parties § 10—

Where an additional party is joined on motion of defendant, without notice to plaintiff or such additional party, on the ground that such additional party is a necessary party, plaintiff and such additional party are entitled to a hearing on that question, and where the holding of the court that the additional party was not a necessary party is legally correct, the discretionary refusal of the court to join such additional party as a proper party is not reviewable.

PARKER, J., not sitting.

Certiorari to review an order of *Morris, J.*, entered May 12, 1958 Term, of BERTIE.

This action was instituted in May 1957. The complaint alleges defendants Tarkington, on 3 April 1956, contracted to pay to Starlite Theatres, Inc. (hereinafter designated as Starlite) $14,943 in weekly installments of $45, beginning 9 April 1956; to secure payment, debtors executed a mortgage on described chattels; plaintiff, on 20 February 1957, purchased the contract to pay and is a holder for value; defendants defaulted in their payments on 20 February 1957, at which time there was a balance owing of $14,583; plaintiff, in accord with the contract provisions, declared the entire debt due. Plaintiff seeks judgment for the debt with interest from the date of default and possession of the chattels as provided in the mortgage.

Defendants admit execution of the chattel mortgage and contract to pay as alleged in the complaint and default in payment of the installment due 20 February 1957; they deny plaintiff is a purchaser for value. As a defense and as a basis for affirmative relief they allege they purchased in 1953 a building and the described chattels from Starlite for $39,000; execution of two notes for the purchase price payable in weekly installments, one secured by mortgage on the real estate, the other by mortgage on the chattels; the notes so executed included usurious interest; payments on these notes, including payments of usurious interest; their failure to make all payments provided for in the original notes; a refinancing of their debt to Starlite for the amount claimed by it to be owing; the execution of new contracts to pay, including the instrument sued on, which included usurious charges; and payments thereon to 20 February 1957, which payments were in part for usurious interest. They allege the usury charged by Starlite included in the contract sued on amounts to $8,610.22, and in addition usury paid to Starlite aggregating $6,395.78. Based on these allegations they asserted they were entitled to have deducted from the asserted debt the usurious charge of $8,610.22 and were entitled to a penalty of twice the usurious interest paid which should be applied first to pay the debt sued for and the balance of said penalty adjudged an obligation owing them by Starlite and plaintiff.

Based on the answer asserting the right to affirmative relief, Starlite was, on motion of defendants and without notice to plaintiff, made an additional defendant. Summons and copy of the answer were served on Starlite. Thereafter the answer was amended so as to assert the right to use the alleged usury defensively as to plaintiff and affirmatively against Starlite to the extent not needed to discharge their obligation to plaintiff.

Plaintiff and Starlite each moved to strike from the answer all alle-

gations of payment of usurious interest and to vacate the order making Starlite a party. Each also demurred for misjoinder of parties and causes of action. The court vacated the order making Starlite a party and dismissed the action as to it. It allowed plaintiff's motion to strike all of the allegations with respect to payment of usurious interest to Starlite.

Defendants Tarkington excepted to the order and applied for *certiorari* which was allowed.

Rom B. Parker and J. C. Taylor for plaintiff, appellee.
Daniel R. Dixon for original defendants, appellants.
George C. Hampton, Jr., for additional defendant, appellee.

RODMAN, J. It is not asserted the contract sued on is a negotiable instrument. Plaintiff seeks to recover as an assignee of a chose in action. The rights of the parties are to be determined on that assertion.

Plaintiff, as an assignee, is by statute, G.S. 1-57, given the right to maintain the action in his name but that right is circumscribed by the express provision that it shall be without prejudice to any offset or other defense existing at the time of the assignment.

Plaintiff does not challenge the right of defendants to assert a usurious charge included in the instrument sued on with the right to have the evidence of the debt reduced to the extent of such charge. *Mortgage Co. v. Zion Church,* 219 N.C. 395, 14 S.E. 2d 37; *Faison v. Grandy,* 126 N.C. 827; *Ward v. Sugg,* 113 N.C. 489. Plaintiff denies defendants have a right to assert defensively or affirmatively the penalty for usurious interest collected by his assignor.

Defendants, in the answer as originally filed, asserted a liability imposed on the assignee for usurious payments made to the assignor; but by amendment to the answer they no longer claim such payments as a sword which they can use to attack the plaintiff. So far as plaintiff is concerned they now merely claim the right to use it as a buckler to shield and protect them from the attack made by plaintiff. The order striking the allegations deprived defendants of this asserted right. By the express language of the statute if the allegations could be asserted as a defense in an action by the assignor, they can be used for that purpose in this action.

Our statute, G.S. 24-2, provides: "And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of an action for debt."

Plaintiff's position is that the statute provides a penalty and for

that reason must be strictly construed. When so construed, the words "may recover back" provide a weapon which a debtor who has paid usurious interest may use for attack, as illustrated by *Sloan v. Insurance Co.*, 189 N.C. 690, 128 S.E. 2; but its use is limited to that purpose—it may not be used defensively. Our decisions are to the contrary. *Stacy, C. J.*, said in *Waters v. Garris*, 188 N.C. 305, 124 S.E. 334: "From an examination of the above section it will be seen that two remedies are provided for the enforcement of the penalties authorized by the statute:

"First. Where a greater rate of interest than six per centum per annum has been paid, the person or his legal representatives or the corporation by whom it has been paid, may recover back twice the amount of interest paid, in an action at law in the nature of an action for debt. *Bank v. Wysong & Miles Co.*, 177 N.C. 380.

"Second. In any action brought by the creditor to recover upon any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set off, the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged."

Authoritative interpretation given to the Federal statute, 12 U.S. C.A. 86, accords with plaintiff's construction of our statute. *McCollum v. Hamilton Nat. Bank*, 303 U.S. 245, 82 L. Ed. 819, 58 S. Ct. 570. This difference in interpretation is noted in the well considered opinion of *Bobbitt, J.*, in *Credit Corporation v. Motors*, 243 N.C. 326, 90 S.E. 2d 886. The Court there reaffirmed the right to plead usurious interest paid as a defense. No sound reason is advanced for reversing the conclusion heretofore reached.

It follows that since defendants had a right to plead the usurious payments as a setoff or defense to any action brought by the original creditor, he could not evade the express language of the statute by assigning his debt to a third person. There was error in striking the allegations of the usurious payments made to Starlite. *Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E. 2d 398; *Iselin Co. v. Saunders*, 231 N.C. 642, 58 S.E. 2d 614; *Trust Co. v. Williams*, 201 N.C. 464, 160 S.E. 484; *Pully v. Pass*, 123 N.C. 168.

Our statute, G.S. 1-73, makes it mandatory "when a complete determination of the controversy cannot be made without the presence of other parties" for these others to be made parties to the action. They are necessary parties. *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843.

In a single instance our statute gives a party the right to bring

in others not necessary parties, i.e., the right to bring in joint obligors for contribution. G.S. 1-240.

When not regulated by statute the procedural processes which will best promote the administration of justice are left to the judicial discretion of the trial judge. He has plenary power with respect to those who ought to be made parties to facilitate the administration of justice. *Childers v. Powell,* 243 N.C. 711, 92 S.E. 2d 65; *Jackson v. Baggett,* 237 N.C. 554, 75 S.E. 2d 532; *Marriner v. Mizzelle,* 205 N.C. 204, 170 S.E. 650; *Horne v. Horne,* 205 N.C. 309, 171 S.E. 91.

The order making Starlite a party defendant so that the original defendants might have affirmative relief aganst Starlite was entered without notice to plaintiff or Starlite. It recites that Starlite is a necessary party. Starlite and plaintiff were entitled to be heard on the question of defendants' right to make Starlite a party. On the hearing on that question Judge Morris held that Starlite was not a necessary party. That holding is supported by carefully considered prior decisions. *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659; *Board of Education v. Deitrick,* 221 N.C. 38, 18 S.E. 2d 704; *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252; *Hannah v. House,* 247 N.C. 573, 101 2d 357; *Kimsey v. Reaves,* 242 N.C. 721, S.E. 89 S.E. 2d 386.

Apparently Judge Morris recognized Starlite as a proper party on account of the implied warranty arising from the assignment. *Bird v. Ross,* 12 N.C. 472; *Drennan v. Bunn,* 7 Am. St. Rep. 354; *Challis v. McCrum,* 31 Am. Rep. 181; *Carroll v. Nodine,* 69 P 51; 6 C.J.S. 1159. The motion of defendants to make Starlite a party when it was not a necessary party but a proper party called on the presiding judge to exercise his discretion. His order recites he refused in the exercise of his discretion to make Starlite a party. His ruling in that respect is not reviewable. *Horne v. Horne, supra.*

Under the factual situation depicted in *Amusement Co. v. Tarkington, supra,* the additional defendants were not merely proper parties; they were necessary parties. Therein lies the distinction between that case and this case.

The order reviewed will be modified to conform to this opinion, and as so modified is affirmed.

Modified and affirmed.

PARKER, J., not sitting.

THE McLEAN TRUCKING COMPANY, A NORTH CAROLINA CORPORATION v. T. C. DOWLESS, INDIVIDUALLY, AND TRADING AND DOING BUSINESS AS T. C. DOWLESS TRANSFER.

(Filed 14 January, 1959.)

1. Appeal and Error § 34—

Except when necessary to present particular exceptions, the evidence should be set out in the record in narrative and not in question and answer form. Rule of Practice in the Supreme Court No. 19 (4).

2. Trial § 36—

Issues should be formulated so as to present separately the determinative issues of fact arising on the pleadings and evidence.

3. Contracts § 5—

Whether the stipulations upon a page appearing after the page containing the signatures of the parties is a part of the contract depends upon the intention of the parties, and is ordinarily a question of fact to be decided by the jury.

4. Trial §§ 20, 36—

Where defendant admits the execution of the contract but consistently denies that a page appearing after the page containing the signatures of the parties was a part of the agreement, an issue of fact is raised for the determination of the jury, and it is error for the court to answer such issue as a matter of law.

5. Judgments § 17b: Trial § 36—

The court may not, even with the consent of the parties, adjudicate a cause in part and leave one of the causes of action undisposed of, but should enter a single judgment completely and finally determining all of the rights of the parties arising on the pleadings and evidence.

APPEAL by defendant from *Johnston, J.*, February 10, 1958 Term FORSYTH Superior Court.

Civil action to recover $16,027.94 which the plaintiff alleged it was required to pay, and did pay (1) to the United States for cargo loss, and (2) to the dependents of Herbert Matheson, as provided in a certain uniform motor vehicle trip lease agreement, under the terms of which the defendant lessor furnished to the plaintiff lessee three motor trucks and drivers. The plaintiff alleged the lease contained a clause which required the lessor to indemnify the plaintiff for any loss or damage which it might be required to pay under (1) and (2) above, if caused by the negligence or incompetence of any driver furnished by the lessor to operate a leased vehicle. The plaintiff further alleged it was required to pay the sum of $7,893.65 to the United States for loss of and damage to cargo, for transfer and wrecker charges; and $8,134.29 to the dependents of Herbert Matheson as compensation for his death; that the loss proximately resulted from

the negligence and incompetence of Ed Shafton Barnes, "furnished by the defendant as the driver of one of the leased trucks."

The defendant denied negligence on the part of Barnes, denied the execution of any contract of indemnity as alleged by the plaintiff. He set up further defenses, among them (renumbered) (1) Matheson was contributorily negligent in following too close to the truck driven by Barnes; (2) that Section 22 was not a part of the contract of lease; (3) the contract of lease required the plaintiff, lessee, to carry insurance covering the losses now in suit; that the defendant paid the premium on the insurance by a reduction in the freight charges and that the plaintiff should look to the insurance company for its loss; (4) during the trip covered by the lease the plaintiff had exclusive control over both the drivers and the vehicles involved in the accident.

The plaintiff introduced the trip lease contract and other evidence bearing on the issues raised by the complaint, answer, and reply. The defendant also introduced evidence bearing on the issues. Both parties tendered issues and the court submitted those tendered by the plaintiff, as follows:

"1. Did the death of Matheson, the injuries to Barnes, and the damage to the cargo result from the negligence, incompetence, or other fault of Barnes, the driver furnished by Dowless, as alleged in the Complaint?

"2. If so, did Dowless contract to indemnify McLean Trucking Company as set forth in the Complaint?

"3. If so, did the defendant breach his contract of indemnity to the plaintiff as set forth in the complaint?

"4. How much is the plaintiff entitled to recover of the defendant?"

After the court's charge, the jury returned to the courtroom and the following took place:

"Juror: If your Honor please, the jury feels . . .

"Court: No, I don't want you to express any feeling that the jury has about it.

"Juror: I will phrase it this way: The jury would like to know if Issue (1) does not consist of more than one issue, or should it answer it as one?

"Court: . . . gentlemen, you will answer the first issue Yes or No under the instructions the court has given you."

After further deliberation the jury answered the first issue, Yes, and the second issue, No. Further proceedings are fully explained by the court's judgment:

"THIS CAUSE COMING ON TO BE HEARD, and being heard before the Honorable Walter E. Johnston, Jr., Judge Presiding over

the February 10, 1958, Civil Term, Superior Court of Forsyth County, upon motion by the plaintiff for judgment with respect to a portion of the relief sought in the complaint, said motion being made in open court in term-time;

"And the Court having considered said motion after hearing arguments of counsel for both the plaintiff and the defendant in open court;

"And it appearing to the Court that this cause was heard before the undersigned Judge Presiding and a jury at this February 10, 1958, Civil Term of Superior Court;

"And it further appearing to the Court that the jury answered in the affirmative the first issue submitted to them as follows:

"1. Did the death of Matheson, the injuries to Barnes, and the damage to the cargo result from the negligence, incompetence, or other fault of Barnes, the driver furnished by Dowless, as alleged in the Complaint?

Answer: YES;

"And further appearing to the Court that the answer to the second issue submitted to the jury has been set aside by the Court in its discretion upon motion of the plaintiff, and it further appearing to the Court that the answer of the jury to Issue No. 1 has been allowed to stand by order of the Court; and the Court now being of opinion that Issue No. 1 is the only issue arising under the pleadings and evidence;

"And it further appearing to the Court that the contracts alleged in paragraph 3 of the Complaint, particularly the contract pertaining to the truck driven by Ed Shafton Barnes, were executed by the defendant and the execution thereof is admitted by paragraph 1 of the Further Defense No. 6 of the Amendment to the defendant's Amended Answer;

"And it further appearing that paragraph 12 of the Complaint alleges that plaintiff has paid and is by law required to pay Workmen's Compensation benefits and medical payments to and on behalf of said Barnes and the dependents of Matheson the sum of $8,134.29, and that the defendant in paragraph 12 of his Amended Answer has admitted said allegations, and it further appearing that the allegations of paragraph 16 of the Complaint alleging that notice to the defendant that it had been damaged in such amount and that the defendant had refused to indemnify the plaintiff therefor are admitted by paragraph 16 of the Amended Answer;

"And it further appearing to the Court that the jury having answered Issue No. 1 as above set out in favor of the plaintiff and having found that the death of Matheson, the injury to Barnes,

and the damage to the cargo resulted from the negligence, incompetence or other fault of Barnes, the driver furnished by Dowless;

"And it further appearing to the Court that by reason of the finding of the jury with respect to said issue and further by reason of the setting aside of the answer to Issue No. 2 in the discretion of the Court that the plaintiff is entitled to a judgment to the extent of $8,134.29, which amount is admitted by the defendant in its Amended Answer;

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of the plaintiff that it have and recover of the defendant judgment in the sum of $8,134.29 is allowed, and the plaintiff shall therefore have and recover of the defendant the sum of $8,134.29, together with the costs of this action.

"This the 28th day of February, 1958."

The defendant excepted to the judgment and appealed.

Deal, Hutchins and Minor, By: Roy L. Deal,
Womble, Carlyle, Sandridge and Rice, By: I. E. Carlyle, for defendant, appellant.

Spry, White and Hamrick, By: Claude M. Hamrick for plaintiff, appellee.

HIGGINS, J. Motions to amend the pleadings to make the same more definite, and to strike, and orders thereon have been heard on repeated occasions and by three different judges of the superior court. While the matters actually in dispute do not appear too complicated, yet the pleadings have been added to and taken from to such extent a clear understanding of them can be gained only by painstaking study and analysis. Since the case must go back for another hearing, it is suggested the parties recast their pleadings in the interest of clarity and to the end the trial court and jury may understand what matters are actually involved in the case. The Court calls attention, also, to the fact that 50 pages of the record are taken up by the evidence in question and answer form in violation of Rule 19(4), Rules of Practice in the Supreme Court, 221 N.C. 552.

The jury had trouble with the first issue and asked if it might not be answered in two parts, to which the court replied it should be answered yes or no. The defendant had set up contributory negligence on the part of the driver Matheson as a defense to the claim for damages to the cargo of the truck driven by him. Whether Barnes was the employee of the plaintiff or of the defendant was raised by the pleadings. Three appropriate issues raising these questions were tendered by the defendant. The court refused to submit them and in-

stead submitted issue No. 1. The jury's trouble in answering it would have been obviated by the submission of the separate issues tendered by the defendant.

The jury refused to follow the court's peremptory instruction to answer the second issue yes, and answered it no. The pleadings and the evidence raised the issue whether paragraph 22 was intended by the parties as a part of the trip lease agreement. The agreement was drawn by counsel for the plaintiff. The signatures of the parties executing it appear on page 3. Section 22, under which the plaintiff claims the right of indemnity, appears on page 4. Between the signatures on page 3 and the indemnity clause on page 4, there appear receipts for equipment to be signed by the plaintiff only, both of which are on page 3. At the beginning of page 4 are blanks for information with respect to the driver and the helper, including a certificate of a doctor as to their physical condition. The lease was comparatively new, supplanting one of a single page. The pleadings and the evidence raise the question whether the defendant is bound by paragraph 22 which appears on another page of the lease below and beyond the formal execution signatures. The issue should be decided on the basis of the intention of the parties.

That the court had a mistaken view of the issues discussed above is shown by the following from the judgment: "And it appearing to the Court that the contracts alleged in paragraph 3 of the Complaint, particularly the contract pertaining to the truck driven by Ed Shafton Barnes, were executed by the defendant and the execution thereof is admitted by paragraph 1 of the Further Defense No. 6 of the Amendment to the defendant's Amended Answer."

Paragraph 3 of the complaint alleged the execution of the lease (by reference made a part of the paragraph). The amended answer to paragraph 3 contains the following: "The defendant admits signing the first three pages of the lease agreement. . . . The defendant denies, however, that page 4 (on which indemnity provision No. 22 appears) constituted a part of the contract of lease."

The first paragraph of the defendant's further defense No. 6 contains the following: "The defendant admits signing the first three pages of the written lease agreement, a copy of which is attached to the complaint. The defendant denies, however, that page 4 constituted a part of the contract of lease . . ."

It may be noted that nowhere in the record does the defendant admit the execution of any part of the lease agreement below and beyond the signatures on page 3. He specifically denies in the answer, in the amended answer, and in further defense No. 6 that Section 22, under which the plaintiff claims the right to recover, was a part of

the contract. The evidence offered by the parties required the submission of the issue to the jury. The court committed error in attempting to answer it as a matter of law.

Also raised by the pleadings is the question whether paragraph 12 of the lease places responsibility for loss upon the plaintiff by its own terms, or, if not, whether defendant paid for the insurance contemplated by the paragraph as he alleges; and, if so, whether by so doing he is relieved of responsibility for the loss.

A question of law may also arise whether there is a conflict between paragraph 12 and paragraph 22 of the lease if it be found that paragraph 22 is a part thereof. That question of law was not passed on by the superior court, but should be before it can be heard here.

Nothing in this opinion is intended to vary or change the holding of this Court in the well considered case of *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732. There the facts were stipulated. The court entered the judgment based on them. Here the facts are in dispute. The court cannot enter judgment until the facts are determined.

The plaintiff sued for $16,027.94, made up of two items: One for $8,134.29 paid to the dependents of Matheson on account of his death; the other for $7,893.65 paid to the United States for loss of cargo, and wrecker and transportation charges. The judgment was upon motion by plaintiff for judgment with respect to a part of the relief sought. That is, recovery of the amount paid to the dependents of Matheson only. That part of the claim paid to the United States for loss of cargo is left undetermined. Apparently the trial judge, upon the plaintiff's motion, attempted to do what this Court has said many times cannot be done—settle a case piecemeal—adjudicate in part and withhold in part. "Can the court, by consent, enter a fragmentary judgment settling a part of the case and leave part of the issues to be settled at a later date or in another action? A judgment is conclusive as to all issues raised by the pleadings. When issues are presented it is the duty of the court to dispose of them. Parties, even by agreement, cannot try issues piecemeal. The courts and the public are interested in the finality of litigation. . . . *Horne v. Edwards*, 215 N.C. 622, 3 S.E. 2d 1. 'The law requires a lawsuit to be tried as a whole and not as fractions. Moreover, it contemplates the entry of a single judgment which will completely and finally determine all the rights of the parties.' *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384. . . . 'Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from a final judgment.'" *Hicks v. Koutro*, 249 N.C. 61, 105 S.E. 2d 196.

This Court does not undertake to fix with finality the issues to be

submitted on the new trial. They can only be determined after the evidence is in. The Court has discussed a number of them for the purpose of pointing out the errors in the trial below. To the end that disputed issues of fact raised by the pleadings and supported by evidence may be resolved by the jury, the judgment of the superior court is set aside and the case remanded to the Superior Court of Forsyth County for a

New Trial.

L. R. ARMSTRONG v. AETNA INSURANCE COMPANY.

(Filed 14 January, 1959.)

1. Attachment § 7—

The filing of bond by the defendant to release his property from attachment does not bar defendant from challenging the validity of the attachment. G.S. 1-440.39(d).

2. Attachment § 11—

Where, in plaintiff's action *ex contractu* against a domestic corporation, attachment is ordered *ex parte* on plaintiff's allegation that defendant was secreting its property with intent to defraud, and defendant files answer denying all allegations upon which the right of attachment was based, a consent judgment thereafter entered that plaintiff recover the sum originally demanded, but which does not determine the validity of the attachment or direct that defendant's bond should be liable for the payment of the judgment, constitutes a simple judgment for the amount specified and precludes recovery by plaintiff against the surety on defendant's bond.

3. Judgments § 1—

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and in order to vacate such judgment an independent action must be instituted.

APPEAL by plaintiff from *Seawell, J.*, February Term, 1958, of BRUNSWICK.

Civil action to recover on $6,000.00 bond executed by Harris & Harris Construction Company, Inc. (hereafter called Construction Company), as principal, and by defendant, as surety, filed in plaintiff's prior action against the Construction Company, heard on an Agreed Statement of Facts.

The pertinent facts in said prior action, entitled *"L. R. Armstrong, Plaintiff, v. Harris & Harris Construction Company, Inc., Defendant,"*

are set forth in the following numbered paragraphs.

1. Summons issued and complaint filed on June 4, 1956, were served on the Construction Company on June 6, 1956.

2. Plaintiff alleged that the Construction Company, general contractor on a street paving job, owed him $2,931.15 for labor performed and equipment furnished in compliance with his subcontract. He alleged, upon information and belief, "that defendant, a domestic corporation, through its officers, servants, and employees has assigned, disposed of, or secreted or is about to assign, dispose of, or secrete its property with intent to defraud its creditors and particularly this plaintiff," in that "defendant, through its officers, obtained payment for the paving and construction work performed by the plaintiff through misrepresentation of facts and said officers have also made telephone withdrawals of funds in defendant's name on deposit with the Southport, North Carolina, branch of the Waccamaw Bank & Trust Company."

3. The clerk, reciting therein, *inter alia*, that plaintiff had executed and delivered the required Attachment Bond, ordered that the sheriff of Brunswick County attach all of the Construction Company's property in said county. Actually, the condition of the $1,000.00 bond for attachment, executed by plaintiff and a surety, was as follows: ". . . to be void, however, if the within named plaintiff shall pay the defendant all such costs as the defendant may recover of the plaintiff in this action." Plaintiff, with other surety, executed a separate $200.00 cost bond in usual form.

4. The said order of attachment was issued, *ex parte*, on June 4, 1956. Pursuant thereto, and prior to his return of June 12, 1956, the sheriff levied on and took into his possession two (described) trucks and served notice of levy (and summons to garnishee) on (1) the Cashier of the Waccamaw Bank & Trust Company, Southport, and (2) the Mayor and Board of Aldermen of Southport.

5. Answers were filed by said garnishees on June 18, 1956; but prior thereto, to wit, on June 15, 1956, the clerk had "dismissed" the attachment when the Construction Company, as principal, and Aetna Insurance Company, defendant herein, as surety, executed the bond dated June 13, 1956, on which the present action is based, the provisions thereof, after recitals, being as follows: "NOW, THEREFORE, we, Harris & Harris Construction Company, Inc., and Aetna Insurance Company, undertake in the sum of SIX THOUSAND ($6,000) DOLLARS that if the said property be returned to the defendant it shall be delivered to the plaintiff with damages for its deterioration and detention, together with the costs of this action, if such delivery adjudged and can be had, and if such delivery cannot for any cause

be had, that the plaintiff shall be paid such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, together with the costs of this action not exceeding the sum hereinabove set forth."

6. Later, but in apt time, the Construction Company answered the complaint. It denied categorically the allegations of paragraphs 8 and 9 of the complaint, the only portions thereof purporting to allege facts constituting a ground for attaching the Construction Company's property. It denied that it was indebted to plaintiff; and, by way of cross action, alleged that plaintiff was indebted to it in the amount of $2,740.11 on account of losses it sustained because of the rejection of plaintiff's negligent work. It prayed, *inter alia,* "that any order of attachment which might have been issued in this cause be vacated."

7. In reply, plaintiff denied the allegations of the Construction Company's cross action, prayed that it be dismissed and "that the plaintiff recover of the defendant in accordance with the prayer contained in his complaint filed in this action." No allegation in plaintiff's reply refers to the attached property or to the bond given for the release thereof.

8. Judgment dated October 16, 1956, signed by Judge Burgwyn, bearing the written consent of the parties and their counsel, *verbatim,* was as follows:

"This cause coming on to be heard and being heard before his Honor W. H. S. Burgwyn, Judge presiding at the October 1956 Term of the Superior Court of Brunswick County and it appearing to the court from the statement of counsel for the parties hereto that all matters of controversy set out in the pleadings have been agreed upon by the said parties, and that the defendant has agreed to pay to the plaintiff and the plaintiff has agreed to accept the sum of $2,931.15 and the costs of this action in full accord and satisfaction thereof;

"Now, therefore, by consent, it is ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of $2,931.15 and the costs of this action to be taxed by the Clerk."

9. A transcript of said judgment was docketed December 17, 1956, in the office of the Clerk of the Superior Court of Durham County, the county in which the Construction Company had its principal office and place of business.

10. Executions issued December 31, 1956, to the sheriffs of Brunswick and Durham Counties, were returned, unsatisfied.

On July 9, 1957, plaintiff instituted the present action against Aetna Insurance Company, to recover *on the bond* set forth in paragraph 5 above the amount due him by the Construction Company

under the terms of the consent judgment set forth in paragraph 8 above plus the costs of this action.

On the stipulated facts, the court entered judgment "that the plaintiff have and recover nothing of the defendant by reason of the matters and things alleged in the complaint and that the defendant recover its costs to be taxed by the Clerk from the plaintiff."

Plaintiff excepted and appealed.

James C. Bowman, Edgar L. Yow, Carter & Murchison and James C. Fox for plaintiff, appellant.

Fletcher & Lake for defendant, appellee.

BOBBITT, J. Decision herein depends upon the legal significance of what occurred in plaintiff's prior action against the Construction Company.

The clerk's *ex parte* order of attachment was properly issued under G.S. 1-440.12 *if* plaintiff's verified complaint and bond for attachment met the requirements of G.S. 1-440.11 and G.S. 1-440.10, respectively.

The Construction Company, by answer (1) denied all allegations on which plaintiff based his alleged right of attachment and (2) moved to vacate the clerk's *ex parte* order of attachment. It thereby challenged the legal sufficiency of plaintiff's verified complaint and bond for attachment; and, in addition, it raised issues of fact for determination by the court or by a jury in accordance with G.S. 1-440.36. The fact that it had obtained a discharge of the clerk's *ex parte* order of attachment by filing the $6,000.00 bond, with defendant herein as surety, did not bar the Construction Company from challenging the validity of the attachment. G.S. 1-440.39(d).

It is noted that plaintiff did not amend or ask leave to amend his verified complaint or bond for attachment.

When the prior action came on for hearing before Judge Burgwyn, the matters in controversy, properly determinable therein, related (1) to plaintiff's action, (2) to the validity of the attachment, and (3) to the Construction Company's cross action.

Plaintiff, had he so elected, could have undertaken to establish (1) the legal sufficiency of his verified complaint and bond for attachment and (2) facts essential to the validity of the attachment. *Rushing v. Ashcraft*, 211 N.C. 627, 191 S.E. 332. He did not do so. On the contrary, in settlement of "all matters of controversy set out in the pleadings," it was adjudged, by consent of the parties, "that the plaintiff have and recover of the defendant the sum of $2,931.15 and the costs of this action to be taxed by the Clerk."

The consent (final) judgment, as stated therein, was the result of a settlement of all matters in controversy. All that plaintiff acquired thereby was a simple judgment against the Construction Company for a specified amount. It does not purport to confer on plaintiff any rights whatsoever either to the attached property or with reference to the bond given for the release thereof. Indeed, the issuance of executions for the collection of said judgment out of *any* personal or real property of the Construction Company, indicates plaintiff then considered the judgment collectible by execution and not otherwise.

In the settlement embodied in the consent judgment, the Construction Company abandoned all rights under its cross action. Unless it barred plaintiff from asserting rights as an alleged attachment creditor, we do not perceive that the Construction Company received any consideration from the *settlement* embodied in the consent judgment.

The Construction Company was a North Carolina corporation on which personal service of process in this State was made. The jurisdiction of the court to enter the consent judgment did not depend upon the validity of the attachment.

The allegations of the verified complaint, on which plaintiff based his alleged right of attachment, include the indispensable allegation that the Construction Company acted "with intent to defraud." Hence, the Construction Company had a special interest in defeating the attachment. The sole benefit gained by the Construction Company from the settlement embodied in the consent judgment was plaintiff's abandonment of his alleged right of attachment, thereby eliminating the possibility of a finding that it had acted "with intent to defraud."

Questions as to the legal sufficiency of plaintiff's verified complaint and bond for attachment were determinable in the prior action; but a judicial determination thereof was obviated when all matters in controversy therein were resolved by the settlement embodied in the consent judgment. Hence, there is no occasion to discuss such questions.

"It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and that such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted." *Spruill v. Nixon,* 238 N.C. 523, 526, 78 S.E. 2d 323, and cases cited.

It is noted that the $6,000.00 bond executed by defendant herein as surety for the Construction Company in the prior action was not conditioned as prescribed by G.S. 1-440.39 but as set forth in paragraph 5 in the statement of facts. However, in view of our holding

that the consent judgment limited plaintiff's rights to a simple money judgment against the Construction Company, we pass, without discussion or decision, questions relating to the extent of plaintiff's right to recover on such $6,000.00 bond *if* he had established (which he did not) the validity of the attachment in the prior action.

Affirmed.

E. L. BONN v. RAYMOND SUMMERS AND WIFE, ELSIE SUMMERS.

(Filed 14 January, 1959.)

1. Brokers and Factors § 6—

Where a broker, within the time limited in the contract, obtains a purchaser ready, able and willing to purchase on the terms prescribed by vendors, the broker is entitled to his commission, notwithstanding vendors voluntarily fail to comply with their agreement to sell.

2. Brokers and Factors § 2—

An exclusive listing with a broker which stipulates that it should be in force for a period of three months and thereafter until revoked by the giving of notice, and stipulates further that if within three days after "this listing expires" the broker should furnish a list of the prospects actually shown the property, vendors would pay full commission if any of the prospects purchased the property within ninety days after expiration of the agreement, is not ambiguous and requires affirmative action on the part of vendors in order to effect its cancellation unless such requirement is waived by the broker.

3. Same—

Whether a broker by conduct or otherwise waives the contractual notice of the termination of the brokerage contract is ordinarily for the jury.

APPEAL by plaintiff from *Johnston, J.*, May 26 Civil Term, 1958, of GUILFORD (Greensboro Division).

This is a civil action instituted in the Municipal-County Court of Greensboro, North Carolina, on 11 October 1957 for the purpose of collecting the sum of $1,200.00 alleged to be due the plaintiff as commission for the sale of the defendants' 86-acre farm, pursuant to the terms of a contract entered into by and between the plaintiff and the defendants on 21 May 1957. The plaintiff obtained a judgment in the Municipal-County Court and the defendants appealed to the Superior Court of Guilford County where the matter was heard *de novo*.

The contract executed by both the defendants granted to the plain-

tiff for a period of three months from the date of the agreement and thereafter until the agreement should be revoked by ten days' notice in writing delivered to the plaintiff, the exclusive right and authority to sell the property therein described for the sum of $12,000, payable $5,000 in cash, the balance to be secured by first mortgage, or upon other terms mutually agreeable. The contract provided for the plaintiff to receive a cash commission of ten per cent of the gross consideration upon the sale of the property. The contract contained this further provision: " * * * and if within three days after this listing expires you furnish me a list of prospects to whom you or your representative has actually shown this property, then I will pay you full commission should any of these prospects purchase the property within 90 days after expiration of this listing."

The plaintiff submitted to the defendants on 19 September 1957 a written offer of $11,500 in cash, and the plaintiff testified he agreed to reduce his commission to five per cent in order that the sale might go through. The defendant Raymond Summers accepted this offer in writing; the defendant Elsie Summers refused to accept it.

On 1 October 1957 the plaintiff tendered to the defendants a written offer from the same purchaser for $12,000, payment to be made upon delivery of a deed conveying a good and marketable title to said property. The defendants refused to accept the offer.

The plaintiff thereafter on 4 October 1957 made demand by registered letter for the payment of his commission of $1,200.00. The defendants made no response thereto and this action was instituted.

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

Hoyle & Hoyle, and J. Sam Johnson, Jr., for plaintiff.

J. Owen Lindley, Stedman Hines, and Benjamin Hines for defendants.

DENNY, J. There is no contention on the part of the defendants that the plaintiff did not procure a *bona fide* purchaser, who was ready, able, and willing to purchase the property of the defendants upon the terms offered by them. However, the defendants take the position that under the terms of their contract, the plaintiff's authority to sell the property involved expired at the end of three months from 21 May 1957 and that they were under no obligation to accept any contract of purchase submitted by the plaintiff after the expiration of that period. The contract is not so written. It provides for the listing to continue after the expiration of three months' period

fixed therein and until the defendants revoke the listing by giving ten days' written notice thereof to the plaintiff.

There is no contention that any written notice was given to the plaintiff revoking the listing prior to the procurement by the plaintiff of a *bona fide* purchaser.

It seems to be settled law that where a broker acts within the terms and authority given, and succeeds in procuring a contract of sale with a responsible purchaser, he is entitled to his stipulated commission and his claim therefor is not affected because the vendors voluntarily fail to comply with their agreement to sell. *Crowell v. Parker,* 171 N.C. 392, 88 S.E. 497; *House v. Abell,* 182 N.C. 619, 109 S.E. 877; *White v. Pleasants,* 225 N.C. 760, 36 S.E. 2d 227; *Eller v. Fletcher,* 227 N.C. 345, 42 S.E. 2d 217; *Carver v. Britt,* 241 N.C. 538, 85 S.E. 2d 888; 8 Am. Jur., Brokers, section 184, page 1097.

Where property is listed for sale with an agent and no time limit is set in the contract, notice of revocation of authority to sell must be given to the agent by the principal, otherwise the broker is entitled to his commission if he produces a purchaser who is ready, able, and willing to purchase the property listed with the agent. *Reams v. Wilson,* 147 N.C. 304, 60 S.E. 1124; Mechem on Agency, section 226, page 151, et seq.

It is true that where no time is fixed for the continuance of a contract between the broker and his principal, either party can terminate the contract at will, subject to the ordinary requisites of good faith. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency and not merely a collateral interest, such as in commissions or compensation for making sale. However, a revocation will not be effective for the purpose of depriving the broker of his commission when a responsible purchaser is procured before the revocation. *Abbott v. Hunt,* 129 N.C. 403, 40 S.E. 119; *Insurance Co. v. Disher,* 225 N.C. 345, 34 S.E. 2d 200; *White v. Pleasants, supra.*

This brings us to the gravamen of this appeal. The defendants contend the contract is ambiguous, contradictory, and unenforceable. They insist that in one sentence the agreement indicates that it might be in full force for a period of three months subsequent to the signing of the instrument and thereafter until revoked by giving the notice required therein by the defendants. However, in a subsequent paragraph the same document states, "if within three days after this listing expires you furnish me a list of prospects to whom you or your representative has actually shown the property * * * I will pay you full commission * * *."

They insist that the term "revocation" denotes the necessity for

affirmative action on the part of the defendants, while the term "expires" indicates that the contractural relationship automatically ceased at a definite time, specifically after the three months' period stated in the contract.

We find no ambiguity in this contract or any irreconcilable provision therein. The contract does require affirmative action on the part of the defendants in order to effect its cancellation, unless such requirement had been waived by the plaintiff. Under the terms of the contract, the defendants had the right to give the plaintiff notice of revocation ten days before the expiration of three months. *Greene v. Donner,* 198 Wis. 122, 223 N.W. 427. If such notice had been given, the plaintiff's authority to sell would have been revoked at the expiration of the three months. Since this was not done, the contract, in our opinion, remained in full force and effect until notice of revocation was given as provided in the contract or the intention of the defendants not to comply therewith was brought to the attention of the plaintiff before he procured a purchaser.

In 12 C.J.S., Brokers, section 16, page 48, it is said: "Where the contract creates an exclusive agency for a certain period and provides that it may be revoked at the expiration of such period only by a specified written notice, the agency is exclusive for the period specified and continues thereafter until revoked by such notice; and such a contract is not objectionable as being for an indefinite or unreasonable term, since it may be revoked at any time, by written notice."

In *Reinke v. West,* Texas Appeals, 303 S.W. 2d 419, the contract in question gave the broker authority to sell the land for a period of ninety days, "and thereafter from day to day until you are given written notice of the termination of this contract * * *" The contract in question was dated 11 July 1953 and a written cash offer for the sale of the land was presented to the principal on 11 April 1955. The principal contended "that the contract providing only for a 90-day listing and thereafter from day to day or until written termination must be limited to a reasonable duration and that a period of 22 months was unreasonable." The Court dismissed this contention, saying, "We do not agree that the rule contended for is applicable. The parties exercised their right to contract freely. They provided for a method of terminating the listing agreement which appellant failed to invoke. He is bound by the contract as written."

In the case of *Hentges v. Wolff,* 240 Minn. 517, 61 N.W. 2d 748, the contract granted the brokers the exclusive right to sell the property in question "until March 1, 1952, and thereafter until ten days' written notice terminating the agreement was received." The agreement was entered into on 2 January 1952 and contained this further pro-

visions: "It is further agreed that upon any sale or contract for the sale of said real estate made by me within three months next after the termination of this agreement to any person with whom you have had negotiations for the sale of the same and of which I shall have been advised, I will pay you the full rate of commission, as above indicated."

On 1 May 1952, negotiations for the sale of the property were begun by the brokers with one Dougherty, the ultimate purchaser, of which negotiations defendant was advised. On 23 June 1952, defendant sold the property to Dougherty. The Court held that the defendant must pay the commission, thus holding that the contract was in effect under the extension provision, no notice having been given of its termination.

In *Brownell v. Hanson,* 109 Wash. 447, 186 P 873, the contract in question provided that the authority of the broker to sell the land was "to continue in force for thirty days and thereafter until sold, unless revoked by a written notice at the expiration of the thirty days." The defendant sold the property involved through another broker, without having given the plaintiff any notice of the revocation of his authority to sell. The plaintiff procured a judgment against the defendant for commissions. The defendant appealed and contended in the appellate court that the provision that the agency should continue in force after the thirty days until the property was sold, unless revoked by written notice at the expiration of 30 days, in effect constituted an agreement in perpetuity. The Court said: "This contention is not meritorious. The agency could easily be revoked at any time, either at or after the fixed period had expired, by written notice as the contract provided, and there is certainly nothing in the nature of a perpetuity in such contracts."

Likewise in *Gunning v. Muller,* 118 Wash. 685, 204 P 779, the contract provided, "I do hereby give and grant unto you for the period of 60 days from the date hereof and hereafter until withdrawal by ten days' written notice the exclusive right to sell said property * * *" In affirming the judgment of the lower court, awarding the broker his commissions, the Supreme Court of Washington said, "No notice of cancelation or withdrawal of the contract was ever given, therefore it was in force at the time of the sale." See also *Howard & Brown Realty Co. v. Barnett, Missouri Appeal,* 206 S.W. 417, and *Leslie v. Boyd,* 124 Ind. 320, 24 N.E. 887. Cf. *Wilson v. Franklin,* 282 Pa. 189, 127 A 609.

Whether the plaintiff, by his conduct or otherwise, waived the necessity of giving notice as required by the terms of the agreement under

consideration, is for the jury to determine. We have before us the plaintiff's evidence only. Even so, in our opinion, his evidence, when considered in the light most favorable to him, as it must be on motion for judgment as of nonsuit, is sufficient to require its submission to the jury. *Lindsey v. Speight,* 224 N.C. 453, 31 S.E. 2d 371; *White v. Pleasants, supra.* Hence, the judgment of the court below is

Reversed.

TROY NUNN, ADMINISTRATOR, VERLIAN NUNN ESTATE; TROY NUNN INDIVIDUALLY (UNMARRIED); L. C. NUNN AND WIFE, VIRGINIA NUNN, MRS. LOMA WILSON AND HUSBAND, BOYD WILSON; EVA TURNEY AND HUSBAND, ROBERT TURNEY; MRS. GRADY N. JACKSON AND HUSBAND, WOODROW JACKSON, AND BEULAH N. GIBBONS, PETITIONERS v. RONNIE (ROMEY) GIBBONS; THELMA NUNN MITCHELL AND HUSBAND, MURRAY MITCHELL, RESPONDENTS.

(Filed 14 January, 1959.)

1. **Executors and Administrators § 16—**

The regularity of a proceeding by an executor or administrator to sell lands to make assets to pay debts of the estate will be presumed in the absence of evidence to the contrary.

2. **Judgments § 27b—**

A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter.

3. **Executors and Administrators § 24a— Evidence held sufficient to support claim on quantum meruit for personal services rendered decedent.**

Where order for the sale of lands of the estate to make assets to pay debts is entered in a proceeding in which all interested persons are *sui juris* and parties, and the proceeding is then transferred to the civil issue docket for adjudication of the claim of one of the daughters and her husband to recover for personal services rendered decedent, claimants' evidence that they performed personal services and supported decedent for some time prior to her death, while decedent was ill and required many onerous services of a menial nature, and that decedent made statements to a number of persons in claimants' presence to the effect that she wanted claimants to have payment for such services, *is held* sufficient to overcome the presumption that the services by the daughter were gratuitous, and further, the services of the son-in-law are not presumed gratuitous, and therefore nonsuit on the claim was erroneous.

APPEAL by respondents from *Crissman, J.,* at October, 1958, Civil Term, of STOKES.

Special proceeding to sell land to make assets to pay debts of decedent Verlian Nunn.

From petition of petitioners and answer of respondents these facts appear to be uncontroverted:

1. Troy Nunn is the duly qualified administrator of the estate of Verlian Nunn, who died intestate on 2 November, 1955, a resident of Stokes County, N. C.

2. Verlian Nunn survived her husband, Rufus Nunn, who died 1 June, 1955, a resident of said Stokes County, leaving as her nearest next of kin the following children, whose names and addresses are as follows: "(1) Troy Nunn, son, (divorced and unmarried) a resident of Surry County, N. C.; (2) L. C. Nunn, son, who is married to Virginia Nunn, who are residents of Ararat, Virginia; (3) Thelma Nunn Mitchell, daughter, who is married to Murray Mitchell, who lives at Bassett, Virginia; (4) Mrs. Loma Nunn Wilson, daughter, who is married to Boyd Wilson, who live in Stokes County, N. C.; (5) Eva Nunn Turney, daughter, who is married to Robert Turney, who are residents of Surry County, N. C.; (6) Grady Nunn Jackson, daughter, who is married to Woodrow Jackson, who are residents of Surry County, N. C., and (7) Beulah Nunn Gibbons, daughter, a resident of Stokes County, who is married to Ronnie (Romey) Gibbons, separated but not divorced, who lives in Forsyth County."

And all of them, except Ronnie (Romey) Gibbons and Thelma Nunn Mitchell and husband, Murray Mitchell, party respondents, are parties petitioners, and all parties are more than 21 years of age.

3. Verlian Nunn, as the survivor of an estate by the entirety, left certain real property located in Stokes County, specifically described in the petition, as a part of her estate, and, therefore, the same is now owned by seven children, named above, as tenants in common "subject to the existing taxes, debts, and cost of administration of said estate." And Troy Nunn, as administrator of the Verlian Nunn estate, brings this action both as a co-tenant and also as administrator as a party petitioner; "that the personal assets of said estate are insufficient to pay the debts and, therefore, the land must be sold in order to pay the debts, and the remainder of said fund, subject to costs of administration, is to be divided among the tenants in common as their interests appear, each a 1/7 undivided interest."

And 4, petitioners allege: "That the size and nature of said property above is such that an actual partition is impossible, also because of the debts of said estate; that the same should be sold as a whole as being to the best interest of said estate and said tenants in common in order to make assets to pay debts and for division among the tenants in common"; and they pray: 1. That the said real property be sold in order to make assets for said estate, and for a division of said remainder among the tenants in common, etc.

The respondents, further answering the petition of petitioners, allege and say, summarily stated, that the estate is indebted to them in the sum of $825.00 in caring for, supporting and maintaining their mother Verlian Nunn, for thirty-three weeks, while she lived with them, during which time she was sick and required care and nursing at all hours of the day and night for which "compensation was intended by the decedent for the rendition of these services and was expected" by them; and they pray that the court order the commissioner to pay all debts, and that this debt take its place as provided by the General Statutes of North Carolina.

Petitioners, replying to the new matter, so set up in the said answer, deny that the estate of Verlian Nunn is indebted to Thelma Nunn Mitchell and husband, Murray Mitchell, in the amount stated or in any other amount.

And the record shows that the Clerk of Superior Court entered judgment, in which after reciting matters substantially as hereinabove related and providing that administrator should not disburse the fund, particularly the sum of $825.00 until the claim of the defendants is either settled, or said amount determined by the jury, and then to pay to defendants the "sum so determined by the jury," and finding that it is necessary to sell said lands "to make assets for the completion of the administration of said estate," appointed a commissioner to sell said land at public sale after advertisement as there directed, the sale to be subject to upset bids as provided by law. How the proceeding was transferred to civil issue docket does not appear in the record, but the record does show "Respondent's Evidence" tending to show substantially these facts: That Mrs. Nunn was the mother of Thelma Nunn Mitchell, who is wife of Murray Mitchell; that the Mitchells have lived in Bassett, Virginia, for around seven years; that Mrs. Nunn lived with them in their home there from about 15 March, 1955, until her death on 2 November, 1955; that her health was poor during said period, she being bedfast part of the time; that Mrs. Mitchell cared for her by washing, cooking, nursing, and performing many onerous duties of a menial nature; that Murray Mitchell provided the house, paid the rent and grocery bills, and waited on and cared for her— and has not received anything for doing it; and that in the presence of the Mitchells, Mrs. Nunn made statements to Mrs. Lilly Greer, Paul Ward and Mrs. Paul Ward, and James E. Spencer, respectively, in substance that Thelma and Murray had been better to her than any child she had and she wanted them to have pay when she was dead; that she didn't know what she would have done if it had not been for them; that they had been a big help to her; and that she wanted them paid and paid well when she died for what they

had done for her.

And at the close thereof motion of petitioners for judgment as of nonsuit was allowed by Judge of Superior Court presiding, and, in accordance therewith, judgment was signed by the judge. Respondents excepted and appeal to Supreme Court, and assign error.

John H. Blalock, Edward N. Swanson for appellees.
Norman and Reid for appellants.

WINBORNE, C. J. The sole assignment of error on this appeal is based upon exception by respondents to the ruling of the trial court in allowing motion of petitioners, made at the close of respondents' evidence, for judgment as of nonsuit.

Considering the pleadings, shown in the record on this appeal, stripped of extraneous matter appropriate in a special proceeding to sell real estate for partition among tenants in common, G.S. 46-1, et seq, it is seen that this is a proceeding instituted by the administrator of the estate of Verlian Nunn, deceased, to sell certain real estate owned by her to make assets to pay debts of her estate. G.S. 28-81 and G.S. 28-86.

The statute, G.S. 28-81, as amended by 1955 Session Laws, Chapter 302, Section 1, effective 24 March, 1955, provides that "When it is alleged and shown that the personal estate of a decedent is insufficient to pay all of his debts including the charges of administration, it shall not be necessary that the personal property of such decedent be first exhausted, and the executor, administrator or collector may, at any time after the grant of letters, apply to the Superior Court of the county where the land or some part thereof be situated by petition to sell the real property for the payment of the debts of such decedent."

And G.S. 28-86 prescribes that the petition shall contain, among other things, "the names, ages, and residences, if known, of the devisees and heirs at law of the decedent."

It is also provided in G.S. 28-87 that the heirs and devisees of the decedent are necessary parties to the proceeding.

In the light of these statutory provisions, it appears in instant case (1) that the petition lists all the heirs at law and distributees of Verlian Nunn, deceased; (2) that all parties agree that it is necessary to sell the real estate to make assets to pay debts; (3) that respondents, in their further answer, aver that among the debts of the estate is a sum due to them for services rendered to decedent; (4) that the petitioners deny that the estate is so indebted to respondents; and

(5) that the Clerk has ordered sale of the real estate, and the proceeds of sale not to be disbursed to the prejudice of respondents in their claim.

Thus it appears that the battleground on which the parties pitch this contest is around the validity of the claim of respondents made in their further answer. And it is a well established presumption that the regularity of the proceeding by an executor or administrator to sell lands to make assets to pay debts due by the estate, will be presumed in the absence of evidence to the contrary. *Wadford v. Davis,* 192 N.C. 484, 135 S.E. 353; see also *Odom v. Palmer,* 209 N.C. 93, 182 S.E. 741; *Caffey v. Osborne,* 210 N.C. 252, 186 S.E. 364; *Toms v. Brown,* 213 N.C. 295, 195 S.E. 781; *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873.

A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter. *Henderson Co. v. Johnson,* 230 N.C. 723, 55 S.E. 2d, 502, and cases cited.

Now then, in respect to the issue thus raised, when the evidence offered by respondents on the trial below as hereinabove briefly related, is considered in the light most favorable to respondents giving to them the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is done in passing upon motion for judgment as of nonsuit, G.S. 1-183, under applicable principles of law, the Court is of opinion and holds that a case is made for determination by a jury. See *Landreth v. Morris,* 214 N.C. 619, 200 S.E. 378, and cases cited. Indeed, paraphrasing the *Landreth case, supra,* the evidence does not justify the application of the presumption that the services were rendered gratuitously as a matter of law,— but rather the issue should be submitted to the jury. Furthermore the presumption that services rendered by a child to his parent are gratuitous does not apply to the relationship between a mother-in-law and son-in-law.

For reasons stated the judgment as of nonsuit is

Reversed.

DORIS ETHERIDGE, ADMINISTRATRIX OF THE ESTATE OF CHARLIE HORACE BORDEAUX v. CAROLINA POWER & LIGHT COMPANY (DEFENDANT) AND SWIFT & COMPANY (ADDITIONAL DEFENDANT).

(Filed 14 January, 1959.)

1. Torts § 6—

When an injured party elects to sue some but not all of the tort-feasors responsible for his injuries, those sued have a right to bring the other wrongdoers in for contribution, and the original defendant then becomes a plaintiff on the cross-action in relation to such additional defendants.

2. Same—

In order for the original defendant to be entitled to the joinder of an additional defendant for contribution, the original defendant must allege facts sufficient to establish the right to contribution, and motion of the additional defendant to strike such cross-action for contribution is in effect a demurrer thereto.

3. Appeal and Error §§ 3, 16—

Rule 4(a) of this Court has no application when the order striking a portion of the pleading is in effect the granting of a demurrer on the ground that the facts alleged are insufficient to constitute a cause of action, and an appeal will lie from such order under G.S. 1-277.

4. Torts § 6— Allegations of answer held sufficient predicate for joinder of additional party for contribution.

Plaintiff sued a power company for the wrongful death of her intestate resulting when intestate came in contact, in the course of his employment with a construction company, with a wire negligently erected by defendant at a place endangering workmen on the construction job. Defendant alleged that its customer agreed with its construction company to furnish the construction company electricity needed to perform the job, that the construction company, as agent for the customer, requested defendant to erect the transmission line, and designated where the line should be run. On these allegations, the power company had the customer joined as additional party defendant for contribution. *Held:* The allegations were sufficient to support the claim for contribution, and it was error to grant the motion of such additional defendant to strike such allegations.

5. Pleadings § 30—

An additional defendant, joined for contribution, has no standing to move to strike from the answer defenses asserted by the original defendant to plaintiff's claim.

6. Same—

Where the answer alleges the facts in regard to intestate's actions, relied on as a defense to recovery, first under the designation of contributory negligence, repetitions of such facts, designated as defenses under the doctrine of assumption of risk and *volenti non fit injuria*, are properly stricken, since the rights of the parties are to be de-

termined in accordance with the facts alleged and proven and not the designation given the defense.

7. Pleadings § 7—

The answer must state in a plain and concise manner the facts constituting an affirmative defense, without unnecessary repetitions. G.S. 1-135.

APPEAL by Carolina Power & Light Company from *Seawell, J.*, January 1958 Civil Term, of COLUMBUS.

Plaintiff seeks compensation for personal injuries to and the death of her intestate, hereinafter referred to as Bordeaux, resulting from the asserted negligence of Carolina Power & Light Company, hereafter designated as Power Company. Plaintiff alleges these facts: Swift & Company, hereafter designated as Swift, owned and operated a fertilizer plant in New Hanover County. It contracted with Leonard Construction Company, hereafter designated as Construction Company, for the erection of certain structures including a cooling tower at its fertilizer plant. Bordeaux was employed as a welder by Construction Company. In the course of his employment in erecting the cooling tower he came in contact with a wire of Power Company carrying 11,000 volts. This transmission line of Power Company was a temporary line intended to provide power and current to Construction Company. It was erected by Power Company at the request of Construction Company. Power Company, when it built the line, knew the location and expected height of the proposed structures. It built the line over the site on which the tower would be erected. The wires were uninsulated and inadequate in height. Power Company failed to make proper inspections of this temporary transmission system.

Power Company answered. It denied the allegations of negligence. It asserted these additional affirmative defenses: (1) contributory negligence by Bordeaux; (2) assumption of risk by Bordeaux; (3) concurrent negligence of Swift and Construction Company as the intervening proximate cause of Bordeaux's death; (4) negligence by Construction Company proximately contributing to Bordeaux's death, thereby effectually barring it and its insurance carrier from receiving the amounts paid or payable under the Workmen's Compensation Statutes because of Bordeaux's death. In addition to the defenses asserted, it seeks affirmative relief, by way of contribution, against Swift if it is adjudged liable to plaintiff.

Based on the allegations of the answer, Swift was made an additional defendant. It moved to strike portions of the answer asserting affirmative defenses against plaintiff and all of the cross-action form-

ing the basis for contribution and to dismiss the action as to it. Its motion was allowed. Power Company excepted and appealed.

Plaintiff moved to strike from the answer the allegations constituting the plea of assumption of risk and the plea of intervening negligence proximately causing Bordeaux's death. Plaintiff's motion was allowed as to the plea of assumption of risk and otherwise denied. Power Company excepted and appealed.

Power Company also applied for *certiorari*. The petition was allowed. The order allowing the writ provided the errors assigned should be heard with the appeal.

James & James for plaintiff, appellee.

Proctor & Proctor and A. Y. Arledge for defendant, appellant, Carolina Power & Light Company.

Royce S. McClelland for additional defendant, appellee, Swift & Company.

RODMAN, J. When an injured party elects to sue some but not all of the tort-feasors responsible for his injuries, those sued have a right to bring the other wrongdoers in for contribution. G.S. 1-240. The original defendant then becomes as to the tort-feasors not sued a plaintiff. *Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773; *Wrenn v. Graham*, 236 N.C. 719, 74 S.E. 2d 232. The pleading filed by the original defendant must state facts which are sufficient to show that the original defendant is entitled to contribution from the additional defendant. If the facts alleged do not suffice to establish a right to contribution, the party or parties brought in as additional defendants are unnecessary parties and may on motion have the allegations stricken and the action dismissed as to them. *Hayes v. Wilmington*, 239 N.C. 238, 79 S.E. 2d 792, s.c., 243 N.C. 525, 91 S.E. 2d 673. The motion is in effect a demurrer for failure to state a cause of action, G.S. 1-127.

Rule 4(a) of this Court has no application when the order striking a portion of the pleading is in effect a demurrer denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action. Such an order comes within the provisions of G.S. 1-277 and the party adversely affected may appeal.

To entitle it to contribution, Power Company alleged in brief these facts: It generates and distributes electricity. It has for many years sold current to Swift at a potential of 11,000 volts. Swift maintained on its premises its own substation and distribution system, reducing the voltage as it desired by means of its own transformers. Swift agreed when it contracted with Construction Company to furnish the

latter with such electricity as might be needed in the erection of the tower and other buildings. Pursuant to the contract between Swift and Construction Company the latter, as agent for Swift, requested the Power Company to erect the new transmission line with proper transformers for Swift and as a part of its system. Power Company built this line for Swift. It was constructed at places designated and built in accordance with directions given it by the agent of Swift. The mere fact that Construction Company was Bordeaux's employer and was also agent for Swift in contracting for the erection of the transmission line did not afford Swift immunity from its negligence.

The allegations are, we think, sufficient to support a claim for contribution and to withstand a demurrer. It follows that there was error in striking the allegations of the answer constituting a cause of action against Swift for contribution.

Plaintiff seeks no relief from Swift. Hence it is not interested in any defenses asserted by Power Company to defeat plaintiff's claim. The order made on Swift's motion to strike facts alleged by Power Company as a defense was likewise erroneous. To what extent the facts alleged would, if established, constitute valid defenses need not now be determined.

Power Company as a defense alleged Bordeaux was a qualified electric welder acquainted with the hazards of electric transmission lines. He knew the line in question was energized at 440 volts. He had been warned about the dangers inherent in the line in question. He helped build the tower, bringing it in close proximity to the transmission line. He ignored the warnings given him and continued to work in a place of known danger. He performed his work in a careless manner without regard for his own safety. This conduct is asserted to constitute negligence barring recovery.

Immediately following this plea of contributory negligence Power Company alleged:

"That if the plaintiff's intestate was not guilty of contributory negligence in respect to his alleged injury, suffering, and death, as hereinbefore alleged, nevertheless the plaintiff is barred from a recovery herein under the doctrines of Assumed Risk and of *volenti non fit injuria,* in that the plaintiff's intestate knew or should have known of the existence of said electric line and of the highly dangerous current which was, or was liable to be, thereon, and if the place where he was working was a dangerous place for him to do the work in which he was engaged, as the plaintiff alleges, which is denied, that he had full opportunity to know and did know and appreciate such dangers, and with such knowledge and appreciation of such alleged dangerous condition, and, not being under the force of compulsion so to

do, he voluntarily went into and worked in said dangerous place and exposed himself to the dangers then and there existing and he thereby assumed all the risks of injury which confronted him, and the defendant hereby pleads that the aforesaid doctrines of Assumption of Risk and *volenti non fit injuria* in bar and defense of a recovery herein."

The court on motion of plaintiff struck the quoted section. Power Company excepted and appealed and also applied for *certiorari* which was allowed. We need not now determine whether this assignment of error is decided as a question incident to and presented by the appeal, as was done in *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E. 2d 410, or decided pursuant to the order allowing *certiorari*.

Notwithstanding the strenuousness with which counsel for the Power Company argue the question, we are of the opinion the order was properly entered.

Parties are not permitted to recover nor may a recovery be defeated by a *cognomen* or phrase fashioned to indicate in a general way the character of the action or defense. The rights of litigants are determined by facts admitted or proven. Pleadings are the vehicles used to put an opponent on notice of decisive facts which pleader will undertake to prove.

Our statutes are specific in directing "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition" when drafting a complaint, G.S. 1-122; and "in ordinary and concise language, without repetition" when stating an affirmative defense, G.S. 1-135.

The judgment is, as it relates to the motions made by
Swift & Company, Reversed.
Plaintiff, Affirmed.

STATE v. ROBBIE J. MERCER.

(Filed 14 January, 1959.)

1. Criminal Law § 26—

A plea of former jeopardy cannot be predicated upon the fact that the grand jury had theretofore returned not a true bill another indictment of the same defendant for the identical offense.

2. Grand Jury § 2—

The grand jury is not a trial court but an investigatory body, and it is competent to send to the grand jury as many bills of indictment as may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial.

3. Courts § 11—

The County Recorder's Court of Pamlico County is a duly constituted court. G.S. 7-218

4. Criminal Law § 16—

The Recorder's Court of Pamlico County has jurisdiction to try a defendant on a charge of operating a motor vehicle on a public highway while defendant's license was revoked, and when the judge of that court testifies that he held a session of court on a Friday, such court is a court of competent jurisdiction to try the defendant for such offense on such day. G.S. 7-220.

5. Automobiles § 3: Criminal Law § 75—

A record of the Department of Motor Vehicles disclosing, under official Department action, that defendant's license was in a state of revocation during the period defendant was charged with driving on a highway of this State, is competent when the record is certified under seal of the Department. G.S. 8-35.

6. Criminal Law § 154—

Assignments of error which fail to specify in particular the subject matter of the assignment is ineffectual. Rule of Practice in the Supreme Court No. 21.

APPEAL by defendant from *Moore, J.*, at August 1958 Term, of PAMLICO.

Criminal prosecution upon a bill of indictment charging: "That Robbie J. Mercer late of the County of Pamlico on the 24th day of January, A. D., 1958, did feloniously, wilfully and unlawfully commit perjury upon the trial of an action in County Recorder's Court in Pamlico County, wherein State of North Carolina was plaintiff and Robbie J. Mercer was defendant, by falsely asserting on oath or solemn affirmation that he was not the operator of a certain motor vehicle, to wit: a 1957 Ford automobile owned by him, the said Robbie J. Mercer, at the time and while the same was then and there proceeding eastwardly on N. C. Highway No. 304 across the Hobucken Inland Waterway bridge on December 4th, 1957, at about 5 P. M., and that the operator of said vehicle at said time and place was Raymond T. Jones, the said matter so testified to as aforesaid being material to said issue being tried in said action knowing said statement or statements to be false, or being ignorant whether or not said statements were true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

And the record shows that defendant, before pleading, moved to quash the bill of indictment on grounds hereinafter set forth, and that the motion was denied, and defendant excepted.

Upon trial in Superior Court the State offered evidence tending to

support the several elements of the crime charged to which in the course of the trial some exceptions were taken.

Reference will be made hereinafter to such of the evidence as bears upon assignments specifically and expressly treated.

The defendant offered no evidence. And the case was submitted to the jury upon evidence offered by the State under the charge of the trial judge to which only one exception is taken as hereinafter stated.

Verdict: That the defendant is guilty as charged.

Judgment: Confinement in the State's prison for a term of not less than one year nor more than two years to be assigned to work under the supervision of the State Prison Department, as provided by law and with the recommendation that the defendant be permitted to serve his sentence in a youthful and first offender's camp if it can be done according to rules.

Defendant appeals to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard, for the State.

Robert G. Bowers, Larkins & Brock for defendant, appellant.

WINBORNE, C. J. At the outset defendant challenges the ruling of the court below in denying his motion to quash the bill of indictment for that a bill of indictment for perjury was sent in case No. 219 and was returned not a true bill at the August Term 1958, and that thereafter in case No. 219-A the same grand jury at the same term returned a true bill against the defendant on the identical charge of perjury. It is recited that there was an additional witness added for the State on the bill in case No. 219-A and one of the witnesses appearing in case No. 219 on the first bill was deleted.

The ruling is in accord with what is said by this Court in *S. v. Lewis*, 226 N.C. 249, 37 S.E. 2d 691. There in opinion by *Seawell, J.*, the Court stated the case in this manner: "1. At the same term of court two bills of indictment, one charging Ed Church with committing rape upon Emmie Green, and one charging Harry Mills with committing rape upon the same person, were returned: 'Not a True Bill.' The appellants urge that in the indictments found 'Not a True Bill' the grand jury had already passed upon the matters concerned, and the State was thereby estopped from presentation of other bills for the same offense, and the action of the grand jury in finding the true bills was ineffective. Apart from the discrepancies obvious upon comparison of the indictments, we do not think the objection could raise a serious question in trial procedure had there been an identity

of persons and description of offenses in the indictments rejected with those found a true bill."

And in respect thereto the Court declared: "The grand jury is not a trial court, but an investigatory body, and no question of double jeopardy is presented by its repeated investigation under the bills presented to it. The Constitution, Article I, sec. 12, requires that 'No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment,' and this sufficiently explains the function of the grand jury as a part of the court. It is competent to send to the grand jury as many bills of indictment as may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial."

What is held there is applicable here,— and the Court approves. Indeed, it would seem that the factual situations in cases cited and relied upon by defendant are distinguishable from those in instant case.

Next, the defendant contends that the County Recorder's Court in Pamlico County, North Carolina, was not a court of competent jurisdiction on Friday, January 24, 1958, to try the case against him.

In this connection the State, over objection and exception by defendant, offered in evidence from the minutes of the Board of County Commissioners of Pamlico County, a resolution by said Board, "in meeting duly assembled at the courthouse in Bayboro, N. C., on August 3, 1931, that a County Recorder's Court be established as provided by statute." G.S. 7-218. * * * "Whenever necessary the court shall convene at the courthouse in the courtroom in Bayboro, North Carolina, for the trial of all criminal causes of which it has jurisdiction on Tuesday morning of each week at ten o'clock, and shall continue its session from day to day until all business is transacted by trial, continuance or otherwise, special sessions of the court may be called by the judge as the necessities may require." And it is declared that "the court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition to this jurisdiction shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now provided by law. The court shall have such other power and authority as conferred by law."

Indeed statute, G.S. 7-220, authorizes the establishment of such a court. And the judge of the court testified that he held a session of the Pamlico County Recorder's Court on Friday, January 24, 1958, and that he presided at that term, and had occasion to try defendant for a motor vehicle violation in which he was charged with operating a motor vehicle after his license had been suspended or revoked.

And the trial judge in Superior Court instructed the jury as a matter of law that the Recorder's Court of Pamlico County was on January 24, 1958, a court of competent jurisdiction to try a defendant on a charge of driving a motor vehicle on a public highway of North Carolina after the defendant's operator's license had been revoked and during such period of revocation. Defendant's exception thereto is not well taken.

This Court holds the ruling to be correct and proper.

And defendant excepts to the introduction in evidence by the State of an official record of the North Carolina Department of Motor Vehicles, Drivers License Division.

The record, as shown upon response to order on motion suggesting diminution of the record, reveals that the record is certified under seal of the Department of Motor Vehicles. As introduced the Exhibit discloses, as contended by the Attorney General, only the fact that under official department action the defendant's license was in a state of revocation for a period covering the date of the offense for which defendant was indicted. Hence the requirements of G.S. 8-35 are complied with, and is of no avail to defendant.

Furthermore, defendant lists under assignments of error many other exceptions without specifying in particular the subject matter as is required by Rule 21 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at 558. See *Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492, and numerous others of like import. While these assignments are insufficient, error is not made to appear.

And, lastly, while defendant assigns as error the denial of his motions aptly made for judgment as of nonsuit, the subject is not treated in his brief except as it might be touched by jurisdictional matter expressly treated.

The Court concludes that in the judgment below from which appeal is taken there is

No Error.

A. CAUDILL v. NOAH WADE McNEIL AND WIFE, ALMA S. McNEIL; N. P. MYERS AND MRS. DAPHNA M. McNEIL.

(Filed 14 January, 1959.)

1. Boundaries § 9—

A description in a deed to part of a tract of land which gives certain corners and lines and then directs "then east a sufficient distance to divide" the land equally, thence south to a road and thence along definite lines to the beginning, so as to include one half the tract, *is held* to require the division of the land by area rather than by value and is a sufficient description if the dividing line can be established by mathematical computation, and the exclusion of testimony of the court surveyor that he had ascertained the dividing line by computation and the running of the remaining calls in the description, was error.

2. Boundaries § 5—

It is not competent to use a junior deed from the common grantor for the purpose of locating the boundaries of the senior deed.

APPEAL by plaintiff from *Crissman, J.*, April-May Term, 1958, of WILKES.

This is a processioning proceeding. Plaintiff alleged ownership of a specifically described tract of land and his location of the disputed line.

Defendants denied plaintiff's ownership. They alleged they were the owners of a tract specifically described in a deed to them. They also asserted title by adverse possession. Surveyors were appointed as required by statute. They surveyed the respective contentions and made and filed a map showing land claimed by plaintiff, land claimed by defendants, and the respective contentions as to the location of the line dividing the properties. Only one boundary is in controversy.

On the trial in the Superior Court it was "stipulated that both parties received their title from a common source and that the common grantors were M. D. Reeves and wife A. C. Reeves." Plaintiff's deed from M. D. Reeves and wife is dated 8 November 1912 and was recorded 3 March 1913. The record does not disclose the date of the deed under which defendants claim title. It is stated in the brief for plaintiff appellant that his is the senior title from the common source. We understand from the oral argument and the brief of defendant appellees this to be conceded.

Plaintiff offered in evidence the deed to him from M. D. Reeves and wife dated and recorded as aforesaid. He then proposed to show by the court surveyor the location of the several lines called for in that deed. The court was of the opinion that the description was so vague and uncertain that parol evidence could not be offered for the purpose of establishing its boundaries and was such as "to make it

impossible to locate the north-south dividing line between petitioner and respondents." He thereupon rendered judgment fixing the location of the dividing line in accordance with the contention of defendants.

Ralph Davis and McElwee & Ferree for plaintiff, appellant.
Whicker & Whicker for defendant appellees.

RODMAN, J. The several assignments of error present only one question: Does the description in the deed to plaintiff furnish information which will permit an informed person to locate on the ground the corners called for?

The description in the deed to plaintiff reads:

"BEGINNING on a White Oak M. C. Reeves' southwest corner running northward with the Gregory Road to the Hunt Road west with the Hunt Road to the C. M. Dearman corner, then with C. M. Dearman's line to L. Wood's line, then with said line to M. D. Reeves and L. Wood's Pine corner, then east a sufficient distance to divide the M. D. Reeves land equally, thence south with an agreed line to the Hunt Road, thence southeast an agreed line to J. S. Pendry line, thence with the said Pendry's line back to beginning, including ten acres on the south side of the Hunt Road and including one half of the M. D. Reeves land."

The asserted vagueness grows out of the call "then east a sufficient distance to divide the M. D. Reeves land equally." It is plaintiff's position that this language and the concluding clause of the description, "including one half of the M. D. Reeves land," means one half in area. Based on this interpretation plaintiff offered in evidence a deed from W. U. Higgins to M. D. Reeves dated 5 April 1904, recorded 6 December 1904. He then offered evidence by the court surveyor tending to establish the boundaries of that tract and the fact that it was known as the M. D. Reeves land.

The land described in the deed from Higgins to Reeves covers the land claimed by plaintiff and the land claimed by defendants, and these claims cover all of the land described in the Higgins-Reeves deed. The surveyor testified that he knew each of the boundaries called for in that deed and had at one time or another surveyed each of the lines called for. He further testified that he had surveyed the land claimed by plaintiff from its beginning corner "to M. D. Reeves and L. Wood's Pine corner" as called for in plaintiff's deed. He knew each of these calls; they were correctly located on the court map; he had surveyed the calls "with an agreed line to the Hunt Road, thence southeast" etc., as directed in the deed, to the beginning. Plaintiff

then proposed to show by the court surveyor that he had computed the acreage of the M. D. Reeves land as described in the deed from Higgins and could, by the computation, determine how far east it would be necessary to go to divide the M. D. Reeves land equally as to area by running in accordance with the remaining calls to the beginning. This evidence offered by plaintiff was excluded.

We cannot concur in the view expressed by defendants that the meaning of the language "a sufficient distance to divide the M. D. Reeves land equally" is, when supplemented by the language "including one half of the M. D. Reeves land," fairly susceptible of two interpretations: one, a division based on value; the other, a division based on area; and because of these two permissible interpretations it is not possible to determine what property is intended to be described.

The deed to plaintiff recites a substantial consideration. Presumably the grantor intended to convey a readily identifiable parcel of land—not something almost certain to produce controversy in the future. That intent should be given effect if possible. *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918; *Lee v. Barefoot,* 196 N.C. 107, 144 S.E. 547. The deed first says: "to divide the M. D. Reeves land equally," and having completed the description and in the place usually given to the area of the property conveyed, says "one half of the M. D. Reeves land." If value had been intended, why not direct the surveyor to run the line so as to convey land worth $1625, the consideration paid? Fairly interpreted, we have no doubt of grantor's intention to convey one half in area nor do we doubt the sufficiency of the language to appropriately express that intent.

Given that meaning it was, the surveyor testified, a mere matter of mathematical computation to determine the location of the line necessary to divide the land described in the deed from Higgins to Reeves in two parts of equal areas. That this can be done can be readily demonstrated graphically. Since the missing line could be determined by calculation, the description was sufficient. *Oxford v. White,* 95 N.C. 525; *Warren v. Makely,* 85 N.C. 12.

Holding as we do that the description is not void as a matter of law, it follows that evidence to show the location of the various corners to be as plaintiff contended was competent. It would not be competent to use a junior deed from the common grantor for the purpose of locating the boundaries of plaintiff's land. *Coffey v. Greer,* 241 N.C. 744, 86 S.E. 2d 441, and cases cited.

Reversed.

STATE v. THEO BELL.

(Filed 14 January, 1959.)

1. Criminal Law § 78—

Where defendant's wife testifies in his behalf, she is subject to be cross-examined to the same extent as if unrelated to him. G.S. 8-57.

2. Criminal Law § 84—

A witness for defendant may be cross-examined as to unrelated criminal offenses committed by her for the purpose of impeaching her credibility.

3. Criminal Law § 80—

Even when defendant puts his character in evidence, the State may not, by cross-examination or otherwise, show his bad character by evidence that defendant had committed an unrelated, separate and distinct criminal offense, and certainly may not do so when defendant does not put his character in evidence.

4. Criminal Law § 34: Intoxicating Liquor § 12—

Where defendant is charged with possession of nontaxpaid whiskey and with possession for the purpose of sale, evidence that defendant had nontaxpaid whiskey in his possession on a date some nine months after the offense for which defendant was being tried is irrelevant and incompetent, nor is such evidence admissible to prove *quo animo*, since mere proof of unlawful possession at one time is not relevant to whether his possession at another time was for the purpose of sale, notwithstanding that his possession on such other occasion would constitute *prima facie* evidence in a separate criminal prosecution that the possession was for the purpose of sale.

APPEAL by defendant from *Sharp, Special Judge,* August Term, 1958, of HARNETT.

Criminal prosecution, tried *de novo* on defendant's appeal from Recorder's Court of Dunn on original warrant charging that defendant on November 20, 1957, unlawfully (1) had in his possession a quantity of nontaxpaid whiskey, and (2) had it in his possession for the purpose of sale, wherein the jury returned a verdict of "Guilty on both counts."

On the verdict, as related to each count, the court pronounced a separate judgment imposing a prison sentence of 18 months, the two sentences to run concurrently.

Defendant excepted and appealed, assigning as error the admission, over his objection, of testimony elicited by the solicitor in his cross-examination of defendant's wife.

Attorney General Seawell and Assistant Attorney General McGalliard, for the State.

Young & Taylor for defendant, appellant.

BOBBITT, J. Evidence offered by the State tended to show: On the night of November 20, 1957, police officers of Dunn went to defendant's home. A search warrant was served on Edna Bell, defendant's wife. Upon search, they found eight half-gallon jars of nontaxpaid whiskey. Ten or twelve unidentified persons (men and women) were in the house with Edna Bell. The officers did not know any of them or whether any lived there. Defendant was not at home when the search was made. The officers arrested Edna Bell. Some ten or fifteen minutes after her arrival at the police station, defendant voluntarily came to the police station and said, "It's my whiskey" and "it wasn't hers."

Defendant did not testify. The only witness offered by defendant was Edna Bell, his wife.

Edna Bell testified that she "was going to have a party"; that she had bought the whiskey; that her father had given her the $12.00 she used for that purpose; that defendant had no knowledge of what she had done; and that defendant was at work, not at home, when the whiskey was brought in. On cross-examination, she testified that she had pleaded guilty in the Recorder's Court of Dunn to "having this whiskey," but later gave notice of appeal. (The record is silent as to the judgment of the Recorder's Court in Edna Bell's case and as to disposition of her case in the superior court.)

The further cross-examination of Edna Bell includes the following: "Q. Did you say this was the first whiskey that ever went to your house? A. Yes. Q. Have you had any there since, nontaxpaid whiskey? (Objection; overruled; Exception No. 1) A. I haven't had any. Q. You haven't? A. No. Q. But your husband has, hasn't he? (Objection; overruled; Exception No. 2) A. That was his. I don't know how much whiskey they found in my house two weeks ago, because what they found was his. It wasn't mine."

While the record does not show the date of trial, the trial term began August 25, 1958. Defendant was on trial for an offense alleged to have been committed on November 20, 1957.

If the defendant, as testified by his wife, had nontaxpaid whiskey in his possession in August, 1958, he was then guilty of a separate criminal offense, to wit, a violation of G.S. 18-48. *S. v. Cofield,* 247 N.C. 185, 189, 100 S.E. 2d 355, and cases cited.

G.S. 8-57, in pertinent part, provides: "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a com-

petent witness for the defendant, . . . Every such person examined as a witness shall be subject to be cross-examined as are other witnesses." When Edna Bell was examined as a witness for defendant, she was subject to be cross-examined to the same extent as if unrelated to him. *S. v. Tola,* 222 N.C. 406, 23 S.E. 2d 321, and cases cited. (Note: Ch. 1036, Session Laws of 1957, does not affect the quoted portions of G.S. 8-57, but rewrites *only* the *fourth sentence* thereof.)

If based on information and asked in good faith, (compare *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762), it was permissible for the solicitor to ask Edna Bell concerning *her* unrelated criminal offenses for the purpose of impeaching her credibility. *S. v. Neal,* 222 N.C. 546, 23 S.E. 2d 911; *S. v. Conner,* 244 N.C. 109, 92 S.E. 2d 668. "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *S. v. Nelson,* 200 N.C. 69, 156 S.E. 154. Assignment of error based on Exception No. 1 is untenable. The question was permissible. Moreover, the answer was in the negative.

Assignment of error based on Exception No. 2 presents a different question. Criminal conduct of defendant in August, 1958, some nine months after the alleged criminal offense for which defendant was being tried, had no relation to the credibility of Edna Bell. The probative force of this testimony was to show that defendant in August, 1958, had committed an unrelated, separate and distinct, criminal offense.

Edna Bell did not testify to defendant's good character. When a defendant avails himself of his right to offer evidence of his good character, "the State can introduce evidence of bad character, but cannot, by cross-examination or otherwise, offer evidence as to particular acts of misconduct." *S. v. Holly,* 155 N.C. 485, 71 S.E. 450; *S. v. Adams,* 193 N.C. 581, 137 S.E. 657; *S. v. Phillips, supra,* (527). *A fortiori,* when, as here, a defendant does not put his character in issue, the State cannot, "by cross-examination or otherwise," offer evidence to show that defendant committed an unrelated, separate and distinct, criminal offense.

"The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *S. v. McClain,* 240 N.C. 171, 81 S.E. 2d 364, where *Ervin, J.,* citing prior cases, discusses fully the general rule and the exceptions. Nothing in this record suffices to take this case out of the general rule.

This criminal prosecution is based on a warrant issued November 21, 1957. Certainly, *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808, cited

by the State, does not support the view that defendant could be convicted on this warrant for what occurred in August, 1958.

The crucial issue was whether the nontaxpaid whiskey found on November 20, 1957, was in possession of defendant or in possession of Edna Bell. The fact that defendant had nontaxpaid whiskey in his possession in August, 1958, was not relevant to this issue.

Even so, the State contends that testimony as to what occurred in August, 1958, was admissible to prove *quo animo,* that is, that defendant had possession of nontaxpaid whiskey on November 20, 1957, *for the purpose of sale.* In support of this contention, the State cites *S. v. Simons,* 178 N.C. 679, 100 S.E. 239; *S. v. Crouse,* 182 N.C. 835, 108 S.E. 911; *S. v. Colson, supra,* where, in criminal prosecutions for possession of whiskey for the purpose of sale, evidence tending to show that the defendant either had sold whiskey on other occasions or was involved on other occasions in the construction or operation of a still for the manufacture thereof, was held admissible.

Here, if defendant had nontaxpaid whiskey in his possession in August, 1958, there is no evidence that he either sold it or that his possession was for the purpose of sale. Under G.S.18-11, proof of defendant's unlawful possession of nontaxpaid whiskey in August, 1958, would constitute *prima facie* evidence in a separate criminal prosecution based on the transaction of August, 1958, that his possession was for the purpose of sale; but proof of unlawful possession of nontaxpaid liquor in August, 1958, standing alone, while a criminal offense, is not relevant to whether his possession, if any, on November 20, 1957, was for the purpose of sale.

Our conclusion is that, since the only probative force of the testimony that defendant in August, 1958, unlawfully had nontaxpaid whiskey in his possession, was to show that he then committed a separate criminal offense, its admission, over defendant's objection, was erroneous and prejudicial.

It is noted that the basis of decision is that the testimony was inadmissible, independent of the circumstance that it was given by defendant's wife.

New trial.

HAROLD SUITS v. OLD EQUITY LIFE INSURANCE COMPANY.

(Filed 14 January, 1959.)

1. Trial § 19—

The sufficiency of the evidence to require the submission of an issue to the jury is a question of law for the court.

2. Insurance § 29—

Where the policy in one part provides benefits for nonconfining total disability and total loss of time, and in another part provides additional benefits if such disability confines insured continuously within doors, insured, in order to qualify for the additional benefits, must show that his total disability and total loss of time, during the period claimed, confined him "continuously withindoors" within the language of the policy construed liberally in favor of insured.

3. Insurance § 3—

While a policy of insurance will be liberally construed in favor of insured, the courts cannot revise the contract of the parties or strike out any of its provisions.

4. Contracts § 12—

When competent parties contract at arms length upon a lawful subject, the courts must construe the agreement as written by the parties.

5. Insurance § 29—

Where, in a suit to recover additional benefits provided by the policy if insured's total disability should continuously confine insured withindoors, insured's evidence discloses that during the period in question he enrolled as a graduate student at a university 35 miles distant, drove to and from the university and attended classes three times a week unaided, drove his car on personal errands and on pleasure trips, etc., nonsuit should be entered, notwithstanding insured's evidence that he was paralyzed from the lower abdomen down and suffered total disability and loss of time.

APPEAL by defendant from *Phillips, J.*, February 24, 1958 Term, GUILFORD Superior Court (Greensboro Division).

Civil action to recover insurance benefits under the following provision of the defendant's policy:

> "PART H. CONFINING DISABILITY BENEFITS—$50.00 MONTHLY FOR LIFE.—If injury or sickness confines the insured continuously withindoors for one day or more and requires regular treatments therein by a legally qualified physician or surgeon, the company will pay, commencing with the first such treatment, benefits at the rate of $50.00 per month so long as such confinement remains continuous, provided said injury or sickness causes total disability and necessitates total loss of time."

The plaintiff was seriously injured in an automobile accident on November 1, 1952. The injuries resulted in complete paralysis from the lower abdomen downward. The paraplegia from which the plaintiff is suffering as a result of his injury will continue for the remainder of his life. He cannot dress or undress, go to bed or get up without assistance. He uses a special hospital bed in his father's home. Elimination is artificial and special aids and equipment are necessary to take care of bodily needs. After several months in the hospital, the plaintiff attended a rehabilitation center. By the use of crutches and artificial leg braces, and specially fitted shoes, he is able to walk short distances without help. He has an automobile with special hand controls which he is licensed to and does drive.

The defendant paid monthly benefits under H from the date of the injury until February 1, 1955, and thereafter declined to make further payments, although under another provision of the policy the defendant paid the maximum benefits for the total loss of use of both feet. In addition to Part H, the policy, under Part I, provided payment for nonconfining sickness or injury. The defendant contends that since February, 1955, the plaintiff's injury was no longer continuously confining indoors as contemplated by the policy.

The plaintiff testified in substance that upon release from the hospital in the Summer of 1953 he attended a rehabilitation center where the braces and special shoes were fitted, and by means of these and crutches he was taught to maneuver his feet and legs, and after gradually building up the strength in his arms he learned to walk. He was taught to drive a specially equipped automobile, and by the use of his braces and crutches he was able to get in and out of it, although not without difficulty. He must have assistance always, to put on and take off the braces and shoes.

In February, 1955, the plaintiff enrolled as a graduate student at the University of North Carolina. He drove from his home in Liberty to Chapel Hill, a distance of 35 miles, and returned three days each week during the regular sessions. He was absent from home during his attendance at the University on an average of 5½ to 6½ hours per day. By the use of his braces and crutches, he was able to walk from his parking place near the English building to his classes. In 1957 he received his M. A. Degree in English. He drives to church, to the store, to the barber-shop, to the doctor's office, and to nearby towns. Twice he has visited Currituck County, a distance of about 300 miles, accompanied by his mother who did about one-third of the driving. On each visit he spent one night only. At all other times he has returned to his father's home at night where his parents can assist him and administer to his needs. His body must be bathed

frequently to prevent bedsores.

The plaintiff has been unable to secure a position as a teacher, although he has made some effort to do so. The doctors classify him as permanently and totally disabled. His attendance at the University was with the approval of his doctors and recommended by the rehabilitation center. Since graduation he has driven back to Chapel Hill on six or seven occasions, to Pinehurst, to High Point, to Durham, and other places for pleasure. He teaches Sunday School with the exception of one Sunday in each month.

The defendant did not offer evidence. Its motion for judgment of involuntary nonsuit was overruled. Appropriate issues were submitted to and answered by the jury in favor of the plaintiff. From judgment on the verdict, the defendant appealed.

McLendon, Brim, Holderness & Brooks, By: G. Neil Daniels, Hubert Humphrey for defendant, appellant.

Smith, Moore, Smith, Schell & Hunter, By: Bynum M. Hunter for plaintiff, appellee.

HIGGINS, J. The defendant has abandoned all assignments of error except No. 9 which presents the question whether the plaintiff's evidence, in the light most favorable to him, was sufficient to qualify him for further benefits under Part H of his policy. The question is one of law. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463. The policy issued to the plaintiff by the defendant company is designated "Lifetime Income Protection Policy." Part A provides for loss or, under certain conditions, the loss of use of members of the body. The defendant has paid the maximum benefits for the loss of both feet. Part H provides for confining disability benefits. Part I provides for nonconfining benefits. Other parts of the policy provide for additional benefits not material here. Part H only is involved.

The courts of the several states are not in agreement in their interpretation of policy provisions similar to Part H. Some courts adhere to the rule of literal construction, even of the indoors provision. *McFarlane v. Pacific Mutual Life Ins. Co.,* 192 Fed. 2d 193 (*certiorari* denied, 343 U.S. 915); *Reeves v. Midland Casualty Co.,* 174 N.W. 475. Others, among them our own, adhere to a more liberal interpretation, treating the "continuously confined withindoors" provision as descriptive of the extent of the illness or injury, and at the same time allowing reasonable deviation from the indoors requirement. *Glenn v. Ins. Co.,* 220 N.C. 672, 18 S.E. 2d 113; *Duke v. Assurance Corp.,* 212 N.C. 682, 194 S.E. 91; *Thompson v. Accident Ass'n.,* 209 N.C. 678, 184 S.E. 695; *Wade v. Mutual Benefit,* 177 S.E. 611; *Mutual Benefit*

v. McDonald, 215 P. 135. Under Part I the parties provide benefits for nonconfining injury which resulted in total disability and total loss of time. The difference in the provisions is this: Part I eliminates the confining requirement present in Part H.

In order, therefore, to qualify for benefits under the confining disability clause, it is not enough for the policyholder to show regular treatment by a qualified physician or surgeon for a totally disabling injury resulting in total loss of time. In addition, the evidence must be such as will permit the reasonable inference under our liberal construction rule that the injury "confines the insured continuously withindoors" during the period for which the benefits are claimed. The plaintiff's evidence met all except the last requirement. The showing of total disability and total loss of time are not enough to make out a case if we give any effect to the confinement provision. If the decisions in *Massachusetts Bonding Co. v. Springston,* 283 P. 2d 819 (Okla.); *Mutual Benefit v. Murphy,* 193 S.W. 2d 305 (Ark.); and *Occidental Life v. Sammons,* 271 S.W. 922 (Ark.), have the effect of removing the confinement provision, we are unable to follow them. It is an integral part of the contract the parties made. We cannot revise it. When competent parties contract at arms length upon a lawful subject, as to them the contract is the law of their case. *Muse v. Metropolitan Life Ins. Co.,* 193 La. 605.

It is the purpose and intent of this Court to give a liberal construction in favor of the plaintiff to the continuous confinement withindoors provision of the policy, but we cannot strike it out. The outside activities of the insured in the *Glenn,* the *Duke,* and the *Thompson cases* above referred to were restricted in time, scope, and field, too much so to bear any true resemblance to those carried on by the plaintiff or to constitute a precedent in his favor.

A reading of the record in this case excites admiration for the plaintiff's fortitude and indomitable will. However, giving provision H of his policy liberal interpretation in his favor, and strict interpretation against the insurer, as is our rule in construing contracts of insurance, we reluctantly conclude the plaintiff's activities away from home have been too extensive and too regularly carried on for too long a time to permit him to qualify for benefits under the questioned provision of the policy. The plaintiff's evidence offered at the trial (and only briefly summarized in the factual statement) was not sufficient to bring the plaintiff within the coverage of Part H. The defendant's assignment of error No. 9 is sustained. The court should have allowed the defendant's motion for involuntary nonsuit.

Reversed.

MRS. ELEANOR JOHNSON OSBORNE, WIDOW, ELEANOR JOAN OSBORNE, DAUGHTER, Z. T. OSBORNE, DECEASED v. COLONIAL ICE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY.

(Filed 14 January, 1959.)

1. Master and Servant § 55d—

If a finding of the Industrial Commission is supported by competent evidence, the admission of evidence that is without probative value upon the question is immaterial.

2. Evidence § 45—

A witness who has been duly qualified as an expert and who has made a chemical analysis of a sample of blood taken from the person in question shortly after the time in question, is competent to testify as to the alcoholic content of the blood and that such percentage of alcohol would render such person intoxicated.

3. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive if supported by competent evidence, notwithstanding that the evidence would support a contrary finding.

4. Master and Servant § 40c—

Findings, supported by evidence, that in overtaking a truck preceding him on the highway, his car left skid marks for 75 feet straight in a line forward and then skid marks sideways across the center of the highway to his left, and that his car was struck by a car approaching from the opposite direction, together with evidence that his blood contained .20 per cent of alcohol, *are held* sufficient to show that the accident resulted from the employee's violation of a safety statute and to support the finding of the Industrial Commission that the employee's injury and death was occasioned by his intoxication, and judgment denying compensation is affirmed.

APPEAL by plaintiffs from *Preyer, J.*, January 10, 1958 Civil Term, GUILFORD Superior Court (Greensboro Division).

This proceeding originated before the North Carolina Industrial Commission upon the claim filed by the dependents of Z. T. Osborne for compensation as the result of his death in an industrial accident. The parties stipulated (1) the employer-employee relationship existed, (2) the parties were subject to the Workmen's Compensation Act, (3) the Hartford Accident & Indemnity Company was the insurance carrier on the risk at the time of the accident, February 18, 1954; (4) the employee's average weekly wage was $140.38.

The Virginia Industrial Commission held a hearing on June 2, 1955, at Rocky Mount, Virginia, and certified to the North Carolina Industrial Commission a transcript of the evidence taken at the hearing. The evidence taken there involved a charge of reckless driving on the Virginia highways. Witnesses testified in their opinion Osborne

was under the influence of liquor at about 11:30 a. m. Others were of the opinion that he was not intoxicated. Those who saw him at the time he left Rocky Mount, Virginia, about 2:30 p. m. were of the opinion that at that time he was sober.

According to the evidence introduced at a hearing in Greensboro before Commissioner Gibbs, Z. T. Osborne, the employee, driving an automobile south on highway No. 220, about three miles from the Greensboro city limits at about 6:30 p. m., attempted to pass a truck going in the same direction (south), skidded his automobile across the center line of the highway in front, and in the path, of a car driven north by Jimmie Wilson. The two cars collided in the east lane about opposite the truck. The Osborne car left skid marks in a straight line south for 75 feet and then skid marks turning abruptly to the left across the center of the highway and into Wilson's proper lane of traffic. Osborne, who was alone in his car, received injuries from which he died on the way to the hospital.

The body was taken from the hospital to a funeral home to be prepared for burial. Within a short time after death Dr. Harvey, the Guilford County Coroner, procured about three ounces of blood from the employee's veins. He kept this bottle in a Frigidaire until next morning, then delivered it to R. B. Davis, Jr., a chemist. After analysis, Mr. Davis, found by the Commission and the Court to be an expert in chemistry, haemotology, and clinical technology, testified that his training and experience had been such as to enable him to qualify as an expert and to give an opinion as to the effect on intoxication of alcohol in the blood stream. He testified that analysis of the specimen delivered to him by Dr. Harvey showed the presence of 0.20 per cent of alcohol in the blood and that the presence of such an amount showed intoxication.

Commissioner Gibbs found all facts in favor of the claimants, except No. 14:

> "That Z. T. Osborne was intoxicated at the time of his said injury resulting in his death; that his intoxication was the sole proximate cause of his attempting to pass the truck on the occasion herein complained of, of the manner in which he was driving his automobile at said time, and of the resulting collision with the automobile driven by Jimmy Wilson; and that his said injury, resulting in his death, was occasioned by said intoxication."

Upon Finding No. 14, Commissioner Gibbs made an award denying the claim. The plaintiffs petitioned for a review by the full Commission which by a 2-1 vote (Chairman Bean dissenting) adopted as its own the findings, conclusions and award of Commissioner Gibbs. The

petitioners appealed to the Superior Court of Guilford County upon exceptions duly filed. The judge of the superior court overruled the exceptions, affirmed and approved the full Commission's findings, conclusions, and award. The plaintiffs appealed.

Thomas Turner, Jordan, Wright & Hanson for plaintiffs, appellants.
Adams, Kleemeier & Hagan, By: Charles T. Hagan, Jr., for defendant, appellee.

HIGGINS, J. The plaintiffs' assignments of error, as stated in their brief, present three questions: (1) Does the testimony tending to show an individual was intoxicated at 11:30 a. m. have any probative value as to whether the same individual was intoxicated at 6:30 p. m. the same day? (2) Is evidence of chemical analysis of the blood alone sufficient upon which to base a finding that the deceased was intoxicated? (3) Is there sufficient competent evidence to support the findings that the deceased was intoxicated at the time of the accident, and if so, is there sufficient competent evidence to support the finding that the intoxication of the deceased occasioned the accident in which he was killed?

In answer to the first question, under the facts of this case, the Court has doubt as to the probative value of testimony of intoxication at 11:30 a. m. upon the issue of intoxication at 6:30 p. m., especially in view of the evidence the subject was sober at 2:30 p.m. However, the admission of evidence that is without probative value is not fatal in a proceeding of this character. The question is whether the finding of intoxication at 6:30 p. m. is supported by competent evidence. *Bradsher v. Morton,* 249 N.C. 236. *Pitman v. Carpenter,* 247 N.C. 63, 100 S.E. 2d 231; *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758; *State v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454.

The decisions of this Court are to the effect the percentage of alcohol in the blood stream is competent evidence on the question of intoxication. Davis, the chemist, qualified as an expert in the field of chemical analysis; and haemotology (blood analysis). His knowledge and experience have been such as to enable him to testify as to the effect of various percentages of alcohol in the blood stream in producing intoxication. He testified that 0.20 per cent of alcohol in the blood stream will produce intoxication. He analyzed the blood sample delivered to him by Dr. Harvey. It contained 0.20 per cent of alcohol. In his opinion the victim, because of the presence of that percentage of alcohol, was intoxicated. Such evidence is sufficient to support the Industrial Commission's finding to that effect. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *State v. Henderson,* 245 N.C.

165, 95 S.E. 2d 594; *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899; see also, *State v. Collins,* 247 N.C. 244, 100 S.E. 2d 489. A finding by the Industrial Commission, if supported by competent evidence, is binding on the superior court judge who reviews the case and is likewise binding on this Court on the appeal. *Blalock v. Durham, supra; Brooks v. Carolina Rim & Wheel Co.,* 213 N.C. 518, 196 S.E. 835.

In answering the third question presented, we call attention to the rule stated in the preceding paragraph. The courts are bound by the Commission's findings if supported by competent evidence, even though the evidence would have supported a different or contrary finding. Determination of disputed questions of fact involves the weighing of the evidence, which is a function of the fact finding, and not of the reviewing authority. *Graham v. N. C. Butane Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757; *Queen City Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Mica Co. v. Board of Education,* 246 N.C. 714, 100 S.E. 2d 72.

The evidence in the case showed that Osborne left skid marks for 75 feet in a straight line forward and then skid marks sidewise across the center line of the highway to his left, with the result the truck he was attempting to pass and his skidding automobile blocked both lanes of the highway. Wilson's car, in its proper lane, struck Osborne's car on the right-hand side near the middle. The Commission found the driver of the skidding car was intoxicated. In operating the car on the highway, he was violating a safety statute. Whether the accident was proximately caused by the violation was a question for the fact finding body. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Beaman v. Duncan,* 228 N.C. 600, 46 S.E. 2d 707.

The evidence in the case afforded sufficient factual support for the findings, conclusions, and award of the Industrial Commission. The judgment of the Superior Court of Guilford County is

Affirmed.

H. B. KOONCE v. ATLANTIC STATES MOTOR LINES, INC.

(Filed 14 January, 1959.)

1. Compromise and Settlement—

Compromise and settlement is an affirmative defense which ordinarily must be pleaded.

2. Same—

Plaintiff employee contended that it was agreed that his salary should not be reduced but that the amount paid him monthly should be reduced

and the amount of the reduction should accrue and be paid him in a lump sum at a later time. Defendant employer contended that the employee's salary was merely reduced by the said sum without further agreement, and introduced salary checks endorsed and cashed by the employee stating that they were in full settlement of all amounts of every nature due the payee on the date specified. *Held:* The acceptance of the checks would not preclude the employee from claiming the accrued salary unless the checks were accepted in settlement of a disputed account, and an instruction to this effect is without error.

3. Master and Servant § 2b—

Where the employer contends and offers evidence to the effect that it reduced the salary of an employee by a certain sum and that the contract thereafter continued without change for the reduced salary, and the employee contends and offers evidence to the effect that the parties agreed that his salary should not be reduced, but that it should be paid part in cash, and the amount of the reduction should accrue and be paid him at a later date in a lump sum, and that this agreement continued without change, the conflicting evidence raises an issue for the determination of the jury, and further the employee could not be limited in his recovery to the last six months of the employment.

4. Same: Customs and Usages: Evidence § 55—

Plaintiff employee contended that his salary, under agreement of the parties, was to be paid partly in cash and the balance to accrue and be paid in a lump sum at a later date, and offered evidence that on a prior occasion a raise in his salary was permitted to accrue and was paid in a lump sum at a later date. *Held:* The prior course of dealing tended to corroborate the plaintiff in his claim and was competent for that limited purpose.

APPEAL by defendant from *Phillips, J.*, March 17, 1958 Civil Term, GUILFORD Superior Court (High Point Division.)

Civil action to recover $5,750.00 the plaintiff alleged was the balance due on his salary. The defendant alleged payment had been made in full. The plaintiff testified that in the Fall of 1953 he was employed by the defendant as traffic and rate man on a part-time basis at $600.00 per month. On January 1, 1954, he entered into a contract of full time employment by the defendant at $750.00 per month, giving up his other employment. His salary was paid through the month of July, 1954. The parties are in agreement as to the salary and its payment through July, 1954. What happened thereafter is in dispute.

Here is the plaintiff's version: "Mr. R. L. Brinson (Chairman of the Board) stopped me one morning . . . and asked me to come by his office, and when I went in he called Mr. Joe Brinson (President) in, and he wanted to know . . . how much it took for me to live . . . He said that he wanted to get me to just draw $500.00 a month for six months and let $250.00 accrue on the books, and at the end of that

six months period he'd pay me the accrued for six months at $250.00 and put me back on $750.00 per month. His explanation as to why he wanted me to do that was that business was slow and he wanted to save every dollar he could right at that particular time. . . . I agreed to that with the understanding that I'd go back at $750.00 at the end of six months and get my accrued salary. . . . Mr. Brinson told me that he'd put that $250.00 on the books. So in a month or two I looked at the books and checked around, and I found out that it wasn't being put on there, so I talked with him about it then. . . . He told me the reason he wasn't putting it on there was that he would have to pay Social Security and withholding tax on it. . . . he had just left it off the books and would pay it all and settle it all at one time. . . . after the six months was up, I talked with Mr. Joe Brinson about it on several occasions. . . . Joe told me it was going to be paid if it was the last thing he ever did, that he would see that I was paid and I didn't need to worry about it. . . . I talked to Joe then (June 30, 1956, when plaintiff left defendant's employment) and he still assured me that it was all right and not to worry about it."

The plaintiff testified over defendant's objection that he had previously worked for the defendant in 1941 or 1942, and that at that time a raise in salary of $50.00 per month was set up on an accrual basis and later paid in a lump sum. At the time the evidence was admitted, the court gave the jury the following instructions: "Ladies and gentlemen of the jury, accrued pay at the different time from that mentioned in the suit is not to be considered by you as substantive evidence in this case. It is only for the purpose of showing a system between the plaintiff and the defendant, if it does show a system of accrual payments at other times."

The defendant, in its answer, denied any agreement to accrue any part of the salary; that the agreement was for a reduction from $750.00 per month to $500.00 per month; and that no other agreement was ever made.

Here is the defendant's version: R. L. Brinson testified (January 1, 1954), "Joe and I had a conversation with him (plaintiff) and hired him at $750.00 per month. . . . I had another conversation with him about the middle of July, 1954. We were losing so much money we had to do something with the top executives. So I called him in and told him I had to reduce his salary to $500.00 per month, and as soon as the company began to make money we'd reinstate his salary, reinstate it to $750.00." The witness further stated he never had any conversation about any accrual of salary: "That was never mentioned."

Joe Brinson testified nothing was ever said about accrual of salary

and no promise was made to reinstate it. His salary was cut $250.00 per month.

The defendant introduced salary checks issued to the plaintiff and endorsed and cashed by him. Each check contained the following: "This check is given in full settlement of all amounts of every nature due the payee named herein to the date specified. The endorsement and cashing of the same will constitute an acknowledgment of its correctness and a release of all further claims. If incorrect, do not cash, but return immediately."

At the close of all the evidence the defendant renewed its motion for nonsuit as to the claim generally, and specifically as to all the claim except for six months beginning August 1, 1954. The motions were overruled. The jury answered the issue of indebtedness in favor of the plaintiff for the full amount of his claim. From the judgment on the verdict, the defendant appealed.

Schoch and Schoch, By: Arch K. Schoch for defendant, appellant.

Roberson, Haworth & Reese, By: Horace S. Haworth for plaintiff, appellee.

HIGGINS, J. The defendant urges the judgment of the superior court should be reversed upon the ground the plaintiff accepted the monthly payment checks, for the entire period involved, with the notation on each check as set out in the statement of facts, and that the acceptance precludes the plaintiff from asserting any further claim. The defendant further contends if nonsuit is not warranted, at least a new trial should be awarded for the errors of the trial court (1) in denying the motion to limit recovery to the six months beginning August 1, 1954; (2) in permitting the plaintiff to testify that the parties had a similar accrual arrangement in 1941-42; (3) in giving undue emphasis and stress to the plaintiff's contentions and his evidence in support; (3) other errors in the charge.

Sharply divergent allegations of the parties and the evidence of each in support present a simple question of fact: Whether there was an agreement to accrue $250.00 per month of the plaintiff's salary. It may be noted that the defendant did not plead accord and satisfaction of a disputed claim. Ordinarily, such is an affirmative defense to be taken advantage of by pleading. *Joyner v. Woodard*, 201 N.C. 315, 160 S.E. 288. However, the court in effect gave the defendant the benefit of such plea by its charge: "When a creditor receives and collects a check sent by a debtor upon condition that it shall be a settlement in full of a disputed account, he may not thereafter repudiate the condition annexed to the acceptance. . . . All they (defendant)

plead is that they owe him nothing. So you will take this rule of law in this case, a check given and received by the creditor which purports to be in full of account to date does not conclude the creditor accepting it from showing that in fact it was not in full unless under the principle of accord and satisfaction there had been an acceptance of the check in settlement of a disputed account." *Allgood v. Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825; *Rosser v. Bynum*, 168 N.C. 340, 84 S.E. 393.

We perceive no legal distinction between the plaintiff's right to recover for the first six months beginning August 1, 1954, and his right to recover for the full term of his employment. Neither party contends there was ever any change in the contract. The plaintiff testified his salary was $750.00 per month, $500.00 to be paid in cash and $250.00 to be accrued; and that this contract continued without modification as long as he worked for the defendant. The defendant, on the other hand, offered testimony that the contract for the full term of the employment from August 1, 1954, to the time the plaintiff left the company, was unchanged; that it was for $500.00 per month, with no additional payment to be accrued, or otherwise. So the parties agree that no change was made in the contract after August 1, 1954. The question was simple. Which party was correct? The answer, whether simple or complex, was for the jury. Motion for judgment of nonsuit was properly denied.

The plaintiff testified that on a prior occasion by agreement of the parties a raise in his salary was permitted to accrue and was paid in a lump sum at a later date. This evidence was received by the court for the limited purpose of showing a prior arrangement between the parties somewhat similar to that now contended for by the plaintiff. The prior course of dealing by the parties tended to some extent to corroborate the plaintiff in his present claim. The evidence was competent for that purpose and so limited by the court.

The defendant's other exceptions, including those to the charge, fail to disclose error. The court stated the contentions of the parties, reviewed the evidence thereon, and fairly and impartially applied the law to the factual situations as testified to and contended for by the parties. In the trial below, there is

No Error.

STATE v. JUNIOR TROUTMAN AND ROY BARRETT.

(Filed 14 January, 1959.)

1. Criminal Law § 99—

On motion to nonsuit only the evidence favorable to the State need be considered.

2. Arrest and Bail § 6: Criminal Law § 9— Evidence held sufficient to be submitted to the jury as to defendant's guilt as aider and abettor.

Evidence tending to show that both defendants were present when a police officer was attempting to make an arrest, that together they followed the officer with the prisoner to the patrol car, and that one of the defendants closed the car door to prevent the officer from placing his prisoner inside and then kicked the officer and forced him to release the prisoner, and that both defendants immediately thereafter joined in an assault on the officer, *is held* sufficient to be submitted to the jury as to the other defendant on a charge of interfering with the officer while he was engaged in the lawful discharge of his official duty in arresting the prisoner, since such evidence is sufficient to warrant the jury in finding that such other defendant was present for the purpose and with the intention of aiding, encouraging, and abetting the first defendant.

3. Criminal Law § 81—

Where a defendant testifies at the trial, it is competent to cross-examine him in reference to convictions in other criminal cases for the purpose of impeaching his credibility as a witness, the questions not being based on mere assumptions or implications.

4. Assault and Battery § 16—

Where, in a prosecution for assault with deadly weapons with intent to kill, inflicting serious injury not resulting in death, defendants testify that they used no weapons but fought in their self-defense, and thus controvert the use of deadly weapons and the intent to kill, the court properly instructs the jury as to lesser degrees of the offense charged.

5. Assault and Battery § 17—

A verdict of guilty of an assault where serious injury is inflicted is a sufficient finding of serious damage within the purview of G.S. 14-33(a) and removes the prosecutions from the limitations under (b) of that statute, so as to authorize fine, or imprisonment, or both, in the discretion of the court.

APPEAL by defendants from *Sharp, S. J.*, June, 1958 Regular Term, GASTON Superior Court.

Criminal prosecutions upon six bills of indictment returned by the grand jury. In Nos. 1083 and 1088 defendants were separately charged with hindering, obstructing, delaying, and interfering with Lowell Police Officer Ridley while he was engaged in the lawful discharge of his official duty in arresting Jerry Warren for being drunk in a public

place in the Town of Lowell. In Nos. 1085 and 1091 the defendants were separately charged with the felonious robbery of Officer Ridley by assaulting and putting him in fear, and by threats of violence did forcefully take from and rob him of a .38-calibre pistol, blackjack, and a flashlight. In Nos. 1086 and 1087 the defendants were separately charged with felonious assault with deadly weapons—pistol, blackjack and flashlight—with intent to kill, inflicting serious injury not resulting in death. All the foregoing charges were consolidated and tried together. Numerous witnesses testified both for the State and for the defendants. The defendants testified in their own behalf. The jury returned verdicts of guilty in Nos. 1083 and 1088, interfering with the police officer in the discharge of his duties; and in Nos. 1086 and 1087 the jury returned verdicts: "Guilty of an assault wherein serious injury was inflicted." In Nos. 1085 and 1091, in which the defendants were charged with robbery, the jury returned verdicts of not guilty. In the cases in which verdicts of guilty were returned, prison sentences of two years were imposed as to each defendant in each case, to run consecutively. From the judgments, defendants appealed.

Malcolm B. Seawell, Attorney General, Claude L. Love, Ass't. Attorney General, for the State.

Mullen, Holland & Cooke, By: Frank P. Cooke for defendants, appellants.

HIGGINS, J. The defendant Barrett insists the evidence as to him in case No. 1083—interfering with an officer—was insufficient to go to the jury and that his motion to dismiss should have been allowed. The sufficiency of the evidence to go to the jury on the assault charge against Barrett and as to both charges against Troutman is not controverted. In testing the sufficiency of the evidence, only that favorable to the State need be considered. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *State v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676.

The State's evidence disclosed that Officer Ridley, on duty and in uniform, received two complaints and, in consequence thereof, he went to a public place of business on Birch Street in the Town of Lowell, about eight o'clock at night. The place was operated by Ben Davis who carried "a small line of canned goods, assorted drinks, and bread." In addition to the defendants, Jerry Warren and Clarence Gibson were present in the Davis store. Warren was drunk. On observing Warren's condition, Officer Ridley sought to place him under arrest for being drunk in a public place. The officer, with Warren in custody, started to the patrol car outside, but the prisoner braced himself against the door facing, and the officer testified, "I couldn't

budge him out." As the officer got the prisoner outside and near the patrol car, (the defendants having followed) Troutman said, "Let him—let us have him and we'll take him home." The officer replied, "No, I have brought him this far and had this much trouble with him, I'm going to carry him on. . . . Troutman, Barrett, and Gibson came up to my car . . . Troutman . . . slammed the door . . . Jerry Warren (the prisoner) made a break to get away . . . I was holding him . . . As we went in front of Troutman, he threw his foot up in the pit of my stomach and grabbed me with both hands . . . Warren got aloose and ran . . . They were cussing me there. Roy Barrett and Junior Troutman were cussing about using that damn blackjack."

Officer Ridley called for help over the police car radio. Then followed a fight in which the defendants took the blackjack, pistol, and flashlight from the officer. Barrett, with the blackjack, and Troutman, with the gun, assaulted the officer. "I was helpless, and I was trying to protect my head, and they beat me down to the ground two or three times. . . . They beat me flat on my face on the ground and I was lying there and was knocked out for a little bit . . . I was bleeding severely."

An ambulance carried the officer to the hospital where he remained six days. He had cuts about his head and face, one on the back of his head required 18 stitches—and one on his lip required four stitches. He was unable to work for three weeks.

Fairly interpreted, the evidence shows Troutman and Barrett were together in the Davis store, and, together, they followed the officer with his prisoner to the patrol car. Troutman closed the door to prevent the officer from placing his prisoner inside and then kicked the officer and grappled him and forced the release of the prisoner. Then both defendants joined in the assault. The almost instantaneous joinder of Barrett in the assault was sufficient to warrant the jury in finding Barrett was present with Troutman for the purpose and with the intention of aiding, encouraging, and abetting in releasing the prisoner and in preventing the officer from pursuing him after his escape. The court properly submitted the evidence to the jury in Case No. 1083 against Barrett. *State v. Burgess*, 245 N.C. 304, 96 S.E. 2d 54; *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241.

The defendant Troutman assigns as error the action of the court in permitting the solicitor to cross-examine him in reference to convictions against him in other criminal cases. The defendant was testifying as a witness in his own behalf. The impeaching questions were relevant and proper as bearing on his credibility as a witness. *State v. Howie*, 213 N.C. 782, 197 S.E. 611; *State v. Maslin*, 195 N.C. 537, 143 S.E. 3. The case of *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d

762, cited by the defendant, is in nowise authority for the exclusion of the evidence elicited by the solicitor on cross-examination of Troutman. In the *Phillips case,* the questions were based on assumptions, upon implications, and for that reason were properly excluded. However, an entirely different situation was present in this case. The evidence elicited on the cross-examination had bearing on the weight to be given by the jury to the defendant's testimony.

Finally, the defendants assign as error the action of the court in charging the jury that under the indictments in 1086 and 1087 the jury might return one of the following verdicts: (1) Felonious assault; (2) assault with a deadly weapon; (3) assault inflicting serious injury; (4) not guilty. In cases Nos. 1086 and 1087, the State offered evidence sufficient to support a verdict of a felony. However, the defendants had testified, claiming they did not use any weapons; that they fought with their hands only in their own self-defense and to prevent an unlawful arrest. Thus the evidence as to intent to kill, and as to the use of weapons was in conflict. It became the duty of the court, therefore, to instruct the jury as to the verdicts of an assault with a deadly weapon or assault inflicting serious damage. The verdicts of "guilty of an assault wherein *serious injury* is inflicted," is a sufficient finding of *serious damage* to remove these cases from the limitations under (b) of G.S.14-33 and to permit punishment under (a) of that section; that is, by fine, or imprisonment, or both, in the discretion of the court. *State v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140, and the numerous cases therein cited.

The court's charge covered all essential features of the cases fully and accurately, and in the trial we find

No Error.

STATE v. JUNIOR TROUTMAN AND ROY BARRETT.

(Filed 14 January, 1959.)

1. Criminal Law § 133—

Where sentences against defendants are not ordered to begin at the expiration of prior sentences imposed upon them, the subsequent sentences run concurrently.

2. Criminal Law § 164—

Where sentences entered against defendants in certain prosecutions run concurrently with other sentences theretofore imposed, and will have expired before the expiration of the other sentences, defendants cannot be prejudiced.

STATE *v.* GRUNDLER.

APPEAL by defendants from *Pless, J.*, July, 1958 Term, GASTON Superior Court.

Criminal prosecution upon a bill of indictment charging the defendants with the crime of rape. At the time of arraignment the solicitor for the State "announced in open court the State would not seek a verdict of guilty of rape, but would seek a verdict of assault with intent to commit rape." The jury returned a verdict of guilty of assault on a female. From the judgment of not less than 18 months nor more than 24 months in jail, to be assigned to work on the roads, the defendants appealed.

Malcolm B. Seawell, Attorney General, Claude L. Love, Ass't. Attorney General, for the State.

Mullen, Holland & Cooke, By: Fred P. Cooke, for defendants, appellants.

PER CURIAM. In Case No. 149, now before this Court, the same defendants appealed from judgments imposing total sentences of four years on the roads, and the judgments have this day been upheld.

The sentences in this case were not ordered to begin at the expiration of the prior sentences, consequently they run concurrently with them. By upholding the sentences in this case, the defendants will complete serving them before the expiration of the first of the prior sentences. The defendants, therefore, are not prejudiced by the judgment involved in this appeal. Moreover, the assignments of error appear to be without substance.

No Error.

STATE v. ROBERT J. GRUNDLER.

(Filed 14 January, 1959.)

1. Criminal Law § 143—

A judge of the Superior Court has authority under G.S. 1-220 to hear a motion made within the time allowed to serve case on appeal to set aside an order theretofore entered in the action vacating the appeal entries and the abandonment of the appeal.

2. Criminal Law § 169: Appeal and Error § 55—

Where it appears that the judge below has ruled upon a matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light.

STATE *v.* GRUNDLER.

APPEAL by defendant from *Frizzelle, J.*, at June 1958 Criminal Term, of NEW HANOVER.

Criminal prosecution upon a bill of indictment, found at February 24, 1958 Term a true bill, charging that Robert J. Grundler, on the first day of February, 1958, with force and arms, at and in New Hanover County, did, unlawfully, willfully and feloniously, ravish and carnally know a certain named female person, by force and against her will, against the form of the statute in such case made and provided and against the peace and dignity of the State, heard in Superior Court of New Hanover County upon motion of defendant to set aside defendant's withdrawal and abandonment of appeal entered 8 March, 1958.

Pertinent thereto the record on this appeal shows substantially the following:

1. Upon arraignment in Superior Court on the charge lodged against him defendant pleaded not guilty.

2. At March 1958 Criminal Term of New Hanover the jury returned verdict: Defendant is guilty of rape with recommendation of life imprisonment.

3. Judgment was entered March 8, 1958 of said court that defendant be confined in the State prison for the term of his natural life.

4. Defendant made formal motions of procedural nature, to the denial of which he excepted, and appeals to the Supreme Court in *forma pauperis*.

5. And as prerequisite to such appeal (a) defendant executed affidavit, (b) presented certificate of attorney Aaron Goldberg, counsel for defendant, and (c) procured order of the presiding judge, W. H. S. Burgwyn, E. J., dated March 8, 1958, granting to defendant permission to so appeal, and requiring the Board of Commissioners of New Hanover County to obtain and furnish to defendant transcript of proceedings, all apparently in full compliance with law— and appointing attorney Aaron Goldberg to prosecute said appeal to Supreme Court of North Carolina, for and on behalf of said defendant, and defendant was allowed 120 days in which to serve case on appeal upon the Solicitor.

And the record shows that on the same date the following was addressed to

"Mr. Aaron Goldberg—

On behalf of myself and my son I desire that the appeal taken in this case be withdrawn and abandoned.

William Henry Grundler
Robert Joseph Grundler"

pursuant to which the Judge presiding, W. H. S. Burgwyn, E. J.,

signed an order that the appeal be abandoned, and "the Clerk is instructed to strike said notices of appeal from the minutes of this court."

The record also shows that thereafter on 10 April, 1958, and within the time allowed defendant to serve case on appeal as above stated, Herbert E. Rosenberg and George Rountree, Jr., as counsel for defendant gave notice to Solicitor Burney, of the Fifth Judicial District, that, in the Superior Court of New Hanover County at the courthouse in Wilmington, N. C., before Judge Frizzelle, holding the courts of the Fifth Judicial District, or other Judge lawfully presiding at the designated term of court, they, as counsel for defendant, would move and petition the court for an order setting aside the order of Judge Burgwyn, vacating the appeal entries allowed by him for the reasons stated in the application to set aside the withdrawal and abandonment of appeal, copy of which was attached to and made a part thereof, and that said motion and petition would be heard before the said Judge at certain time at the Regular May 1958 Criminal term of said court, or as soon after said date and time as counsel can be heard.

And the record shows that the Solicitor answered the application of defendant, and prayed that it be dismissed.

The cause coming on for hearing before Judge Frizzelle, upon the motion and petition aforesaid, and being heard upon affidavits filed and arguments made that under the provisions of G.S. 1-220 the Judge has authority to entertain the motion. However the Judge, being of contrary opinion, ordered the motion "dismissed for the reason that the court has no jurisdiction or authority under G.S. 1-220 to hear the motion, and that the defendant Grundler's sole procedure for relief is by application to the Supreme Court of North Carolina for a *writ of certiorari.*"

The defendant excepted thereto, and appeals to the Supreme Court assigning error.

Attorney General Seawell, Assistant Attorney General Bruton, for the State.

George Rountree, Jr., Herbert E. Rosenberg, Member of New York Bar, for defendant, appellant.

Edward Norwalk, Member of Bar of U. S. Supreme Court, on brief.

WINBORNE, C. J. This is the determinative question on this appeal: Did the Judge below err in dismissing application of defendant, appellant, on the ground that he had no jurisdiction or authority un-

der G.S. 1-220 to hear the motion? The Court is of opinion and holds that the ruling is erroneous.

In this State it is provided by statute G.S. 15-180 that "in all cases of conviction in the Superior Court for any criminal offense, the defendant shall have the right to appeal * * *; and the appeal shall be perfected and the case for the Supreme Court settled, as provided in civil action."

And the General Assembly declares that "the judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding against him through his mistake, inadvertence, surprise, or excusable neglect * * * ."

Considering these statutes in the light of decisions of this Court it is held that the judge of Superior Court to whom the application of defendant was addressed had the power and duty to hear the matter.

And it is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light. See *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324, and cases cited including *S. v. Fuller,* 114 N.C. 886, 19 S.E. 797; *S. v. Casey,* 201 N.C. 620, 161 S.E. 81; *Tickle v. Hobgood,* 212 N.C. 762, 194 S.E. 461; *Bullock v. Williams,* 213 N.C. 320, 195 S.E. 791; *Farris v. Trust Co.,* 215 N.C. 466, 2 S.E. 2d 363. See also numerous cases listed in Shepard's North Carolina Citations (215 N.C. 752, headnote 3).

For error pointed out this case is remanded for such further hearing.

Error and Remanded.

DR. H. M. SEAWELL AND WIFE, CONSTANCE T. SEAWELL v. BOONE'S MILL FISHING CLUB, INCORPORATED.

(Filed 14 January, 1959.)

1. Ejectment § 7—

Upon defendant's denial of plaintiff's title and defendant's trespass in an action for the recovery of land, the burden is on plaintiff to prove his title and the trespass of defendant.

2. Ejectment § 10—

Where plaintiff, in an action for the recovery of land, introduces deeds establishing a common source of title but fails to offer evidence fitting the descriptions in the deeds to the land claimed, nonsuit is

proper, since rarely does a deed prove itself as to the identity of the land conveyed, but such proof must be effected by evidence *dehors* the instrument.

APPEAL by plaintiffs from *Morris, J.*, at March Term, 1958, of NORTHAMPTON.

Civil action to remove cloud of adverse claim of defendant from certain real property, and to have plaintiffs declared to be the owners of same in fee simple free from the claim of defendant.

As pertinent to this appeal the record shows the following:

I. (a) Plaintiffs allege in their complaint in part:

"3. That by a deed dated June 1, 1953, recorded in Book 399, page 90, Northampton County Register of Deeds office, Frank B. Meacham and his wife, Mary Lois Meacham, grantors in said deed conveyed to plaintiffs the following described tract of land: 'That tract of land in Occoneechee Township, Northampton County, North Carolina, lying on the north side of State and U. S. Highway No. 158, and more particularly described' " as there set forth, containing 17.5 acres.

(b) Plaintiffs further allege adverse claim of defendant.

(c) And pursuant thereto plaintiffs pray judgment (a) That the cloud of said adverse claim of the defendant be removed from the said title to said property, and that the plaintiffs be declared the owners in fee simple of said property free from the claim of the defendant; and (b) for such other and further relief as plaintiffs may be justly entitled together with the costs of this action.

II. Defendant, answering the complaint, while admitting that "there is of record in the office of the Register of Deeds of Northampton County in Book 399, at page 90, an instrument purporting to be a deed from Frank B. Meacham and his wife, Mary Lois Meacham, to Dr. M. H. Seawell and his wife, Constance T. Seawell," and "that according to the description" therein "a part of the lands therein attempted to be described is covered by the waters of Wheeler's Mill Pond," denies all other allegations of the complaint, and asserts "that it not only claims title to the lands covered by the waters of said Wheeler's or Boone's Mill Pond, but is the owner and in possession thereof."

Defendant, further answering the complaint, pleads, among other bars, to right of plaintiffs to prosecute this action, adverse possession of *locus in quo* for more than forty years.

Upon the trial in Superior Court plaintiffs offered in evidence, among other things:

1. Deed recorded in Book 399, page 90, Northampton County Public Registry, from Frank B. Meacham and wife, Mary Lois Meacham,

as parties of first part, to M. H. Seawell and wife, Constance T. Seawell, as parties of the second part, 1 June, 1953, purporting to convey to parties of second part, as tenants by the entireties, their heirs and assigns, the lands described in paragraph three of the complaint, to have and to hold with all privileges thereto belonging "but subject to the reservations hereinafter set out," etc.

2. Deed recorded in Book 327, page 366, Northampton County Public Registry from Matt W. Ransom III and wife, as parties of the first part, to Frank B. Meacham, as party of the second part, dated 29 July, 1944, purporting to convey in fee to parties of the second part "the following described tract or parcel of land: That tract of land in Occoneechee Township, Northampton County, North Carolina, bounded on the north by the lands of the estate of the late J. E. Ransom and others; on the east by the run of Wheeler's Mill Swamp; on the south by State Highway No. 48 and the lands of the estate of the late J. E. Ransom, containing 1500 acres, more or less, known as 'Mowfield'."

3. And plaintiffs offered oral testimony for the purpose of identifying the land in controversy.

Motion of defendant for judgment as of nonsuit was allowed, and from judgment in accordance therewith plaintiffs appeal to Supreme Court and assign error.

V. D. Strickland for plaintiffs, appellants.
George C. Green, Eric Norfleet for defendant, appellee.

WINBORNE, C. J. The principal assignment of error presented on this appeal is based upon exception to the ruling of the trial court in granting defendant's motion for judgment as of nonsuit entered when plaintiffs rested their case.

In this connection, taking the evidence offered by the plaintiffs in the light most favorable to them, this Court is of opinion, and holds, that there is total failure of proof as to location of land sought to be recovered by plaintiffs as described in the complaint. And hence the nonsuit was properly granted.

When in an action for the recovery of land, as in the present case, defendant denies plaintiffs' title and defendant's trespass, nothing else appearing, issues of fact arise both as to the title of plaintiffs and as to trespass of defendant,— the burden as to each being on plaintiff. *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *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. See also *Paper Co. v. Cedar Works*, 239 N.C. 627, 80 S.E. 2d 665; *Teel v. Johnson*, 228 N.C. 155, 44 S.E. 2d 727.

In such action plaintiff must rely upon the strength of his own title. This requirement may be met in various methods which are specifically set forth in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142.

In the present action plaintiff undertakes to connect himself with a common source of title, and to show in himself a better title from that source— (the sixth method set out in the *Mobley case*).

However, as stated in *Skipper v. Yow*, 238 N.C. 659, 78 S.E. 2d 600, opinion by *Barnhill, J.*, later C. J.: "In an ejectment action a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed— that is, he must show that the very deeds upon which he relies convey, or the descriptions therein contained embrace within their bounds, the identical land in controversy. If one or more of his deeds convey less than the whole, he must show that the land conveyed thereby lies within the bounds, and forms a part of the *locus in quo*. As to the identity of the land conveyed, a deed seldom, if ever proves itself. Fitting the description contained in the deed to the land in controversy, or vice versa, must be effected by evidence *dehors* the deed," citing *Smith v. Fite*, 92 N.C. 319; *Locklear v. Oxendine, supra; Linder v. Horne*, 237 N.C. 129, 74 S.E. 2d, 227; *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759; *Self Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889.

Indeed in *Smith v. Fite, supra*, this Court, through *Smith, C. J.*, declared that "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give efficacy to his possession." And in *Locklear v. Oxendine, supra*, this Court adds this comment, "in other words, the plaintiff must not only offer the deed upon which he relies, he must by proof fit the description in the deed to the land it covers —in accordance with appropriate law relating to course and distance and natural objects called for, as the case may be." And "the general rule as to this is that in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line," citing cases.

Hence other assignments of error require no express consideration, and the judgment from which appeal is taken is

Affirmed.

R. M. PENTECOST v. LONNIE RAY.

(Filed 14 January, 1959.)

1. Partnership § 12—

Upon the dissolution of a partnership, either by the partners or by the court, the partners are responsible to each other for an accounting.

2. Receivers § 9: Reference § 11—

Where, pursuant to the referee's report, in an action for the dissolution of a partnership, receivers are appointed to take inventory and to sell assets of the partnership, the property of the partnership is in the hands of the court and the partnership is terminated, and another reference may not be ordered on the ground that thereafter one of the partners had commenced a business of a similar nature and had used partnership assets therein and should account therefor, since, if the receivers did not take over all of the partnership property, the remedy is to send them back for it or to have its loss accounted for.

APPEAL by defendant from *Hobgood, J.*, September, 1958 Civil Term, ALAMANCE Superior Court.

Civil action instituted November 7, 1953, for dissolution of a partnership and for an accounting. The plaintiff alleged the parties entered into a partnership for the manufacture of hosiery under the name Ray Hosiery Mill; that the partnership operated at a loss and the defendant refused to dissolve. Plaintiff prayed for dissolution, for the appointment of a receiver to liquidate under order of the court.

The defendant, by answer, denied the partnership, but admitted an operating agreement which was discontinued on July 31, 1953; that a loss of about $3,000.00 resulted from the operating arrangement.

At the May Term, 1955, the superior court ordered a compulsory reference and directed the referee to conduct a hearing on "all issues, both of fact and of law, involved in the above-entitled action," and report findings and conclusions. The referee conducted hearings, made detailed findings of fact, and based thereon concluded: (1) A partnership existed to which the plaintiff contributed $6,494.77, and the defendant contributed $6,967.18; (2) the plaintiff owed the partnership $700.00 in addition to the amount necessary to make him an equal owner in the partnership business; (3) the partnership had an operating loss of $4,856.68. The referee further concluded the plaintiff was entitled to have a receiver appointed to take charge of the assets and dispose of them.

The defendant filed detailed exceptions to the referee's report which were subsequently abandoned. At the July, 1956 Term, the report of the referee was confirmed and a consent order was entered (1) that

Paul Messick and Clarence Ross be appointed receivers; (2) that the receivers "ascertain and make inventory of the property and assets . . . involved in this litigation;" (3) the receivers "are hereby authorized and empowered to sell, either publicly or privately, such property as they may ascertain as belonging to the Ray Hosiery Mill and involved in this action, and report their actions and such sales into court."

The plaintiff on two occasions made application to the superior court to amend the complaint to allege the defendant was still operating the partnership business under a new name and that he be required to account to the plaintiff for the profits. In each instance the court entered an order denying the motion. No exception was taken.

At the September Term, 1957, the court entered an order directing the receivers to examine the present business now conducted by the defendant and to ascertain whether any property of the Ray Hosiery Mill as originally operated was in the possession of the defendant; and whether the same was being used in the present business.

The receivers ascertained and listed the assets involved in the litigation, sold the same for $700.00, and made report to the court on October 5, 1957, and asked that the sale be approved. The receivers were Mr. Messick, of counsel for the plaintiff, and Mr. Ross, of counsel for the defendant. They had for distribution about $1,700.00, less fees and costs which they had been ordered to pay.

At the September Term, 1958, the court, "on its own motion, having ordered a reference as hereinafter set forth; and all parties having by proper exceptions duly preserved their right to a jury trial on the report of the referee"; . . . Thereupon a new referee was appointed to:

> "3. Hear the evidence of the parties and determine (a) whether the defendant, during the pendency of this action, has commenced a business of a similar nature to the business of the original partnership, and the nature of said business; (b) whether the defendant, pending this action, has commenced another business wherein he used any of the property or assets of the original partnership and, if so, what property or assets.
>
> "4. In the event his findings on either 3(a) or 3(b) above are in the affirmative, he will require the defendant to render an account of all profits or net earnings from the operation of said new business from its inception to the date of his Report; and will hear and determine all exceptions and surcharges, if any, filed to said account by the plaintiff."

To the foregoing order that the case be again referred, the defendant excepted and from it, appealed.

Thomas C. Carter, Clarence Ross, Lee W. Settle for defendant, appellant.

W. D. Madry, Paul Messick, W. R. Dalton, Jr., for plaintiff, appellee.

HIGGINS, J. If the order appealed from is permitted to stand, the cause has made a circuit through the legal steps set forth in the statement of facts and is now only a few degrees off the position it occupied when Judge Sharp ordered it referred. The court has been spinning its wheels for almost four years. The new order of reference injects new questions into the cause and opens the door for a jury trial as to matters the plaintiff has sought to inject by unsuccessful attempts to amend his complaint. The present situation is this: The plaintiff sued for dissolution and accounting. The defendant denied the partnership. The court ordered a compulsory reference. The referee found a partnership existed, determined the amount each partner contributed, and the amount the plaintiff was due the partnership. The referee found that the partnership had an operating loss of more than $4,800.00, and that the plaintiff was entitled to a dissolution and to an accounting. The report was confirmed and no exceptions taken. Receivers were appointed, consisting of an attorney of record for each party. The receivers sold the assets, collected the accounts, and reported to the court.

Each partner is responsible to the partnership for what he takes from it as long as it exists. When the partnership is dissolved, either by the partners or by the court, the partners are responsible to each other for an accounting. *Casey v. Grantham*, 239 N.C. 121, 79 S.E. 2d 735. In this case, when the court appointed receivers to take over all the assets of the partnership, to liquidate them, and to report to the court for further orders, the partnership was thus at an end. The partnership property was in the hands of the court. If the receivers did not take over all the partnership property, the remedy is to send them back for it or to have its loss accounted for. The court may then make distribution. There is nothing in the record to warrant a further reference. The superior court should pass on the report of the receivers and make distribution if the report is approved. If it is not approved, the court should instruct the receivers what further action they should take in order to complete their duties.

To the end this may be done, the order appealed from is set aside. The case is remanded to the Superior Court of Alamance County for disposition as indicated.

Reversed.

BRITT *v.* CHILDREN'S HOMES.

DAVID M. BRITT, INGRAM P. HEDGPETH, AND P. A. McRAE, TRUSTEES OF THE ROBESON BAPTIST ASSOCIATION, AND THE ROBESON BAPTIST ASSOCIATION, A VOLUNTARY ASSOCIATION OF BAPTIST CHURCHES IN ROBESON COUNTY, NORTH CAROLINA, AND ITS IMMEDIATE ENVIRONS v. THE BAPTIST CHILDREN'S HOMES OF NORTH CAROLINA, INC., A NORTH CAROLINA CORPORATION.

(Filed 14 January, 1959.)

Appeal and Error §§ 1, 55—

The grantors in a deed are necessary parties in an action to construe the deed to determine whether it conveyed the fee simple title or contained a condition subsequent which would defeat the title, and when the grantors are not parties, the cause must be remanded.

APPEAL by defendant from *Bickett, J.*, September 1958 Civil Term, of ROBESON.

Plaintiff seeks to compel defendant to purchase and pay $100 pursuant to the provisions of a contract for 46.65 acres conveyed to their predecessors in office by E. L. Odum and wife. A copy of the deed to plaintiffs is attached to and made a part of the complaint. The grantees are named persons, "Trustees of the Robeson Baptist Association, for the use of church purposes and Christian education among the Indians of Robeson County . . ." The consideration recited is "$1.00 in hand paid and for the interest they have in the better Church advantages and Christian education of the Indians of Robeson County . . ." The property is conveyed "unto the said parties as Trustees of the Robeson Baptist Association and to their successors in office for the uses above mentioned, and none other . . ."

Defendant admitted the contract and its refusal to accept the deed tendered. It alleged it was incorporated for the primary purpose of providing "care and christian training of indigent and orphaned children of North Carolina," receiving its principal support from Missionary Baptist Churches of North Carolina, including members of plaintiff association; the buildings on the property used by plaintiff to house Indian orphans were in a bad state of repair, jeopardizing the safety and welfare of the children occupying the same; it contracted to purchase, expecting to renovate the existing buildings and, if necessary, to erect a new dormitory, but because plaintiffs had only a defeasible fee and could not convey free from the trust set out in the deed to plaintiff, it had declined to accept the deed tendered and pay the purchase price.

Based on the pleadings and exhibits the court concluded plaintiffs could convey in fee simple without restrictions affecting the title, and the deed tendered was sufficient for that purpose. It decreed specific performance. Defendant excepted and appealed.

Varser, McIntyre, Henry & Hedgpeth for plaintiff appellees.
Jones, Reed & Griffin for defendant, appellant.

RODMAN, J. Appellee's brief states the question for decision as: "Does the Odum deed, which conveys the land in question, contain a condition subsequent that could defeat the title?"

The Odums are not parties to this action. They cannot be bound without an opportunity to be heard. No matter how laudable the purpose of the parties to this action, no judicial declaration should be made which could have no binding effect, but which might seriously cloud and interfere with such rights as the Odums may have. Adhering to our practice, *Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E. 2d 679; *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E. 2d 869; *Peel v. Moore*, 244 N.C. 512, 94 S.E. 2d 491; *Cutler v. Winfield*, 241 N.C. 555, 85 S.E. 2d 913; *Story v. Walcott*, 240 N.C. 622, 83 S.E. 2d 498; *Thomas v. Reavis*, 196 N.C. 254, 145 S.E. 226, the judgment appealed from is vacated and the cause remanded to the Superior Court where additional parties necessary to a decision may be made.

Remanded.

BILLY GENE LAKE v. HARRIS EXPRESS, INCORPORATED, ORIGINAL DEFENDANT; AND EVELYN R. FREEMAN, ADMINISTRATRIX OF THE ESTATE OF DANIEL VANCE FREEMAN, ADDITIONAL DEFENDANT.

(Filed 14 January, 1959.)

1. Negligence § 19b(1)—

If plaintiff's evidence, considered in the light most favorable to him, tends to establish all essential elements of actionable negligence, nonsuit should be denied.

2. Trial § 22c—

Inconsistencies and conflicts in the evidence are to be resolved by the jury and do not justify nonsuit.

3. Automobiles § 41c—

Plaintiff's evidence tending to show that the vehicle in which he was riding as a guest had been brought to a stop to avoid hitting another car in the driver's lane of travel opposite an intersection, that defendant's truck, traveling south in the western lane of the four-lane highway, approached from the opposite direction, and suddenly turned left and struck the car in which plaintiff was riding, requires the submission of the issue of negligence to the jury, notwithstanding other evidence inconsistent and in conflict therewith.

APPEAL by plaintiff from *Olive, J.*, March, 1958 Term, ROWAN Superior Court.

Civil action to recover damages for alleged injuries upon the ground the original defendant was guilty of actionable negligence (1) by failing to yield to the car in which the plaintiff was riding as guest passenger one-half the travel portion of the highway; (2) by attempting to cross to the left into the plaintiff's line of traffic without ascertaining the movement could be made in safety; (3) by failing to keep a proper lookout and to keep its vehicle under proper control.

The original defendant denied negligence and set up as a further defense: (1) The plaintiff and the driver of the automobile in which he was riding were on a joint venture and were exercising joint control over the car, and that the accident was the result of their negligence because of, (1) excessive speed, (2) driving on the wrong side of the highway, (3) failure to yield one-half the highway to the defendant's vehicle, (4) attempting to pass another vehicle going in the same direction when it was unsafe to do so, (5) the negligence and contributory negligence of the plaintiff and his companion were the proximate or contributory causes of the plaintiff's injury.

The evidence tended to show the accident occurred on U. S. Highway No. 29 about four miles south of Salisbury at about 7:00 p.m. on December 2, 1955. No. 29 is an arterial highway for traffic north and south. The travel portion of the highway is concrete and 40 feet wide, with four marked traffic lanes—two on the east for north-bound traffic, separated by a broken white line; and two on the west for south-bound traffic, also separated by a broken white line. Double yellow unbroken lines down the middle separate the interior lanes.

Here, summarized in part and quoted in part, is the plaintiff's evidence: On December 2, 1955, the plaintiff was a guest passenger in a Packard automobile driven and owned by D. V. Freeman. It was dark and the weather was "misty." Freeman was driving next to the yellow lines in the inside lane for north-bound traffic. The road was approximately straight both north and south from the point where the accident occurred. The airport road intersects with Highway 29 from the west, forming a T intersection. As the automobile approached the airport road intersection, a car with rear lights burning appeared to be stopped directly in front of the lane in which Freeman was driving. He applied his brakes and stopped just as the car in front moved forward toward Salisbury. The original defendant's heavy truck, driven by its agent Hilton, "was coming down the highway, cut in across the highway when it hit us. It was in his right-hand lane going south.

There was a lane between him and the yellow line. After we stopped and I looked out the window, I seen the truck was in that right-hand lane coming down the highway. I don't know that is when he turned, or what, I don't know what was causing it without it was vibration. I noticed the lights were jumping up and quivering around. Then I seen him turn and cut right in the side of the car and hit us. He was turning to the left across the highway; turned in the direction of the Southern Railway tracks (to his left). He cut out of the south-bound lane and cut across and hit us in the north-bound lane after we had stopped. . . . It was nothing in the path of the truck to prevent it from going straight ahead."

The plaintiff introduced evidence of his injuries resulting from the collision and at the conclusion of his evidence the court overruled the defendants' demurrer thereto. The original defendant introduced evidence, renewed its motion, which was allowed. The plaintiff excepted and appealed.

James L. Woodson, Walter H. Woodson for plaintiff, appellant.

Helms, Mulliss, McMillan & Johnston, By: Fred B. Helms, W. T. Shuford for defendant, Harris Express, Inc., appellee.

HIGGINS, J. The question presented is whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. "If the evidence in the light most favorable to plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit." *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297; *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Scarborough v. Veneer Co.,* 244 N.C. 1, 92 S.E. 2d 435.

Inconsistencies and conflicts in the evidence, whether witnesses are mistaken or otherwise, truthful or otherwise, are questions of fact to be resolved by the fact finding body—the jury. Only a question of law is presented by demurrer to the evidence or motion to nonsuit. *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Mallette v. Cleaners,* 245 N.C. 652, 97 S.E. 2d 245.

The plaintiff alleged the defendant, with its own travel lane unobstructed, (1) carelessly turned to his left across another south-bound traffic lane, crossed the yellow lines into the path of traffic going into the opposite direction, and collided with the car in which the plaintiff was a guest passenger; that the movement could not be made in safety; (2) the defendant failed to yield one-half the travel portion of the highway; (3) he failed to keep his vehicle under proper control and

to operate it carefully under the conditions then existing, thus causing the accident and the plaintiff's injury. His evidence was sufficient to entitle him to have the jury consider and pass on it. The allegations and the evidence present issues of fact. The court committed error in withdrawing the case from the jury.

Reversed.

STATE v. RAYMOND WILLIAM BERTRAND.

(Filed 14 January, 1959.)

Criminal Law § 108—

The court's statement that it would give the jury peremptory instructions in the case, together with the court's interrogation of witnesses, and recall of the jurors after they had deliberated only fifteen minutes, with instructions to them to go back and take a vote, *is held* to constitute prejudicial error, notwithstanding that the court did not give peremptory instructions, the probable effect on the jury and not the motive of the judge being determinative.

PARKER, J., dissents.

APPEAL by defendant from *Williams, J.*, January, 1958 Regular Term, ROBESON Superior Court.

Criminal prosecution upon a bill indictment charging seduction under promise of marriage. The defendant entered a plea of not guilty. The State offered the evidence of the prosecuting witness and other corroborating and supporting testimony. The defendant did not offer evidence.

At the close of the plaintiff's evidence the court announced: "Gentlemen, I shall give the jury peremptory instructions." The defendant excepted. The court did not give the peremptory instruction but charged in the manner usual in contested criminal cases. After completing the charge, the court instructed the jury to retire and to deliberate on its verdict. After the elapse of 15 minutes, the court recalled the jurors and inquired if they had arrived at a verdict. The foreman replied they had just started to take a vote.

"Court: Gentlemen, you are to decide this case from the evidence presented and be guided by the instructions of the court as to the law. Go back and take your vote."

The jury returned a verdict of guilty. From the sentence of five years in the State's prison at hard labor, the defendant appealed.

Malcolm B. Seawell, Attorney General, T. W. Bruton, Ass't. Attorney General, for the State.

J. H. Barrington, Jr., for defendant, appellant.

HIGGINS, J. During the progress of trial, the presiding judge asked some of the State's witnesses questions which the defendant contends may have given the jury the impression the judge was attempting to bolster the State's case. No doubt the experienced and learned judge intended only to clarify rather than to emphasize the State's evidence. The court's questions, standing alone, would not be of disturbing importance. However, the effect of the court's announcement at the close of the evidence that it would give the jury peremptory instructions may not have been removed by the court's failure to give them. The announcement alone was calculated to impress the jury with the idea either that the evidence failed to make out a case or that it did establish an impregnable one. By a peremptory instruction, the court tells the jury how to decide the case. It would be unsafe to assume that at least some of the jurors failed to grasp the purport of the court's statement, or that its effect was lost on them. Added thereto the court's inquiry about the verdict after 15 minutes deliberation may have been taken as a suggestion that they had wasted enough time on the case. It is impossible to tell, of course, what may be the determining factors in a jury's verdict. However, there is nothing in this record from which the jury might reasonably conclude the trial judge thought the defendant should be acquitted. We fear the court, by the matters herein discussed, inadvertently left an impression to the contrary. The probable effect on the jury and not the motive of the judge determines whether another trial is required. *State v. Newton,* 249 N.C. 145, 105 S.E. 2d 437; *State v. Taylor,* 243 N.C. 688, 91 S.E. 924; *State v. Love,* 229 N.C. 99, 47 S.E. 2d 712; *State v. Ownby,* 146 N.C. 677, 61 S.E. 630.

The reasons here assigned make it necessary that the case be submitted to another jury.

New Trial.

PARKER, J., dissents.

JOE BARKER SHAW v. RAMEY (RAYMOND) JOYCE.

(Filed 14 January, 1959.)

Animals § 3—

In this action by a motorist to recover damages suffered when he collided with a mule when it suddenly jumped onto the highway immediately in front of his car at nighttime, evidence tending to show that defendant knew that the wire around his pasture was old and that the mule had escaped from the pasture earlier on the day of the collision and on the night before the collision, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to exercise reasonable care to keep the animal in restraint.

APPEAL by plaintiff from *Crissman, J.*, July 1958 Term, of SURRY.

Plaintiff seeks to recover damages resulting from a collision between defendant's mule and an automobile owned and operated by plaintiff. The collision occurred near midnight on 14 August 1947 on Highway 89. Plaintiff was driving westwardly towards Mount Airy on his right side at a speed approximating 40 m.p.h. The highway was paved. There were dirt shoulders on each side of the pavement; a cornfield was on the left of the highway, and a wooded area to the right, with plum bushes reaching practically to the highway. When plaintiff was opposite the plum bushes, the mule, dark in color, suddenly jumped on the highway immediately in front of and then on plaintiff's automobile. The car came to an abrupt stop. Plaintiff then discovered that the object which struck him was defendant's mule. Plaintiff offered evidence, referred to in the opinion, for the purpose of charging defendant, the owner, with knowledge that the mule frequented the highway. At the conclusion of plaintiff's evidence, defendant's motion to nonsuit was allowed.

J. H. Blalock and Edward N. Swanson for plaintiff, appellant.
Wilson Barber for defendant, appellee.

RODMAN, J. The measure of defendant's duty as owner of the mule to prevent it from roaming on the highway is concisely stated in *Gardner v. Black*, 217 N.C. 573. It is there said: "The liability of the owner of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape. In such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations. It is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them

in restraint." Similar declarations are found in *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711; *Lloyd v. Bowen,* 170 N.C. 216, 86 S.E. 797; *Pongetti v. Spraggins,* 34 A.L.R. 2d 1277; *Smith v. Whitlock,* 19 S.E. 2d 617, 140 A.L.R. 737; 2 Am. Jur. 737, 738.

To establish defendant's negligent failure to keep the mule off the highway, plaintiff offered evidence that the mule was kept in a pasture to the rear of defendant's home and about 250 feet from the highway; the wire around the pasture was old, the gate was a "tobacco slide." The mule escaped from the pasture earlier on the day of the collision and on the night before the collision. Defendant knew of these escapes. Following the accident defendant stated ". . . he had a poor fence down there, a poor pasture where he kept his mules and cows . . ." This evidence sufficed to require submission of an appropriate issue to the jury.

Whether plaintiff was negligent in not seeing the mule before it came on the highway or in failing to exercise reasonable care to prevent the collision must be determined by a jury.

Reversed.

WILSON J. McNEILL, ADMINISTRATOR OF THE ESTATE OF RICKY McDOUGALD v. AVERY BULLOCK.

(Filed 14 January, 1959.)

1. Automobiles § 34—

It is the duty of the operator of a motor vehicle to use ordinary care to avoid injury to a child of tender years, even when the vehicle is being operated on private property away from a public highway or street.

2. Automobiles § 41m—

Plaintiff's evidence tended to show that his intestate, a twenty-months-old child, was playing in the yard near defendant as defendant was repairing his car, that the child was called into the house for his bath, that while his bath was being prepared the child must have gone outdoors, and that defendant, in backing his car thereafter to test the brakes, ran over and killed the child. *Held:* Nonsuit was proper in the absence of any evidence tending to show that defendant saw the child after the child was called into the house.

APPEAL by plaintiff from *Bone, J.,* August Civil Term, 1958, of ROBESON.

This is an action in which the plaintiff seeks to recover for the alleged wrongful death of a twenty-months-old child, Ricky McDougald, who made his home with the defendant and his wife, who

were tenants on plaintiff's farm at Parkton, in Robeson County, North Carolina. The child was not any blood kin of either the defendant or his wife, nor had he been adopted by them.

On 6 July 1957, about 6:30 in the afternoon, the defendant was working on his 1953 Plymouth automobile. The car was parked in the yard of his home, several hundred yards from a public highway. Included in the work on the car was the adjusting of brakes, necessitating defendant lying on the ground while he did the work. Plaintiff's intestate was playing all around the defendant while he was working on the car, and actually played on defendant's back and stomach while defendant was lying on the ground. Lena Bullock, wife of the defendant, testified that she called the deceased into the house to get his bath; that he came into the house, and while she went to light the stove to heat the water to give him a bath, the child must have gone outdoors, for Avery (the defendant) called her about five minutes later and the child had been run over and fatally injured.

The plaintiff testified that the defendant told him he was busy working on his brakes and started to back up and he felt a bump and got out to see what it was and he had backed over the child. The child died on the way to the hospital.

The defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiff appeals, assigning error.

Britt, Campbell & Britt for plaintiff.
Varser, McIntyre, Henry & Hedgpeth for defendant.

PER CURIAM. Even though a motor vehicle is operated on private property and away from a public highway or street, it is the duty of the operator thereof to exercise ordinary care to avoid injury to a child of tender years. 60 C.J.S., Motor Vehicles, section 349 (3) page 821.

In the instant case, however, there is no evidence tending to show that the defendant saw the plaintiff's intestate after the child went into the house for the purpose of being bathed. Did the defendant know the child had been called to come in the house to get his bath? If so, did the defendant know that the child had left the yard in response to such call? Since the record is silent in respect to such matters, and there is no evidence tending to show that the defendant knew the child was in the yard at the time he backed his car over the child, in our opinion the evidence is insufficient to establish actionable negligence on the part of the defendant.

The ruling of the court below in sustaining the defendant's motion

for judgment as of nonsuit will be upheld.

Affirmed.

MARSELL WOMBLE v. BERRY ELSTER McGILVERY.

(Filed 14 January, 1959.)

Automobiles § 41l—

Plaintiff's evidence tending to show that plaintiff was intoxicated and was walking in a street near the edge of the pavement, facing traffic, that defendant's car was approaching from the opposite direction on the right side of the street at a lawful speed, that plaintiff saw the car but paid no attention to it, and that the car struck plaintiff and came to an immediate stop, together with testimony of a witness for plaintiff that plaintiff moved out into the street just before the accident *is held* insufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by plaintiff from *Williams, J.*, February-March Term, 1958, of ROBESON.

This is a civil action to recover for personal injuries sustained when the plaintiff was hit by an automobile owned and operated by the defendant on Madison Street, just outside the corporate limits of the Town of Fairmont, in Robeson County, North Carolina, on 11 December 1955, about 10:45 p.m.

The plaintiff's evidence tends to show that he had been drinking that evening and had been in a fight and got cut rather seriously about an hour and a half before the accident complained of herein; that after he got cut he went into a nearby field and laid down; that he did not know how he got into the street; that he was walking near the edge of the pavement, facing traffic; that he saw the defendant's car approaching but paid no attention to it "until it got right on me." One of the plaintiff's witnesses testified that just before the accident the plaintiff "moved out into the road." The plaintiff was going north on the street or road and the defendant's car was being driven in a southerly direction. The speed of the defendant's car was fixed by one of the plaintiff's witnesses at not more than 20 miles per hour. This witness further testified that defendant's car was being operated on its right side of the street and did not move at all after it came in contact with the plaintiff; that plaintiff was knocked not more than four or five feet by the car. The plaintiff testified "I don't remember how much drinking I did. I drank about half a pint in all. * * * I sure don't remember much else, after drinking that half pint.

* * * I had moved off that street and was trying to make it home. I was going in the opposite direction from home, but I thought I was going home. I didn't know exactly where I was going."

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

Hackett & Weinstein for plaintiff.
Johnson & Biggs for defendant.

PER CURIAM. In our opinion the plaintiff's evidence was insufficient to establish actionable negligence on the part of the defendant. Hence, the ruling of the court below will be upheld.

Affirmed.

STATE v. WILLIAM McDONALD.

(Filed 14 January, 1959.)

1. Homicide § 13—

The burden is upon defendant to prove to the satisfaction of the jury that he acted in his self-defense and that in the exercise of his right to self-defense he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm.

2. Homicide § 20—

Testimony of State's witnesses as to declarations made by defendant tending to establish that defendant killed his wife in self-defense, does not justify nonsuit when the other evidence in the case tends to show the facts to be other than as set forth in defendant's declarations.

APPEAL by defendant from *Williams, J.*, May Criminal Term, 1958, of ROBESON.

Indicted at April Criminal Term, 1958, for the first degree murder on April 7, 1958, of Eloise McDonald, his wife, defendant was put on trial at May Criminal Term, 1958, for second degree murder.

The only evidence was that offered by the State.

Upon the verdict, "Guilty of Manslaughter," judgment, imposing a prison sentence of twenty years, was pronounced.

On appeal, defendant's only assignment of error, based on appropriate exception, is directed to the overruling of his motion for judgment of nonsuit.

Attorney General Seawell and Assistant Attorney General Moody, for the State.

Britt, Campbell & Britt for defendant, appellant.

PER CURIAM. There was plenary evidence to support a finding that defendant intentionally shot his wife and that the shotgun wound so inflicted caused her immediate death, giving rise to the presumptions that the killing was unlawful and with malice.

The deceased woman weighed "around 115 to 120 pounds." Defendant appeared to weigh "180 or 185 pounds or more." The killing occurred in the bedroom of their (rented) portion of a divided dwelling.

Two investigating officers testified that defendant, in explanation of the killing, stated that the deceased "was chasing him and pulled a razor on him" and, despite his warning, "kept coming on him with the razor." Defendant's sole contention, namely, that this portion of the testimony of these officers established completely that he shot his wife in self-defense, is untenable.

The said officers also testified as to declarations by defendant to the effect that when he entered the bedroom (1) he found his wife lying on her bed, and (2) what he saw, before and after entering the bedroom, caused him to believe that his wife and the landlord had engaged in sexual intercourse. (The landlord, testifying as a State's witness, contradicted all material portions of defendant's declarations relating to him.)

Another witness, a neighbor, to whom defendant *first* reported the killing, testified that the only explanation defendant *then gave* was that "he caught his wife wrong." His testimony, together with testimony as to physical conditions in the bedroom, the location of the wounds on the body of deceased, and the absence of injury to defendant, tended to show that the facts were other than as set forth in the portions of defendant's declarations to said officers bearing upon self-defense.

The evidence, considered in its entirety, was sufficient to support a finding that defendant, when he shot his wife, was not acting in self-defense. Moreover, it was incumbent upon defendant to satisfy the jury (1) that he did act in self-defense, and (2) that, in the exercise of his right to self-defense, he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm.

The State's evidence was sufficient for submission to the jury. Hence, the court's ruling, now challenged by defendant, is approved.

No Error.

STATE v. CARLEE MORGAN.

(Filed 14 January, 1959.)

APPEAL by defendant from *Preyer, J.*, at Regular April 1958 Term, of ROBESON.

Criminal prosecution upon a bill of indictment charging that defendant did unlawfully and willfully, maliciously, and feloniously burn certain automobile, property of Bossie Henderson, with the intent to injure and prejudice the insurer Southeastern Fire Insurance Company thereon under certain policy in violation of G.S. 14-66.

Upon trial in Superior Court the State offered in evidence a statement purportedly signed by defendant confessing the burning of the automobile in question. The trial judge ruled that the confession was voluntary, and overruled defendant's objection thereto. The State offered also other evidence tending to show other incriminating statements.

The defendant testifying in his own behalf denied the commission of the offense charged.

The case was submitted to the jury upon the evidence offered under a charge apparently free from error,— since none is pointed out.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Confinement in common jail of Robeson County to be assigned to the State Prison Department for a period of twelve months.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General T. W. Bruton, for the State.

Britt, Campbell & Britt for defendant, appellant.

PER CURIAM. Decision here is determined upon whether the alleged confession of defendant was voluntary.

The ruling of the court is accordant with well established principles of law. And the evidence is abundantly sufficient to take the case to the jury and to support the verdict rendered. Hence in the judgment below there is

No Error.

STATE v. ALVIN C. CORNWELL.

(Filed 14 January, 1959.)

APPEAL by defendant from *Pless, J.*, at July 1958 Regular Criminal Term, of GASTON.

Criminal prosecution (as shown by the record and by certificate of Clerk of Superior Court of Gaston County in response to order upon suggestion of diminution of record) upon three bills of indictment, originating in warrants issued out of court of justice of the peace, hearing waived and defendant bound over to Superior Court, and there cases consolidated for trial, charging defendant with several offenses as follows:

I. Number 1187 on two counts of operating a motor vehicle upon a public road, street or highway of Gaston County (1) while under the influence of intoxicating liquors; and (2) while under the influence of bitters, morphine or narcotic drugs. Tried only on first count.

II. Number 1188 for assault upon one R. E. Shaney with a deadly weapon, to wit a certain knife; and

III. Number 1189 for resisting arrest.

Defendant pleaded to each charge: Not guilty.

Verdict: In #1187— "Guilty of operating an automobile under the influence."

In #1188— Not guilty—and

In #1189— Guilty.

Judgment: In #1187— Confinement in common jail of Gaston County for a term of not less than eighteen months nor more than twenty-four months, assigned to work under the supervision of the State Prison Department. Defendant excepts.

In #1189— Confinement in common jail of Gaston County "for a term of two years, to be assigned to work under the supervision of the State Prison Department. Service of this sentence to begin at expiration of the prison sentence imposed in case #1187, and is to be served separately therefrom and in addition thereto. This prison sentence is suspended with consent of defendant for a period of five years upon the following conditions: (1) That the defendant be of good behavior and not in any wise violate the law, and (2) That he not operate a motor vehicle upon the public highways for a period of five years, and not then unless and until he shall have obtained a valid driver's license. Otherwise, capias to issue to put the prison sentence into effect at any subsequent term of the court."

Defendant appeals to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard, for the State.

Mullen, Holland & Cooke for defendant, appellant.

PER CURIAM. Careful consideration of all exceptions presented on this appeal fails to disclose error of such prejudicial nature as to require a new trial. The matters to which defendant excepts are in substantial accord with decisions of this Court.

Hence in the trial below the Court holds there is

No Error.

MATTHEW MOORE v. TOWN OF PLYMOUTH, NORTH CAROLINA, PAUL BASNIGHT, ALFRED BARNES, W. A. DANIEL AND HERBERT E. MANNING.

(Filed 28 January, 1959.)

1. Automobiles § 7—

Fog on a highway, even though temporary, increases the hazards and requires increased caution on the part of motorists.

2. Same—

A red light is a recognized method of giving warning of danger, and a driver seeing a red light ahead of him on the highway is required, in the exercise of due care, to heed its warning.

3. Automobiles § 15—

The right of a motorist to assume that vehicles approaching from the opposite direction will remain on their right side of the highway is not absolute, and when a motorist approaches a machine emitting a chemical fog obscuring the entire highway, he may not rely on such assumption when a reasonably prudent man might reasonably anticipate that a motorist might be on the highway meeting him and unable to keep safely on his side of the highway on account of the fog.

4. Same—

A motorist is required to drive his vehicle with due caution and circumspection at all times and at a speed and in a manner so as not to endanger or be likely to endanger any person or property. G.S. 20-140.

5. Negligence § 5—

There can be more than one proximate cause of an injury, and negligence which continues to the moment of impact is a proximate cause thereof.

6. Negligence § 6—

Concurrent negligence consists of negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single, indivisible injury.

7. Automobiles § 41b—

Evidence tending to show that defendant driver saw approaching him, when some 250 yards away, a truck with a red flashing light on its front and a fogging machine in the truck emitting chemical fog, which completely obscured the entire highway, that defendant driver slowed his vehicle but drove into the fog at a pretty good rate of speed and so continued on his right side of the highway until he was hit head-on by a truck traveling in the opposite direction, injuring plaintiff, a passenger in defendant's vehicle, *is held* sufficient to require the submission to the jury of the questions of such defendant's negligence and proximate cause. G.S. 20-140.

8. Evidence § 3—

It is a matter of common knowledge that the breeding and presence of anopheles mosquitoes constitute a menace to the health and comfort of persons exposed to them.

9. Municipal Corporations § 7a—

A municipal corporation has power to operate chemical fogging machines to destroy anopheles mosquitoes in the interest of health. G.S. 160-200(6).

10. Municipal Corporations § 12—

Where a municipal corporation procures liability insurance on a vehicle used by it in the performance of a governmental function, it waives its governmental immunity for the negligent operation of such vehicle to the extent of the amount of liability insurance. G.S. Chapter 160, Art. 15A.

11. Automobiles § 34a—

The emission from a vehicle of a chemical fog on a highway totally or materially obscuring the vision of the traveling public, without warning or signals except the noise of the machine and warning lights on the vehicle and fogging machine, which were completely obscured by the fog as to motorists approaching from its rear, is negligence, since injury to motorists on the highway may be reasonably foreseen.

12. Automobiles § 41t—Evidence held sufficient to be submitted to jury on question of operation of fogging machine without adequate warning signals.

Evidence tending to show that a municipality operated, for mosquito control, a fogging machine on its streets after sunset, that the machine had no warnings or signals to the traveling public except for the lights on the vehicle and the noise of its operation, that a vehicle approached from its rear, ran into the fog, turned to its left of the highway and sideswiped a vehicle standing on the shoulder and then collided head-on into another vehicle, traveling in the opposite direction, whose driver had slowed down but continued to drive into the fog, injuring plaintiff passenger, *is held* sufficient to be submitted to the jury on the questions of negligence and proximate cause of the municipality and its employees operating the fogging machine and the municipal truck, and motion to nonsuit on the ground of intervening negligence of the driver of the truck turning to his left on the highway should have been denied.

13. Negligence § 6—

The test of whether an intervening act of another insulates the primary negligence is whether such intervening act could have reasonably been foreseen and expected.

14. Automobiles § 43—

In an action by a passenger on a truck to recover for personal injuries received in a collision, whether the negligence of a municipality and its employees in operating a fogging machine on the highway after sunset without sufficient warnings and signals, was insulated by the negligence of the driver of one of the vehicles involved in the collision in continuing to drive into the fog and in turning to his left side of the highway, thus causing the head-on collision, *held* a question for the jury on the basis of whether, upon the facts then and there existing, the subsequent act of the driver and resulting injury could have been reasonably foreseen.

BOBBITT, J., dissents as to defendant Daniel.

APPEAL by plaintiff from *Moore, Clifton L., J.*, February Civil Term, 1958, of WASHINGTON.

At the close of plaintiff's evidence the court entered a judgment of involuntary nonsuit as to the defendants Town of Plymouth, Paul Basnight, Alfred Barnes and W. A. Daniel. Whereupon, the plaintiff took a voluntary nonsuit as to the defendant Herbert E. Manning.

From the judgment of involuntary nonsuit plaintiff appeals.

Charles F. Blanchard and Norman & Rodman for Matthew Moore, plaintiff, appellant.

Jordan, Wright & Henson and W. L. Whitley for the Town of Plymouth, Paul Basnight and Alfred Barnes, defendants, appellees.

Bailey & Bailey for W. A. Daniel, defendant, appellee.

PARKER, J. This action arose out of a head-on motor vehicle collision, in which plaintiff was severely injured, between a pickup-truck driven by W. A. Daniel, in which plaintiff was riding in the rear as a passenger, and a truck loaded with junk, the truck and junk weighing some 11,000 pounds, operated by Herbert E. Manning. The collision occurred about 7:30 p. m. on Labor Day, 3 September 1956, on U. S. Highway No. 64 within the corporate limits of the Town of Plymouth, county seat of Washington County.

At the time and place a thick chemical fog was being created on the highway by a Ford pickup-truck, which had mounted on its rear a fogging machine. This Ford pickup-truck equipped with the fogging

machine was owned by the Town of Plymouth, and on this occasion was being driven slowly on its right-hand side of Highway No. 64 in an easterly direction. This truck was driven and the fogging machine was operated at the time by Paul Basnight and Alfred Barnes, employees of the Town of Plymouth. One of these men drove the truck, and the other operated the fogging machine. The fogging machine is an independent unit, and is of the jet type.

This is a description of the fogging machine and its operation, as testified to by Lon L. Joseph Wrightson, a witness for plaintiff: "It sprays with a white gasoline with Diesel oil and DDT in a 55-gallon barrel. The machine has a little five-gallon gas container on it. The machine burns white gas. The white gas burns the Diesel oil and the DDT. That is what causes the fog. It goes out the rear and it has a pipe that turns down toward the ground and the fog goes out through that. The fog is expelled by a pipe leading out of the back of the fogging machine. The fog comes out of a jet inside and goes into a 4" pipe. It is discharged out of the 4" pipe. . . . The fog is effective to kill mosquitoes. When the machine is cut off there is no fog being emitted. . . . The fog covers the area directly behind the truck first. It then gradually spreads out to cover the whole street or road."

The town's truck was equipped with a big seven-inch red blinker light on the front and headlights, and regular red taillights on the rear. The taillights and the truck cannot be seen by a motorist approaching the town's truck from the rear, when the fogging machine is discharging the chemical fog. This chemical fog or smoke that is discharged by the fogging machine is white or light. When it is fresh on the road, it is just a white sheet that cannot be seen through. It completely obscures the view ahead. At such a time an automobile approaching from the rear will have its lights reflected on the white fog. When the fogging machine is in operation on the truck, it makes a heavy roaring noise like a jet airplane flying. A witness for plaintiff testified such noise is constant, while the fogging machine is in operation, and can be heard a distance of three quarters of a mile or more.

A witness for plaintiff testified that he went to the scene of the collision. That in going he met the town truck with the fogging machine in operation discharging fog and smoke. He pulled off the road, and in less than a minute he was able to go on.

As this Ford pickup-truck, with the fogging machine on it in operation and creating on the highway behind it a thick chemical fog or smoke, was slowly proceeding on U. S. Highway No. 64 on its right side of the road after sunset on 3 September 1956, Fred G. Floyd, Sr. driving an automobile on the highway was approaching it from the

front, following Floyd's automobile some 150 to 200 feet behind and proceeding in the same direction was a pickup-truck driven by W. A. Daniel, in which plaintiff was a passenger, and approaching the town's pickup-truck from the rear was the truck heavily loaded with junk driven by Herbert E. Manning. As the town's pickup-truck and fogging machine approached Floyd, he drove off the concrete of the highway and stopped on its shoulder. When the truck with the fogging machine passed by Floyd on the shoulder of the highway, the smoke from the fogging machine closed in around him so he could not see anything. When Floyd started to pull off on the shoulder, he saw through his rear view mirror W. A. Daniel, who was some 150 to 200 feet behind him, slow down and start to pull off on the shoulder. The last view Floyd had of the Daniel pickup-truck before the smoke enveloped him, it looked as if the pickup-truck was about half on the shoulder of the highway and half on the highway.

After Floyd's automobile had been stopped a few seconds on the shoulder of the highway, and was enveloped in the smoke from the fogging machine, it was sideswiped by a heavily loaded truck driven by Herbert E. Manning, which hit the Floyd automobile behind the hinges of the left front door and stripped it to the rear. Manning's truck after sideswiping the Floyd automobile proceeded on and crashed head-on into Daniel's pickup-truck, demolishing the front end of Daniel's pickup-truck. In the collision plaintiff, who was lying down in the rear of Daniel's pickup-truck, was severely injured. After the wreck there was a distance of 50 to 60 feet between Floyd's automobile and Daniel's pickup-truck.

A. W. Peacock, a policeman of the Town of Plymouth and a witness for plaintiff, arrived at the scene of the wreck a few minutes after it occurred. When he arrived, the fog or smoke had entirely disappeared. The bumpers of the Daniel and Manning trucks had about disappeared, the trucks "were tied together" head-on. Manning's truck was half on the shoulder and half on the concrete. Daniel's truck's right side was off on the shoulder, and its left wheels were about a foot on the pavement. The collision occurred about 75 yards east of a curve on the highway. The shoulder of the highway at the scene of the wreck was wide enough for the trucks to have gotten completely off the highway.

Herbert E. Manning was called as a witness by plaintiff. He was in transit to Portsmouth, Virginia, and approached the town truck with the fogging machine in operation on U. S. Highway No. 64 from the rear. This is his testimony as to the wreck given on direct examination: "I recall going around a curve just inside the city limits. I recall going around the curve about 20 or 25 miles per hour. It was

not much more than that. As I rounded this curve I met this smoke. The smoke looked like a house on fire or something to me but it was all over the highway. I could not tell you what the color of the smoke was. Black or brown or gray, I could not tell. It was just smoke is all I could tell you. As I entered that curve I reckon I was the distance of four cars from this smoke when I first saw it. I did not see any lights ahead of me until I got in it. I slowed up when I saw this fog. Then I saw a light coming on my side. I pulled on my left-hand side to get away out of that man's way. That is when I run on the left-hand side of the road. I couldn't see nothing when I entered the fog. I was blind after I got in it. Couldn't see nothing. Couldn't see as far as here to you. Then is when I sideswiped one man and hit the other one. I did not hear any sirens out there at the time. I could see no light signals ahead of me. I was in the smoke then. I could not see nothing then. I did not see it until after it was over with." The concrete on the highway was 22 feet wide.

The deposition of plaintiff was read to the jury. He testified in substance as follows: He was lying down in the back of Daniel's pickup-truck with his head toward the cab. The truck began slowing up some, but it was still moving along at a pretty good speed. When the truck slowed down, he raised up on his knees, peeped out through the windshield, and saw that it was mighty foggy. He then lay back down, and the collision occurred.

The pickup-truck of the Town of Plymouth was not hit, neither did it hit any automobile. It went on down the highway without stopping. Apparently, Basnight and Barnes, who were operating the truck and the fogging machine, due to its noise, did not know of the collision between the Daniel and Manning trucks.

Plaintiff offered in evidence the following admissions from the joint answer filed by the Town of Plymouth, Paul Basnight and Alfred Barnes: That the pickup-truck owned by the town was used by the town in spraying chemical fog for the purpose of destroying mosquitoes and like insect life in the town. That the truck at the time of the collision in which plaintiff was injured was operated on U. S. Highway No. 64 by Basnight and Barnes, its employees, in the course of their employment.

Plaintiff offered in evidence this part of paragraph twenty of Daniel's answer: "This defendant admits that at a distance of about 250 yards he saw the cloud which had emitted from said fogging truck of defendant Town of Plymouth and, as he drew nearer, he saw said truck and the red flashing light on the front thereof."

CASE OF PLAINTIFF AGAINST W. A. DANIEL

Plaintiff's evidence tends to show that the truck and fogging machine owned and operated by the Town of Plymouth created at the time and place on the highway a chemical fog which totally obscured the view on the highway for some seconds after its emission from the fogging machine. The time was after sunset. Daniel admits in his answer that as he approached the front of the town's truck he saw at a distance of about 250 yards "the cloud which had emitted from said fogging truck of defendant Town of Plymouth and, as he drew nearer, he saw said truck and the red flashing light on the front thereof."

This Court said in *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891: "The fog was an increased, though temporary, hazard to travelers upon the highway and, therefore, called for increased caution on their part."

A red light is recognized by common usage as a method of giving warning of danger, and a driver seeing a red light ahead is required in the exercise of due care to heed its warning. *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533.

This Court said in *Chesson v. Teer Co.*, 236 N.C. 203, 72 S.E. 2d 407: "A motorist should exercise reasonable care in keeping a lookout commensurate with the increased danger occasioned by conditions obscuring his view."

"The precise degree or quantum of care properly exercisable by a motorist, or pedestrian, under varying atmospheric conditions, such as fog, smoke, dust, and the like, is ordinarily a question for the jury. Whether the exercise by a driver of reasonable care required a complete stop, a slowing down, or any other precautions dictated by the standard of ordinary prudence, is generally within the province of the jury to decide, in the light of all the surrounding facts and circumstances." 5A Am. Jur., Automobiles, §1070.

In *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312, the Court said: "The driver of the car in which plaintiff was riding was operating his automobile at 30 or 35 miles per hour, under conditions which made it impossible for him to see more than a few feet ahead. He was outrunning his lights. Although the jury found otherwise, that he was guilty of negligence seems to be apparent."

The defendant Daniel contends that in proceeding ahead into the fog he had the right to assume that the driver of a vehicle coming from the opposite direction will obey G.S. 20-148 giving to him at least one-half of the main travelled portion of the highway as nearly as possible, and to act on such assumption in determining his own manner of using the highway. "But this right is not absolute. It may be qualified by the particular circumstances existing at the time."

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; *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387. Daniel had no absolute right to act upon such assumption for a reasonably prudent man might reasonably have anticipated that a motorist might be on the highway meeting him, and unable to keep safely on his right side of the road on account of the chemical fog. *Ewing v. Chapman*, 91 W. Va. 641, 114 S.E. 158.

The true and ultimate test of Daniel's conduct is this: What would a reasonably prudent person have done in the light of all the surrounding facts and circumstances?

G.S. 20-140, which statute the plaintiff alleges Daniel violated, required Daniel at all times to drive his pickup-truck with due caution and circumspection and at a speed or in a manner so as not to endanger or be likely to endanger any person or property. *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903.

It is well settled law in North Carolina that there can be more that one proximate cause of an injury. *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844. This Court said in *Graham v. R. R.*, 240 N.C. 338, 82 S.E. 2d 346: "This alleged negligence, if established, continued to the moment of actual impact and so constituted a proximate cause of Graham's death. As stated by *Seawell, J.*, in *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876: 'No negligence is "insulated" so long as it plays a substantial and proximate part in the injury.'"

"Concurrent negligence consists of negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single, indivisible injury." *Yandell v. Fireproofing Corp.*, 239 N.C. 1, 79 S.E. 2d 223.

Daniel, seeing the chemical fog obscuring his view on the highway some 250 yards away, and as he drew nearer seeing a red flashing light on the front of the truck meeting him whose fogging machine was emitting the chemical fog, slowed down his pickup-truck but drove into the fog at a pretty good rate of speed, and so continued driving until he had a head-on collision with the truck driven by Manning. The trial court erred in not permitting the jury to decide whether Daniel in driving his pickup-truck into the fog on the highway as he did in the light of all the surrounding circumstances exercised that degree of care which a reasonably prudent man would have exercised under similar conditions, and whether he was not operating his pickup-truck in violation of G.S. 20-140, and if he failed to exercise such due care and failed to obey the mandate of G.S. 20-140, or failed in either such respect in operating his pickup-truck, whether such failure in both or either such respects proximately caused plaintiff's in-

juries, or was one of the proximate causes thereof.

CASE OF PLAINTIFF AGAINST TOWN OF PLYMOUTH, PAUL BASNIGHT AND ALFRED BARNES.

The plaintiff alleges that the Town of Plymouth, according to the provisions of G.S., Ch. 160, Municipal Corporations, Art. 15A, by securing liability insurance covering the Ford pickup truck in this case had waived its governmental immunity from liability for any damage by reason of death, or injury to person or property proximately caused by the negligent operation of such truck by its employees acting within the course of their employment; such waiver of immunity being only to the extent of the amount of insurance so obtained. The joint answer filed by the Town of Plymouth, Basnight and Barnes avers that the Town of Plymouth has not waived its governmental immunity, except as provided in G.S., Ch. 160, Art. 15A. *Stephenson v. Raleigh,* 232 N.C. 42, 50 S.E. 2d 195, was decided prior to the enactment of this statute.

The evidence is clear that the Ford pickup-truck and the fogging machine were being operated at the time by the Town of Plymouth to destroy mosquitoes. It is a well known fact that the breeding and presence of anopheles mosquitoes constitute a menace to the health and comfort of persons exposed to them. See *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485; *Pruitt v. Bethell,* 174 N.C. 454, 93 S.E. 945. The Legislature has given powers to municipalities to promote and to secure the lives and health of their residents by empowering them in G.S. 160-200(6) ". . . to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof."

Unquestionably the Town of Plymouth had a legal right to destroy mosquitoes detrimental to the health and comfort of its residents, but if in doing so in the instant case it injured plaintiff by actionable negligence in the operation of its truck and fogging machine, it cannot completely avoid liability to him by reason of the provisions of G.S., Ch. 160, Art. 15A. It is equally true that the traveling public is entitled to make a free and lawful use of U. S. Highway No. 64 passing through its corporate limits.

The Town of Plymouth, Basnight and Barnes are charged with negligence in part as follows:

"(a) They carelessly, negligently, and improperly carried on their spraying operations.

"(b) They failed to display adequate warning signs for motorists on said highway of the hazardous situation which they knew or should have known would be created by their spraying operations.

"(e) They failed to display a rear flashing light or flag, or carry any signal whatsoever to approaching rear traffic that the smoke it was emitting was impenetrable, blinding, and generally hazardous.

"(f) They continued said blinding operations after they saw, or should have seen, the defendant Daniel and the defendant Manning approaching.

"(h) They emitted fog on both sides of said truck and did not confine their spraying operations to the right side of said highway to avoid obscuring the view of motorists."

We have found no case with the same factual situation as that which gave rise to the present litigation: nor have counsel called our attention to such a case. However, the principles of law stated in the cases where steam or smoke has been emitted upon public highways by property owners to the hazard of persons using the highways seem to be applicable to the instant case.

Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E. 2d 943, was an action for injuries by a motorist, who, while proceeding at a rate of 3 or 4 miles per hour, was struck from the rear by another automobile on the highway in the afternoon. The view of both motorists was obstructed by dense smoke created by fire started by railroad employees on the railroad right of way, which was about 160 feet from the highway. In affirming a judgment for damages to plaintiff the Court held that the negligence of the railroad's receivers was properly submitted to the jury. The Court in its opinion said: "There was a duty upon appellants to refrain from the creation or maintenance of any condition upon their right of way which subjected the traveling public, using public highways in the vicinity of such right of way, to unreasonable risks or conditions that were unnecessarily dangerous. A violation of this duty would constitute negligence. The evidence was sufficient to entitle the jury to determine whether or not appellants were guilty of negligence."

In *Lavelle v. Grace*, 348 Pa. 175, 34 A. 2d 498, 150 A.L.R. 366, it was held that the Crucible Steel Company of America from whose premises clouds of steam from a vent pipe about on a level with an adjacent highway are from time to time blown across the highway is liable for injuries resulting from a collision of automobiles on the highway in consequence of the obscuring of the view of the travelers by a cloud of steam. The Court said: "The steam carried by the wind across the bridge from the roof of the boiler house was not a mere background of the accident, but an active agency produced by the Crucible Steel Company which, by materially interfering with the vision of the operators of the two automobiles, was, if not the

sole, at least a concurrent or contributing, cause of the happening. The likelihood of such an occurrence was so obvious that it was negligence on the part of the company to persist in the maintenance of a condition which constituted a more or less constant menace to human life. The situation is not similar to that of a railroad company whose locomotives unavoidably belch forth steam and smoke and whose trains cause noise and dust in the vicinity of its tracks. . . ."

In *Oviatt v. Garretson,* 205 Ark. 792, 171 S.W. 2d 287, it was held that where a motorist traveling at high speed, through smoke from fire started on railroad right of way and permitted to spread to adjacent highway, emerged from smoke on wrong side of road and collided head-on with another automobile, whether negligence of railroad in permitting smoke to obscure highway was concurrent cause of collision was for jury.

The following decisions in the courts of other States imposed liability upon those responsible in cases in which persons were injured in automobile collisions caused by steam or smoke blown across the highway so as to impair the driver's vision. *Fisher v. Southern Pac. Co.,* 72 Cal. App. 649, 237 P. 787; *Bonner v. Standard Oil Co.,* 22 Ga. App. 532, 96 S.E. 573; *Southern Cotton Oil Co. v. Wallace,* 27 Ga. App. 415, 108 S.E. 624; *Farrer v. Southern R. Co.,* 45 Ga. App. 84, 163 S.E. 237; *Keith v. Yazoo & M. V. R. Co.,* 168 Miss. 519, 151 So. 916; *Pisarki v. Wisconsin Tunnel & Const. Co.,* 174 Wis. 377, 183 N.W. 164; *Ryan v. First Nat. Bank & Trust Co. of Racine,* 236 Wis. 226, 294 N.W. 832. In *Smith v. Edison Electric Illuminating Co.,* 198 Mass. 330, 84 N.E. 435, 15 L.R.A. (NS) 957, it was held the jury may find the turning by a manufacturer of steam into a sewer in such quantities that it escapes and envelopes a pedestrian on the sidewalk to be negligence and the proximate cause of an injury to the pedestrian through a fall on account of becoming bewildered by the steam, so as to render the manufacturer liable for the injury. In its opinion the Court said: "Nor can it be said that injury to travelers, in the manner complained of, ought not to have been apprehended as a reasonable result of suddenly pouring quantities of steam into the street. The jury might be convinced that bewilderment, a misstep and fall, were the natural consequences of such an act." See also 150 A.L.R., Annotation, p. 371, et seq., entitled "Emission of smoke or steam from private premises, or existence of other conditions thereon, as ground of liability of owner or occupant for results of an automobile accident in the highway."

Considering the evidence in the light most favorable to plaintiff (as we are required to do in passing on a motion for judgment of nonsuit, *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492), it is susceptible

of a legitimate and fair inference by a jury that had it not been for the chemical fog or smoke created on the highway after sunset by the Town of Plymouth and its employees Basnight and Barnes, who were acting within the course of their employment, totally or materially obscuring the vision of the traveling public at the time and place and interfering with the rights of the traveling public by creating a dangerous condition, with no warning or signals to the traveling public of such condition, except such as appeared from the truck and fogging machine and fog and its noise in operation, the head-on collision between the trucks of Daniel and Manning, in which plaintiff was injured, might not have occurred, and that under all the surrounding facts and circumstances the Town of Plymouth, Basnight and Barnes could have reasonably foreseen that some injury or harm would probably result from the chemical fog or smoke on the highway. If a jury should make such an inference from the evidence, the negligence of the Town of Plymouth, Basnight and Barnes was, therefore, one of the concurring causes which produced plaintiff's injury and without which the head-on collision between the trucks of Daniel and Manning would not have occurred, and it will be treated as one of the proximate causes, unless an independent agency has intervened in such a way as to break the chain of causation and to become the sole proximate cause. The Town of Plymouth, Basnight and Barnes contend that if they were negligent, the act of Manning in driving into the chemical fog or smoke was an independent intervening act of a third person which broke the chain of causation and that such act became and was the sole proximate cause of plaintiff's injuries.

"The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808. This is quoted with approval in *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673.

In *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299, the Court said: "The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected. . . . We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act."

Considering the evidence most favorably in plaintiff's behalf, it

cannot be said as a matter of law that the Town of Plymouth, Basnight and Barnes could not reasonably foresee, in the light of the facts then and there existing as to the chemical fog or smoke on the highway created by them, the subsequent act of Manning and resultant injury.

The trial court erred in sustaining the motion for judgment of nonsuit made by the Town of Plymouth, Basnight and Barnes.

The judgment of involuntary nonsuit as to the defendants Town of Plymouth, Paul Basnight, Alfred Barnes and W. A. Daniel is Reversed.

BOBBITT, J., dissents as to defendant Daniel.

BRYSON W. BIGGS, ANCILLARY ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ARNOLD M. DAVIS, DECEASED, v. FIRST-CITIZENS BANK AND TRUST COMPANY OF SMITHFIELD, NORTH CAROLINA, EXECUTOR AND TRUSTEE OF THE ESTATE OF JAMES E. BRYAN, DECEASED, AND BYRON E. BRYAN, EXECUTOR OF THE ESTATE OF MARY Z. BRYAN, DECEASED.

(Filed 28 January, 1959.)

1. Fraud § 2: Cancellation and Rescission of Instruments § 10—

While fraud is presumed in dealings between a fiduciary and the person to whom he stands in such relationship, in order for such presumption to obtain and be sufficient to take the case to the jury, it is first required that there be sufficient evidence to support a finding that such fiduciary relationship existed.

2. Fiduciaries—

An agreement under which the employees of a corporation contract with the principal stockholders to purchase the entire capital stock of the corporation, partly for cash and partly upon deferred payments, merely defines the contractual rights and obligations of the respective parties, and does not establish a fiduciary or confidential relationship between them.

3. Cancellation and Rescission of Instruments § 10— Evidence held not to disclose absence or inadequacy of consideration.

Certain of the employees of a corporation executed an agreement with the principal stockholders under which the employees were to purchase the entire capital stock of the corporation, partly in cash and partly upon deferred payments. The cash payment was made out of the corporate assets. Thereafter the business was continued and the employees received the same or larger salaries. Upon the refusal of one of the employees to sign notes for the balance of the purchase price, the agreement was revoked by instrument intended to restore the *status quo ante*

and releasing the partners of their obligations to pay the large deferred portion of the purchase price. *Held:* The agreement of revocation was supported by a valuable consideration, and the contention of the representative of an employee-partner who signed the instrument that the absence or gross inadequacy of consideration for the revocation of the agreement was sufficient to take the issue of fraud in its execution to the jury is untenable.

4. Same— Evidence held insufficient to show that execution of agreement was procured by fraud, duress or undue influence.

Certain of the employees of a corporation entered into an agreement with the principal stockholders to purchase the entire capital stock of the corporation upon cash and deferred payments. Upon the refusal of one of the employees to sign notes for the deferred payments, an agreement revoking the prior agreement was drawn up and signed by the parties. This action was instituted by the personal representative of one of the employees who had signed the revocation agreement to rescind the agreement of revocation for fraud. The evidence disclosed that the employees were requested to sign the revocation agreement on the day it was drawn up in order that one of the attorneys might return to his residence outside the State, but there was no evidence that plaintiff's testate failed to read or understand the revocation agreement or that he requested further time for consideration. *Held:* The evidence is insufficient to show that intestate's signature to the revocation agreement was obtained by fraud, duress or undue influence, and nonsuit was properly entered

APPEAL by plaintiff from *Fountain, Special J.*, June (assigned) Civil Term, 1958, of WAKE.

The appeal is from a judgment of involuntary nonsuit entered at the conclusion of plaintiff's evidence.

Civil action instituted October 13, 1955, to recover from First-Citizens Bank and Trust Company of Smithfield, North Carolina, Executor and Trustee of the estate of James E. Bryan, deceased, and Mary Z. Bryan, 8% of all of the assets of a partnership consisting of Arnold M. Davis (plaintiff's testate), Luther B. Hughes, David T. Bailey, June D. Lane, William E. Moore, Samuel A. James, and Colin MacNair, operating under the firm name of Bryan Rock and Sand Company, in the alleged wrongful possession of defendants, including all additions thereto and increases therein from May 1, 1952, to December 10, 1952, and 8% of all additions thereto and increases therein and net profits accruing from the management and operation of the same by defendants since December 10, 1952, subject to any deductions for which plaintiff may be liable, and for an accounting.

Defendants, answering, denied plaintiff's right to recover and pleaded a release. Plaintiff, in reply, alleged that his execution of the release was obtained by fraud, duress and undue influence.

Defendant Mary Z. Bryan died, testate, on July 9, 1957. Byron E.

Bryan, the duly appointed and qualified executor for her estate, was substituted as party defendant in her stead. He adopted the answer theretofore filed by Mary Z. Bryan.

A prior civil action had been instituted June 4, 1953, wherein Arnold M. Davis was plaintiff and First-Citizens Bank and Trust Company of Smithfield, North Carolina, Executor and Trustee of the estate of James E. Bryan, deceased, and Mary Z. Bryan, were defendants. It was tried at October Term, 1954. The record on this appeal shows that a judgment was entered therein but does not disclose the contents thereof.

Arnold M. Davis died, testate, on March 27, 1955. At the time of his death, he was a resident of Florida where his will was probated and the executrix named therein qualified. On October 3, 1955, Bryson W. Biggs was appointed Ancillary Administrator with Will Annexed of the Estate of Arnold M. Davis, deceased, by the Clerk of the Superior Court of Wake County, North Carolina, and duly qualified. Shortly thereafter, as indicated above, the present action was instituted.

As indicated above, James E. Bryan had died, testate, before the institution of said prior action, to wit, on February 5, 1953.

Upon the trial of this action, the evidence consisted of (1) documents referred to below, (2) portions of the pleadings herein, (3) portions of the pleadings in said prior action, and (4) the testimony given by Arnold M. Davis upon the trial of said prior action.

Uncontroverted facts include the following:

1. Under date of April 24, 1952, an agreement was made and executed by and between James E. Bryan and Mary Z. Bryan, his wife, as parties of the first part, and Luther B. Hughes, David T. Bailey, June D. Lane, Samuel A. James, Colin MacNair, Arnold M. Davis, and William E. Moore, as parties of the second part, involving the sale and purchase of all issued and outstanding capital stock of Bryan Rock and Sand Company, Inc., a North Carolina corporation, hereafter called Corporation, to wit, a total of 5,000 shares. It recites: (1) that each of the Bryans owned 2,500 shares; and (2) that the purchasers "are officers or key employees" of said Corporation. The parties of the second part agreed to purchase said 5,000 shares in the following proportions: (1) Hughes—1,300 shares; (2) Bailey—1,300 shares; (3) Lane—800 shares; (4) Moore—400 shares; (5) James—400 shares; (6) MacNair—400 shares; (7) Davis—400 shares. The total purchase price was $3,000,000.00, of which $400,000.00 was to be paid within fifteen days, and the balance in equal payments of $260,000.00 per year for ten years, the deferred payments to be evidenced by notes of the parties of the second part dated May 1,

1952, and bearing interest at the rate of 4½% per annum until paid.

2. The agreement of April 24, 1952, contained, *inter alia*, the following provision:

"The said deferred payments, evidenced by notes, shall be secured by the shares of capital stock hereby sold, provided, however, that the parties of the second part shall be free to liquidate the said Corporation immediately if they so desire in order to conduct the business as a Partnership, in which event the said notes shall be secured by a Deed of Trust on the real property and a Chattel Mortgage on the equipment presently owned by the said Corporation, said Deed of Trust and Chattel Mortgage to be executed and delivered by the second parties to the first parties immediately after the liquidation of said Corporation."

3. Under date of April 25, 1952, the seven purchasers made and executed a partnership agreement. The object of the partners, as stated therein, was to liquidate the Corporation immediately, take over its assets in kind, and carry on under the partnership name of Bryan Rock and Sand Company the business activities theretofore carried on by the Corporation. The capital contributions of the respective partners consisted of the shares of the Corporation's capital stock each had purchased. Their respective interests were defined as follows: Hughes—26%; Bailey—26%; Lane—16%; Moore—8%; James—8%; MacNair—8%; Davis—8%. It was agreed that, prior to the division of partnership profits, each partner should receive as monthly salary the following amounts; Hughes—$1,500.00; Bailey—$1,500.00; Lane—$1,500.00; Davis—$1,000.00; Moore—$700.00; James—$700.00; MacNair—$700.00.

4. Effective as of April 30, 1952, the liquidation of the Corporation was consummated; and from May 1, 1952, until December 10, 1952, the business was carried on by said partnership.

5. Under date of December 10, 1952, the parties thereto executed the following agreement:

"AGREEMENT AND RELEASE"

"THIS AGREEMENT AND RELEASE, made this 10th day of December, 1952, by and between James E. Bryan and Mary Z. Bryan, his wife, both of Wake County, North Carolina, as parties of the first part, and Luther B. Hughes, David T. Bailey, June D. Lane, Samuel A. James, Colin MacNair, and Arnold M. Davis, all of Wake County, North Carolina, and William E. Moore of Harnett County, North Carolina, parties of the second part, WITNESSETH:

"WHEREAS, under date of April 24, 1952, the parties hereto

executed an Agreement for the purchase by the second parties of all of the issued and outstanding capital stock of Bryan Rock & Sand Company, Inc., a North Carolina corporation, owned in equal shares by the parties of the first part, which Agreement may be deemed to be incorporated herein by reference, and

"WHEREAS, pursuant to said Agreement, the said corporation, Bryan Rock & Sand Company, Inc., was liquidated in kind to the parties of the second part as partners under a Partnership Agreement dated April 25, 1952, which may be deemed to be incorporated herein by reference, and

"WHEREAS, out of the assets so distributed in kind in liquidation of said corporation to the said parties of the second part as partners, there was paid to the parties of the first part the initial payment of Four Hundred Thousand ($400,000.00) Dollars, referred to in said Agreement of April 24, 1952, and

"WHEREAS, the Partnership formed by the parties of the second part, pursuant to said Partnership Agreement of April 25, 1952, commenced business with the assets constituting the liquidating dividend of the said Bryan Rock & Sand Company, Inc., and no other or further capital contributions have been made by said parties of the second part as partners, and

"WHEREAS, the parties of the second part as partners have withdrawn their respective salaries set forth in said Partnership Agreement of April 25, 1952, but have made no other or further drawings and hence the said Partnership has made no distribution of profits apart from said salaries, and

"WHEREAS, due to the difficulties and physical work involved, it has been impossible heretofore to prepare all of the instruments of conveyance between the respective parties in order to effectuate the said Purchase and Sale Agreement of April 24, 1952, and

"WHEREAS, it now appears, due to mutual mistakes of fact, advisable and necessary to rescind and cancel the said Purchase and Sale Agreement of April 24, 1952, and restore the parties hereto to the positions they would have been in had no such Agreement been executed.

"NOW, THEREFORE, in consideration of the premises, the parties hereto agree:

"1. That the said Purchase and Sale Agreement of April 24, 1952, by and between the parties hereto shall be and hereby is cancelled and rendered null and void as of the date of its execution, namely, April 24, 1952.

"2. That the parties of the second part never acquired any right, title or interest to any of the capital stock of Bryan Rock & Sand

Company, Inc., and, accordingly, never acquired any right, title or interest in and to any of the assets of said Corporation which were purportedly distributed to them as partners in complete liquidation in kind of the said Corporation. Conversely, any and all liabilities of said Corporation, which purportedly were assumed by the parties of the second part in the purported complete liquidation of said Corporation, never became and are not now liabilities of said parties of the second part.

"3. That all of the properties of every kind and description, including cash, which have been acquired in the name of the said Partnership pursuant to the Partnership Agreement of April 25, 1952, whether acquired as the result of exchange or conversion from one form of property to another, or as the result of earnings, did not become the property of the parties of the second part either individually, collectively, or as partners but, instead, were and have been held by them as trustees for or nominees of the parties of the first part in equal shares. Conversely, any liabilities which have been incurred in the name of 'Bryan Rock & Sand Company,' the Partnership formed under the said Partnership Agreement of April 25, 1952, shall be, and now are considered to be the actual liabilities of the parties of the first part.

"4. That the Partnership known as 'Bryan Rock & Sand Company,' which was created under said Partnership Agreement of April 25, 1952, shall be and is deemed to have had no validity as such but shall be deemed to have operated exclusively for and in the interests of the parties of the first part, who were and are the actual owners of the properties standing in the name or to the credit of 'Bryan Rock & Sand Company' and who are the parties who are actually liable for all liabilities incurred in the name of 'Bryan Rock & Sand Company.' The parties to said Partnership Agreement of April 25, 1952, will immediately terminate said Agreement effective at once, and will take immediate steps to notify all interested parties, including all banks in which funds standing in the name of 'Bryan Rock & Sand Company' are on deposit; and said parties of the second part further agree not to enter into any further transactions as alleged partners under said Partnership Agreement of April 25, 1952.

"5. That the said initial payment of Four Hundred Thousand ($400,000.00) Dollars referred to in said Purchase and Sale Agreement of April 24, 1952, was not and shall not be deemed to have been a payment by the parties of the second part to the parties of the first part but shall be and is hereby deemed to have been a part of the liquidating dividend in kind of Bryan Rock & Sand Com-

pany, Inc., to its actual and beneficial stockholders, namely: James E. Bryan and Mary Z. Bryan.

"6. That the salaries heretofore drawn by the parties of the second part pursuant to the said Partnership Agreement of April 25, 1952, shall be and hereby are deemed to have been salaries paid to the respective parties of the second part by the parties of the first part for their services as employees.

"7. That each of the parties of the first part does hereby release and absolve each of the parties of the second part from any and all liabilities or obligations incurred under said Purchase and Sale Agreement of April 24, 1952, which is hereby cancelled and annulled ab initio.

"8. That each of the parties of the second part does hereby release and absolve each of the parties of the first part from any and all liabilities or obligations incurred under said Purchase and Sale Agreement of April 24, 1952, which is hereby cancelled and annulled ab initio.

"9. It is the spirit and intent of this Agreement and Release to restore the parties hereto, so far as possible, to the same position in which they would have been had the Purchase and Sale Agreement of April 24, 1952, not been executed and had the said Partnership Agreement of April 25, 1952, not been executed but, instead, the parties of the first part had liquidated the said Corporation in kind and had carried on the business as a Partnership under the name of 'Bryan Rock & Sand Company' from May 1, 1952, to date. Accordingly, each of the parties hereto hereby agrees to execute any additional writing which may appear to be advisable or necessary in order to effectuate that purpose.

"IN WITNESS, WHEREOF, . . ."

6. Under date of December 10, 1952, the parties thereto executed the following agreement:

"DISSOLUTION OF PARTNERSHIP"

"THIS AGREEMENT, made this 10th day of December, 1952, by and between Luther B. Hughes, David T. Bailey, June D. Lane, Samuel A. James, Colin MacNair, Arnold M. Davis, all of Wake County, and William E. Moore of Harnett County, North Carolina,

"WITNESSETH"

"THAT WHEREAS, under date of April 25, 1952, the parties hereto executed a Partnership Agreement for the conduct of a business to be known as Bryan Rock & Sand Company, the capital contributions to which were to be made by the parties out of assets to be distributed as a liquidating dividend by Bryan Rock & Sand Company, Inc., a North Carolina corporation, for the purchase of

which the parties hereto had entered into a contract with James E. Bryan and Mary Z. Bryan under date of April 24, 1952, and

"WHEREAS, the said Agreement of Purchase and Sale dated April 24, 1952, has been cancelled and rendered null and void ab initio in consequence of which the Partnership contemplated by the Agreement of April 25, 1952, never became possessed of any assets or properties of its own but, instead, all such assets and properties belonged to and were owned by the said James E. Bryan and Mary Z. Bryan, and

"WHEREAS, the objects and purposes for which said Partnership was created having failed through lack of capital contributions by the partners;

"NOW, THEREFORE, it is hereby agreed that the Partnership contemplated by the said Partnership Agreement of April 25, 1952, be and the same hereby is dissolved."

The evidence relevant to plaintiff's allegations that his execution of said "AGREEMENT AND RELEASE" of December 10, 1952, was obtained by fraud, duress and undue influence, will be considered in the opinion.

Plaintiff excepted to said judgment and appealed, assigning errors.

Murray Allen, Clem B. Holding and R. P. Upchurch for plaintiff, appellant.

Arendell & Green and Alton T. Cummings for defendant, First-Citizens Bank and Trust Company of Smithfield, North Carolina, appellee.

Armistead Maupin for defendant Byron E. Bryan, appellee.

BOBBITT, J. The only question presented is whether the evidence, considered in the light most favorable to plaintiff, was sufficient to make out a case for jury determination.

It was stipulated that Davis executed each and all of the documents referred to in the statement of facts. Obviously, plaintiff is barred by said "AGREEMENT AND RELEASE" of December 10, 1952, unless it is void as to Davis on the ground that his execution thereof was obtained by fraud, duress and undue influence, as alleged.

Plaintiff's first contention is that, when Davis executed said "AGREEMENT AND RELEASE," the Bryans' relationship to Davis was that of a fiduciary; and that the presumption of fraud arising from their fiduciary relationship cast upon defendants the burden of establishing by the greater weight of the evidence that the transaction was fair to Davis. Hence, plaintiff contends, independent of evidence of actual fraud, duress or undue influence, the issue was for

determination by the jury.

If such fiduciary relationship existed, decisions such as *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615; *Abbitt v. Gregory,* 201 N.C. 577, 160 S.E. 896, and others cited by plaintiff, would support plaintiff's contention as to the legal significance thereof; but none of the cited cases supports his antecedent and basic contention that the evidence herein was sufficient to support a finding that such fiduciary relationship existed.

In his brief, plaintiff asserts: "The fiduciary or confidential relationship was created when the parties executed the agreement of purchase and sale." But the agreement of April 24, 1952, to which plaintiff refers, simply defined the contractual rights and obligations of the respective parties. Nothing therein may be construed as establishing a fiduciary or confidential relationship between the contracting parties.

Plaintiff's second contention is that evidence tending to show "the absence of or the gross inadequacy of consideration alone was sufficient to take the case to the jury upon the issues of fraud, undue influence and duress," citing *Knight v. Bridge Co.,* 172 N.C. 393, 90 S.E. 412; *Butler v. Fertilizer Works,* 195 N.C. 409, 142 S.E. 483; and *Hill v. Insurance Co.,* 200 N.C. 502, 157 S.E. 599. Conceding the soundness of the rule declared in the cited cases as applied to the factual situations therein, the evidence here does not show either absence or gross inadequacy of consideration for said "AGREEMENT AND RELEASE."

Neither Davis nor any other partner had made any capital contribution to the partnership. The only capital assets of the partnership were those acquired from the Corporation. The initial payment of $400,000.00 to the Bryans was made therefrom. While the partnership subsisted Davis received a larger salary than he had theretofore received as an employee of the Corporation.

Plaintiff relies largely on testimony of Davis tending to show that from May 1, 1952, to December 10, 1952, the period the business was operated by the partnership, the profits, exclusive of the amount set aside for depreciation of equipment, were $472,330.24, and that the properties and business were of much greater value on December 10, 1952, than on April 24, 1952, or May 1, 1952.

By said "AGREEMENT AND RELEASE," Davis and his partners were released from their obligations under the contract of April 24, 1952, to pay $2,600,000.00, the deferred portion of the purchase price; and, whether said "AGREEMENT AND RELEASE" was to their advantage or otherwise, it cannot be said that there was an absence or gross inadequacy of consideration therefor. In this con-

nection, it is noted that the agreement of April 24, 1952, and said "AGREEMENT AND RELEASE," were between the Bryans, on the one hand, and all seven purchasers or partners, on the other hand.

The circumstances preceding and at the time of the execution of said "AGREEMENT AND RELEASE" are narrated below.

The partners elected these officials, who served during the period of partnership operation, viz.: Bailey, General Manager; Hughes, Office Manager and Purchasing Agent; Davis, Sales Manager; MacNair, Traffic Manager; Lane, General Superintendent. It appears that, pending performance by the seven purchasers of their obligations under the contract of April 24, 1952, the business was carried on substantially as theretofore. Davis testified that Bryan continued to occupy the same office in the suite of six offices in the Raleigh Building; that Bailey made reports to Bryan; and that Bryan "took charge of the business." He did say that the name on the door to Mr. Bryan's office was changed to "James E. Bryan."

"Several days" prior to December 10, 1952, the late Mr. Sam Ruark, a Raleigh attorney, drafted certain notes and deeds of trust bearing date of May 1, 1952, which, if executed by the purchasers and their wives, as provided therein, would have obligated them to pay the deferred portion of the purchase price, to wit, $2,600.000,00, in accordance with the schedule of maturities specified in the contract of April 24, 1952. Until then, so far as the evidence discloses, the purchasers had done nothing to comply with their obligations in respect of said deferred portion of the purchase price. Whether Mr. Ruark represented the Bryans or the partnership or both is not clear. As to this, Davis' testimony was indefinite and contradictory.

Prior to December 10, 1952, the partners, at several meetings, discussed whether they would sign the notes and deeds of trust as drafted by Mr. Ruark. On December 7, 1952, at such a meeting, Lane was noncommittal as to whether he would sign. During this period, Davis conferred with an attorney with reference to these documents.

At the conference or meeting on December 10, 1952, the persons present were (1) each of the seven partners, (2) James E. Bryan, (3) Mr. Ruark, and (4) Mr. Stanley Worth, an attorney of Washington, D. C., who represented the Bryan interests. Davis testified: "The papers were brought in and we were asked whether or not we would sign them by Mr. Ruark." All partners were willing to sign except Lane. Lane "said he wasn't going to sign them." Davis testified that, while he didn't like certain provisions, he agreed to sign the notes and deeds of trust.

When Lane said he would not sign the notes and deeds of trust, Mr. Worth "said it would have to be taken back as of May 1st to

a partnership of Mary Z. Bryan and James E. Bryan." Mr. Worth then drafted said "AGREEMENT AND RELEASE." Since Mr. Worth had to go back to Washington, the partners were told to wait; and, after said "AGREEMENT AND RELEASE" had been drafted, were invited "into the back room where Mr. Worth was, and it was presented for signatures and was given to us for signing so Mr. Worth could go back to Washington." At the time of the actual signing of said "AGREEMENT AND RELEASE," the only persons present were the seven partners, Mr. Bryan, and Mr. Worth.

When he executed said "AGREEMENT AND RELEASE," Davis, then 50 years of age, was a college trained man of wide experience in road construction and engineering. There was no suggestion that he could not or did not read and fully understand the provisions of said "AGREEMENT AND RELEASE" or that anybody misrepresented in any way the contents thereof. True, Davis testified that it "was given to us for signing without change," and that he didn't sign it "freely and voluntarily," but there was no testimony that he raised any question or made any protest as to said "AGREEMENT AND RELEASE" as drafted by Mr. Worth or any provision thereof or that he requested or even suggested a delay for the purpose of further study and consideration.

There is merit in plaintiff's contention that the notes and deeds of trust as drafted by Mr. Ruark contained provisions beyond those required by the contract of April 24, 1952. However, these facts should be noted: (1) So far as the evidence discloses, the only discussion as to specific provisions was by the partners *inter se;* (2) Davis agreed to sign the notes and deeds of trust as drafted; (3) Lane, whose refusal to sign resulted in the rescission *ab initio* of the contract of April 24, 1952, did not indicate that his refusal was based on any particular provisions of the notes and deeds of trust. In any event, irrespective of the actions of his co-purchasers and partners, Davis was at liberty to refuse to sign said "AGREEMENT AND RELEASE" and stand on his rights under the contract of April 24, 1952, if he wanted to do so. It is noted that plaintiff did not call Lane, or any of Davis' former partners, to testify as witnesses herein.

Under date of December 10, 1952, the seven partners, including Davis, executed the "DISSOLUTION OF PARTNERSHIP" agreement. There was no evidence as to the circumstances under which this document was drafted and executed.

Beginning December 10, 1952, and thereafter, the business was operated by a partnership composed of James E. Bryan and Mary Z. Bryan. It appears that, while Davis did some work for the new partnership after December 10, 1952, he was out sick for three or four

days. When he came back to the office on or about December 16, 1952, he was discharged by D. T. Bailey, then acting for the Bryan partnership. (Note: Mr. Bailey had been General Manager of the seven-member partnership and prior thereto Vice President and Auditor of the Corporation. Davis was an employee of the Corporation from February 15, 1946, to April 24, 1952. He had no written contract of employment and "no term of employment was specified.")

Davis testified that he "got a check for $2,000 along about the 13th of December" but did not know whether this was for his salary through the month of December. He testified that he received another check dated December 16, 1952, for $1,600.00, drawn on Bryan Rock & Sand Company, not incorporated, which he endorsed and cashed, but did not know whether this was a bonus payment.

We have considered both the admitted and the excluded evidence. Hence, there is no need to discuss plaintiff's assignments of error based on his exceptions to the court's exclusion of portions of Davis' testimony. However, it seems appropriate to say that Davis' testimony (1) as to property valuations made by a Mr. Wright, who was not a witness, and (2) as to what Mr. Bailey, who was not a witness, *told* Davis Mr. Bryan had said and done, was clearly incompetent and properly excluded.

Whether Davis by (1) his execution of said "DISSOLUTION OF PARTNERSHIP," and (2) his acceptance of said checks, affirmed and ratified said "AGREEMENT AND RELEASE," is a question we do not reach. See *Presnell v. Liner,* 218 N.C. 152, 10 S.E. 2d 639; *Sherrill v. Little,* 193 N.C. 736, 138 S.E. 14, and cases cited therein.

The judgment of involuntary nonsuit is affirmed on the ground that there was no evidence that Davis' execution of said "AGREEMENT AND RELEASE" was obtained by fraud, duress and undue influence as alleged, and therefore plaintiff's right to recover is barred by said "AGREEMENT AND RELEASE."

Affirmed.

W. F. SLEDGE v. DUNCAN MILLER, JAMES H. DAVIS, L. F. BASS SR., AND L. F. BASS, JR.

(Filed 28 January, 1959.)

1. Reference § 4—

In order for a plea in bar to preclude an order of reference, it is necessary that the plea, if established, should finally determine the entire controversy.

2. Same—

In an action for trespass to try title, defendant's plea of the three-year statute as a bar to the recovery of damages for trespass and his plea of title by adverse possession under the seven, twenty, twenty-one and thirty year statutes, does not constitute a plea in bar precluding reference since the three-year statute would not determine the question of title and the pleas of the other statutes raise the very questions as to the boundaries justifying a reference under the statute. G.S. 1-189.

3. Adverse Possession § 17—

Possession for the statutory period under color or possession for the statutory periods without color but under known and visible lines and boundaries, vests title in the possessor.

4. Boundaries § 11—

A sketch as to the timber conveyed by defendant's predecessor in title would not be competent as an admission against interest as to the boundaries of the land owned by such predecessor in fee even if the ancestor saw and approved the sketch and even though plaintiff establishes the identity of the descriptions in the timber deed and the description set out in the answer, since the fact that a person conveys the timber on a designated tract, without more, is no evidence that the land therein described is all the land owned by him. *A fortiorari*, a copy of the original sketch made by the draftsman after the death of the ancestor and the destruction of the original by fire, is incompetent.

5. Trespass to Try Title § 3—

In an action in trespass to try title, defendant's denial of plaintiff's title places the burden of proof on plaintiff to establish his title by one of the approved methods.

6. Same: Ejectment § 7—

In an action involving title to realty in which plaintiff seeks to establish title by a connected chain of title from the sovereign, the burden is on plaintiff to show that the descriptions in each of the deeds constituting a link in his chain of title cover and include the land claimed.

7. Ejectment § 10: Trespass to Try Title § 3—

It would seem that the testimony of plaintiff's witness to the effect that the land described in the complaint was generally reputed to be within the area covered by the description in a deed in plaintiff's chain of title, is insufficient to require the submission of that question to the jury when on cross-examination the witness testifies that a survey in accordance with the description in the deed would not include the land in controversy.

8. Same—

Where plaintiff, in seeking to establish his chain of title, introduces in evidence a deed executed by receivers, but fails to offer in evidence the judgment roll to establish that the persons named as receivers were in fact receivers and had authority to convey, there is a break in the chain of title, and nonsuit is proper, since the recitals in the deed do not establish as against strangers the facts therein recited. The same rule applies as to a deed executed by commissioners without proof of authority in the commissioners to execute the instrument.

9. Adverse Possession §§ 2, 4—

Where both parties claim by adverse possession of the *locus in quo*, if the title of one of them had matured prior to the other, the title acquired by the first is the older title, and the law would presume that thereafter his possession was rightful, and the possession of the other under color, without physical possession of any of the land within the claim of the first, would not be constructively extended to cover any of the land within the claim of the first.

10. Appeal and Error § 45—

Where it is judicially determined that plaintiff was not the owner of the land in controversy, the refusal to submit an issue as to damages resulting from defendant's asserted trespass cannot be prejudicial.

APPEAL by plaintiff from *McKinnon, J.*, April 1958, Term of BRUNSWICK.

The primary purpose of this action is to determine ownership of a tract of land in Brunswick County. The complaint alleges plaintiff is the owner of a part of Green Bay Swamp. The part claimed is described by course and distance and is asserted to contain 1720 acres. The complaint alleges trespass by defendant, cutting and removal of merchantable timber to the amount of $1,000. Plaintiff prays that he be adjudged the owner, that defendants be enjoined from trespassing, and that he recover damages for the timber cut.

Defendants answered and denied plaintiff owned the land described in the complaint or trespass on plaintiff's land, and, as an additional defense to the asserted trespass, pleaded the three-year statute of limitations. For affirmative relief they alleged they were the owners in fee of a parcel of land therein specifically described. They alleged they have been in possession of that land for (a) more than seven years under color of title, (b) more than twenty years under known and visible boundaries, (c) more than twenty-one years under color of title, and (d) more than thirty years under known and visible boundaries. They plead such possession and the seven, twenty, twenty-one, and thirty year statutes of limitations to vest title in them and to defeat plaintiff's claim of ownership.

At the April 1955 Term, Judge Frizzelle entered an order of reference reciting: "this action should be referred because it involves complicated questions including the location of boundary lines, the determination of possible lappage, facts regarding adverse possession and other issues, and likely will require a personal view of the premises." Plaintiff excepted to the order of reference.

The referee, after hearings, found that defendants had possessed the land described in the answer for more than thirty years. He concluded they were the owners thereof and so reported. He made no findings with respect to the remainder of the land described in the complaint nor did he make any findings with respect to the asserted trespass. Plaintiff excepted to the finding that defendants had possessed the land for sufficient time to mature their title. He tendered an issue as to the ownership of the land described in the answer and an issue as to damages for timber cut. Judge Fountain remanded the cause to the referee to make findings with respect to the land described in the complaint which lies outside of the boundaries claimed by defendants. The referee supplemented his report, finding plaintiff was the owner of that portion. Plaintiff did not file further exceptions or again tender issues.

Issues were submitted to determine ownership, but not as to damages. The jury responded to the issues of ownership to the same effect as found by the referee. Judgment was entered on the verdict and plaintiff appealed.

E. J. Prevatte and Kirby Sullivan for plaintiff, appellant.
Carter & Murchison for defendant appellees.

RODMAN, J. Plaintiff's first assignment of error is directed to the order of reference. He contends that defendants' pleas of the statutes of limitations were pleas in bar and until disposed of, a reference was improper.

True, no reference should be ordered when there is a plea in bar which when determined will completely dispose of the controversy; but unless the plea is sufficient, when established, to finally settle the entire controversy, it constitutes no basis for refusing to refer. *Solon Lodge v. Ionic Lodge,* 245 N.C. 281, 95 S.E. 2d 921; *Grimes v. Beaufort County,* 218 N.C. 164, 10 S.E. 2d 640; *Brown v. Clement Co.,* 217 N.C. 47, 6 S.E. 2d 842. Manifestly the plea of the three-year statute to defeat a recovery for the asserted trespass would not dispose of the controversy. No proper inquiry could be made with respect to trespass until the question of ownership had been determined.

The asserted possession for the several periods of time referred to

in the answer constituted defendants' several sources of title. Possession for the statutory period under color vested title in defendants. Possession for the statutory period, without color, but under known and visible lines and boundaries gave defendants good title. *Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765; *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Martin v. Bundy,* 212 N.C. 437, 193 S.E. 831; *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3; *Johnson v. Fry,* 195 N.C. 832, 143 S.E. 857; *Christenbury v. King,* 85 N.C. 229; *Graham v. Houston,* 15 N.C. 232.

It was the location of the boundaries called for in the deed or other instruments constituting defendants' color of title or the location of the "known and visible lines and boundaries" marking defendants' possession which formed the basis for the reference. These were the complicated questions of boundary referred to in the statute, G.S. 1-189. To defer a reference until these questions were determined would remove the necessity for a reference. Accepting plaintiff's interpretation of the statute, reference would be permissible when a complicated question of boundary arose between two property owners, each of whom claimed under connected paper title; but if one of the parties asserted title by adverse possession, reference would be improper, no matter how complicated the boundary question. The question has heretofore been settled contrary to plaintiff's contention. *Fibre Co. v. Lee,* 216 N.C. 244, 4 S.E. 2d 449.

Plaintiff assigns as error the refusal of the court to permit plaintiff to offer as substantive evidence a map or sketch which he asserts shows the location of defendants' land as pointed out by their ancestor in title. Admissions or declarations against interest by a person in possession are competent against him and those claiming under him. Defendants do not controvert the soundness of this principle. They merely deny its application to the factual situation here presented. The evidence for plaintiff coming from his witness Brown was to the effect that W. D. Andrews, ancestor in title of defendants, had made a deed conveying the timber on a portion of his land. Brown testified: "When I went to see Mr. Andrews I carried the timber deed mentioned. That's all I had relating to this land. I did not have Mr. Andrews' deed with me where he bought the land. I went down there and asked him about this timber deed. . . . I asked him about the description in that timber deed. That's what he showed me. I read the timber deed to him. That's all I talked to him about that was my business there." Brown then testified that he made a sketch on the back of the timber deed showing the location of the land pointed out by Andrews as the land described in that deed. The record is not clear as to whether Andrews saw the sketch made by Brown, but, if it be

conceded that Andrews did see and approve Brown's sketch, that fact would not be an admission that the sketch made of the land described in the timber deed was likewise a map of the land described in the answer. The identity of the two descriptions should be shown. Certainly the fact that one conveys the timber on a designated tract is, without words to that effect, no evidence that the land there described is all the land grantor owned.

Apparently Brown's original sketch was destroyed by fire, and plaintiff on the trial proposed to use a sketch then made. Certainly such a sketch then made could not be construed as an admission by Andrews, who had then been dead for twenty years.

Defendants' denial of plaintiff's title cast on plaintiff the burden of proof. He could establish his title by showing adverse possession under color for seven years. The court submitted that question to the jury. It found adversely to plaintiff. He could also carry the burden of proof by showing a connected chain of title from the sovereign to him for the identical lands claimed by him. He insists he has carried this burden. Judge McKinnon held to the contrary. The correctness of this ruling is made the basis for assignments of error 11, 12, 13, 16, 17, 19, and 29. Plaintiff contends he has shown four connected chains of title to the land claimed by him. He offered no evidence tending to fix the location of any of the lands described in his asserted third and fourth source of the title; hence we consider only the first two sources. The first source is a deed from the State Board of Education to Hammer Lumber Company dated July 1920 conveying for $2,000 a tract there specifically described as containing 26,240 acres and "being the same tract of land granted by the State of North Carolina to David Allison, January 22, 1796 . . ." He then offered a deed from Hammer Lumber Company to Beaufort County Lumber Company dated January 1922 for the identical land described in the deed from State Board of Education. The next asserted link in this chain of title is a deed from William S. Grady, Jr., W. N. Jackson, and L. R. Varser, receivers of the Beaufort County Lumber Company, to F. McMillan. This deed recites a consideration of $150. The description in this deed differs from the description in the two preceding deeds. The acreage is not given. It is manifestly substantial since one line called for is more than four miles long, another more than three, and another a mile and a half.

The next link is a deed from F. McMillan to plaintiff, dated June 1941, containing the identical description used in the complaint.

The burden was on plaintiff to show that the descriptions in each of the deeds on which he based his claim of title covered and included the land he claimed. *Seawell v. Fishing Club, ante,* 402; *Southgate*

v. Elfenbein, 184 N.C. 129, 113 S.E. 594; *McBrayer v. Blanton,* 157 N.C. 320, 72 S.E. 1070.

To meet this burden plaintiff sought to show by the witness Brown that the land in controversy was within the boundaries set out in the deed from the State Board of Education to Hammer Lumber Company. Brown testified on direct examination that the land described in the complaint "is generally reputed to be within the area covered by the Allison grant." On cross-examination the witness testified that when surveyed according to the calls in the Allison grant the land in controversy would not be within its boundaries. Judge McKinnon was of the opinion that the statement on direct examination as to general reputation was without probative force because of the unequivocal testimony on cross-examination. Plaintiff cites no authority to support his claim that Brown's testimony of general reputation sufficed to require submission of that question to the jury. The question is not the same as that presented in *Singleton v. Roebuck,* 178 N.C. 201, 100 S.E. 313. There the witness testified of his own knowledge to a physical fact. Here his unequivocal testimony with respect to the location of the Allison grant is directly contrary to his assertion as to general reputation.

But if it be conceded that the reason given by Judge McKinnon was wrong, we think that he unquestionably reached the right result. Plaintiff had the burden of establishing not only the identity of the lands in the several deeds but a connected chain of title. Where a link is missing the chain is severed, and no benefit can accrue from the earlier conveyances. The first and second asserted chains of title are the only two which trace to the sovereign and in each of these claimed chains of title there appears to be a definite break.

The deed from State Board of Education to Hammer Lumber Company and the deed from Hammer Lumber Company to Beaufort County Lumber Company sufficed to show, *prima facie,* title to the lands there described in the Beaufort County Lumber Company, but plaintiff failed to establish that he acquired title to the properties owned by Beaufort County Lumber Company. For that purpose he offered a deed from Grady and others, receivers of Beaufort County Lumber Company. The record does not show what recitals, if any, appear in this deed. It may be presumed, however, that the persons named as receivers in the deed claimed judicial authority to convey, and that the deed contained recitals to that effect, but the recitals, if they appear in the deed, were not, as against these defendants, sufficient to establish that fact. The burden rested on plaintiff to show that the persons named as receivers were in fact receivers and had authority to convey. This should have been established by offering

the judgment roll in the action appointing receivers. *Shingleton v. Wildlife Commission,* 248 N.C. 89, 102 S.E. 2d 402; *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809; *Meeker v. Wheeler,* 236 N.C. 172, 72 S.E. 2d 214; *Benners v. Rhinehart,* 109 N.C. 701; *Williamson v. Bedford,* 32 N.C. 198. Mere recitals in the deed do not establish, as against strangers, the facts there recited. *Walston v. Applewhite & Co.,* 237 N.C. 419, 75 S.E. 2d 138; *Thompson v. Lumber Co.,* 168 N.C. 226, 84 S.E. 289; *Barefoot v. Musselwhite,* 153 N.C. 208, 69 S.E. 71; *Crump v. Thompson,* 31 N.C. 491; *Claywell v. McGimpsey,* 15 N.C. 89; *Hardy v. Jones,* 6 N.C. 52, s.c. 4 N.C. 144.

One of the links in the asserted second chain of title is the deed from Andrews and Prevatte, commissioners, to Mary White. The recitals with respect to the authority of the grantors in this deed are not in the record, but, as noted above, if the deed contains recitals as to the authority of grantors, such recitals would not suffice to establish the right of the commissioners to act.

The court held that neither plaintiff nor defendants had established good paper title. For either to be adjudged owner it was necessary to establish title by virtue of possession, either for seven years under color or for twenty years without color. There is no evidence tending to show possession by plaintiff or his ancestors prior to 1940 to which he can connect himself. Evidence subsequent to that date was submitted to the jury by the court.

There was evidence on behalf of defendants tending to establish title to the land in controversy both by possession under color and by possession without color and that by virtue of such possession title had ripened in the defendants or their ancestors in title long prior to 1940. The court charged the jury that if they found as a fact that the defendants had, by virtue of such possession, acquired title to the land in controversy, theirs became the older title and the law would presume that they were thereafter rightfully in possession, and possession by plaintiff outside of and beyond the boundaries of the land owned by defendants would not, by virtue of plaintiff's color, be constructively extended to cover the land which defendants had acquired by virtue of their prior possession. This was a correct statement of the law. *Land Co. v. Potter,* 189 N.C. 56, 127 S.E. 343; *Boomer v. Gibbs,* 114 N.C. 76.

Plaintiff assigns as error the refusal of the court to submit to the jury an issue as to the amount of damages for trespass. The court was of the opinion that plaintiff had not properly preserved his right to have that issue submitted, but if plaintiff was right and his exceptions sufficed to justify submission of the issue, certainly no prejudice has come to him by the refusal. The finding of the jury that de-

fendants were the owners of the land from which the timber was cut negatived plaintiff's claim of trespass and defeated his claim for damages.

We have examined each of the other assignments of error but find none prejudicial to plaintiff or which in our opinion requires discussion. The judgment is

Affirmed.

KATHRYN P. SHEPARD v. RHEEM MANUFACTURING COMPANY, PIEDMONT NATURAL GAS COMPANY, INC AND ERVIN CONSTRUCTION COMPANY, INC.

(Filed 28 January, 1959.)

1. **Judgments § 18: Process § 8d— Foreign corporation engaged in selling appliances in this State may be served under G.S. 55-145(a) (3) for injury from defective appliance.**

A foreign corporation selling home appliances to wholesalers in North Carolina is subject to service of process under G.S. 55-145(a) (3), in an action by a resident of this State to recover for personal injury allegedly resulting from a defective appliance manufactured by the foreign corporation, notwithstanding that title to appliances sold by the corporation in this State pass to the wholesalers at the point of shipment outside of this State and notwithstanding that the foreign corporation maintains no agents or employees here except agents for the solicitation of orders which are subject to approval by the home office, and service under the statute subjects the foreign corporation to a judgment *in personam*.

2. **Constitutional Law § 24—**

The constitutionality of a statute of this State authorizing service of process on foreign corporations involves a question of due process of law, Fourteenth Amendment to the United States Constitution, to be determined in accordance with the decisions of the Supreme Court of the United States.

3. **Same: Process § 8d—**

G.S. 55-145(a) (3), authorizing the service of process on a foreign corporation by service on the Secretary of State in causes of action to recover for injuries resulting from the production, manufacture or distribution of goods of such corporation consumed or used in this State, is constitutional and valid.

APPEAL by defendant Rheem Manufacturing Company from *Craven, S. J.*, at June 16, 1958 Special Term, of MECKLENBURG.

Civil action to recover for personal injury allegedly sustained as proximate result of actionable negligence of defendants in manner

stated in the complaint— duly heard upon motion of Rheem Manufacturing Company to dismiss for lack of jurisdiction over the person.

And the court, having considered the stipulation of parties, the evidence offered and the record, made the following findings of fact:

"1. This action was instituted by the issuance of a summons on September 27, 1957. At the same time proceedings in attachment were instituted against the defendant Rheem Manufacturing Company and pursuant to said proceedings a summons in garnishment was issued against Parnell-Martin Supply Company with respect to any indebtedness owed by that company to the defendant Rheem Manufacturing Company. The answer to the garnishment summons filed by Parnell-Martin Supply Company shows an indebtedness subject to said garnishment proceedings as of September 27, 1957, in the amount of $6,852.98.

"2. The action was removed to the United States District Court for the Western District of North Carolina on petition of two of the defendants but was thereafter remanded to the State Court by order of the United States District Judge.

"3. While the action was pending in the United States District Court, the defendant Rheem Manufacturing Company filed a motion to dismiss for lack of jurisdiction *in personam* and also a motion to dismiss the attachment proceedings. After remand, the defendant Rheem Manufacturing Company filed a new motion to dismiss appearing in the record in which no attack was made upon the attachment proceedings and upon the hearing in this Court on the motion to dismiss it was stated for the record by counsel for Rheem Manufacturing Company that motion to dismiss the attachment proceedings filed in the Federal Court was abandoned and that the motion to dismiss was confined to the question of jurisdiction to render a judgment *in personam.*

"4. That the original summons was returned without service as to the defendant Rheem Manufacturing Company and thereafter, while the action was pending in the United States District Court, the plaintiff caused an Alias Summons to be issued for service on the Secretary of State of North Carolina under the provisions of G.S. 55-145 and 55-146, the defendant Rheem Manufacturing Company, not having appointed an agent for service of process in this State. No question is raised as to the procedure followed in undertaking to comply with the provisions of G.S. 55-146, the question presented being confined to whether or not the facts of the case bring the case within the provisions of G.S. 55-145 and, if so, whether said statute, as applied to the facts, is unconstitutional.

"5. The defendant Rheem Manufacturing Company is a foreign

corporation and is not, and never has been, domesticated in North Carolina, is not incorporated under the laws of this State, and is not, and never has been, admitted to do business in North Carolina.

"6. At the time of the institution of this action, and for some years prior thereto, and up to the present time, Rheem Manufacturing Company has solicited orders in North Carolina for its products to be shipped in interstate commerce from manufacturing or assembling plants in other states to purchasers in North Carolina. All such sales are solicited by sales representatives who, in some, but not all, cases, reside in North Carolina. No sales representative has now, nor has had in the past, authority to enter into complete and binding contracts in North Carolina, it being the practice of the company that all sales, before becoming final, must be accepted by the regional sales office which in all cases is located outside of North Carolina.

"7. Employees of Rheem Manufacturing Company received or obtained 784 orders during the Company's last fiscal year or accounting period, for the sale, delivery, or shipment of goods, articles or products by the Company to persons or concerns in the State of North Carolina.

"8. Of the 784 orders referred to in the preceding paragraph, only one order was not accepted by the appropriate office of the Rheem Manufacturing Company, the reason for non-acceptance in that case being that the Company was unwilling to supply the merchandise ordered to the requested specifications.

"9. The average monthly dollar volume of Rheem Manufacturing Company sales of goods of all kinds to persons or concerns located in North Carolina during the Company's last fiscal year or accounting period was $140,426.16. As of September 30, 1957, Rheem Manufacturing Company had 57 customers in North Carolina consisting of wholesale purchasers of its products.

"10. Under sales practices employed by the Rheem Manufacturing Company as of the time of the institution of this action, when goods, articles and products were shipped or delivered by Rheem Manufacturing Company to customers or purchasers located in North Carolina, all shipments to North Carolina were f.o.b. plant from which shipments were made. Title to such goods passed at the plant from which shipments were made, which, in each case was outside of North Carolina.

"11. Payments for all goods sold to North Carolina customers are made by remittance through United States mail to offices of Rheem Manufacturing Company outside of North Carolina and the sales representatives do not make collections and are not authorized to receive money for the company in North Carolina.

"12. The names and addresses of all salesmen and other agents employed by Rheem Manufacturing Company, who, during the last six months of 1957, performed in the State of North Carolina any acts in furtherance of the purposes for which the Company was formed, are as follows:

Frank Landon, 4019 Sheridan Drive, Charlotte, N. C.
John Painter, 2101 Highland Street, Charlotte, N. C.
Paul Morris, 517 Parkview Drive, Spartanburg, S. C.

"13. Frank Landon is and was a salesman employed by the Container Division of Rheem Manufacturing Company. John Painter is and was a salesman employed by the Richmond Plumbing & Fixture Division of Rheem Manufacturing Company. Paul Morris is and was a salesman employed by the Home Products Division of Rheem Manufacturing Company. Each of said salesmen engages in general sales solicitation for the purpose of obtaining orders from wholesale customers in the Southeastern States in the case of Mr. Landon and Mr. Painter, and in North Carolina, South Carolina and Tennessee in the case of Mr. Morris.

"14. Approximately 60% of the activities of Frank Landon are in North Carolina. Approximately 50% of the activities of John M. Painter are in North Carolina. Approximately 65% of the activities of Paul Morris are in North Carolina.

"15. During the Company's last fiscal year or accounting period, Rheem Manufacturing Company did not make any sales to customers in North Carolina on a consignment basis.

"16. Neither Rheem Manufacturing Company nor any of its sales representatives does now maintain, nor has in the past maintained, any office or place of business in North Carolina.

"17. Rheem Manufacturing Company purchases goods from suppliers in North Carolina under sales transactions which provide for shipment f.o.b. the supplier's plant in North Carolina, at which point title to such supplies passes to Rheem Manufacturing Company. The average monthly dollar volume of such purchases of goods of all kinds from persons and concerns located in North Carolina during the company's last fiscal year or accounting period was $682.74. The average number of orders per month involving such purchases was thirty-nine. These purchases are generally made by purchase orders issued at the plant facilities of Rheem Manufacturing Company outside of North Carolina and transmitted by mail to the supplier in North Carolina. In relatively few instances representatives of the supplier visit plant facilities of Rheem Manufacturing Company outside of North Carolina and secure purchase orders on the occasions of such visits. Under no circumstances do employees of Rheem Manufacturing Company

make agreements of purchase in North Carolina for such supplies.

"18. On September 30, 1957, the total amount of indebtedness owed to Rheem Manufacturing Company by persons or concerns located in North Carolina was $247,099.38. Rheem Manufacturing Company did not have any interest in any tangible property located in the State of North Carolina during September 1957, except price sheets, specification sheets and sales promotion literature such as is normally carried by salesmen. The only property which Rheem Manufacturing Company owned, or in which it had an interest in North Carolina, at any time, consisted of the indebtedness due from its North Carolina customers, goods in transit purchased from North Carolina suppliers as outlined in Finding No. 17 above, and price sheets, specification sheets and sales promotional literature, such as is normally carried by salesmen.

"19. Rheem Manufacturing Company has now, and had at the time of the institution of this action, and at all times alleged in the complaint, no employee situated in North Carolina except the sales representatives specifically named in other findings of fact."

And upon the foregoing findings of fact and upon the record, the court made the following conclusions of law:

"1. Service of process was had upon the defendant Rheem Manufacturing Company in this case in full compliance with the procedural requirements of G.S. 55-146, as authorized by G.S. 55-145 (c).

"2. The cause of action stated in the complaint against Rheem Manufacturing Company arises out of a transaction which falls within the terms of G.S. 55-145 (a) (3), and accordingly, the service which was had in this case under G.S. 55-146 brought the defendant Rheem Manufacturing Company within the jurisdiction of this Court for purposes of an *in personam* judgment.

"3. The activities which the Rheem Manufacturing Company has carried on in this State through its employees and agents have been throughout the period in question, regular, systematic and continuous and have resulted in a large volume of interstate business between said Company and persons and concerns in this State.

"4. The cause of action stated in the complaint against Rheem Manufacturing Company arises out of the activities of the said Company referred to in the preceding paragraph.

"5. The activities of the Rheem Manufacturing Company carried on in North Carolina as above stated establish such direct, substantial and uninterrupted contacts by that Company with this State as to make it reasonable and just for this Court to exercise its jurisdiction over said Company in this case as authorized by G.S. 55-145 and 146.

"6. Under all of the facts contained in the record before this Court, no right of the Rheem Manufacturing Company under the 14th Amendment of the United States Constitution or under Article I, Section 17 of the North Carolina Constitution will be violated by this court's exercise of the jurisdiction conferred upon it by G.S. 55-145 over said Company."

Therefore the court "ordered, adjudged and decreed" that the special appearance and motion to dismiss filed herein by defendant Rheem Manufacturing Company be, and it is hereby overruled, and defendant is allowed specified time within which to file answer or otherwise plead.

To the signing and entering of the foregoing order, the defendant Rheem Manufacturing Company objects and excepts, and appeals to the Supreme Court, assigning error.

Blakeney and Alexander, Ernest W. Machen, Jr., Payne and Hedrick for plaintiff, appellee.

Robinson, Jones & Hewson for defendant, appellant.

WINBORNE, C. J. Appellant states this as the question involved on this appeal: "Upon the facts found by the Superior Court Judge, did the court err in holding that the defendant Rheem Manufacturing Company is subject to *in personam* jurisdiction of the court?"

And it is stated in appellant's brief filed in this Court that "the primary errors complained of consist in reaching the wrong legal result upon findings of fact to which no exception is taken."

In this connection it is provided by statute in this State, G.S. 55-145, in respect to jurisdiction over foreign corporations, not transacting business in this State, that:

"(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State, or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State or whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising * * * (3) out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that these goods are to be used or consumed in this State and are so used, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers * * * ."

Applying the provisions of this statute, G.S. 55-145, (a) (3), to the facts found by the court, it seems clear that the Legislature in

enacting the statute had in mind just such situation as that involved here. For as is succinctly stated by appellee in her brief, "The plaintiff is a resident of this State, and the appellant is a foreign corporation engaged in manufacturing, producing, and assembling gas water heaters and various other appliances for use in the home. Through the efforts of its agents residing and working in the State, the appellant ships large quantities of these appliances to North Carolina with the reasonable expectation that they will be installed and used in the homes of the people of this State, and they are so used. The acts of negligence upon which the plaintiff bases her cause were committed by the appellant in the course of this very activity, that is, her injuries came about through the negligence of the appellant in manufacturing and producing a defective gas water heater and in causing it to be shipped into this State where it was installed and used in the plaintiff's home until, by reason of the defect, the gas explosion occurred," inflicting upon her serious personal injury.

Manifestly, therefore, upon the undisputed facts, the cause of action arises out of activities described in G.S. 55-145 (a) (3). Thus the court had authority, so far as the provisions of the statute are concerned, to assert jurisdiction over the person of Rheem Manufacturing Company in the case.

Now as to the constitutionality of the statute, G.S. 55-145 (a) (3), decisions of the Supreme Court of the United States are controlling. And in this connection the decision of that court in the case of *International Shoe Company v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 161 A.L.R. 1057, is pertinent and decisive of the question here involved.

We find it stated there: "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'," citing cases.

Attention has been called to the cases of *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d, 445, and *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F. (2d) 502, in which upon the facts of each particular case, the statute G.S. 55-38 (a) (3) identical with present

statute 55-145 (a) (3) was held unconstitutional. It is sufficient to say these cases are distinguishable in factual situation from the case in hand.

In the light of the facts in instant case the statute G.S. 55-145 (a) (3) is not found to be violative of any provision of the Constitution of the State of North Carolina.

Hence the judgment from which appeal is here taken is hereby Affirmed.

AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK; GREAT AMERICAN INSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; THE CONTINENTAL INSURANCE COMPANY; AND VIRGINIA FIRE AND MARINE INSURANCE COMPANY v. CHARLES F. GOLD, COMMISSONER 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.

HARDWARE MUTUAL INSURANCE COMPANY OF THE CAROLINAS, INC., 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 28 January, 1959.)

1. Constitutional Law § 10—

The presumption is in favor of the constitutionality of an act of the General Assembly, and a statute will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.

2. Taxation § 1—

The constitutional requirement of uniformity in taxation applies not only to taxes on property but also to taxes on trades, professions, franchises and incomes. N. C. Constitution, Art. V, sec. 3.

3. Insurance § 3—

An insurance premium is a consideration paid, whether in money or otherwise, for a contract of insurance.

4. Insurance § 1: Firemen's Pension Fund Act—

The tax imposed by Chapter 1420, Session Laws of 1957, (G.S. 118-20) is not a tax imposed on insurance companies as a condition to writing insurance and is not a part of the premium but is an addition to the

premium and a tax to be paid by the purchasers of insurance and collected by insurers for the Firemen's Pension Fund.

5. Constitutional Law § 20: Taxation § 1: Firemen's Pension Fund Act—

The provisions of sec. 1½, Chapter 1420, Session Laws of 1957, (G.S. 118-37) exempting those who purchase policies from insurance companies which are members of the Farmers Mutual Fire Insurance Association from the tax imposed by the statute on those who purchase insurance from other companies, results in unconstitutional discrimination in the imposition of the tax, it being established by a finding of fact that the exempted companies sell insurance of the kind taxed by the statute.

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

APPEAL by plaintiffs from *Clark, J.*, Second August 1958 Civil Term, of WAKE.

Plaintiffs in these cases seek a determination under the Declaratory Judgment Act of the constitutionality of c. 1420, S. L. 1957, creating a firemen's pension fund. The causes were here previously on appeal from a judgment sustaining a demurrer to the complaint. That judgment was reversed. A summary was then made of the allegations forming the basis of the asserted unconstitutionality of the statute. Reference is made thereto, *Assurance Co. v. Gold, Comr. of Insurance,* 248 N.C. 288, 103 S.E. 2d 344.

At the same term an action seeking to present the identical questions now raised was dismissed for want of a genuine controversy. *Bizzell v. Insurance Co.*, 248 N.C. 294, 103 S.E. 2d 248.

Defendants, when the cause reached the Superior Court after the prior appeal, filed answers. The causes were consolidated and one judgment was rendered, based on the pleadings, stipulation of the parties, and findings made by the court. The court concluded that none of the alleged grounds of invalidity were well founded and adjudged the statute valid and constitutional. Plaintiffs excepted to the several conclusions of law and judgment and appealed.

Allen & Hipp and Joyner & Howison for plaintiff appellants.

Ehringhaus & Ellis, Attorney General Seawell, and Staff Attorney Pullen for defendant appellees.

RODMAN, J. Plaintiffs assert the statute in question violates both the State and Federal Constitutions in that it levies a tax not uniform in its application and denies to them the equal protection and due process of law.

When called upon to pass on the constitutionality of a statute, it

is assumed that the Legislature has not trespassed on forbidden territory delineated by the people by constitutional restrictions. Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt. These principles have been enunciated in a multitude of cases. Recent statements to that effect are made in *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851; *Wilson v. High Point,* 238 N.C. 14, 76 S.E. 2d 546; *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209; *Nesbitt v. Gill,* 227 N.C. 174, 41 S.E. 2d 646; *Tobacco Co. v. Maxwell,* 214 N.C. 367, 199 S.E. 405. In reaching our decision in the present case we are mindful of the principle declared in those cases.

While several reasons are assigned to support the assertion of invalidity, we find it necessary to pass on only one, i.e.: Does sec. 1½ of the Act, reading "Provided, nothing in this Act shall be construed to include Farmers Mutual Fire Insurance Associations," destroy the uniformity of the tax levied by the Act and deprive plaintiffs of the equal protection and due process of law?

"Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied. The General Assembly may also tax trades, professions, franchises and incomes . . ." N. C. Constitution, Art. V., sec. 3.

Literally, the language used restricts uniformity to taxes on property, but an unbroken line of decisions has construed the rule of uniformity required by the Constitution to apply equally to the taxes authorized by the last quoted sentence. *Kenny Co. v. Brevard,* 217 N.C. 269, 7 S.E. 2d 542; *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316; *Hilton v. Harris,* 207 N.C. 465, 177 S.E. 411; *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149; *Clark v. Maxwell,* 197 N.C. 604, 150 S.E. 190, aff. 282 U.S. 811; *Tea Company v. Doughton,* 196 N.C. 145, 144 S.E. 701; *S. v. Williams,* 158 N.C. 610, 73 S.E. 1000; *Worth v. R. R.,* 89 N.C. 301; *Gatlin v. Tarboro,* 78 N.C. 119.

An examination of the statute is necessary to ascertain legislative purpose and the means used to accomplish that purpose. Art. 3 is directed to be included in chapter 118 of the General Statutes. The statute adds secs. 18 to 36 inclusive to that chapter. For convenience we shall hereafter refer to those portions of the statute necessary for determination of this case by the section numbers directed to be used in the General Statutes.

Sec. 18 establishes a State fund to be known as the North Carolina Firemen's Pension Fund "to provide pension allowances and other

benefits for eligible firemen in the State who elect to become members . . ."

This fund is composed of (a) contributions by firemen, G.S. 118-24, and (b) taxes as provided by G.S. 118-20. Sec. 20 reads: "Every fire insurance company, corporation or association as aforesaid shall, within 75 days from December thirty-first of each year, deliver and pay over to the State Insurance Commissioner the sum of one dollar ($1.00) out of and from every one hundred dollars ($100.00), and at that rate, upon the amount of all premiums written on fire and lightning policies covering property in North Carolina located in areas where fire protection is available during the year ending December thirty-first in each year, or such portion of each year as said company, corporation or association shall have done business, provided, that, the premium on fire and lightning policies covering property in North Carolina issued by said Fire Insurance Company, corporation or association shall be increased by the amount of said payment. All money so paid shall be paid over by the Insurance Commissioner to the State Treasurer as custodian of the North Carolina Firemen's Pension Fund."

For the purpose of ascertaining the amount of taxes payable to the Pension Fund, G.S. 118-19 requires every fire insurance company to file with the Insurance Commissioner "a just and true account of all premiums collected and received from all fire insurance business done in North Carolina during the year ending December thirty-first . . ."

Where did the Legislature place the burden of the tax imposed? The answer is to be found in the section which imposes the tax. Sec. 20 does two things: First it prescribes the measuring rod to determine the amount of the tax to be paid. It is clear that amount is one per cent of the premium. The word "premium," when used in connection with insurance, has a well-defined meaning. It is "the consideration paid, whether in money or otherwise, for contract of insurance." Webster's New Int. Dic., 2d ed. "Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency." *S. ex rel. Duffy v. Western Auto Supply Co.*, 16 N.E. 2d 256, 119 A.L.R. 1236.

Having fixed the yardstick with which to measure the tax, the statute in clear and mandatory language says that the premium "shall be increased by the amount of said payment." Can there be any doubt that the Legislature intended for the insurance company to charge its insured with the premium plus the tax; and this tax, when collected and received (sec. 19), paid to the Insurance Commissioner?

This tax is not paid as part of the premium; it is an addition to the premium. There is nowhere a statement that the amount paid is imposed on the insurance company as a condition to writing insurance. It is manifest that the Legislature placed the tax burden on the purchaser of the described insurance.

The similarity between the tax imposed by the statute under consideration and the use tax, G.S. 105-164.6, and the sales tax, G.S. 105-164.7, which taxes are classified along with automobile license taxes, G.S. 105-147(4), is manifest upon comparison of the several statutes.

The classes bearing the tax burden imposed by G.S. 118-20 and 118-2 are different. The latter statute carries no provision requiring the tax to be passed on. The fact that it may be included in the amount paid by the purchaser as a part of the cost of doing business does not make the insurer the collecting agent, collecting the tax from the insured as the statute under consideration directs.

Section 1½ of the Act, codified as G.S. 118-37, provides: "Provided, nothing in this Act shall be construed to include Farmers Mutual Fire Insurance Associations."

Pertinent to this portion of the statute is the sixth finding of fact made by the court, as follows: "That in North Carolina there is what is known as Farmers' Mutual Insurance Association and said association is not licensed to sell insurance in North Carolina, is not engaged in the business of selling insurance in North Carolina and is simply a trade association of which several independent companies are members; that there are in North Carolina some thirty-six 'Town or County Mutual Insurance Companies' organized under G.S. 58-77 (5) (d), only some of which are members of the aforesaid trade association; that said companies are separately licensed under individual names and are, for insurance selling purposes, independent of said trade association; that said companies have their own individual schedules of rates, not controlled or supervised by the North Carolina Fire Insurance Rating Bureau, and they operate upon an unlimited assessment liability plan. These companies operate in a manner unlike any other fire insurance company authorized by law to do business in North Carolina, but some of these companies do write policies in protected areas in competition with some of plaintiffs."

G.S. 58-77 prescribes the amount of capital and surplus required to organize companies to write insurance. Subsection 1 applies to stock life insurance companies. Subsection 2, to stock accident and health companies, subsection 3, to stock fire and marine companies, subsection 4, to stock casualty, fidelity, and surety companies, subsection 5, to mutual fire and marine companies, subsection 6, to mu-

tual life, accident, and health companies, and subsection 7, to mutual casualty, fidelity, and surety companies. Subsection 5, relating to mutual fire and marine companies, is divided into four parts fixing the capital required, dependent on the assessability of members in differing situations.

The statutes relating to insurance companies supplemented by the finding make it evident, we think, that the insurance associations referred to in the Act are those companies defined in G.S. 58-77(5)(d). The finding establishes the fact that these companies sell insurance of the kind taxed by c. 1420, S. L. 1957.

No tax must be paid if insurance is purchased from a company defined in sec. 1½ of the Act, G.S. 118-37. A tax must be paid if a purchase is made from any other insurance company.

The discrimination and lack of uniformity is apparent. A tax for the privilege of selecting between two competing insurance companies is contrary to fundamental justice and in violation of the specific requirement of Art. V, sec. 3 of our Constitution. The judgment is

Reversed.

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

IN THE MATTER OF A FILING MADE BY THE NORTH CAROLINA FIRE INSURANCE RATING BUREAU SEEKING A RECOMMENDED RULE AND ORDER.

(Filed 28 January, 1959.)

APPEAL by Commissioner of Insurance and intervenors from *Sharp, S. J.*, February Assigned Civil Term, 1958, of WAKE.

North Carolina Fire Insurance Rating Bureau, created by G.S. 58-125, filed with the Commissioner of Insurance a proposed rule prescribing the method of handling the additional charge for insurance required by c. 1420, S. L. 1957, codified as G.S. 118-18 et seq. The proposed rule would require the statutory additional charge to be shown as an addition to and separate from the premiums. The Commissioner thereupon gave notice of a public hearing as required by G.S. 58-27.2. The North Carolina Association of Insurance Agents, Inc. and the North Carolina Association of Mutual Insurance Agents opposed the proposed rule. A hearing was had. The Commissioner rejected the proposed rule, holding the insurance companies were authorized to increase the rate and thereby increase the premium to meet

the mandate of the statute. The Rating Bureau sought a judicial review of the Commissioner's ruling as permitted by G.S. 58-9.3. The record was certified to the Superior Court of Wake. The associations of insurance agents were permitted to intervene. Judge Sharp held that the Commissioner erred in concluding and holding that the statute required the increased charges to be passed to the insured by an increase in rate rather than by an addition to the premium. Judgment was entered vacating the Commissioner's order and remanding the cause for further consideration. The Commissioner and the associations appealed.

Attorney General Seawell and Staff Attorney Pullen, for Commissioner of Insurance.

Fletcher & Lake for North Carolina Association of Insurance Agents, Inc. and North Carolina Association of Mutual Insurance Agents.

Joyner and Howison and James H. Pou Bailey for North Carolina Fire Insurance Rating Burea.

PER CURIAM. We have held the requirements of c. 1429, S. L. 1957, imposing an additional charge on the purchasers of insurance from some but not all insurance companies, are prohibited by constitutional restrictions. *Assurance Co. v. Gold, ante,* page 461. Since the charge cannot be legally collected, no rule with respect thereto is required. There is no subsisting controversy. The appeal is

Dismissed.

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

NATIONAL BISCUIT COMPANY, INC. v. C. N. STROUD AND EARL FREEMAN TRADING AS STROUD'S FOOD CENTER.

(Filed 28 January, 1959.)

Partnership § 5—

Where there is a general partnership of two persons, without restrictions on the authority of either partner to act within the scope of the partnership business, one of the partners cannot, by notice to a third person that he would not be personally liable for goods thereafter sold the partnership in the ordinary course of the partnership business, relieve himself of liability for such goods thereafter ordered by the other partner while the partnership is a going concern. G.S. 59-39, G.S.

59-45, G.S. 59-48. Further, in this case the partner disaffirming liability was bound by the dissolution agreement to pay the partnership liabilities.

RODMAN, J., dissents.

APPEAL by defendant Stroud from *Parker (Joseph W.), J.*, June Civil Term, 1958, of CARTERET.

The case was heard in the Superior Court upon the following agreed statements of fact:

On 13 September 1956 the National Biscuit Company had a Justice of the Peace to issue summons against C. N. Stroud and Earl Freeman, a partnership trading as Stroud's Food Center, for the nonpayment of $171.04 for goods sold and delivered. After a hearing the Justice of the Peace rendered judgment for plaintiff against both defendants for $171.04 with interest and costs. Stroud appealed to the Superior Court: Freeman did not.

In March 1953 C. N. Stroud and Earl Freeman entered into a general partnership to sell groceries under the name of Stroud's Food Center. Thereafter plaintiff sold bread regularly to the partnership. Several months prior to February 1956 the defendant Stroud advised an agent of plaintiff that he personally would not be responsible for any additional bread sold by plaintiff to Stroud's Food Center. From 6 February 1956 to 25 February 1956 plaintiff through this same agent, at the request of the defendant Freeman, sold and delivered bread in the amount of $171.04 to Stroud's Food Center. Stroud and Freeman by agreement dissolved the partnership at the close of business on 25 February 1956, and notice of such dissolution was published in a newspaper in Carteret County 6-27 March 1956.

The relevant parts of the dissolution agreement are these: All partnership assets, except an automobile truck, an electric adding machine, a rotisserie, which were assigned to defendant Freeman, and except funds necessary to pay the employees for their work the week before the dissolution and necessary to pay for certain supplies purchased the week of dissolution, were assigned to Stroud. Freeman assumed the outstanding liens against the truck. Paragraph five of the dissolution agreement is as follows: "From and after the aforesaid February 25, 1956, Stroud will be responsible for the liquidation of the partnership assets and the discharge of partnership liabilities without demand upon Freeman for any contribution in the discharge of said obligations." The dissolution agreement was made in reliance on Freeman's representations that the indebtedness of the partnership was about $7,800.00 and its accounts receivable were about $8,000.00. The accounts receivable at the close of business actually

amounted to $4,897.41.

Stroud has paid all of the partnership obligations amounting to $12,014.45, except the amount of $171.04 claimed by plaintiff. To pay such obligations Stroud exhausted all the partnership assets he could reduce to money amounting to $4,307.08, of which $2,028.64 was derived from accounts receivable and $2,278.44 from a sale of merchandise and fixtures, and used over $7,700.00 of his personal money. Stroud has left of the partnership assets only uncollected accounts in the sum of $2,868.77, practically all of which are considered uncollectible.

Stroud has not attempted to rescind the dissolution agreement, and has tendered plaintiff, and still tenders it, one-half of the $171.04 claimed by it.

From a judgment that plaintiff recover from the defendants $171.04 with interest and costs, Stroud appeals to the Supreme Court.

Luther Hamilton for defendant, appellant.
George W. Ball for plaintiff, appellee.

PARKER, J. C. N. Stroud and Earl Freeman entered into a general partnership to sell groceries under the firm name of Stroud's Food Center. There is nothing in the agreed statement of facts to indicate or suggest that Freeman's power and authority as a general partner were in any way restricted or limited by the articles of partnership in respect to the ordinary and legitimate business of the partnership. Certainly, the purchase and sale of bread were ordinary and legitimate business of Stroud's Food Center during its continuance as a going concern.

Several months prior to February 1956 Stroud advised plaintiff that he personally would not be responsible for any additional bread sold by plaintiff to Stroud's Food Center. After such notice to plaintiff, it from 6 February 1956 to 25 February 1956, at the request of Freeman, sold and delivered bread in the amount of $171.04 to Stroud's Food Center.

In *Johnson v. Bernheim,* 76 N.C. 139, this Court said: "A and B are general partners to do some given business; the partnership is, by operation of law, a power to each to bind the partnership in any manner legitimate to the business. If one partner go to a third person to buy an article on time for the partnership, the other partner cannot prevent it by writing to the third person not to sell to him on time; or, if one party attempt to buy for cash, the other has no right to require that it shall be on time. And what is true in regard

to buying is true in regard to selling. What either partner does with a third person is binding on the partnership. It is otherwise where the partnership is not general, but is upon special terms, as that purchases and sales must be with and for cash. There the power to each is special, in regard to all dealings with third persons at least who have notice of the terms." There is contrary authority: 68 C.J.S., Partnership, pp. 578-579. However, this text of C.J.S. does not mention the effect of the provisions of the Uniform Partnership Act.

The General Assembly of North Carolina in 1941 enacted a Uniform Partnership Act, which became effective 15 March 1941. G.S. Ch. 59, Partnership, Art. 2.

G.S. 59-39 is entitled PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS, and subsection (1) reads: "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority." G.S. 59-39(4) states: "No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction."

G.S. 59-45 provides that "all partners are jointly and severally liable for the acts and obligations of the partnership."

G.S. 59-48 is captioned RULES DETERMINING RIGHTS AND DUTIES OF PARTNERS. Subsection (e) thereof reads: "All partners have equal rights in the management and conduct of the partnership business." Subsection (h) thereof is as follows: "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."

Freeman as a general partner with Stroud, with no restrictions on his authority to act within the scope of the partnership business so far as the agreed statement of facts shows, had under the Uniform Partnership Act "equal rights in the management and conduct of the partnership business." Under G.S. 59-48(h) Stroud, his co-partner, could not restrict the power and authority of Freeman to buy bread for the partnership as a going concern, for such a purchase was an "ordinary matter connected with the partnership business," for the purpose of its business and within its scope, because in the very nature of things Stroud was not, and could not be, a majority of the

partners. Therefore, Freeman's purchases of bread from plaintiff for Stroud's Food Center as a going concern bound the partnership and his co-partner Stroud. The quoted provisions of our Uniform Partnership Act, in respect to the particular facts here, are in accord with the principle of law stated in *Johnson v. Bernheim, supra;* same case 86 N.C. 339.

In Crane on Partnership, 2nd Ed., p. 277, it is said: "In cases of an even division of the partners as to whether or not an act within the scope of the business should be done, of which disagreement a third person has knowledge, it seems that logically no restriction can be placed upon the power to act. The partnership being a going concern, activities within the scope of the business should not be limited, save by the expressed will of the majority deciding a disputed question; half of the members are not a majority."

Sladen v. Lance, 151 N.C. 492, 66 S.E. 449, is distinguishable. That was a case where the terms of the partnership imposed special restrictions on the power of the partner who made the contract.

At the close of business on 25 February 1956 Stroud and Freeman by agreement dissolved the partnership. By their dissolution agreement all of the partnership assets, including cash on hand, bank deposits and all accounts receivable, with a few exceptions, were assigned to Stroud, who bound himself by such written dissolution agreement to liquidate the firm's assets and discharge its liabilities. It would seem a fair inference from the agreed statement of facts that the partnership got the benefit of the bread sold and delivered by plaintiff to Stroud's Food Center, at Freeman's request, from 6 February 1956 to 25 February 1956. See *Guano Co. v. Ball,* 201 N.C. 534, 160 S.E. 769. But whether it did or not, Freeman's acts, as stated above, bound the partnership and Stroud.

The judgment of the court below is

Affirmed.

RODMAN, J., dissents.

FRANK WILSON CARMICHAEL *v.* EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA.

(Filed 28 January, 1959.)

1. Automobiles § 2—

A driver whose license is suspended, canceled or revoked by the Department of Motor Vehicles in the exercise of its discretion is entitled to judicial review.

2. Same—

It is mandatory for the Department of Motor Vehicles to suspend or revoke the license of any operator or chauffeur upon receiving a record of his conviction in a North Carolina court for operating a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, G.S. 20-17(2), and there is no right of judicial review when the revocation is mandatory.

3. Same—

It is discretionary with the Department of Motor Vehicles whether to suspend or revoke the license of any operator or chauffeur upon receiving notice of the conviction of such person in another state for an offense which, if committed in this State, would be grounds for the revocation or suspension of the license.

4. Same— Licensee is entitled to judicial review of order permanently revoking license which is based in part on out-of-state conviction.

Where order of the Department of Motor Vehicles permanently revoking the license of a driver for a third conviction of such driver for operating a motor vehicle while under the influence of intoxicating liquor, is based in part upon notice of the licensee's conviction of that offense in another state, the licensee has the right to show, if he can, that the proceedings in such other state were irregular, invalid and insufficient to support the reported conviction, and is entitled to a hearing *de novo* in the Superior Court upon his petition for review. The sustaining of a demurrer to such petition is error, petitioner being entitled to an adjudication of the validity of the out-of-state conviction in order to determine whether the revocation should be permanent or for the period of time prescribed by G.S. 20-19(b).

5. Same—

The beginning date of the term of suspension of a driver's license, and likewise the effective date of the permanent revocation of such license for a conviction of a third offense, cannot be earlier than the dates of the respective convictions and cannot be computed as of the date the respective offenses were committed.

APPEAL by petitioner from *Bone, J.*, August Civil Term, 1958, of ROBESON.

The petitioner filed his petition in the Superior Court of Robeson County in which he seeks to have the trial and conviction of the offense of driving drunk on 1 October 1956 in the County Court of

Carroll County, Virginia, declared null and void on the grounds that (1) there was nothing in the warrant served on him that gave the time, date, or place of trial; (2) that he was never notified of the date or place when and where the trial was to be held; and (3) that if this Court holds that the conviction in Carroll County Court of Virginia is legal and binding on the petitioner, that the respondent be directed to consider the right of revocation thereunder discretionary rather than mandatory, as provided in G.S. 20-23, and that the original date of revocation, as alleged in the petition, to wit, 29 August 1956, be declared as the proper date of revocation rather than 29 October 1956 as set forth in the "Corrected Notice" of 18 November 1957.

The petitioner concedes that for the purpose of this petition the respondent has received in his office of the Department of Motor Vehicles, hereinafter called Department, records of convictions of the petitioner of the following offenses:

(1) "Driving drunk on July 14, 1953, in the Criminal Court for Scotland County, Laurinburg, North Carolina, in violation of Section 20-17 (2) of the General Statutes of North Carolina.

(2) "Driving drunk on the 29th day of August 1956, in the Superior Court of Union County in Monroe, North Carolina, in violation of Section 20-17 (2) of the General Statutes of North Carolina.

(3) "Driving drunk on the 6th day of September 1956, in the Mayor's Court in the Town of Tatum, South Carolina.

(4) "Driving drunk on October 1, 1956, in the County Court of Carroll County, State of Virginia, in violation of Sections 46-416 and 46-59 of the Code of Virginia of 1950.

(5) "Driving drunk on the 29th day of October 1956, in the Superior Court of Union County in Monroe, North Carolina, in violation of Section 20-17 (2) of the General Statutes of North Carolina."

On 10 September 1956 the respondent notified the petitioner of the revocation of his license as of 29 August 1956, for a period of one year, based on the record of the driving drunk conviction on said date in the Union County Superior Court.

On 25 September 1956 the Department notified the petitioner of the revocation of his driver's license as of 6 September 1956, for a period of three years from said date, based on the petitioner's conviction of driving drunk in the Mayor's Court in the Town of Tatum, South Carolina, said conviction being designated a "second offense."

Thereafter, on 16 January 1957 the Department notified the petitioner of the revocation of his driving privileges in North Carolina on a "permanent basis" from 1 October 1956, on the Virginia conviction, the notice designating the conviction a "third offense."

On 19 January 1957 the petitioner requested a hearing as provided in section 20-16 (c) of the General Statutes of North Carolina. A hearing was granted and the revocation affirmed as set out in the notice of 16 January 1957.

Again in October 1957, the petitioner, on what was alleged to be newly discovered evidence, requested another hearing, which was allowed. The rehearing was held on 5 November 1957 which resulted in the Department's adherence to its previous order and notice dated 16 January 1957.

In the meantime, at the request of the petitioner, the Department turned the entire file and records in this case over to the Attorney General for study and review.

In the hearing on 5 November 1957 the Laurinburg conviction was brought to light and certified to the Department on 18 November 1957; in the meantime, the driving drunk conviction of 29 October 1956, in the Superior Court of Union County, had been certified to the Department.

The petitioner contends that the 29 August 1956 conviction in Union County and the 29 October 1956 conviction in that County involved the same case. (We find nothing in the record to support this contention.)

Upon advice of the Attorney General's office, the South Carolina conviction in question was voided (the reason therefor is not revealed by the record). Consequently, the order of 16 January 1957 was set aside and a "Corrected Notice" of permanent revocation, effective as of 29 October 1956, was sent to the petitioner, based on the 1953 Laurinburg conviction, the 1 October 1956 Virginia conviction, and the 29 October 1956 Union County conviction. Petitioner's hearing for relief from said permanent revocation of his driving privileges was continued from time to time until it was finally concluded in a letter from the respondent dated 31 December 1957 and the petition for review was filed in the Superior Court within thirty days therefrom.

This cause came on for hearing in the Superior Court and the respondent demurred *ore tenus* to the petition on the grounds that, the court did not have jurisdiction for that the petition reveals on its face that the records of the Department show that the petitioner had been convicted of driving drunk on three or more occasions; that the last conviction occurred on 29 October 1956; and that the permanent revocation of the operator's license of the petitioner was mandatory.

Whereupon, the court sustained the respondent's demurrer *ore tenus* and entered judgment dismissing the proceeding and directing the Clerk of the Court to tax the petitioner with the costs. The petitioner appeals, assigning error.

Attorney General Seawell, Ass't. Attorney General Pullen, for Department of Motor Vehicles, respondent.
Joe M. Cox for petitioner.

DENNY, J. The question presented on this appeal is whether or not the court below committed error in sustaining the respondent's demurrer *ore tenus.*

This Court held in *In re Wright,* 228 N.C. 301, 45 S.E. 2d 370 and in s.c. on rehearing, 228 N.C. 584, 46 S.E. 2d 696, that a petitioner is entitled to a review whenever the suspension, cancelation, or revocation is made in the discretion of the Department, whether under G.S. 20-16, G.S. 20-23, or any other provision of the statute.

It is mandatory under the provisions of G.S. 20-17 (2) for the Department to revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for "driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug." This mandatory provision applies only to a conviction in a North Carolina court.

G.S. 20-23 provides: "The Department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur."

The Department was clearly within its rights when it permanently revoked the license of the petitioner based on the information before it with respect to the Laurinburg conviction, the Virginia conviction, and the Union County conviction. *In re Wright,* 228 N.C. 301, 45 S.E. 2d 370. However, it must be kept in mind that the Department, under the provisions of G.S. 20-23, is merely authorized, not directed, to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur.

The fact that the Department in the exercise of its discretion accepted the certification of the Virginia conviction at its face value, did not foreclose the petitioner's right to review as provided in G.S. 20-25. *In re Wright, supra,* on rehearing. In other words, our General Assembly has never made it mandatory on the Department to suspend or revoke the license of a resident of this State based on the conviction of such person in another state of any offense therein which, if committed in this State, would make the revocation mandatory.

The petitioner has the right to show, if he can, that the Virginia

proceedings were irregular, invalid, and insufficient to support the reported conviction. If he succeeds in doing so, he would be entitled to have the permanent revocation canceled and the revocation limited to a period of three years, as provided in G.S. 20-19 (d), unless, at that time, it should be determined that the petitioner had been convicted three times for driving while under the influence of intoxicating liquor or a narcotic drug, exclusive of the Virginia conviction.

If upon review in the Superior Court it is determined that the reported Virginia conviction is valid, the order of the Department should be affirmed. *Barnhill, J., later C.J.,* in *In re Wright, supra,* on rehearing, said "A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. These, under express provisions of the Act, include full *de novo* review by a Superior Court judge, at the election of the licensee, in all cases except where the suspension or revocation is mandatory. *S. v. McDaniels,* 219 N.C. 763."

It is mandatory under the provisions of G.S. 20-17 (2) for the Department to revoke the license of a citizen of this State who has been convicted in a court of competent jurisdiction in North Carolina, and whose conviction is final, of driving a motor vehicle upon a public highway or street in this State while under the influence of intoxicating liquor or a narcotic drug. In such case the period of revocation shall be as provided in G.S. 20-19.

There is no right of judicial review when the revocation is mandatory pursuant to the provisions of G.S. 20-17. *Fox v. Scheidt, Commissioner,* 241 N.C. 31, 84 S.E. 2d 259.

There is no merit in the petitioner's contention that if the Virginia conviction is held to be valid that the date of the permanent revocation of his license should be from 29 August 1956 instead of 29 October 1956. A revocation based on a second offense for driving while under the influence of intoxicating liquor or a narcotic drug must be for a period of three years, and the effective date of the revocation for such period should not begin prior to the date of the second conviction. Likewise, when a license is permanently revoked, the effective date of such revocation should not be earlier than the date of the conviction for the third offense.

In our opinion the court below committed error in sustaining the respondent's demurrer *ore tenus,* and we so hold. Hence, the ruling is

Reversed.

STATE OF NORTH CAROLINA EX REL NORTH CAROLINA UTILITIES COMMISSION v. NORFOLK SOUTHERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 28 January, 1959.)

1. Carriers § 5: Utilities Commission § 3—

In a proceeding to recover excessive freight charges collected because of an error in the tariff distance table filed with the Utilities Commission, the charges being in conformity with the tariff schedule for a greater distance than the correct distance between the termini, evidence offered by the carriers as to whether the higher rate was fair and reasonable for the shorter distance is properly excluded, since the carriers should not be permitted to change the rate by reason of a mistake in their tariff distance table, and petitioners are entitled to recover that part of the excess charged which is not barred by the statute of limitations.

2. Utilities Commission § 5—

The rates approved by the Utilities Commission are to be deemed just and reasonable and any different rate is to be deemed unjust and unreasonable. G.S. 62-123.

3. Utilities Commission § 2—

Where carriers charge rates in accordance with the published tariffs on file, but because of error in the tariff distance table the charges are excessive, the shippers may recover the excess charged by petition before the Utilities Commission, the remedy by civil action to recover overcharges and penalties being the proper remedy only when the charges are collected in excess of the published tariffs. G.S. 60-110, G.S. 62-138, G.S. 62-139.

4. Same—

Where the tariffs charged are in accordance with the approved tariff schedules but are excessive because of error in the tariff distance table filed with the Utilities Commission, the Utilities Commission has power to enter a retroactive order awarding reparations, since the order does not purport to change, retroactively, the authorized tariffs.

APPEAL by defendants from *Mallard, J.*, March, 1958 Term, WAKE Superior Court.

The petitioners instituted this proceeding before the North Carolina Utilities Commission for the award of reparations by reason of the defendants' wrongful application of a short line distance tariff rate of $1.40 per ton on shipments of sand and gravel to plaintiff's wholly-owned subsidiary; whereas, the correct short line distance tariff should have been at the rate of $1.30 per ton. The shipments were made from Lane, North Carolina, to Greensboro, North Carolina. Part of the shipments were carried from Lane over the Norfolk Southern Railway Company to Durham, North Carolina, thence over the Southern Railway Company to Greensboro, a total distance of

131 miles. Part of the shipments were carried from Lane over the Norfolk Southern to Varina, North Carolina, thence over the Durham & Southern to Durham, thence over the Southern Railway to Greensboro, a distance of 118 miles. The short line distance between Lane and Greensboro is over the Atlantic and Western Railway Company from Lane to Sanford, North Carolina, thence over the Southern Railway Company to Greensboro. The tariff distance table filed with the Utilities Commission by the Southern Freight Traffic Bureau, agent for the defendants, showed the short line to be 101 miles. Applicable tariffs, therefore, in effect between Lane and Greensboro were calculated on the basis of 101 miles, and at the rate of $1.40 per ton. This rate the petitioner paid.

No shipments were actually made over the short line. However, subsequent to the shipments here involved, the short line distance Lane to Greensboro has been ascertained to be 100 miles and not 101 miles. The error occurred in calculating the distance between Lane and Sanford. The tariff distance schedule was corrected accordingly. Tariffs in effect at the time the shipments here involved fixed a rate per ton of $1.30 on sand and gravel for joint line distances 80 to 100 miles, and at $1.40 per ton for joint line distances 101 to 125 miles. The correct rate, accordingly, should have been $1.30 per ton. Thus the plaintiff paid 10 cents per ton in excess of what the Utilities Commission fixed as a just and reasonable rate for the short line distance of 100 miles.

The defendants, before the Utilities Commission, offered to introduce in evidence a schedule of rates on sand and gravel which was in force under the North Carolina Corporation Commission Order No. 224 on November 25, 1921, and supplements thereto effective March 5, 1924, and September 22, 1926, for the purpose of showing what rates are fair and reasonable on the respective dates the questioned shipments were made by the plaintiff. The Commission declined to receive the evidence upon the ground fair and reasonable rates per unit of distance had already been determined and that the only question involved is whether the petitioner's shipments were within the distance bracket 80 to 100 miles, carrying a rate of $1.30 per ton, or within the distance bracket 101 to 125 miles, carrying $1.40 per ton. The defendants excepted to the refusal of the commission to hear evidence on the question whether $1.40 per ton on shipments Lane to Greensboro were just and reasonable.

The petitioner brought this proceeding on July 17, 1956, for recovery on all shipments between November 11, 1952, and the date the petition was filed. However, recovery was allowed only for two years

next preceding the filing of the petition because of the limitation in the statute.

Among the findings made by the Utilities Commission were the following:

"3. Transportation of these shipments was by joint lines. The tariff specifically provided a joint-line rate of $1.30 per ton for sand and gravel for distances over 80 miles and not over 100 miles and for $1.40 per ton for distances over 100 miles but not over 125 miles.

"4. The rates and charges collected by the defendant railroads, other than A and W, from petitioner Coble wherein rates and charges were assessed and collected at the rate of $1.40 per ton for a distance of 100 miles instead of $1.30 per ton were unjust, unreasonable, discriminatory and preferential.

"5. The just, reasonable, nondiscriminatory and nonpreferential rates or charges which the defendant railroads were entitled to charge during the two-year period next prior to the filing of the petition in this matter for the transportation of sand and gravel from Lane, North Carolina, to Greensboro, North Carolina, was $1.30 per ton instead of $1.40 which was actually charged."

The Commission ordered restitution on all shipments made within two years preceding the filing of the petition and included $85.98 Federal Transportation Tax.

The Commission found Atlantic and Western Railway Company did not carry any of the shipments and did not receive any of the tariffs involved, dismissed the action as to it. From the findings, conclusions, and award of the Commission, Norfolk Southern Railway Company and Southern Railway Company appealed to the Superior Court of Wake County. Durham and Southern Railway Company did not appeal. After hearing, the Superior Court of Wake County entered an order, in material part:

"THE COURT IS FURTHER OF THE OPINION that the award made to Coble Construction Company by the Order of the North Carolina Utilities Commission dated August 16, 1957, should be affirmed in all respects, except that the award of $85.99 Federal Transportation Tax and the addition of a twelve percent surcharge between the dates December 18, 1954 and May 23, 1955 should be reversed for the reason that the award of Federal Transportation Tax and the 12 percent surcharge is contrary to law and is unsupported by competent, material and substantial evidence in view of the entire record as submitted."

The Court modified the Commission's order by striking out the Federal Transportation Tax award, and affirmed it otherwise. From

the judgment, the Norfolk Southern Railway Company and the Southern Railway Company appealed.

Simms & Simms and Joyner & Howison for defendants, Norfolk Southern Railway Company and Southern Railway Company, appellants.

Armistead J. Maupin for plaintiff, appellee.

HIGGINS, J. The North Carolina Utilities Commission, in the exercise of its intrastate rate making power, approved as just and reasonable a schedule of rates based on mileage. In order to simplify the calculations and avoid fractions, distance brackets were set up in the schedules. The Commission approved a per-ton rate of $1.30 on sand and gravel for distances 80 - 100 miles; and $1.40 for distances 101-125 miles. Rates for other distances are not material to the questions here presented. Mileage is calculated over the shortest rail line between the point of origin and the point of delivery. G.S. 62-137.

The approved rates were based on tariffs 629-C, NCUC 221, prepared and filed by the defendants through their agent, the Southern Freight Tariff Bureau. The tariff as filed fixed 101 miles as the shortest rail distance between Lane, North Carolina, and Greensboro, North Carolina. On the basis of the mileage reported, the rate was fixed at $1.40 per ton. Subsequent to the shipments it was discovered the shortest rail line distance was actually 100 miles. The tariff schedule was corrected accordingly. The actual mileage permitted only a $1.30 per-ton rate. The petitioner paid $1.40 per ton beginning November 11, 1952. The excess over the $1.30 rate amounted to $7,218.60. However, only $2,953.47 was paid within two years of the date on which the petition was filed. Thus the petitioner paid $4,265.13 which he cannot recover because of the two years limitation.

The petitioner brought this proceeding under G.S. 62-123 for the award of reparations of 10 cents per ton the defendants had collected as a result of their error in reporting the short line distance, thereby placing the shipments in the $1.40-rate bracket, (101-125 miles), whereas, the actual distance placed them in the $1.30 bracket, (80 - 100 miles).

The petitioner contends the pertinent inquiry involves no more than a simple mathematical calculation of the amount of the tariff paid in excess of that which the Commission had approved as just and reasonable for the actual distance; and that its remedy is by petition for reparations under the above section.

On the other hand, the respondents contend the inquiry involves the question whether $1.40 per ton collected was just and reasonable;

and that the Commission committed error in refusing to hear evidence on that question.

We think the fixing of the rate of $1.30 per ton for distances 80 - 100 miles was the controlling factor and did not authorize the collection of a higher rate for any shipment within that distance bracket. The defendants should not be permitted to change the rate by the act of making a mistake in the distance reported in their tariff schedule. The dispute involves no more than the actual short line distance, Lane to Greensboro. The evidence offered by the respondents as to whether $1.40 per ton was a fair and reasonable rate on a 100-mile shipment was properly excluded. The Commission had already determined the just and reasonable rate to be $1.30. The rates approved by the Commission shall be deemed to be just and reasonable, and any different rate shall be deemed unjust and unreasonable. G.S. 62-123; *State v. Municipal Corporations,* 243 N.C. 193, 90 S.E. 2d 519; *State v. Cannon Mfg. Co.,* 185 N.C. 17, 116 S.E. 178.

We do not agree with the defendants' contention that the petitioner has mistaken its remedy and should have proceeded in the superior court by civil action to recover overcharges and penalties as provided in G.S. 60-110, G.S. 62-138, and G.S. 62-139. *Tilley v. R. R.,* 172 N.C. 363, 90 S.E. 309. The sections cited provide penalties for overcharges to be recovered only upon a showing the charges were collected in excess of the published tariffs on file. Even though the mistake in the distance was the result of defendants' error, nevertheless the published tariffs on file showed a rate of $1.40 applicable to Lane to Greensboro shipments. The Commission is the proper forum in which to correct the error in distance in its schedules.

The defendants urgently contend the Commission is without power to enter a retroactive order awarding reparations for charges which were made in accordance with approved tariff schedules. The argument assumes the charges were made in accordance with the published tariffs. These tariffs authorize $1.30 per ton for mileage units 80 - 100 miles, and a mistake in mileage cannot be used to increase the rate. A rate of $1.40 for 100 miles is simply not within the authorized tariffs.

The numerous cases cited by respondents with respect to retroactive overcharges are not in point on the facts here involved. The holdings are based on either lack of statutory authority to make a retroactive order (such as G.S. 62-123), or to lack of jurisdiction of the courts to pass on rates until they had first been passed on by the administrative board.

The appellants have failed to show error of law in the hearing below. The judgment is

Affirmed.

PIEDMONT NATURAL GAS COMPANY, INC. v. CARLTON K. DAY AND WIFE, ETTA C. DAY.

(Filed 28 January, 1959.)

1. Easements § 2—

Where the grant of an easement across a described tract of land provides in the instrument that the grantee of the easement should have the right to select the route, and the grantee thereafter selects the route with the acquiescence of the grantor, the location of the easement will be deemed that which was intended by the grant, and the grant will not be held void for uncertainty of description.

2. Deeds § 6—

The certificate of acknowledgment appearing in due form in the grant of an easement cannot be collaterally attacked, and therefore evidence that one of the grantors did not know that the officer was acting as a notary public but thought he was a mere witness, is properly excluded in an action to restrain interference with the easement, there being no attack on the certificate of the officer on the ground of fraud.

3. Easements § 9—

In a deed which specifically exempts from its provisions an easement theretofore granted across the land by grantors, the grantees take title subject to the easement, and therefore whether the easement grant was properly acknowledged is immaterial as to them, since their deed gives them notice.

4. Easements § 7: Evidence § 27—

Where the grant of an easement specifically stipulates that the grantee should have the right to select the route across the lands described, which the grantee does with the acquiescence of the grantors, evidence of a parol agreement contemporaneous with the execution of the instrument that the route should be selected within the bounds of another prior easement to a third party, is properly excluded as tending to vary or contradict the terms of the written instrument.

APPEAL by defendants from *Hobgood, J.*, July-August, 1958, Civil Term, ALAMANCE Superior Court.

Civil action to enjoin and restrain the defendants from interfering with the plaintiff's easement rights to maintain pipelines for the transmission of gas and petroleum products over a described tract of land.

The defendants, by answer, admitted their predecessors in title signed a paper writing which appears of record. They denied the paper writing was properly acknowledged or that it conveyed any easement right. They alleged that it is void for indefiniteness by reason of the failure to locate the line or boundary of the easement; and that the recorded writing constitutes a cloud upon their title.

The plaintiff, by reply, alleged the easement was executed and registered, and the pipeline constructed in 1952; that any cause of action to have the cloud removed is barred by the three-year statute of limitation.

The plaintiff introduced the written easement dated September 13, 1952, which for a valuable consideration the grantors, T. A. Amick and wife, Maude Amick, bargained and sold to the plaintiff, its successors and assigns, "a right of way and easement for the purposes of laying, constructing, maintaining, operating, repairing, altering, replacing, and removing pipe lines (with valves, regulators, meters, fittings, . . . and appurtenant facilities) for the transportation of gas, oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipe line, the Grantee to have the right to select the route (the laying of the first pipe line to constitute the selection of the route by the Grantee) under, upon, over, through, and across lands of the Grantors," (here follows specific description of the tract of land containing 50 acres in Alamance County, subject to certain exceptions specifically referred to).

The plaintiff, grantee in the right of way agreement, contracted to pay and did pay to the grantors damages to growing crops, timber, and fences caused by the construction and operation of the pipe lines. Thomas A. Amick and wife, on March 18, 1955, executed a deed to the defendants for 44-½ acres of land over which plaintiff claims its easement. The deed contains the following: "That the same is free and clear of all encumbrances except those certain easements heretofore granted to Duke Power Company, Southern Bell Telephone and Telegraph Company, and Piedmont Natural Gas Company." The plaintiff introduced evidence the defendants had interfered with the use and enjoyment of its easement.

The defendants offered as witnesses Mr. and Mrs. Amick, their grantors, who acknowledged they signed the easement in the presence of two men, one of whom signed as a witness to their signatures, but they claimed they did not know the other man was a notary public. They offered to testify that contemporaneously with the execution of the lease, and as a part of it, there was an agreement that the pipeline should be laid within the easement granted to the power company. This evidence the court excluded. The defendants offered testimony

that an agent of the plaintiff approved the method by which the defendants laid out and constructed the streets over the plaintiff's pipe lines. The plaintiff introduced evidence to the contrary.

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

"1. Is the plaintiff the holder of a right of way and easement over the lands of the defendants as alleged in the complaint?

Answer: Yes.

"2. If so, have the defendants interfered with the plaintiff's exercise of its rights under the easement and right of way as alleged in the complaint?

Answer: Yes."

From the judgment on the verdict, the defendants appealed.

W. R. Dalton, Jr., for defendants, appellants.
Sanders & Holt for plaintiff, appellee.

HIGGINS, J. The assignments of error involve the validity of the plaintiff's easement. The defendants contend it is invalid (1) for failure to locate the line upon which it was to be built; (2) for failure of the grantors to acknowledge its execution before a proper officer; and (3) for failure of the plaintiff to comply with the "supplementary agreement" to construct its lines along the power company's right of way.

The easement here involved is not open to the objection the line along which the pipes were to be laid is not defined in the grant. The instrument itself gives the grantee the right to select the line. The plaintiff made the selection, constructed the line, paid the damages to the crops, timber and fences, and took from the grantors a full receipt for the payment. This occurred long before the defendants acquired title from the original grantors. Both the defendants' contract to purchase and their deed specifically state the land is free and clear of all encumbrances, "except those certain easements heretofore granted to Duke Power Company, Southern Bell Telephone and Telegraph Company, and Piedmont Natural Gas Company."

"It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant." *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541. The defendants' contention the grant is void for uncertainty of description cannot be sustained.

The defendants' contention the easement was not properly acknowledged also must fail. The notary public certified to the appearance of Mr. and Mrs. Amick before him and the due acknowledgment by both. Mr. Richardson witnessed the signatures of the grantors. The principal objection was that neither of the men was introduced as a notary public. Mr. Amick was not certain. The notary was positive that his official position was known. The Amicks admitted their signatures, the receipt of the consideration, and the receipt of the payment for damages to crops, timber, and fences. The deed from the Amicks to the defendants refers to the easement grant. The certificate of the officer is not attacked for fraud, but upon the ground that Mrs. Amick did not know the officer was acting as a notary public. The evidence is insufficient to impeach a solemn record. The certificate of acknowledgment must be attacked by direct action and not collaterally. *Lee v. Rhodes,* 230 N.C. 190, 52 S.E. 2d 674; *Freeman v. Morrison,* 214 N.C. 240, 199 S.E. 12; *Best v. Utley,* 189 N.C. 356, 127 S.E. 337; *Ware v. Nesbit,* 94 N.C. 664; *Wright v. Player,* 72 N.C. 94; *Woodbourne v. Gorrell,* 66 N.C. 82.

The defendants' claim would be defeated even if we treat the plaintiff's easement as unrecorded since it is referred to in the defendants' deed from the Amicks. "The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice." *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517; *Dulin v. Williams,* 239 N.C. 33, 79 S.E. 2d 213; *Trust Co. v. Braznell,* 227 N.C. 211, 41 S.E. 2d 744.

The court properly refused to permit the defendants to introduce parol evidence of a contemporary agreement between the Amicks and the plaintiff different from the written instrument. "This Court has consistently held that 'parol evidence will not be heard to contradict, add to, take from, or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound.'" *Bost v. Bost,* 234 N.C. 554, 67 S.E. 2d 745. " . . . in the absence of fraud or mistake, or allegations thereof, parol testimony of prior or contemporaneous negotiations and conversations inconsistent with the writing, . . . is incompetent." *Neal v. Marrone,* 239 N.C. 73, 79 S.E. 2d 239.

The plaintiff's evidence was amply sufficient to support the allega-

tions of the complaint and to sustain the verdict and judgment. The evidence was insufficient to show the defendants were entitled to have the grant removed as a cloud upon their title. Therefore, the question, whether the three years statute of limitation bars an action to remove a cloud upon title, does not arise.

No Error.

W. GLENN LEWIS v. WALTER ALLRED, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF D. FRANK ALLRED, DECEASED, AND AS AGENT FOR LESSIE F. ALLRED, MAY ALLRED ELLIOTT, ET VIR, JOHN P. ELLIOTT, FRED E. ALLRED, ET UX, THELMA L. ALLRED, JOHNNIE H. ALLRED, ET UX, PAULINE D. ALLRED, AND ETTA ALLRED PROOK, ET VIR, GEORGE D. PROOK, AND LESSIE F. ALLRED, INDIVIDUALLY, MAY ALLRED ELLIOTT, ET VIR, JOHN P. ELLIOTT, INDIVIDUALLY, FRED E. ALLRED, ET UX, THELMA L. ALLRED, INDIVIDUALLY, JOHNNIE H. ALLRED, ET UX, PAULINE D. ALLRED, INDIVIDUALLY, AND ETTA ALLRED PROOK, ET VIR, GEORGE D. PROOK, ET VIR, GEORGE D. PROOK, INDIVIDUALLY.

(Filed 28 January, 1959.)

1. Frauds, Statute of, § 2—

A receipt for the cash payment on an identified tract of land belonging to an estate, signed by the executor, who is also an heir and authorized to act in the matter by the other heirs, is a sufficient memorandum of the contract to convey, signed by the party to be charged within the requirement of the statute of frauds. G.S. 22-2.

2. Vendor and Purchaser § 1: Brokers and Factors § 3—

The owner of land may sell same through an agent, and such authorized agent may sign a contract to sell and convey in his own name or in the name of his principal or principals, and the authority of the agent to sell may be shown *aliunde* or by parol.

3. Frauds, Statute of, § 6b—

The authority of an agent to contract to convey lands need not be in writing under the statute of frauds.

4. Same: Vendor and Purchaser § 6—

A memorandum of a contract to sell realty will not be held insufficient because of its failure to stipulate the time for performance, but in the absence of such stipulation the law implies an obligation to perform within a reasonable time.

5. Same—

Where memorandum of a contract to convey lands of an estate is executed by the executor, who is also an heir and authorized to act for the other heirs, but the memorandum fails to stipulate the time for performance and the evidence is conflicting as to whether a definite

time was agreed upon by the executor and the purchaser, the question is for the jury, and an instruction to the effect that the closing date might be controlled by stipulation of the other devisees is erroneous.

APPEAL by plaintiff from *Johnston, J.*, June Civil Term, 1958, of GUILFORD (Greensboro Division).

This is a civil action instituted on 13 August 1956 in which the plaintiff seeks specific performance of an alleged contract for conveyance of certain real property known as the Frank Allred Farm.

The defendants are Walter Allred, individually and as executor of the last will and testament of D. Frank Allred, deceased, and as agent for the other named defendants who are all the heirs at law of D. Frank Allred, deceased, and the sole beneficiaries under his will, together with the respective spouses of those who are married.

The defendant Walter Allred, according to the evidence, informed the plaintiff on or about 1 February 1956 that he had been authorized by the other heirs of D. Frank Allred, deceased, to sell the farm in question for $12,000, and inquired whether or not the plaintiff wanted to purchase the place. The plaintiff informed this defendant that he did, and stated that he wished to make a deposit on it. Defendant Walter Allred insisted that that was not necessary, but the plaintiff insisted on making the deposit and the defendant Walter Allred agreed to let him do so. The plaintiff made a deposit of $100.00 and obtained from Walter Allred a receipt in the following language: "2/1/56. Received $100.00 from Dr. W. Glenn Lewis as the initial part payment on purchase of the Frank Allred Farm. ESTATE OF D. FRANK ALLRED, By: (s) Walter Allred, Extr."

According to the plaintiff's evidence the defendant Walter Allred, at the time he agreed to sell the property to the plaintiff, informed him that they would want to close the deal around the end of the year. The defendant Walter Allred testified that he told the plaintiff in May 1956 "that we'd like to get the place sold by July, because it was renting time."

The evidence of the plaintiff tends to show that Walter Allred never set any specific date for closing the sale on the property.

The defendants' evidence is to the effect that Walter Allred never discussed a closing date with the plaintiff until about Easter 1956; that in May the plaintiff made inquiry as to whether he could close the deal with part cash; that he informed him that he would have to consult his lawyer; that he informed the plaintiff on 6 June 1956 that they would have to have cash and that they would like to get the place sold by July. The defendant Walter Allred further testified that on 18 July 1956 he and the plaintiff agreed upon 1 August 1956

as the closing date. The plaintiff denied that he and Walter Allred ever discussed a definite closing date.

The plaintiff received a letter addressed to him by the defendants' attorneys, dated 24 July 1956, which in pertinent part reads as follows: "We are enclosing herewith a copy of deed to the Allred farm property which Mr. Walter Allred will deliver to you upon payment of the agreed purchase price. Enclosed copy of deed should give your lawyer in Guilford County all the information he needs to make title check.

"It is understood that you have agreed with Mr. Walter Allred, who is acting as agent for these heirs and devisees, that you will close the purchase transaction for this property not later than the 1st day of August 1956. We have been instructed to advise you that the Allreds will insist upon this matter being closed not later than the above mentioned date, and if the matter is not concluded by that time your deposit on purchase price will be returned and the Allreds will undertake to make other disposition of the property."

The plaintiff procured a loan from the Bank of Gibsonville, but according to his evidence there was not sufficient time to have the title searched and the loan closed by 1 August. The defendant Walter Allred called the plaintiff's wife on 8 August 1956 and informed her that the deal was off and that the defendants would not deliver the executed deed. The defendant Walter Allred tore up the executed deed on 18 August 1956, five days after this action was instituted.

The following issues were submitted to the jury and answered as indicated.

"Did the defendants contract to sell the lands described to the plaintiff as alleged in the complaint? Answer: No.

"Is the plaintiff entitled to have said lands conveyed to him as alleged in the complaint, provided the plaintiff pays to the defendants the full balance of the purchase price, with interest before the execution of said deed? Answer ....."

Judgment was entered on the verdict and the plaintiff appeals, assigning error.

Hines & Morrisette; Cooke & Cooke for plaintiff.
Long, Ridge, Harris & Walker for defendants.

DENNY, J. The appellees deny in their answer that they contracted with the plaintiff on or about 1 February 1956 as alleged in the complaint. They also allege that the paper writing dated 1 February 1956 and signed "Estate of D. Frank Allred, By: Walter Allred, Extr.," acknowledging the receipt of $100.00 as part payment on the

purchase of the Frank Allred Farm is not a contract to sell or convey lands in writing signed by the party to be charged therewith, as required by the statute of frauds, and they pleaded the statute G.S. 22-2 in bar of any recovery.

There is no merit in this contention. The party or parties to be charged within the meaning of the statute in this action are the defendant Walter Allred and those for whom he was authorized to act. The memorandum involved in this appeal meets the requirements of the statute and the court below properly so ruled. *Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104, 107 Am. St. Rep. 474; *Lewis v. Murray,* 177 N.C. 17, 97 S.E. 750; *Clegg v. Bishop,* 188 N.C. 564, 125 S.E. 122. Cf. *Elliott v. Owen,* 244 N.C. 684, 94 S.E. 2d 833.

The plaintiff assigns as error the following portion of the charge: "Or if you find, members of the jury, that the defendants, other than Walter Allred, had no dealings whatever with the plaintiff and didn't agree to sell him the farm and that the first dealings they had with it was to have their attorney send him a deed, that is a copy of a deed they had executed, then, of course, you would answer the first issue no."

This instruction was erroneous. While some of the defendants testified, other than Walter Allred, that they never signed anything except the deed and never authorized anyone to sign for them, the letter of 24 July 1956 to the plaintiff from the defendants' attorneys states in unequivocal language that "it is understood that you have agreed with Mr. Walter Allred, *who is acting as agent for these heirs and devisees* * * *" There can be no doubt about the authority of Walter Allred to sell the lands in question in light of the evidence disclosed on this record. Neither is there any controversy about the consideration agreed upon for the purchase and sale of the property.

The owner of real estate may sell such property through an agent, and when so acting the owner is not required to sign the agreement or to communicate with the purchaser. Moreover, the authority of a duly authorized agent to contract to convey lands need not be in writing under the statute of frauds. *Wellman v. Horn,* 157 N.C. 170, 72 S.E. 1010; 8 Am. Jur., Brokers, section 62, page 1019. The agent may sign the contract to sell and convey in his own name or in the name of his principal or principals. *Hargrove v. Adcock,* 111 N.C. 166, 16 S.E. 16; *Neaves v. Mining Co.,* 90 N.C. 412, 47 Am. Rep. 529; *Washburn v. Washburn,* 39 N.C. 306; *Oliver v. Dix,* 21 N.C. 158. Furthermore, the authority of an agent to sell the lands of another may be shown *aliunde* or by parol. *Hargrove v. Adcock, supra.*

There is no evidence on this record to indicate that anyone was authorized to sell the lands involved herein to the plaintiff other than

Walter Allred. Therefore, the time for closing the sale and purchase of the property may not be controlled by what the other devisees might have supposed or understood, but must be governed by the agreement between the plaintiff and their agent, Walter Allred.

In 49 Am. Jur., Statute of Frauds, section 356, page 667, it is said: "A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein. In case of an executory contract of sale, where the time for the execution of the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time, and the failure to incorporate in the memorandum such a statement does not render it insufficient. * * * " See also 37 C.J.S., Statute of Frauds, section 196, page 685.

The plaintiff is entitled to a new trial, and it is so ordered.

New Trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1959

ANNA MAE ALLEN, MILLICENT C. BAILEY, DOROTHY IRENE BALL, C. ELIZABETH BROWN, MARJORIE L. BROWN, WILLIE MAE BROWN, D. L. BRYANT, MARY CALLAHAM, SHIRLEY CARRIKER, EDWARD D. CASEY, E. L. CLOANINGER, JR., W. H. DAVIS, ROY T. ELLIS, JR., E. JUNE JOY, H. L. JUSTICE, R. F. KISTLER, PEGGY McCRANIE, E. E. QUEEN, REBECCA SCHOLL, KATHERINE K. SNAVELY, DOLORES SHEETS, LEE L. STICKLEY, ROBERT R. TATUM, MIRIAM P. THOMPSON, AILEEN E. WARNER AND KATHRYN C. WEISNER, FOR THEMSELVES AND IN BEHALF OF ALL OTHER EMPLOYEES OF THE SOUTHERN RAILWAY COMPANY HAVING A COMMON INTEREST IN THE SUBJECT MATTER OF THIS ACTION, PLAINTIFFS, AND BICKETT BASS, MARY B. CROSBY, GEORGE D. ATWELL, HAROLD B. HACKNEY, CELESTIA S. SMITH, CRAVEN SMITH, R. P. POWELL, H. L. NUSSMAN, J. B. NUSSMAN, SR., JOHN W. JORDAN, AND L. J. BYRUM, ADDITIONAL PLAINTIFFS v. SOUTHERN RAILWAY COMPANY, INTERNATIONAL ASSOCIATION OF MACHINISTS, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF BLACKSMITHS, DROP FORGERS AND HELPERS, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA, NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, NATIONAL

MARINE ENGINEERS BENEFICIAL ASSOCIATION, AMERICAN TRAIN DISPATCHERS ASSOCIATION, RAILROAD YARDMASTERS OF AMERICA AND RAILWAY EMPLOYEES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, DEFENDANTS.

(Filed 25 February, 1959.)

1. **Constitutional Law § 1: Master and Servant § 2c—**

Decision of the Supreme Court of the United States construing the Union Shop Amendment to the Railway Labor Act (45 USCA sec. 152, Eleventh) controls, and a union shop agreement authorized by the Union Shop Amendment is valid in instances governed by the Federal Act, notwithstanding that otherwise it would be void under our "Right to Work" Act. G.S. 95-78 et seq.

2. **Same: Constitutional Law §§ 17, 23— Union shop agreement held not unconstitutional in requiring involuntary payment of dues used partly for political purposes.**

This action was instituted by certain non-operating employees of a railroad to restrain the railroad and certain unions from requiring plaintiffs to join the appropriate union and pay the union fees and dues as a condition for the retention of their jobs. Plaintiffs' evidence was to the effect that they were unwilling to join the union and that the fees and dues collected by the unions would be used in part for the support or defeat of political candidates and for the support or defeat of legislation. There was no evidence that the unions had levied or proposed to levy fines or assessments against plaintiffs for the purpose of coercing conformity with the objectives of the unions. *Held:* Under the decision of the Supreme Court of the United States the use of part of the dues by the unions to keep in touch with and make known their findings in respect of legislation tending to promote or impair their collective bargaining position or in respect of candidates for public office, is reasonably related to the unions' activities as collective bargaining representatives, and therefore the requirement that plaintiffs pay such fees and dues does not violate their personal freedom guaranteed by the First Amendment to the Federal Constitution nor deprive them of property in violation of the Fifth Amendment, and nonsuit should have been entered.

PARKER, J., dissenting.

APPEAL by Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and Brotherhood of Railway Signalmen of America, from *Pless, J.*, and a jury, April 21, 1958, Regular Schedule "B" Civil Term, of MECKLENBURG, docketed and argued as No. 251 at Fall Term, 1958.

The original plaintiffs instituted this action June 8, 1953, against Southern Railway Company, hereafter called Southern, and sixteen railroad labor organizations, hereafter called defendant Unions. After amendment to complaint, referred to below, eleven other individuals,

as permitted by court order, became additional parties plaintiff.

Plaintiffs, non-operating employees of Southern, are not members of, and are unwilling to join, any of defendant Unions.

Plaintiffs alleged that, pursuant to provisions of a contract between Southern and defendant Unions, defendants notified them they would be discharged from their jobs if they did not, by June 15, 1953, join one of defendant Unions and pay to it "fees, dues and assessments"; that the provisions of said contract were "unconscionable and wrongful, contrary to the Constitution, the Common law and the Statutes of the State of North Carolina and violative of the rights of the plaintiffs thereunder"; and plaintiffs prayed that defendants be restrained from their threatened enforcement thereof.

On June 8, 1953, on plaintiffs' *ex parte* application, a temporary restraining order was issued; and on June 17, 1953, after hearing, said restraining order was continued in full force and effect until the trial and final determination of the cause.

Thereafter, separate answers were filed (1) by defendant Unions and (2) by Southern. Defendants admitted their execution of a contract dated February 27, 1953, between Southern and other railroad corporations, referred to therein as "Carrier," and defendant Unions, which provided, *inter alia,* that "all employees of the Carrier . . . shall, as a condition of their continued employment . . . become members of the organization party to this agreement representing their craft or class within sixty (60) calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization."

Defendant Unions asserted the validity of said contract, their right to enforcement thereof, and prayed that the restraining order be dissolved.

Southern prayed that the court "grant its declaratory judgment as to the validity of the Union Shop Agreement . . . and . . . declare the respective rights, status and other legal relations of the parties . . ." Southern is not a party to this appeal.

On February 1, 1957, (after the *Hudson* and *Hanson* decisions, referred to in the opinion,) plaintiffs, as permitted by court order, filed an amendment to their complaint, in which they alleged, *inter alia,* that the periodic dues, initiation fees and assessments which defendant Unions collect from their members and which, unless protected by the court, plaintiffs would be required to pay in order to retain their jobs with Southern, had been, were and would be regularly and continually used by defendant Unions for the following purposes: (1) to

carry on and finance insurance businesses, banking businesses and sundry other business enterprises which plaintiffs were not willing to finance or support; and (2) to carry on, finance and pay for political activities directly at cross purposes with the free will and choice of plaintiffs, including the election of candidates for public and governmental offices whom plaintiffs oppose and the defeat of other political candidates whom plaintiffs support and the enactment of legislation which plaintiffs oppose and the defeat of other legislation which plaintiffs support. Plaintiffs alleged that such use of their money by defendant Unions would not be germane to collective bargaining and that to compel plaintiffs against their will to pay money to defendant Unions for such purposes would deprive them of their rights under the First, Fifth and Ninth Amendments to the Constitution of the United States.

Thereupon, defendant Unions demurred to the complaint, as amended, on the ground that it did not state facts sufficient to constitute a cause of action. After hearing, the court overruled said demurrer; and, based on the facts alleged in said amendment to complaint, entered a new restraining order which remained in effect until the trial at April, 1958, Term.

Upon trial Judge Pless, at the close of plaintiffs' evidence, entered judgment of nonsuit, dismissing the action as to all defendants except Southern and two of defendant Unions, to wit, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereafter called Brotherhood of Railway Clerks, and Brotherhood of Railway Signalmen of America, hereafter called Brotherhood of Railway Signalmen.

Thirteen plaintiffs testified. By reason of their craft or class, twelve were eligible for membership in the Brotherhood of Railway Clerks and one was eligible for membership in the Brotherhood of Railway Signalmen. Two of the original plaintiffs were no longer employees of Southern. One of the additional plaintiffs, having become a supervisor, was no longer subject to the union shop agreement. There was no evidence as to the employment or craft status of the other twenty-one plaintiffs.

The gist of plaintiffs' testimony was as follows: (1) They were unwilling to join the union; (2) they opposed (compulsory) membership as a condition for retention of their jobs; and (3) they opposed the use by the union of any of their money (a) for the support or defeat of political candidates and (b) for the support or defeat of legislation.

Three plaintiffs (all who were questioned with reference thereto)

testified to their opposition to the use by defendant Unions of any of their money to support or finance an insurance or death benefit program.

None of the plaintiffs testified concerning the use the unions had made and were making of money collected as periodic dues, initiation fees and assessments, from their members. Relevant thereto, plaintiffs offered depositions of officials of the Brotherhood of Railway Clerks and the Brotherhood of Railway Signalmen, adversely examined prior to trial, and documentary evidence.

Motions for judgment of involuntary nonsuit, made at the close of plaintiffs' evidence and again at the close of all the evidence, by the Brotherhood of Railway Clerks and by the Brotherhood of Railway Signalmen, were overruled.

Six issues were submitted to the jury. The jury found that defendant Unions used "dues and fees" (1) in support of or in opposition to legislation, (2) to influence votes in elections to public office, and (3) to make contributions to the campaigns of candidates for election to public office; and that these uses, and the use of a portion of the "dues and fees" in connection with the death benefit system of the Brotherhood of Railway Clerks, were not reasonably necessary or related to collective bargaining.

Upon the verdict, the following judgment was entered:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, are hereby restrained and enjoined from placing any compulsion of any nature upon the plaintiffs, individually named as such in the caption of this case, in the course of their employment with the Defendant Railway Company, whereby they, the said plaintiffs, against their free will and choice would be required to join the Defendant Unions, or conform to any rules or disciplines of Defendant Unions, or pay money to said Unions, to wit, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Brotherhood of Railway Signalmen of America.
>
> "This Order, however, is subject to the following conditions:
>
> "The Defendant Unions shall be permitted, upon proper notice to present proof to the Court, not conflicting or inconsistent with the findings of the jury as hereinbefore recited, as to what portion of the periodic dues, initiation fees and assessments, which they desire to collect from the plaintiffs, will be reasonably necessary and related to collective bargaining between the defendant Un-

ions and the plaintiffs' employer, the Defendant Railway Company, and upon making of such proof, not conflicting or inconsistent with the findings of the jury as hereinabove recited, to the satisfaction of the Court, this Order shall have no application or force or effect with respect to such portion of such periodic dues, initiation fees or assessments or the imposition and collection thereof under the terms of the contract referred to in the pleadings.

"The cause is therefore retained for such further hearings, either with or without a jury, and such further Orders as may seem appropriate should the proof referred to above be offered by the defendants.

"IT IS FURTHER ORDERED that the Defendants pay the costs of this action."

The Brotherhood of Railway Clerks and the Brotherhood of Railway Signamen excepted and appealed. When used in the opinion, "defendant Unions" refers only to the two appellants.

Blakeney & Alexander for plaintiffs, appellees.

Schoene & Kramer and J. B. Craighill for defendant Unions, appellants.

BOBBITT, J. Decision depends upon whether the evidence, considered in the light most favorable to plaintiffs, was sufficient to withstand the motion by defendant Unions for judgment of involuntary nonsuit.

Upon adoption of the Railway Labor Act, 20 May, 1926, 44 Stat. 577, Congress "made a fresh start toward the peaceful settlement of labor disputes affecting railroads." *Virginia Ry. Co. v. System Federation No. 40,* 300 U.S. 515, 57 S. Ct. 592, 81 L. ed. 789. This Act, as amended, is now codified as 45 USCA §§ 151 *et seq.* The basic principle underlying this Act is embodied in these provisions: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 USCA § 152, Fourth. In the case cited, the Supreme Court of the United States sustained the constitutionality of the Railway Labor Act, both under the commerce clause and as to the Fifth Amendment, in relation to the requirement that the carrier treat exclusively with the employees' duly chosen bargaining representative.

Defendant Unions, duly chosen as such by the majority, are the exclusive bargaining representatives of *all* employees of the respective crafts or classes to which plaintiffs belong. Under the collective bargaining agreements between defendant Unions and Southern, plaintiffs acquire and have the same rights in respect of seniority, rates of pay, rules, working conditions, etc., under their employment by Southern, as Southern's employees who become and are members of defendant Unions by their free choice.

The validity of the Union shop agreement of February 27, 1953, depends solely upon the authority granted by the Union Shop Amendment to the Railway Labor Act. Act of Congress, January 10, 1951, 64 Stat. 1238, 45 USCA § 152, Eleventh, hereafter called Union Shop Amendment. The agreement contains provisions expressly authorized by the Union Shop Amendment.

Absent the Union Shop Amendment, the union shop agreement would be void under the North Carolina "Right to Work" Act, Session Laws of 1947, Ch. 328, G.S. 95-78 *et seq.*

In *Hudson v. R. R.*, 242 N.C. 650, 89 S.E. 2d 441, *certiorari* denied, 351 U.S. 949, 100 L. ed. 1473, 76 S. Ct. 844, the action was to restrain the carrier and the unions *from entering into* a proposed union shop agreement as permitted, but not required, by the Union Shop Amendment. Plaintiffs therein based their case primarily upon the North Carolina "Right to Work" Act. The constitutional questions now raised were not presented.

In *Hudson*, it was noted that the North Carolina "Right to Work" Act superseded the common law rule approved by this Court in *S. v. Van Pelt*, 136 N.C. 633, 49 S.E. 177, 68 L.R.A. 760, 1 Ann. Cas. 495. The North Carolina "Right to Work" Act was recognized as valid and in full force and effect "except to the extent Congress, in enacting labor legislation related to interstate commerce, has pre-empted the field"; and that the Union Shop Amendment, which relates only to labor relations between carriers and their employees, was in conflict with and superseded the North Carolina "Right to Work" Act. Reference to the opinion will disclose the several questions then considered and discussed.

Prior to *Hudson*, the Supreme Court of Nebraska decided *Hanson v. Union Pacific Railroad Co.*, 160 Neb. 669, 71 N.W. 2d 526, an action to restrain the carrier and the unions from *putting into effect* provisions of union shop agreements containing provisions expressly authorized by the Union Shop Amendment.

For reasons fully set forth by *Justice Wenke*, the Supreme Court of Nebraska held that the enforcement of contract provisions author-

ized by the Union Shop Amendment would deprive plaintiffs of specific constitutional rights, to wit: (1) ". . . the freedom of association, the freedom to join or not to join in association with others for whatever purposes such association is lawfully organized, . . ." guaranteed by the First Amendment; and (2) due process of law, guaranteed by the Fifth Amendment, in that, by requiring an employee who does not desire to join a union to pay initiation fees, dues and assessments, such employee "is required to pay for many things besides the cost of collective bargaining," that is, "all of the varied objects and undertakings in which such labor organizations are or may become engaged." The opinion states: ". . . it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic concepts which may or may not be of an employee's choice."

In *Hudson*, we expressly reserved the constitutional questions decided by the Supreme Court of Nebraska.

In *Railway Employes' Dept. A. F. L. v. Hanson*, 351 U.S. 225, 100 L. ed. 1112, 76 S. Ct. 714, the United States Supreme Court reversed the Nebraska decision. Plaintiffs, citing *Looper v. Georgia, Southern & Florida Railway Co.*, 213 Ga. 279, 99 S.E. 2d 101, contend the questions now presented were not decided but reserved. Defendant Unions contend the identical questions were considered and decided. If the contention of defendant Unions is correct, the decision of the United States Supreme Court, referred to hereafter as *Hanson*, controls.

Mr. Justice Douglas, referring to the decision of the Supreme Court of Nebraska, said: "It held that the union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining. The Nebraska Supreme Court, therefore, held that there is no valid federal law to supersede the 'right to work' provision of the Nebraska Constitution."

Before considering further what was decided in *Hanson* an analysis of plaintiffs' action seems appropriate.

Plaintiffs have made no tender of dues, initiation fees or assessments. The *Hudson* and *Hanson* decisions determined adversely to plaintiffs the cause of action originally alleged. See *Allen v. Southern Ry. Co.*, 114 F. Supp. 72. All original defendants were restrained by interlocutory orders until February 1, 1957, on the basis of facts originally alleged. Allegations that enforcement of the union shop agreement would deprive them of constitutional rights guaranteed by the First, Fifth and Ninth Amendments were first made in amendment

to complaint filed February 1, 1957; and on the basis of these new allegations all original defendants were restrained by interlocutory order until the trial at April Term, 1958.

Whatever the legal relationship between plaintiffs, a minority of the employees of their respective crafts or classes, and defendant Unions, their duly chosen collective bargaining representatives, such relationship is involuntary on the part of plaintiffs. They do not want defendant Unions to represent them. They do not want to become members of defendant Unions. They do not want to pay any amount as dues, initiation fees or assessments. Finally, if required to pay any amount, they insist that no part thereof shall be used, directly or indirectly, except for purposes reasonably necessary or related to collective bargaining. In short, they are completely at cross-purposes with defendant Unions.

Plaintiffs' cause of action, under amended complaint, proceeds on the premise that if plaintiffs can show that defendant Unions use *any* portion of the dues, initiation fees or assessments, directly or indirectly, for *any* purpose not reasonably necessary and related to collective bargaining, the enforcement of the union shop agreement should be restrained until such time as defendant Unions establish precisely *what* portion of the dues, etc., is used solely for purposes reasonably necessary and related to collective bargaining. The trial proceeded, issues were submitted and judgment entered in accordance with plaintiffs' said premise.

The judgment, based on the jury's findings, restrained the enforcement of the union shop agreement until such time as defendant Unions establish "what portion of the periodic dues, initiation fees and assessments, which they desire to collect from the plaintiffs, will be reasonably necessary and related to collective bargaining between the defendant Unions and the plaintiffs' employer, . . ." At the contemplated further hearing, the determination of what expenditures by defendant Unions are reasonably necessary or related to collective bargaining is not limited to expenditures for uses challenged in the amended complaint.

It is noted that the judgment is determinative only as between named plaintiffs and defendant Unions. If persons hereafter employed by Southern should seek similar relief, their status must be determined in subsequent actions.

Considering the testimony and documents in the light most favorable to plaintiffs, there was evidence tending to establish the facts narrated below.

The Brotherhood of Railway Clerks has in excess of 300,000 mem-

bers in the United States and Canada. Its organizational structure consists of the Grand Lodge, system boards of adjustment and local lodges. The initiation fee, applicable to members of the Charlotte Local Lodge, is $10.00, of which $5.00 is paid to the Grand Lodge; and the dues are $2.25 per month, of which $1.00 per month is paid to the Grand Lodge.

The Brotherhood of Railway Clerks has a North Carolina Legislative Committee composed of a representative from each (North Carolina) local lodge. This committee selects a legislative representative. A local lodge, out of the portion of monthly dues retained by it, pays 10c per month per member to this Legislative Committee. The function and responsibility of the legislative representative is to keep in touch with all North Carolina legislation affecting the interests of the Brotherhood and of its members.

The Grand Lodge of the Brotherhood of Railway Clerks has a full time representative in Washington who observes legislative proceedings of particular interest to the Brotherhood and its members, such as legislation relating to railroad retirement, railroad unemployment insurance, railroad labor relations, and contacts members of Congress with reference thereto.

The Brotherhood of Railway Clerks publishes semi-monthly and distributes to each member an official publication known as "The Railway Clerk." It also publishes monthly "The Grand President's Bulletin" which is distributed to Brotherhood officials. If and when a local lodge or system board of adjustment wishes to subscribe to "Labor," a weekly newspaper referred to below, the Grand Lodge contributes 20c towards the costs of each subscription.

The Brotherhood of Railway Signalmen has approximately 16,000 members. Its organizational structure consists of the Grand Lodge, system general committees and local lodges. The initiation fee is $5.00, of which $1.50 is paid to the Grand Lodge; and the dues are $3.33 per month, of which $1.50 per month is paid to the Grand Lodge.

The Grand Lodge of the Brotherhood of Railway Signalmen sets aside a legislative fund from which it pays legislative representatives in the several states.

The Grand Lodge of the Brotherhood of Railway Signalmen publishes monthly and distributes to its members a publication known as "The Signalmen's Journal." Subscriptions to "Labor" are entered on an individual or subordinate lodge basis. The Grand Lodge contributes no part of the subscription price.

Each of the defendant Unions is one of several owners of the society which publishes "Labor." Presently, this society's revenue con-

sists solely of subscriptions and income from investments. In 1956 and 1957, George M. Harrison, Grand President of the Brotherhood of Railway Clerks, served on its board of directors. In special editions of "Labor" published in 1954 and 1956, distributed in areas where political campaigns were in progress, this newspaper advocated by name and opposed by name the particular candidates involved. Generally, this newspaper expresses its views as to candidates and as to legislation.

There is a voluntary group, composed of the heads of several railway labor unions, known as the Railway Labor Executives Association. This group meets ten or twelve times a year "for the purpose of advancing the mutual organizational interests, in handling common problems dealing with collective bargaining and such matters as that." Each of defendant Unions contributes thereto from its Grand Lodge funds. Occasionally, the Railway Labor Executives Association makes contributions to Railway Labor's Political League, referred to below.

Railway Labor's Political League is an unincorporated group composed of the chief executive officers of most of the railway labor unions. It maintains an office in Washington, D. C., staffed by its secretary and one clerical employee. "Generally, the function of it is to carry on political educational work and to collect voluntary contributions from railway employees and other citizens to assist in electing candidates that favor the same general objectives that railroad employees desire to see accomplished in the Federal Congress." Railway Labor's Political League makes contributions to support the campaigns of particular candidates and to influence legislation. This particular group was formed after the 1947 Amendment to the Corrupt Practices Act.

Each of defendant Unions is a member of the American Federation of Labor, Congress of Industrial Organizations Federation, hereafter called AFL-CIO. Harrison is a member of its executive council and of the governing board of its committee on political education known as C.O.P.E. AFL-CIO is a voluntary, unincorporated association, composed of "about 138 national and international Unions." "There are roughly 12½ million members, maybe 13 million, in the Unions that are affiliated with AFL-CIO." Each of defendant Unions pays substantial sums from its Grand Lodge funds to the AFL-CIO. In each instance, the amount so paid is the aggregate of a per capita tax of so much per member as determined by the AFL-CIO Convention. On this basis, the amounts so paid by the Brotherhood of Railway Clerks are quite large. AFL-CIO expends its funds to promote various projects and causes in which it is interested.

The Grand Lodge of the Brotherhood of Railway Clerks, out of its portion ($5.00) of each initiation fee, allocates 90c to its Death Benefit Department Fund; and out of its portion ($1.00) of the monthly dues, allocates 30c per month to its Death Benefit Department Fund. The Constitution of the Grand Lodge of the Brotherhood of Railway Clerks (Article 27), which is a part of the record herein and was a part of the record before the Supreme Court of the United States in *Hanson*, so provides. Thus, in respect of the portion of dues and fees allocated to the Death Benefit Department Fund, the facts established herein are the identical facts established in *Hanson*.

Referring again to the Constitution of the Grand Lodge of the Brotherhood of Railway Clerks, part of the record in *Hanson*, Article 23 thereof deals generally with the subject of "Legislation," and specifically (Section 1) with the appointment of "National Legislative Counsel," and (Section 3) with the formation of "State or Provincial Legislative Committees." Section 2 provides: "The Grand President in consultation with the grand Executive Council, in absence of Convention action, shall determine the policy of the Brotherhood with respect to Federal Legislation." Section 8 provides: "The State or Provincial Legislative Board shall elect a State or Provincial Legislative Chairman. The Legislative Chairman shall, when authorized by the Legislative Board, devote such time as may be necessary at the State or Provincial Legislatures when same are in session. He shall peruse all bills, memorials and resolutions introduced in the legislature and oppose all legislation detrimental to the welfare of the Brotherhood; he shall have introduced and support such bills and resolutions as advances the welfare of the members of the Brotherhood, subject to the policy of the Brotherhood as designated by the Grand President, and when such policy has been agreed upon, and approved by the Grand President it shall become the State or Provincial legislative program."

The record before the Supreme Court of the United States in *Hanson* includes portions of the constitutions of several other unions which were defendants therein, which contain similar provisions.

The appellees in *Hanson*, in their brief, appear to have drawn into sharp focus the matters now pressed by plaintiffs. Referring to money collected by the defendant Unions as initiation fees and dues, they asserted: "They spend it for political purposes. . . . They spend it to pay for the publication of special editions of 'Labor' to help elect or defeat candidates for the United States Senate, to pay for television programs to help elect Democrats to Congress or to state offices, to pay the salaries and expenses of lobbyists, . . ." Again: "They spend it for life insurance, disability, death or funeral benefits for their

members, which the involuntary member may not want or which he may prefer to take out with a company of his own selection."

What the Supreme Court of the United States decided in *Hanson,* and the import of the language in the opinion of *Mr. Justice Douglas,* must be considered in the light of the record before it and the contentions presented.

In closing the opinion, *Mr. Justice Douglas* said:

"It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions of membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' (If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.) For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement."

Earlier in the opinion, *Mr. Justice Douglas,* while recognizing its power to do so, emphasized that it was for Congress to determine whether authority for union shop agreements should be granted. Thereafter, *Mr. Justice Douglas* said:

"To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here. The only conditions to union membership authorized by § 2, Eleventh of the Railway Labor Act are the payment of 'periodic dues, initiation fees, and assessments.' The assessments that may be lawfully imposed do not include 'fines and penalties.' (The financial support required relates, therefore, to the work of the union in the realm of collective bargaining.) No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of 'fines and penalties' precludes the imposition of financial burdens for disciplinary purposes. (If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.)"

In the above quotations, we have indicated by parentheses the words relied upon by plaintiffs to support the contention that the Supreme Court of the United States did not pass upon the questions now raised. Whatever our views, if the questions now raised were originally for our decision, we are of opinion and hold that the very questions now raised by plaintiffs were before the Court and decided in *Hanson;* and that the words upon which plaintiffs rely, when read in context, do not support their contention.

In the first quotation, the requirement upheld is "for financial support of the collective-bargaining agency by all who receive the benefits of its work . . ." We do not think this language conveys the idea that the financial support required is limited to such expenditures as the collective bargaining agency incurs while engaged in the negotiation and servicing of collective bargaining agreements. Rather, it indicates that the required financial support embraces all activities of the collective bargaining agency reasonably related to its maintenance as an effective bargaining representative. If our interpretation is correct, it would seem that, in the discharge of its obligations, the collective bargaining agency would be expected to keep in touch with and make known its findings in respect of legislation tending to promote or to impair its collective bargaining position or tending to enhance or defeat the interests of those whom it represents. In so doing, they would do neither more nor less than the representatives of carriers with whom they negotiate collective bargaining agreements.

This sentence appears in the second quotation: "No more precise allocation of union overhead to individual members seems to us to be necessary." We cannot dispel the impression that the meaning of this sentence is that the requirement that unwilling members pay ordinary periodic dues and initiation fees for the support of their collective bargaining agency is a reasonable requirement and that no more precise allocation need be made. In this connection, it is noted that whatever small portion of the periodic dues and initiation fees might be traced, under the accounting practices of defendant Unions, to the uses challenged by plaintiffs, the evidence shows that the Brotherhood of Railway Clerks not only owns an office building but receives over $300,000.00 per year as income from investments. Obviously, no benefit would accrue to plaintiffs if, by a mere change in accounting practices, the income received solely from investments, rather than any portion of the periodic dues and initiation fees, were expended for uses now challenged by plaintiffs.

There is no evidence that plaintiffs will be required to pay "assessments." The jury's findings refer to "dues and fees," not to "assess-

ments." Defendant Unions, for some years, have made no assessments on their members. They make no demand on plaintiffs for the payment of any assessment. Whether plaintiffs would be required to pay an assessment as a condition of continued employment is not presented by this record. If and when either of defendant Unions should undertake to impose an assessment, plaintiff's liability therefor would have to be determined in the light of all facts concerning such assessment.

As we interpret *Hanson*, the Supreme Court of the United States has decided that a requirement that plaintiffs pay the ordinary periodic dues and initiation fees uniformly required of all members does not violate either the First or the Fifth Amendment. Since the constitutionality of the Union Shop Amendment has been expressly upheld, we need not discuss plaintiffs' general attack thereon predicated on the Ninth Amendment.

All that defendant Unions demand of plaintiffs is that they pay the ordinary periodic dues and initiation fees uniformly required of all members. In all other respects, plaintiffs are free to speak and to act according to their own desires even if by so doing they speak and act at cross-purposes with defendant Unions.

As we interpret it, the questions reserved in *Hanson* would arise only if and when defendant Unions should undertake to deny membership or to terminate membership on account of some failure of plaintiffs to comply with the various regulations applicable to voluntary members, e. g., refusal to sign application blanks, failure to attend meetings, failure to speak or act in harmony with the policies and objectives of defendant Unions, failure to pay an exaction imposed by way of penalty or for disciplinary purposes, etc. If defendant Unions, notwithstanding the tender by plaintiffs of ordinary periodic dues and initiation fees, refuse to recognize plaintiffs as members or deny to them any privilege to which a member is entitled, it would seem that by such conduct they would relieve plaintiffs from further obligations under the union shop agreement. It is quite possible that occasions will arise where defendant Unions will prefer to forego the collection of periodic dues and initiation fees rather than have *nonconformists* as members of their organizations.

It is noted that plaintiffs do not allege or contend that defendant Unions made unlawful expenditures in violation of the federal Corrupt Practices Act. USCA, Title 18, § 610; *U. S. v. International Union*, 352 U.S. 567, 1 L. ed. 2d 563, 77 S. Ct. 529, and cases cited. Nor do plaintiffs allege or contend that any expenditure made by defendant

Unions was otherwise than in accordance with the wishes and will of the majority of their members.

As indicated, our decision is based upon our interpretation of what the Supreme Court of the United States decided in *Hanson.* Whether our interpretation or that made in the *Looper* case, *supra,* is correct, will be resolved in due course.

Pennsylvania R. Co. v. Rychlik, 352 U.S. 480, 1 L. ed. 2d 480, 77 S. Ct. 421, decided subsequent to *Hanson,* is predicated upon the validity of the Union Shop Amendment. However, it relates to a union shop agreement involving *operating* employees; and, since the questions decided were quite different from those presented in *Hanson* and herein, no discussion of the cited case is appropriate.

This action appears to be an incident in the continuing controversy between those who advocate the principles embodied in the Union Shop Amendment and those who advocate the principles embodied in state "Right to Work" statutes and constitutional provisions. It is plain that the Union Shop Amendment constitutes plaintiffs' basic grievance, not the inconsequential sums they are required to contribute to the support of their collective bargaining representative. Southern's answer herein discloses that it shares the views expressed and pressed by plaintiffs. Suffice to say, we express no opinion as to the merits or demerits of the policy embodied in the Union Shop Amendment.

Under the evidence presented, we conclude that plaintiffs were not entitled to the injunctive relief demanded and that the court erred in overruling the motion by defendant Unions for judgment of involuntary nonsuit.

Reversed.

PARKER, J., dissenting. The first five issues submitted to the jury, and their answers thereto are as follows:

"1. Do the defendant Unions use dues and fees which they collect from railroad employees in support of or opposition to legislation which is not reasonably necessary or related to collective bargaining?

Answer: YES.

"2. Do the defendant Unions use dues and fees which they collect from railroad employees to influence votes in elections to public office?

Answer: YES.

"3. If so, is the same necessary or reasonably related to collective

bargaining?
Answer: NO.
"4. Do the defendant Unions use dues and fees which they collect from railroad employees to make contributions to the campaigns of candidates for election to public office?
Answer: YES.
"5. If so, is the same necessary or reasonably related to collective bargaining?
Answer: NO."

As I read the record, there was sufficient evidence produced by the plaintiffs to carry the case to the jury, and to permit them to answer the issues as they did. According to the jury verdict there is no question but that the defendant unions use dues and fees which they collect from their members to support or to oppose legislation not related to collective bargaining, to influence votes in election to public office, and to make contributions to the campaigns of candidates for election to public office. And according to the provisions of a contract between the Southern Railway Company and the defendant unions, an employee of the Southern Railway Company must join the defendant unions and pay the dues and fees demanded, or be discharged.

The fundamental issue is, can the defendant unions in a free United States, whose supreme national law is set forth in the United States Constitution, force an employee of the Southern Railway to join their unions, and compel him financially to support and contribute to a political party and candidates, whose principles, projects, policies or programs he does not believe in, or may abhor, and does not want, and to contribute to support or oppose legislation not related to collective bargaining regardless of his views, or be discharged from his employment?

The specific and narrow question before us is the use made of the dues and fees demanded by the defendant unions, which plaintiffs must pay or be discharged. I take my stand not upon the so called "right to work" statute of North Carolina, but upon the United States Constitution.

Freedom of association, of thought and of speech is protected by the First Amendment to the United States Constitution against any action by Congress. *American Communications Asso. v. Douds,* 339 U.S. 382, 94 L. ed. 925; *Lincoln Fed. L. U., v. Northwestern I. & M. Co.,* 335 U.S. 525, 93 L. ed. 212, 6 A.L.R. 2d 473; *Thomas v. Collins,* 323 U.S. 516, 89 L. ed. 430.

The right to work is protected by the Fifth Amendment to the United States Constitution. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 60 L. ed. 131. "It is said that the right to work, which the Court has frequently included in the concept of 'liberty' within the meaning of the Due Process Clauses (citing authority) may not be denied by Congress." *Railway Employes' Dept. A. F. L. v. Hanson*, 351 U.S. 225, 100 L. ed. 1112.

The Fifth Amendment, which relates to governmental action, federal in character, not to action by private persons, provides that no person shall be deprived of his property without due process of law. *Corrigan v. Buckley*, 271 U.S. 323, 70 L. ed. 969. In my opinion, it is not within the concept of due process to compel a person to contribute dues and fees from his earnings for the purpose of promoting political and ideological ends to which he is opposed and of electing men to public office whose purposes he may distrust, and if he does not so contribute to discharge him from his job with loss of seniority. To hold that this can be done would be a taking of a portion of a person's earnings without due process of law.

In *Railway Employes' Dept. A. F. L. v. Hanson, supra*, the validity of a closed shop contract executed under Section 2, Eleventh of the Railway Labor Act, as amended (64 Stat. 1238) was upheld. However, the Court used this language: "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." The question reserved is the very question presented here for decision.

In my opinion, no Act of Congress, no governmental action, federal in character, can compel a person to contribute dues and fees from his earnings to a labor union for the ends found by the jury's verdict, so long as the First and Fifth Amendments to the United States Constitution remain a part thereof guarding him from such an unwarranted invasion of his personal and property rights. I am fortified in my opinion by the fact that the Supreme Court of Georgia in *Looper v. Georgia, Southern & Florida Railway Co.*, 213 Ga. 279, 99 S.E. 2d 101, which was decided 10 June 1957, more than a year after the decision in the *Hanson* case, has expressed a similar opinion on substantially similar facts averred in a petition, stating that the question was expressly reserved in the *Hanson* case. If a member of a labor

union desires to make *a voluntary contribution* for such purposes, he is free to do so.

If a political party dominant in the Congress should enact a statute requiring every federal employee to join a union, and compelling each one to contribute from his salary dues and fees to support the ideas, purposes and candidates of that party, and if he did not pay such dues and fees, he should be discharged from his employment, can there be any doubt that the exaction of such dues and fees for such support would be held unconstitutional? A holding to the contrary would destroy constitutional government in this nation.

I vote to uphold the verdict and judgment of the trial court.

IN THE MATTER OF THE WILL OF M. W. PRIDGEN, DECEASED.

(Filed 25 February, 1959.)

1. Wills § 7—

If the subscribing witnesses sign a will in a room adjacent to the room in which testator is lying in bed, but the testator is in a position where he did see or could have seen them subscribe their names, the attestation is in compliance with law, and an instruction to this effect is not error. G.S. 31-3.3.

2. Appeal and Error § 59—

An opinion of the Supreme Court must be read in the light of the factual situation then under consideration.

3. Wills § 22—

The burden of establishing mental incapacity to execute a will is on caveators.

4. Wills § 21b—

An instruction to the effect that mental capacity to execute a will is the capacity of testator to know his relatives and to know and realize that the instrument devised and bequeathed his property to the person therein named, to the exclusion of his relatives, in accordance with his free will and desire, *held* not prejudicial.

5. Appeal and Error § 41—

The exclusion of testimony will not be held prejudicial when the same witness is thereafter permitted to give testimony of the same import.

APPEAL by caveators from *Seawell, J.*, March 1958 Term, of COLUMBUS, docketed and argued as No. 606 at the Fall Term 1958.

M. W. Pridgen, age 77 or 78, died in his home on 19 October 1957.

His distributees and heirs were his widow, two sisters, and eight nephews and nieces. On 24 October the widow offered for probate as her husband's will an attested paper writing dated 9 October 1957. This instrument bequeathed and devised to her all of her husband's property and named her as executrix. The instrument was probated in common form. On the following day one of the sisters filed a caveat. Thereupon the proceeding was transferred to the Superior Court. The widow and seven of the nephews and nieces, who are heirs, filed an answer to the caveat. They asserted the instrument was in fact the last will of M. W. Pridgen, having been duly executed as such.

As determinative of the controversy the court submitted issues which were answered by the jury as follows:

"1. Was the paper writing propounded, dated the 9th day of October, 1957, executed by M. W. Pridgen, according to the formalities of the law required to make a valid last will and testament?

"Answer: YES.

"2. At the time of signing and executing said paper writing did said M. W. Pridgen have sufficient mental capacity to make and execute a valid last will and testament?

"Answer: YES.

"3. Is the said paper writing referred to in Issue No. 1, propounded in this cause, and every part thereof, the last will and testament of M. W. Pridgen, deceased?

"Answer: YES."

Based on the verdict, judgment was entered declaring the instrument to be the last will and testament of M. W. Pridgen and as such probated in solemn form. Caveators excepted and appealed.

Varser, McIntyre, Henry & Hedgpeth and Burns & Burns for caveator, appellants.

Powell & Powell for propounder appellees.

RODMAN, J. The assignments of error raise these questions: (1) Did the court correctly instruct the jury with respect to the formalities necessary to the execution of an attested will; (2) was there error in the charge with respect to mental capacity necessary for a testamentary disposition of property; and (3) was there error in the exclusion of evidence bearing on the first two questions?

Mr. Pridgen was in a hospital in Lumberton from 25 September to 30 September 1957. He had earlier that month spent several days in the Columbus County Hospital. The doctors who examined him in Lumberton testified he had a prostatic condition which was proba-

bly malignant, arteriosclerosis, and an irregular heart. He was bedridden in his home from 30 September when he left the Lumberton hospital until his death.

The paper offered for probate was prepared by an attorney in conformity with a message delivered to him by D. R. Nance. Nance, a neighbor, acted at the request of Pridgen. When the will was written, Nance carried it to Pridgen and at his request went for Loren Tart to witness its execution. The other witness was testator's nurse, A. F. Freeman. The instrument was signed on the day it was written.

The evidence touching the execution and subscription of the instrument comes from Tart and Freeman, the subscribing witnesses. Tart testified: "Mr. Pridgen was there in bed. That was his signature on this paper writing, M. W. Pridgen's signature. I have seen the paper writing purporting to be the last will and testament of M. W. Pridgen before. I read that paper to Mr. M. W. Pridgen. After I read that paper to him I asked him if he wanted to sign it, and he said 'yes.' He signed it; he had to be helped to sign it but he had hold of the pen. He signed it in my presence. Mr. Freeman was in the room, Mr. A. S. Freeman. That's my signature, that Loren Tart is my signature. He signed it in the presence of Mr. Freeman. I signed as a witness in the presence of Mr. Freeman. . . . There was a room adjoining the one he was in, and Mr. Freeman and I went to a table there in the adjoining room to witness the paper, to write our names to it. . . . We went to the table to have something to lay it down on to write, that's the table in the adjoining room. . . . Mr. Pridgen was in one room and the table was in the next room adjoining it. . . . Neither Mr. Freeman nor I signed the paper which I have here in the room in which Mr. Pridgen and his bed were . . . I read this paper that was propounded to Mr. Pridgen. When I asked him did he want to sign it, he said 'yes.' Then Mr. Freeman and I went in the adjoining room and signed it on the table, but it was so he could see it in the other room . . ."

Freeman testified: "I was living there in his house at the time he died . . . I was employed by some of them to nurse him. I attended to him while he was sick. I have seen the paper writing purporting to be the last will and testament of Mr. M. W. Pridgen before. The first signature there at the top is Mr. Pridgen's. I saw Mr. Pridgen sign his name to it. That is my name there at the bottom and that's M. W. Pridgen's . . . I signed this paper in the presence of Mr. Pridgen right where Mr. Pridgen could see it . . . Mr. Pridgen was sitting up on the bed when Mr. Tart presented this paper . . . There was a big table just inside the adjoining room that had a television on it

. . . The table I was speaking about signing it on was in another room just inside the door in the corner. That table I was speaking about signing it was just inside the door, it had a television on it. It was in the next room just inside the door and he was right back where he could see it . . . The television was on top of the table where I sat to write my name. It was on a big table right in the corner. That was the table I put the paper on to sign. Mr. Tart wrote his name first, and then I wrote mine."

Estelle Fletcher, one of Pridgen's nieces, prepared a diagram showing the location of the bed which he occupied and various objects in his room and in the adjoining sitting room. She testified: "This indicates his bed. That is the bed in which Mr. Pridgen was sick. This is the opening door there between the bedroom and the living room. The distance from the bed to the door is 3 feet. The distance from the door to the television table is 2 feet and 6 inches. The table had been pulled out away from the corner so he could watch television. The table had been pulled out so he could watch T.V. When the table was pulled out, he could watch it from the bed there and see it all right."

There was testimony on behalf of the caveators from which the jury could find that Pridgen could not have seen the subscribing witnesses at the television table when they signed the paper. There was also evidence on behalf of the caveators from which the jury could find one of the subscribing witnesses had stated they did not write their names at the television table but at another table in the sitting room and that it was impossible for one on the bed to see a person at that table.

G.S. 31-3.3 provides: "(a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section . . . (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other."

The competency of Tart and Freeman to serve as attesting witnesses is not challenged. Caveators contend the evidence is insufficient to support a finding that the paper was signed by the attesting witnesses "in the presence of the testator" and the court erred in defining that phrase.

The court charged: "Our Supreme Court has said in case *In re Will of Willie Bolden*, 150 N.C. 507, and following pages in discussing what is meant by in the presence of, our Court has said that 'actual view is never necessary, but it is sufficient if the party,' in this case Pridgen, the purported testator, 'might see the witnesses

attest though if in a different as well as in the same room. The strictest interpretation of the law has gone no further than to require that the testator should be in a position and have power without removal of his person to see what was done. It is not necessary in fact for him to see. If the testator, the one making the will, is able to see that attestation by the witnesses, it is not material to prove that in fact he did see it, but he must be able to see the witness subscribe the will. Their relative position to him at the time they are subscribing their names as witnesses whether they are in the same room with him or not must be such that he may see them if he thinks proper to do so, for the purpose of the law is not so much to secure signing of the name of witnesses in the actual view of the testator as to afford him an opportunity to detect and prevent the substitution of another will in the place of that which he has signed.' " Caveators make the quoted portion their 64th exception.

The court further charged: "I charge you if you find from the evidence and by its greater weight that Tart and Freeman, the purported subscribing witnesses to the will of M. W. Pridgen, signed their names as subscribing witnesses to the paper writing, that M. W. Pridgen was in a position where he did or could have seen them sign or subscribe their names, this would be a signing in the presence of M. W. Pridgen in compliance with the law. If you find the facts to be so by the greater weight of the evidence." Caveators make this portion of the charge their 65th exception.

Caveators rely on *Jones v. Tuck*, 48 N.C. 202, as authority for their position that the will was not subscribed by the witnesses in testator's presence as required by the statute.

The opinion in that case should be read, like all other opinions, in the light of the factual situation then under consideration. There the evidence was that testator, in an adjoining room, could not have observed the subscription without changing his position, but by raising himself on his elbow could have seen the witnesses sign. This effort would have jeopardized his life.

The court charged that if testator had the physical ability to make this change in position "though against the advice of his physician, and imprudent for him to make such an effort, it would be a signing in his presence." Caveators had requested and the court had refused to charge "that if they should believe that it was not safe for the testator to have made the effort, and that it would have been dangerous for him to have done so, it was not a sufficient signing." Speaking with respect to the charge the Court said: "The charge conceded that, from the position in which the testator lay in his bed, he could

see neither the witnesses nor the paper and that a change of his position was necessary to enable him to do so. This instruction is not in accordance with the cases herein referred to. But his Honor went a step further, and throws out of view entirely the opinion of the medical attendant. The law makes no such requisition upon a testator. It does not require him to risk his life to see that the witnesses signed the paper, or to see the paper."

Dealing with this factual situation the Court says the correct rule is stated in Powell Devises "but though the signing be in a room or chamber, immediately contiguous to the room where the testator is, yet the devise will be void unless the testator is in a *position* in which he can, if he please, without changing his situation, see the witnesses subscribe."

We do not think the rule stated in the case on which caveators rely is at variance with the charge here under consideration. The charge here challenged is, as the court stated, taken from *In re Bowling's Will,* 150 N.C. 507, 64 S.E. 368. The opinion in that case was written by *Justice H. G. Connor,* later selected because of eminent ability by President Taft to serve in another judicial position. Portions of the charge are as noted in the opinion of *Justice Connor,* quotations from other decisions on this question by this Court.

The charge is not, we think, at variance with the conclusion reached in *Jones v. Tuck, supra.* It accords with rulings in *In re Will of Deyton,* 177 N.C. 494, 99 S.E. 424; *In re Snow's Will,* 128 N.C. 100; *Burney v. Allen,* 125 N.C. 314; *Cornelius v. Cornelius,* 52 N.C. 593; *Bynum v. Bynum,* 33 N.C. 632.

This Court held in *In re Allred's Will,* 170 N.C. 153, 86 S.E. 1047, that a blind person could execute an attested will. The case is likewise reported L.R.A. 1916C with an annotation entitled "Wills: when will deemed attested by the witnesses in the presence of the testator." The annotations and notes to that case will show that the charge here challenged not only conforms to previous decisions of this Court but is in accord with the rule as applied by other courts.

The rule given was the correct one for the jury to apply in determining if the witnesses were in the presence of testator at the time they subscribed their names.

A table had been placed so that testator could see television programs. Attestation was on this table which, in the language of one of the subscribing witnesses, was "right where Mr. Pridgen could see it." The evidence measured by the rule is sufficient to support the jury's finding.

Caveators make no claim of fraud or undue influence touching the

execution of the paper writing. It has no validity, they say, because the statute, G.S. 31-1, permits only those of sound mind to make a will, and Pridgen was not, in October 1957, of sound mind.

Touching the question of mental capacity, propounder offered evidence from some of the heirs, neighbors who were frequent visitors in the home, the nurse, and the personal physician for eleven years who was in attendance during the last illness that Pridgen, in their opinion, on the day the paper was signed, had mental capacity to know who his relatives were, what property he owned, whom he wished to own it after his death, that the paper he signed was his will, and its scope and effect.

Caveators offered testimony from Pridgen's sisters, some of his nephews and nieces, the doctors who treated him while in the hospital in Lumberton, and others that he did not have mental capacity to understand what he was doing.

The conflicting testimony presented a question of fact for determination by the jury under appropriate instructions from the court.

The court charged: "Wherever one alleges that the maker did not have sufficient mental capacity to make it, then the burden is upon such person to satisfy the jury by the greater weight of the evidence of the truth of his contention and to overcome the presumption of sanity after the formal execution has been established."

The exception to the charge is not well founded. The court properly placed the burden of establishing lack of mental capacity on the caveators. *In re Will of Franks,* 231 N.C. 252, 56 S.E. 2d 668; *In re Will of York,* 231 N.C. 70, 55 S.E. 2d 791; *In re Will of Brown,* 200 N.C. 440, 157 S.E. 420; *In re Staub's Will,* 172 N.C. 138, 90 S.E. 119.

Caveators assign as error the rule given to the jury to measure mental capacity. The court in its charge stated the rule in various ways, finally summarizing the test in this language; "It is your duty in passing on the mental capacity of M. W. Pridgen to determine with reference to the will in controversy whether when he signed same he had such mental capacity as enabled him to understand the provisions contained in the paper, the extent of the same, and to know that he was giving the property therein bequeathed or devised to the person named therein and that he desired her to have it as written in the paper, to know his relatives and to know and realize that it was his free will and desire that his relatives should not have any property of his other than in the manner devised, or that devised."

The rule which the court gave the jury to ascertain "sound mind" necessary for a valid will is in substance if not verbatim the rule as stated in numerous decisions by this Court. Typical are: *In re Will of*

York, supra; Carland v. Allison, 221 N.C. 120, 19 S.E. 2d 245; *In re Will of Efird,* 195 N. C. 76, 141 S.E. 460; *In re Creecy,* 190 N. C. 301, 129 S.E. 822; *In re Craven,* 169 N.C. 561, 86 S.E. 587.

Caveators took numerous exceptions to the exclusion of evidence relating to testator's mental capacity. An examination of the exceptions and assignments of error would seem to indicate that the court sustained the objections for failure of the witness to respond to the questions propounded; but in every instance where the evidence was excluded the witnesses were thereafter permitted to express their opinion that the testator did not have requisite mental capacity. Even if there was error in originally excluding the testimony, the error became harmless when the witness thereafter gave his opinion and the reasons for the opinion.

We have examined each of the assignments of error. We find none which in our opinion would justify a new trial.

No error.

VIRGINIA N. NOWELL v. J. WALTER NEAL AND ALFRED HAMILTON.

(Filed 25 February, 1959.)

1. Trial § 31e—

The expression of an opinion by the trial court on an issue of fact to be submitted to a jury is prohibited by statute and is legal error.

2. Judgments § 27c—

The sole remedy against an erroneous judgment is by appeal, and an expression of opinion by the trial court on the evidence is error of law within this rule. G.S. 1-277.

3. Appeal and Error § 52—

Petition to rehear is the sole method of obtaining redress from error in a decision of the Supreme Court.

4. Injunctions § 11—

Finding that plaintiff had repeatedly instituted actions on the same cause of action against the same defendants for the purpose of harassment supports an order enjoining plaintiff from thereafter instituting additional actions on the same causes, the order relating only to actions subsequently instituted and to causes which had been determined by final judgment.

5. Same—

The remedy of a bill of peace to prevent vexatious litigation may be invoked in pending litigation.

6. Appeal and Error § 49—

Findings of fact made by the trial court from conflicting evidence are binding on appeal.

APPEAL by plaintiff movant from *Seawell, J.*, March 1958 Civil Term of WAKE, docketed and argued as No. 449 at the Fall Term 1958.

Plaintiff was in 1951 a patient of defendants. They operated on her in May of that year. In April 1953 she instituted suit against them in the Superior Court of Wake County to recover damages alleged to have resulted from the operation and defendants' failure to properly perform their obligations as physicians and surgeons. The cause was tried at the May 1955 Term of Wake Superior Court. During the trial plaintiff submitted to a voluntary nonsuit as to defendant Hamilton. The cause was submitted to a jury on appropriate issues as to defendant Neal. The jury answered the issue relating to the asserted tortious conduct of defendant Neal in his favor. Plaintiff gave notice of appeal and was allowed ninety days to serve her statement of case on appeal. The case on appeal was settled by agreement of counsel for plaintiff, counsel for defendant, and docketed here in due time. Extensive briefs were filed by counsel for their respective clients. The judgment challenged by the appeal was affirmed in an opinion filed 23 November 1955. See 243 N.C. 175. No petition to rehear was filed.

On 11 April 1957 plaintiff "acting as her own attorney" filed in the Superior Court of Wake County a motion "to set aside the verdict and reopen the above entitled action for a new trial for the following reasons:"

The reasons assigned are partiality on the part of the presiding judge to defendant as indicated by the manner in which he reviewed the evidence and stated the contentions of the parties.

On 23 April 1957 defendants filed answer to plaintiff's motion. They denied her right to reopen and sought affirmative relief based on the assertion that plaintiff was merely seeking to vilify and harass defendants by multitudinous actions and motions involving the identical issue presented and decided in 1955. They prayed for an order "restraining and enjoining plaintiff from the institution of any further legal actions or motions related to, connected with or arising out of the May 1955 Trial of this action."

On 29 April 1957 plaintiff replied to the answer and motion. She reaffirmed her assertion that the trial judge had, in May 1955, violated the provisions of G.S. 1-180. She denied any improper motive on her part and asserted that the pamphlets and circulars published by her

and the actions instituted by her were intended solely to obtain redress for the wrongs done her.

At the request of defendants the motions of plaintiff and defendants were heard at the March 1958 Term of Wake. Judge Seawell rendered judgment denying plaintiff's motion to set aside the judgment and verdict rendered at the May Term 1955.

At the same time he heard defendants' motion for injunctive relief and motions by plaintiff and defendants in other actions based on the operations performed and asserted failure to perform the duties imposed by the relationship of patient and physician.

On the motion for injunctive relief the court made an order which recites: "From the records of this Court, and the admission of the plaintiff at the hearing, the Court finds the following facts:" Summarized, the facts found are: (1) A brief review of the action begun in 1953 culminating in the decision of this Court, reported 243 N.C. 175, and plaintiff's failure to pay the costs as adjudged in that action; (2) Legal actions taken by plaintiff since 1955 consisting of (a) institution of an action against Drs. Neal and Hamilton based on the operation performed in 1951 and in substance the same action terminated adversely to plaintiff as noted above, (b) an action against Dr. Hamilton for damages resulting from the operation of May 1951 and asserted subsequent neglect of his patient. (The court noted that each of those actions were at that time dismissed for the reasons assigned in the judgments rendered in those actions. Appeals in those actions are the subject of separate opinions by the Court.) (c) an action against Drs. Neal and Sinclair on account of an operation performed in August 1951 and made necessary by the operation of May 1951. "This action was tried over a period of ten days at the November Civil Term of 1956 of this Court, following which judgment was rendered in favor of the defendants and the costs taxed against plaintiff, from which no appeal was taken. The costs in said action amounting to $402.50 have not been paid." (d) "In April, 1956, plaintiff instituted an action in Durham County Superior Court by issuing summons against these defendants, six other Raleigh physicians who had been connected with the aforesaid 1951 operation and 1955 trial, and Rex Hospital; after this action was ordered removed to Wake County for trial, plaintiff filed in May, 1956, a complaint against these same defendants and Dr. Clarence Gardner, a Durham physician who had been a witness in the May 1955 trial; said defendant Gardner filed a demurrer to said action, which demurrer was upon hearing at the September 1956 Civil Term of the Durham County Superior Court sustained and said action dismissed. Thereafter, on September 21,

1956, plaintiff instituted in Durham Superior Court a third action against these same parties defendant; again the defendant Gardner demurred to this complaint and such demurrer was sustained, after hearing at the March 1957 Civil Term of the Durham Superior Court. Thereafter, plaintiff filed an amended complaint against these same parties defendant and this action is now pending in Durham County Superior Court and is to be heard initially upon demurrer." (e) "On January 7, 1957, the plaintiff swore out warrants in the City Court of Raleigh charging that in the trial of her action against these defendants in May, 1955, one of her medical witnesses (Dr. Senter) and one of the medical witnesses offered by defendants (Dr. Worth) had given perjured testimony. Upon hearing of these charges in the City Court of Raleigh, the Court entered a finding of no probable cause and dismissed the charges." (3) "The plaintiff has, by her own admission, distributed thousands of letters, pamphlets and other communications throughout the county, state and elsewhere, relating to her operation in 1951 and to the trial of this action in 1955; this literature has attacked and impugned the character and integrity of the defendants herein, the Presiding Judge at the 1955 trial, and various medical witnesses appearing in the trials above referred to."

"It is the opinion of the Court that the plaintiff has exhibited and demonstrated an intention and desire to harass the defendants and other physicians who appeared as witnesses in said trials by vexatious litigation and legal proceedings in connection with the matters and things involved in this cause and matters and things arising out of the trial of this action in May, 1955, to an extent which exceeds the rightful and proper use of the courts and the proper administration of justice.

"That the institution of further legal actions by plaintiff pertaining to these same matters will cause undue expense, inconvenience, embarrassment and harassment to these defendants and to the other persons who appeared as witnesses in the aforesaid actions, and such further actions by plaintiff will result in an unwarranted abuse of court process and will unduly clutter and obstruct the trial docket of this Court, and will cause unwarranted expense to the County.

"That it is contrary to the proper and orderly administration of justice for this Court to be used as a mere forum for the utterance of personal views and prejudices or for the conduct of personal propaganda campaigns.

"The Court is further of the opinion that the plaintiff has heretofore been granted wide and unusual latitude in the presenting and trial of her alleged causes of action and has had complete opportunity

to litigate the causes of action which may have arisen out of the aforesaid operation of May, 1951, the medical treatment connected therewith and the trial of this action in May, 1956."

Based on the findings made the court ordered: "That plaintiff be, and she is hereby permanently enjoined and restrained from the institution of any other or further legal actions or proceedings which are related to, connected with, or arise out of the following matters and things:

"(a) An operation performed on plaintiff by these defendants in May, 1951;

"(b) Medical treatment of plaintiff by these defendants prior to and following said operation in May, 1951;

"(c) The trial in May, 1955, of an action against these defendants.

"This injunction shall not be deemed to apply to or affect any legal actions heretofore instituted by the plaintiff."

Plaintiff excepted to the judgment and order and appealed.

Virginia N. Nowell *in propria persona.*

Smith, Leach, Anderson & Dorsett and Howard E. Manning for defendant appellees.

RODMAN, J. Plaintiff took no exceptions to the findings of fact. Her sole assignment of error reads:

"The plaintiff excepted to and assigns as error THE JUDGMENT AND THE SIGNING THEREOF; THE ORDER AND THE SIGNING THEREOF."

This assignment raises only these questions: (1) Did the judge err in refusing to set aside the verdict rendered at the May 1955 Term and the judgment based thereon which had been affirmed by this Court; and (2) Do the facts found by the court support the order entered?

The basic reason underlying plaintiff's motion for a new trial on the issues raised at the trial had at the May 1955 Term is the asserted expression of opinion by the trial judge adversely to plaintiff in violation of our statute, G.S. 1-180. She contends that the court in various ways improperly influenced the jury to answer the crucial issue against her.

The law imposes on the trial judge the duty of absolute impartiality. The expression of an opinion by the trial court on an issue of fact to be submitted to a jury, being prohibited by statute, is a legal error. *S. v. Swaringen,* 249 N.C. 38; *In re Will of Holcomb,* 244 N.C. 391, 93

S.E. 2d 454; *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332; *S. v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378.

The proper method for obtaining relief from legal errors is by appeal, G.S. 1-277, and not by application to another Superior Court. "In such cases, a judgment entered by one judge of the Superior Court may not be modified, reversed or set aside by another Superior Court judge." *Davis v. Jenkins*, 239 N.C. 533, 80 S.E. 2d 257; *Rawls v. Mayo*, 163 N.C. 177, 79 S.E. 298.

That appeal is the proper method of correcting the asserted errors was recognized by plaintiff and her attorneys on the prior appeal. Reference to the record and briefs on that appeal shows 76 assignments of error, 42 of which are to the charge of the court. The 71st assignment of error then urged for a new trial reads: "For that the court instructed the jury in a manner that was highly prejudicial to plaintiff." Other exceptions point to specific parts of the charge which plaintiff then said and now repeats demonstrated a violation of G.S. 1-180. Approximately ten pages of plaintiff's brief on the prior appeal are devoted to this question. The brief then filed by her stated: "Every charge by the Court in this group - (enumerated assignments of error) demonstrates the partiality of the Court in favor of the defendant and this partiality could not have escaped the notice of the jury."

This Court said: "Careful consideration of plaintiff's assignments of error brought forward and argued in the brief filed in her behalf discloses no error of law deemed of sufficient prejudicial effect to warrant a new trial."

No petition to rehear was filed. That is the appropriate method of obtaining redress from errors committed by this Court. Rule 44 prescribes the procedure for the correction of errors made by this Court. *Robinson v. McAlhaney*, 216 N.C. 674, 6 S.E. 2d 517; *Strunks v. Southern Ry.*, 188 N.C. 567, 125 S.E. 182.

The court correctly denied plaintiff's motion to set aside the verdict and direct a new trial.

Did the court err by enjoining plaintiff from instituting new actions limited to the class enumerated in the order? Based on the findings made, we are of the opinion that sound public policy requires a negative answer and an affirmance of the order.

It is to be noted that the order does not apply to actions then pending but relates only to actions subsequently instituted. It is limited to causes of action in tort which arose more than seven years ago, causes of action long since barred by the statutes of limitations, G.S. 1-52(1)(5), G.S. 1-54, and to an action which, as to the defendant

Neal, was disposed of on its merits more than three years ago and which can by him be pleaded as *res judicata* and as to the defendant Hamilton voluntarily dismissed by plaintiff without any right now to institute a new action. G.S. 1-25.

The order based on the facts found is supported by what this Court has previously said in a factually similar case, *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564. The Court there said: "We are of opinion that the action of his Honor in enjoining the plaintiff from prosecuting further actions on the same cause of action was warranted by the facts. The remedy of a bill of peace to prevent vexatious litigation was well known at the common law. As a rule the remedy has not been sought very often in this State, but the right to ask for it is well established, and it may be invoked in the pending action, and a new action for that purpose is not necessary under our method of procedure. *Featherstone v. Carr,* 132 N.C. 800.

"At common law the remedy was affirmed by a bill in equity enjoining the plaintiff from proceeding in the law courts. One of the earliest cases in which a bill of peace was sought is reported in *Selden's cases,* in Chancery, 18. In this State the distinctions between law and equity procedure have been abolished, but the principles of both remain, and equitable relief may be sought in the same action in which the demand at law is sought to be enforced."

Petitions to rehear were filed. *Clark, C.J.,* in denying the petition, said: "*Interest republicae ut sit finis litium.* When a party, by reason of a nonsuit or otherwise, renews his action on the same ground again and again, before a magistrate, or before the Superior Court, the courts will prevent a defendant (who has some rights) being oppressed or annoyed by vexatious litigation, and will restrain the persistent plaintiff from bringing further action by a bill of peace. Certainly the courts should not permit a party to renew his litigation by petition to rehear unless the petition is well founded, and when it has once decided that it is not, it cannot be again presented by a second, or in this case a third, application to rehear."

The doctrine declared in *Moore v. Harkins* has been recognized and applied to prevent vexatious litigation and to effectively apply the principle of *res judicata* expressed in the phrase "Nemo debet bis vexari pro una et eadam causa." *Favorite v. Railway,* 91 N.W. 2d 459; *Bridgeport Hydraulic Co. v. Pearson,* 91 A 2d 778; *Renfroe v. Johnson,* 177 S.W. 2d 600; *Odom v. Langston,* 205 S.W. 2d 518; *Haskell Nat. Bank v. Ferguson,* 155 S.W. 2d 427; *Ackerman v. Kaufman,* 15 P. 2d 966; *Steinberg v. McKay,* 3 N.E. 2d 23; *Fretwell v. Gillette Safety Razor Co.,* 106 F 2d 728; *Burrough of Milltown v.*

City of New Brunswick, 46 A 2d 562; *Mendel v. Berwyn Estates*, 156 A 324; 28 Am. Jur. pp. 246, 249, 250; 43 C.J.S. 479.

Plaintiff failed to except to the findings of fact made by the court. Notwithstanding this failure on her part, she insists in her brief that the facts found are based on false and perjured testimony. When the court is confronted with conflicting testimony, it should, if possible, harmonize and reconcile the differences; but if that is not possible, it must determine which of the witnesses it will believe; and when the court has found the facts from the conflicting testimony, the findings so made are binding on us.

Affirmed.

VIRGINIA N. NOWELL v. ALFRED T. HAMILTON.

(Filed 25 February, 1959.)

1. Limitation of Actions § 5b—

Where it appears from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of the alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged the cause of action for fraud, the action is barred by G.S. 1-52(9).

2. Judgments § 33a—

Where plaintiff fails to pay the costs awarded against her in a prior action nonsuited, the judgment of nonsuit bars a subsequent action instituted on the same cause even though it be instituted within one year of the nonsuit, since compliance with the conditions of the statute is prerequisite to the right to claim its protection. G.S. 1-25.

APPEAL by plaintiff from *Seawell, J.*, March-April 1958 Civil Term, of WAKE, docketed and argued Fall Term, 1958 as No. 450.

Summons issued in this action on 26 April 1956. Complaint was filed 9 July 1956. Plaintiff alleged the relationship of doctor-patient was established 3 May 1951; on 2 May 1951 X-rays were made of her gastrointestinal tract; defendant, after studying the X-rays, consulting with other doctors, and going over plaintiff's hospital records, carelessly, negligently, and falsely advised her the X-rays showed a defect in her duodenal bulb, necessitating an immediate operation; defendant was aware of the fact that the X-rays did not indicate any defect; relying on the advice of defendant and Dr. Neal, she submitted to an operation on 7 May 1951; and while plaintiff was still in need of

medical attention because of the operation, defendant wrongfully terminated the relationship of doctor-patient.

Defendant, on 26 July 1956, answered. He denied all allegations of negligence or wrongdoing. Affirmatively he pleaded the three year statute of limitations and the institution in 1953 of an action by plaintiff against defendant and Dr. Neal based on the same asserted wrongs, which action was tried in May 1955 and nonsuited as to defendant, with a verdict on the merits in favor of Dr. Neal, followed by judgment which was affirmed on appeal. See *Nowell v. Neal,* 243 N.C. 175, 90 S.E. 2d 247. That verdict and judgment were pleaded as *res judicata.* The pleadings and judgment in that action were made a part of defendant's answer in this action.

On 14 August plaintiff replied to defendant's further defense. She admitted the factual allegations but denied the effect asserted by defendant.

At the March Term 1958 Judge Mallard signed orders permitting the parties to amend their pleadings.

Plaintiff, on 25 March 1958, filed an amended complaint which substantially repeated the allegation of her prior pleadings except the allegation that defendants "carelessly, negligently and falsely" interpreted the X-rays. In her amended complaint she alleged defendant falsely and *fraudulently* represented to plaintiff that the defect was shown in the X-rays, and plaintiff, relying on the false and *fraudulent* representations, submitted to the operation.

Defendant answered and again denied plaintiff's accusations; he again pleaded the three year statute of limitations and the nonsuit taken by plaintiff in May 1955 and her failure to pay the costs there adjudged against her; that the prior action was not *in forma pauperis.*

Defendant at the March-April 1958 Term moved for judgment on the pleadings. Based on the admissions in the pleadings "and plaintiff's admission to the Court in this hearing," Judge Seawell found that the wrongful acts complained of occurred in 1951, that costs had not been paid as provided in the judgment of 1955. He thereupon concluded plaintiff was barred. He dismissed the action. Plaintiff excepted to the judgment and appealed.

Virginia N. Nowell *in propria persona.*

Smith, Leach, Anderson & Dorsett and Howard E. Manning for defendant, appellee.

RODMAN, J. Plaintiff asserts her right to maintain this action on two distinct theories:

First. She says this action is not one for a negligent injury barred at the expiration of three years from the date of the injury, G.S. 1-52 (5), but is an action based on fraud, governed by G.S. 1-52 (9) which fixes the date on which the statute starts to run not as the day of the injury but the day when the fraud was discovered.

We think plaintiff's pleadings point to G.S. 1-52(5) as the applicable statute. *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508; *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320.

Nonetheless, if, as plaintiff asserts, the applicable statute is G.S. 1-52(9), we must ascertain if plaintiff's pleadings establish that her asserted cause of action is barred.

We examine the pleadings to ascertain if plaintiff has fixed the moment when the statute started to run. That moment can in no event be later than the discovery of defendant's asserted wrongful act. The amended complaint which is the first pleadings asserting defendant acted fraudulently does not point to the time of discovery, perhaps for the reason plaintiff had previously fixed the latest date when she could deny knowledge of defendant's asserted wrongful act. In her complaint filed in 1953, included as a part of the pleadings in this action, she had charged defendant: "Failed to take into account the X-ray reports of the plaintiff's condition *which demonstrated* that she was not obstructed." (Emphasis supplied.)

Plaintiff does not now deny that she knew in 1953 that defendant had not correctly evaluated the X-rays. More than three years elapsed between plaintiff's admitted discovery of the wrong and March 1958 when she stopped the clock by filing her amended complaint. *Stamey v. Membership Corp.,* 249 N.C. 90. Her pleadings establish the bar of the statute which she selects as applicable to her case.

Second. Plaintiff's second and somewhat inconsistent position is that the present action is based on the same cause of action stated in 1953 and because the nonsuit suffered in 1955 was voluntary, she is permitted to bring another action based on the same cause within one year from the nonsuit.

Even though plaintiff's cause of action may be otherwise barred, G.S. 1-25 permits a plaintiff who has been nonsuited to bring another action to redress the asserted wrong. But the statute annexes two conditions to the right: (1) The new suit must be brought within one year from the nonsuit. (2) Plaintiff must pay the costs awarded against him in the prior action if he did not sue as a pauper. Plaintiff in this action admittedly has not paid the costs awarded against her. Defendant pleads that failure to deprive plaintiff of the benefit of the statute.

Plaintiff, having elected not to comply with the statute, is not entitled to claim its protection. *Osborne v. R.R. Co.*, 217 N.C. 263, 7 S.E. 2d 500; *Loan Co. v. Warren*, 204 N.C. 50, 167 S.E. 494; *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32.

Affirmed.

VIRGINIA N. NOWELL v. DR. WALTER NEAL AND DR. ALFRED HAMILTON.

(Filed 25 February, 1959.)

APPEAL by plaintiff from *Seawell, J.*, March-April 1958 Civil Term of WAKE, docketed and argued at the Fall Term as No. 453.

This action was begun 1 May 1956. The complaint alleges plaintiff became a patient of defendants in 1951, negligence on the part of defendants in interpreting X-rays of her intestinal tract causing her to consent to a needless and negligently performed operation and a more extensive and unauthorized operation.

Defendants by answer denied the allegations of negligence and wrongful conduct. As affirmative defenses they pleaded: (a) the lapse of three years from the accrual of the cause of action and the provisions of G.S. 1-52 as a bar; (b) the provisions of G.S. 1-54 as a bar; and (c) the institution in 1953 of an action based on the wrongs asserted in this action, trial of that action at the May Term 1955 resulting in (1) judgment of nonsuit as to defendant Hamilton, (2) verdict on the merits in favor of defendant Neal with a judgment on the verdict, which judgment was affirmed by this Court in December 1955. See 243 N.C. 175. Defendants attached copies of the pleadings and judgment in the prior action to their answer in this action. They claimed the benefit of that judgment to defeat this action.

Plaintiff replied. She admitted the institution of the prior action resulting in judgment as shown by the exhibits attached to the answer. She denied the asserted legal effect of the prior judgment.

Defendants moved for judgment on the pleadings. Judge Seawell, examining the pleadings, found the identity of the actions and nonpayment of costs adjudged against plaintiff in the prior action. He adjudged the defenses appearing on the face of the pleadings valid and dismissed the action.

Virginia N. Nowell *in propria persona.*

Smith, Leach, Anderson & Dorsett and Howard E. Manning, for defendant, appellees.

PER CURIAM. This action grows out of the same basic facts considered in *Nowell v. Neal, ante,* 516, and *Nowell v. Hamilton, ante,* 523. No new legal question is presented. The judgment rendered conforms with settled principles of law. Hence it is

Affirmed.

EARL HARTSELL, EMPLOYEE v. THERMOID COMPANY, SOUTHERN DIVISION; LIBERTY MUTUAL INSURANCE COMPANY AND EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN.

(Filed 25 February, 1959.)

1. Appeal and Error § 49—

Findings of fact supported by evidence are conclusive on appeal.

2. Master and Servant § 40f—

Upon disability from asbestosis, it must be assumed that even the last five days the employee was exposed to asbestos dust contributed to the injury, and such presumption supports a finding to that effect.

3. Master and Servant § 53e—

The 1957 amendment to G.S. 97-57 became effective 1 July, 1957, and where an employee ceases work because of disability from asbestosis prior to that date, the amendment is not applicable in determining liability for such disability.

4. Same—

G.S. 97-57 is clear as to which employer is liable for disability from asbestosis, the statute providing that the employer in whose service the employee was last exposed to the hazards of the disease for as much as thirty working days, or parts thereof, within seven consecutive calendar months, should be liable, but in those instances in which different insurance carriers are on the risk during such thirty-day period, the statute, prior to the 1957 amendment, makes no provision as to the respective liabilities of the insurers, and therefore their liabilities must be determined in accordance with the policy contracts.

5. Constitutional Law § 10—

The Supreme Court is not a law-making body, but must interpret the law as written.

6. Constitutional Law § 7: Master and Servant § 45—

The General Assembly may not delegate its authority to legislate to a court or commission, and a decision or rule of the Industrial Commission does not have the force of law.

7. Master and Servant § 53e—

Where an employee becomes disabled from asbestosis while working

for a single employer, but different insurers are on the risk during the employee's last thirty days exposure to the hazards of the disease, the carrier last on the risk, even though it was on the risk for only the last five days the employee worked, is solely liable for the award under the provision of the policy contracts that each policy should apply only to injury by disease of which the last day of the last exposure occurs during the policy period, there being no statutory provision governing the respective liabilities of the insurers in such instance prior to the 1957 amendment to G.S. 97-57.

8. Contracts § 12—

A party will not be relieved from its contractual obligations in the absence of mistake, duress, illegality or fraud.

9. Master and Servant § 53e—

Under the Workmen's Compensation Act, an employee has the right to enforce against the insurer the contract of insurance made for his benefit. G.S. 97-98.

10. Master and Servant § 55d—

An exception to the failure of the Industrial Commission to make a pertinent finding supported by evidence must be sustained.

HIGGINS, J., dissenting.

WINBORNE, C. J., concurs in dissent.

APPEALS by defendants, Thermoid Company, Southern Division; Liberty Mutual Insurance Company and Employers Mutual Liability Insurance Company of Wisconsin, from *Pless, J.*, May Special Term, 1958 of MECKLENBURG, docketed and argued as No. 245 at the Fall Term, 1958.

This is a proceeding under Workmen's Compensation Act to recover compensation for disability from asbestosis, an occupational disease.

Claimant was regularly and remuneratively employed by Thermoid Company, Southern Division, from 1919 through 11 January, 1957, and was at all times during the employment exposed to inhalation of asbestos dust. He was so exposed in said employment in North Carolina for more than two years within the 10 years immediately preceding his last exposure; and was so exposed as much as 30 working days, or parts thereof, within 3 calendar months immediately preceding his last exposure on 11 January, 1957. Since that date he has not been employed and has earned nothing.

Claimant was first advised by competent medical authority that he had asbestosis in 1942. He was periodically examined by the Division of Industrial Hygiene of the State Board of Health and was advised by it on 20 April, 1956, that his asbestosis had reached the second

stage and that he should get out of the dusty trade entirely. He continued to work in the trade until 12 January, 1957, when he voluntarily removed himself from such employment. At this time he had 90% total disability on account of the disease.

The last 30 working days, or parts therof, of claimant's injurious exposure consisted of 25 working days prior to 1 January, 1957, and 5 working days in January, 1957. He worked January 7, 8, 9, 10, and 11, 1957. During the first 6 days in January he conferred with the Industrial Commission and doctors in Raleigh.

Employers Mutual Liability Insurance Company of Wisconsin (hereinafter referred to as Employers Company) was insurance carrier for the employer continuously from 1941 through 31 December, 1956. The Liberty Mutual Insurance Company (hereinafter referred to as Liberty Company) was insurance carrier for the employer at all times subsequent to 31 December, 1956.

The Industrial Commission awarded compensation to claimant and assessed five sixths thereof against Employers Company and one-sixth against Liberty Company.

From judgment of the Superior Court affirming the findings of fact, conclusions of law, and award of the Commission, defendant Thermoid Company, and the carriers, Employers Company and Liberty Company, appealed, assigning error.

Robert L. Scott, for plaintiff, appellee.

Carpenter & Webb, for Employers Mutual Liability Insurance Company of Wisconsin and Thermoid Company, appellants.

Helms, Mulliss, McMillan & Johnston for Thermoid Company and Liberty Mutual Insurance Company, appellants.

MOORE, J. All appellants concede that plaintiff, claimant, is entitled to compensation benefits as provided by the Workmen's Compensation Act. The sole question before us is: By whom shall compensation be paid?

The findings of fact to which appellants except are supported by evidence and are therefore conclusive and binding. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668.

Liberty Company seriously contends that there is no evidence to support the finding that claimant was injured by the exposure during the 5 days he worked in January, 1957. There is evidence that he was exposed to inhalation of asbestos dust during this period and that he was 90% disabled when he ceased work. To have found that he was not injured by this exposure, "the Commission would have been

forced to accept the view that . . . there was no longer any sound tissue in the lungs to be scarred. We must assume, because he still lived and breathed, he was capable of further injury." *Haynes v. Producing Co.*, 222 N.C. 163, 22 S.E. 2d 275.

To reach a solution of the question involved in this case, G.S. 97-57 must first be considered and construed. Prior to July, 1957, it was as follows:

> "In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.
> "For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious."

G.S. 97-57 was amended by section 7, Chapter 1396 of the Session Laws of 1957. This amendment did not become effective until 1 July, 1957. This cause of action arose 11 January, 1957. So the amendment has no application to this case. *Oaks v. Mills Corporation*, 249 N.C. 285, 106 S.E. 2d 202.

The case at bar would have presented no problem had the amendment been effective on 11 January, 1957. We must examine G.S. 97-57 as it existed at the time the cause of action accrued and as set out above.

Under this statute the "employer in whose employment the employee was last injuriously exposed . . . shall be liable." And "when an employee has been exposed . . . for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious." It is clear that liability falls upon that employer in whose service the employee was "last injuriously exposed," that is, "exposed for as much as thirty working days, or parts thereof, within seven consecutive calendar months." As between employers, no difficulty arises in determining the one responsible. "It takes the breakdown practically where it occurs." *Haynes v. Producing Co., supra.* See also *Stewart v. Duncan*, 239 N.C. 640, 80 S.E. 2d 764, and *Bye v. Granite Co.*, 230 N.C. 334, 53 S.E. 2d 274.

Plaintiff has had only one employer—Thermoid Company. So the defendant Thermoid Company is liable for plaintiff's compensation.

The defendant does not deny this, but contends that one or both of the insurance carriers should pay the compensation. With this we agree.

G.S. 97-57 provides that "the insurance carrier, if any, which was on the risk when the employee was *so* last exposed . . . shall be liable." (Emphasis ours) This plainly provides that the insurance carrier which was on the risk during the 30 working days, or parts thereof, which constituted injurious exposure, shall be liable. Employers Company was on the risk only 25 days during the exposure in question, and Liberty Company only 5 days. The statute provides that exposure for less than 30 working days, or parts thereof, "shall not be deemed injurious."

Liberty Company contends that it is not liable because 5 days do not constitute injurious exposure and it was, therefore, not on the risk when the plaintiff was "last injuriously exposed"; and that it was not liable because, as between it and Employers Company, the liability should fall on Employers Company, which was on the risk for *a* period of 30 working days within the last 7 months of the employment. Liberty Company also contends that, at the very least, the liability should be prorated between the carriers as set out in the award, since they, together, were on the risk when plaintiff was "last injuriously exposed," and the ratio of time on the risk as between them was that established by the award.

Employers Company contends that it should not be liable because 25 working days do not constitute "injurious exposure" and it was, therefore, not on the risk when plaintiff was "last injuriously exposed." It further contends that by the terms of the policy of insurance issued by Liberty Company to defendant, employer, Liberty Company is solely liable.

It must be borne in mind that G.S. 97-57 defines "last injurious exposure" for the purpose of determining the responsible employer. It applies to the insurance carrier only when the carrier was on the risk when the employee was "last injuriously exposed." The General Assembly did not have in mind a dispute, such as this case presents, between insurance carriers. If the statutory definition of "last injurious exposure" is literally applied as intended, neither of the carriers is liable so far as G.S. 97-57 is concerned. But, if we stop here, we have the anomalous situation of the employer having obtained and paid for insurance that does not protect employer or employee.

It is necessary that we answer some questions raised by the contentions of the carriers, Liberty Company and Employers Company.

1. Is it required that the last 30 working days during the last seven months of employment be considered "last injurious exposure" in

preference to any other 30 consecutive working days during the seven months? In other words, may the Commission arbitrarily select 30 consecutive working days, the last day of which would be in December, 1956, so as to have the "last injurious exposure" at a time when Employers Company was on the risk? As between employers, the statute does exactly this sort of thing. As between insurance carriers, the Workmen's Compensation Act gives no answer to the question. But it would be inconsistent and lead to utter confusion if there were a different period of "last injurious exposure" for employers and insurance carriers. Recognizing this, the General Assembly in the Amendment of 1957, above referred to, placed the carrier liability on a different basis. The Workmen's Compensation Act is primarily for the protection and benefit of the employee, and he is entitled to know with certainty when his right of action accrues. We hold that the last 5 days (in January, 1957) of plaintiff's employment must be included in the "last injurious exposure."

2. May the two carriers, Employers Company and Liberty Company, together, be considered "the insurance carrier . . . which was on the risk when the employee was . . . last (injuriously) exposed"? Such construction is not entirely unreasonable and seems equitable and morally right. It is in accord with the result in *Mayberry v. Marble Co.*, 243 N.C. 281, 90 S.E. 2d 511, but is not the basis for the decision therein. The Industrial Commission followed the *Mayberry* case in making its award in the instant case. The difficulty is that the Workmen's Compensation Act does not so provide and the General Assembly apparently did not consider that it had made provision for such a problem as presented in the case at bar. Hence the amendment of 1957, referred to above and inapplicable in this case.

The Court is not a law-making body—it interprets the law as written. The General Assembly may not delegate its authority to legislate to a court or commission. A decision or rule of the Industrial Commission does not have the force of law. *Motsinger v. Perryman*, 218 N.C. 15, 9 S.E. 2d 511; *Haynes v. Producing Co., supra.*

The two insurance carriers will not be considered as having been jointly on the risk in the case at bar.

3. Is Liberty Company solely liable in this case under the terms of the policy issued by it to defendant, employer? Where the act does not define the responsibility of the insurance carrier to insured and to employee, the insured must look to his contract or policy of insurance. It is true all relevant provisions of the Workmen's Compensation Act become a part of each policy of insurance procured pursuant

to the Act. G.S. 97-99. But with respect to the query in this case, there is no relevant provision of the law.

Both the policy of Employers Company which expired 31 December, 1956, and the policy of Liberty Company in effect from and after said date, contained the following:

> "This policy applies only to injury . . . by disease caused or aggravated by exposure, of which the last day of the last exposure in the employment of the insured, to conditions causing the disease occurs during the policy period."

The last day of plaintiff's "last injurious exposure" occurred during the policy period of the policy issued by Liberty Company. The provision, therefore, excludes Employers Company from liability and places liability squarely upon Liberty Company. The courts will not relieve a party from its contractual obligations in the absence of mistake, duress, illegality, or fraud. Liberty Company is solely liable in this case.

Under the Act, plaintiff has the right to enforce the insurance contract made for his benefit. G.S. 97-98.

The decision reached by us is in accord with the authorities in other jurisdictions in like and similar cases. *Trimboli v. Instrument Co.*, 66 N.Y.S. 2d 39; *Insurance Co. v. Industrial Commission*, 157 P. 2d 800; *Insurance Corporation v. Merritt*, 75 N.E. 2d 803; *Insurance Co. v. McCormick*, 217 N.W. 738. We find no cases *contra* unless *Mayberry v. Marble Co., supra,* may be so considered.

Employers Company's assignment of error No. 4 was addressed to the failure of the Industrial Commission to find as a fact that the insurance policy issued to defendant employer by Liberty Company contained the provision above quoted in this opinion. The policy in question was admitted in evidence and sent as a part of the case on appeal. The failure to find this essential fact was error.

This case is remanded to the Industrial Commission, and the Commission shall modify its findings of fact, conclusions of law and award in accordance with this opinion, and further proceed in this case as provided by the Act.

Liberty Company shall pay the costs of the appeal.

On defendant employer's appeal—Affirmed.

On Liberty Company's appeal—Modified and affirmed.

On Employers Company's appeal—Error and remanded.

HIGGINS, J., dissenting.

The amendment to G.S. 97-57 was intended to take care of the

uncertainty as to carrier liability discussed in *Mayberry v. Marble Company,* 243 N.C. 281. Decision in the instant case must be under the Act as it existed before the amendment.

Asbestosis is of slow onset. The injurious effect of asbestos dust is almost imperceptible in its buildup to the point of disability. For that reason I think the statute said exposure for less than 30 days shall not be deemed injurious.

The claimant worked for the employer from 1919 until January 11, 1957. Employers Mutual was on the risk from 1941 until December 31, 1956. For 11 days in January, 1957, Liberty Mutual was on the risk. During this 11-day period claimant actually worked five days. In view of the provision that exposure for less than 30 days shall not be deemed injurious, I think the employer's liability cannot be fixed during any period of employment for less than 30 days, and that, therefore, the employer's liability must, for that period, antedate January 11, 1957, when the claimant quit work; and that the injurious exposure related back to a time when Employers Mutual was on the risk.

The claimant was found to have the disabling injury and to have quit work on January 11, 1957. The last 30 days exposure period was in December, 1956. Suppose the claimant had not worked at all after December 31, 1956; or that he had changed to another employer with a new insurance carrier beginning January 1, 1957. Could it be said that the new employer is liable? I agree the employer is bound in any event, but I think the Employers Mutual and not Liberty Mutual was the carrier on the risk when the employer became liable.

WINBORNE, C. J., concurs in dissent.

HENRY B. HOOD v. QUEEN CITY COACH COMPANY, A CORPORATION, AND ASHEVILLE UNION BUS STATION, INC., A CORPORATION.

(Filed 25 February, 1959.)

1. Negligence § 19b(1)—

Plaintiff is entitled to have the issue of negligence submitted to the jury if plaintiff's evidence and legitimate inferences therefrom tend to show that defendant breached a legal duty which it owed plaintiff and that such breach of duty, or failure to perform, proximately caused plaintiff's injury.

2. Negligence § 4f(1)—

One who enters the premises of another without permission or other right is a trespasser; one who enters with permission but solely for his own purposes is a licensee; one who enters by invitation, express or implied, is an invitee.

3. Negligence § 4f(4)—

The owner of land owes the duty to trespassers not to injure them wilfully or wantonly.

4. Negligence § 4f(3)—

The owner of land owes the duty to licensees not to injure them wilfully or wantonly and also not to increase the danger by affirmative and active negligence in the management of the property.

5. Negligence § 4f(2)—

The owner of land owes the duty to invitees to keep his premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions so far as they can be ascertained by reasonable inspection and supervision.

6. Negligence § 4f(1)—

A pedestrian, while walking to the rear of a bus station along the paved portion of the property of a bus company, customarily used by pedestrians and patrons, lying between a paved alley and the bus company's office and shops, and in returning to his car along the same route, in making a trip to the bus station for the purpose of buying a ticket, is an invitee.

7. Same—Evidence held sufficient to be submitted to jury on issue of negligence and not to disclose contributory negligence as matter of law on part of invitee.

Evidence that a bus company, on a paved portion of its property between a public alley and its offices and shops at the rear of a bus station, maintained an excavation in the steep grade in order to provide a level entrance to its office, that the excavation was three feet below the driveway at one end, with concrete sidewalls a few inches above the level of the driveway, and that it failed to maintain guardrails at the excavation as required by municipal ordinance, and that an invitee, in returning to the street from the rear of the bus station at nighttime, in avoiding a backing bus, fell into the excavation to his serious injury, and that the lights from the street and the rear of the bus station, etc., illuminated the surface of the driveway but not the excavation, *is held* sufficient to be submitted to the jury on the issue of the bus company's negligence and not to disclose contributory negligence as a matter of law on the part of the invitee.

8. Negligence § 19c—

The burden of proving contributory negligence is on defendant, and nonsuit on the ground of contributory negligence is proper only when no other inference is reasonably deducible from plaintiff's evidence.

9. Appeal and Error § 42—

An assignment of error to the statement of contentions cannot be sustained when no objection was lodged at the time and no request made for correction.

10. Negligence § 20—

Where photographs of the scene are admitted as substantive evidence without objection, and such photographs tend to show that the wall around a depression on defendant's property had been shattered at both ends and iron upright pipes broken off, and there is further evidence that a municipal ordinance required a railing or fence around depressions, there is sufficient evidence of a change of condition in the premises to support an instruction on this aspect of the case.

APPEAL by defendant Queen City Coach Company from *Patton, J.*, October-November, 1958 Term, BUNCOMBE Superior Court.

Civil action against the appellant and Asheville Union Bus Station, Inc., to recover damages for personal injuries alleged to have been caused by the actionable negligence of the defendants by reason of the dangerous and unsafe manner in which they maintained the premises on and adjacent to the Union Bus Station.

The defendants, by answer, denied negligence and pleaded contributory negligence as a defense.

The plaintiff offered evidence tending to show that his injury occurred about 8:30 p. m. on December 20, 1955, near the Union Bus Station in the City of Asheville. The station is located on the east side of Coxe Avenue (a north and south street). The front entrance to the waiting rooms and ticket counters is from the avenue; however, there is at least one double-door entrance at the rear. The area immediately to the north and to the west (rear) of the station is paved, and used as loading ramps for the buses.

Interurban Place (an east and west street) and Coxe Avenue intersect about 90 feet south of the station. Between the station and the intersection is a vacant space (three lots) fronting on the avenue and extending backward to a depth of about 100 feet. This vacant space has Interurban (street) as its southern boundary. Along its rear, or western boundary, is a public alley from Interurban to the surfaced area in the rear of the bus station. Bordering the alley on the west and extending northward to the rear of the bus station is a wedge-shaped vacant lot, No 7, owned by the defendant. The entire surface of Lot No. 7 is paved. It is about 38 feet wide on Interurban and about 10 or 12 feet wide at the narrow, or north end near the station. Paved Lot No. 7, the paved alley, and the paved area in the rear of the bus station merge into each other. They form a

driveway 75 to 100 feet long over which the buses travel between Interurban and the loading ramps at the rear of the station.

The plaintiff's evidence tended to show the public, and especially pedestrians, had been accustomed to use this driveway for the purpose of entering and leaving the rear entrance to the bus station, and for some considerable period of time prior to the plaintiff's injury he had knowledge of this custom, though he had not previously entered the station by this route.

In addition to Lot No 7, the appellant owned a large brick building in which it maintained its offices and repair shops. This building fronted on Interurban and covered (among others) all of Lot No. 6 which adjoined No. 7 on the west. From Interurban there is considerable elevation or upgrade to the station. A narrow excavation out of Lot No. 7 had been made along the east wall of appellant's office building extending from Interurban to a point just beyond the office door. This narrow excavated area was used as a level walk from Interurban to the office. Retaining walls of concrete enclosed the east side and north end of this walk. By reason of the upgrade toward the station, the walk at the north end was about three feet below the surface of the driveway. The concrete sidewall of the walk was a few inches above the level of the driveway and "looked like a street curb" according to plaintiff's testimony.

The plaintiff testified that he found a parking place for his automobile on the north side of Interurban just west of the entrance to the driveway. He walked over this driveway to the station, entered from the rear, purchased, for later use, a round-trip ticket to Charlotte over appellant's lines. Returning to his automobile over the same route, when he was opposite the appellant's office door, a bus started up behind him, and in order to be out of its way, he took one or two steps to his right; and thinking the concrete curb around the walk was the curb to the street, he stepped on it and fell into the pit, sustaining serious and permanent injuries. He further testified the lights from Interurban, from the rear of the bus station, and from other buildings illuminated the surface of the driveway, but did not illuminate the pit which was below the driveway surface. There was no guardrail or other warning device, or notice indicating danger. Over a long period of time he had seen pedestrians use the driveway to the station in the same manner he attempted to use it. There were no signs, warning devices, or notices of any kind that its use by pedestrians was other than safe and approved by the owner. There was a "no admittance" sign at the entrance door to the repair shop, but under it appeared, "apply at office," with an arrow pointing along the driveway

to the office door where the injury occurred. However, the plaintiff admitted on cross-examination that the office door was closed and his only business on the premises was to purchase his ticket and return to his automobile.

The plaintiff introduced in evidence a contract between the appellant and other bus lines on the one hand, and the Asheville Union Bus Station on the other, to the effect that the latter would furnish all necessary terminal facilities. This contract was duly approved by the North Carolina Utilities Commission and was in force at the time of plaintiff's injury. The plaintiff also introduced two ordinances of the City of Asheville, as follows:

> "SECTION 517. RAILINGS PROVIDED. The owner of every lot, piece or parcel of ground within the City of Asheville that is more than 18 inches above or below any street, lane, alley or public footway of said City, and bordering thereon, shall forthwith erect and at all times maintain along the edge of such lot, piece or parcel of ground next to said street, lane, alley, or footway, a secure railing or fence sufficiently high and strong enough to keep persons or animals from falling from such lot, piece or parcel of ground into said street, lane, alley or footway, or from said street, lane, alley or footway into such lot; and any person violating any of the provisions of this section shall be subject to a penalty of $50.00 for each and every such offense.
>
> "SECTION 518. EXCAVATIONS MUST BE PROTECTED BY RAILINGS. No owner, occupant or tenant in possession of any lot, piece or parcel of ground within the City of Asheville shall have, make or maintain on such lot, piece or parcel of ground, any well, hole or other excavation more than three feet deep, unless the same is securely enclosed by railings or otherwise to keep persons or animals from falling into the same; and any person violating any of the provisions of this section shall be subject to a penalty of $25.00 for each and every such offense."

The plaintiff introduced a number of enlarged photographs and a scale map of the area involved. All were introduced generally and without any limitation or request for limitation as to their use. These exhibits were sent up and are a part of the case on appeal. Their content will be referred to in the opinion.

At the close of the evidence the defendants made motions for involuntary nonsuit. Judgment of nonsuit was entered as to Asheville Union Bus Station, from which there was no appeal. The appellant, after resting without offering evidence, moved for judgment of non-

suit and excepted to the court's refusal to allow it. Issues of negligence, contributory negligence, and damages were submitted to the jury and all were answered in favor of the plaintiff. From the judgment on the verdict, the defendant Coach Company appealed.

Harkins, Van Winkle, Walton & Buck, By: Herbert L. Hyde, for plaintiff, appellee.

J. Y. Jordan, Jr., John F. Ray, Coble & Behrends, By: Samuel Behrends, Jr., for defendant, appellant.

HIGGINS, J. Appellant's assignments of error present these questions of law: (1) Is the evidence sufficient to support the issue of negligence? (2) Does contributory negligence appear from the evidence as a matter of law? (3) Does reversible error appear in the challenged portions of the court's charge?

The plaintiff was entitled to have the issue of negligence submitted to the jury if his evidence and the legitimate inferences from it tended to show the defendant breached a legal duty which it owed to him, and that the breach of, or failure to perform, that duty proximately caused his injury. *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297; *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727; *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463.

The plaintiff contended he was an invitee on the appellant's premises for the purpose of purchasing transportation over its lines; that his mission was for the mutual benefit of the appellant and himself; that the appellant was under the legal duty (1) to maintain its premises in a reasonably safe condition for the invited use, and (2) to give warning of hidden dangers; that the defendant breached that duty and thereby caused plaintiff's injury.

On the other hand, the defendant contended that at the time of the plaintiff's injury he was a trespasser, or, if not a trespasser, was on its premises as a licensee; that by entering the premises for his own purposes he assumed all risk incident to the condition of the premises at the time, and that the defendant could be held liable only for wilful and wanton injury, and that the evidence fails to disclose such injury.

The court charged fully as to the owner's liability for injury resulting from the condition of the premises according as the jury might find the plaintiff to have been a trespasser, a licensee, or an invitee. The charge was in accordance with the rules laid down in *Thompson v. DeVonde,* 235 N.C. 520, 70 S.E. 2d 424; *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; *Lowe v. Gastonia,* 211 N.C. 564, 191 S.E. 7; *Brigman v. Construction Co.,* 192 N.C. 791, 136 S.E. 125; *Ellington v. Ricks,* 179 N.C. 686, 102 S.E. 510; *Fortune v. R.R.,* 150 N.C. 695, 64 S.E. 759.

As affecting liability for injury resulting from the condition of premises in private ownership or occupancy, one who enters without permission or other right is a trespasser. One who enters with permission but solely for his own purposes is a licensee. One who enters by invitation, express or implied, is an invitee. *Thompson v. DeVonde, supra; Pafford v. Construction Co., supra; Porchey v. Kelling* 185 S.W. 2d 820 (Mo.); *Lange v. St. Johns Lumber Co.,* 115 Ore. 337, 237 P. 696; *Smith v. Burks,* 305 S.W. 2d 748 (Tenn.); *Tahan v. Wagaraw Holding Co.,* 101 A. 2d 38 (N.J.); "The duty owed trespassers is that they must not be wilfully or wantonly injured." *Jessup v. R.R.,* 244 N.C. 242, 93 S.E. 2d 84. "As to a licensee the duties of a property owner are substantially the same as with respect to a trespasser. But a vital difference arises out of conditions which impose upon the owner of property the duty of anticipating the presence of a licensee. If the owner, while the licensee is upon the premises exercising due care for his own safety, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such active and affirmative negligence." *Wagoner v. R.R.,* 238 N.C. 162, 77 S.E. 2d 701. "The proprietor of a store is not an insurer of the safety of customers while on the premises. But he does owe to them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and 'to give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision.'" *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64.

The evidence disclosed that by contract arrangement approved by the North Carolina Utilities Commission, the Asheville Union Bus Station furnished terminal facilities for the appellant and other bus lines entering the City of Asheville, sold their tickets, accepted, transferred, baggage, mail, freight, etc., and performed the functions for each line which otherwise would have necessitated separate terminals. The evidence was sufficient, therefore, to support a finding it was to the mutual benefit of the parties for the plaintiff to enter the bus station to purchase a ticket to Charlotte over the defendant's line. From the plaintiff's parked automobile the short, direct, and frequently used approach to the bus station was over the paved surface of Lot No. 7 and the public alley which were so merged as to offer a continuous paved route from plaintiff's automobile to the rear doors of the bus

station; that the public, especially pedestrians, had so used this approach for a long period of time; that no notice or warning existed anywhere that the public was not expected to use it or that its use involved any except obvious hazards. Notice on appellant's building, "apply at office," with the arrow pointing along the driveway, tended to indicate its use by those having business was invited. Also, the officials of the company each time they entered the office door were confronted with the conditions tending to show danger. The evidence permitted the finding the plaintiff was an invitee with the legal obligation on the defendant (1) to maintain the premises in a reasonably safe condition for the legitimate use of the invitee, and (2) to provide safeguards against injury by reason of depressed holes, pitfalls, or other hidden dangers. Failure to do either was negligence. *Batts v. Telephone Co.*, 186 N.C. 120, 118 S.E. 893.

The evidence disclosed that lights from the street and from the bus station illuminated the surface of the driveway but did not penetrate into the walk and did not show that danger existed by reason thereof. The defendant permitted the jury to decide the issue of negligence (as well as contributory negligence and damages) on the basis of plaintiff's evidence alone. The evidence was sufficient to support a finding of actionable negligence. *Williamson v. Clay, supra.* The jury having found actionable negligence on the part of the defendant, in order to defeat recovery the burden devolved upon it to show the contributory negligence of the plaintiff. "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; *Bemont v. Isenhour*, 249 N.C. 106, 105 S.E. 2d 431; *High v. R.R.*, 248 N.C. 414, 103 S.E. 2d 498; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19. Under the rules laid down in the cases, therefore, we must hold that the evidence of contributory negligence does not appear as a matter of law.

Failing in the effort to have the judgment reversed on the first two grounds assigned, nevertheless the defendant has urgently contended that it is entitled to a new trial for alleged errors in the charge. Some of the assignments relate to the statement of the plaintiff's contentions. No objection was lodged at the time and no request was made for correction. The principles of law were correctly stated and correctly applied to the evidence in the case.

The defendant, however, in the brief and on the oral argument, has contended: "In those portions of the charge the court submitted to the jury the possibility of a changed condition in the premises after long public use. No evidence to support submission of this question

to the jury appears in the record." The court's charge as to changed conditions was evidently taken from the third paragraph of the opinion by *Stacy, J., (later C.J.,)* in the case of *Batts v. Telephone Co., supra.* Unless the record discloses evidence of a change in condition, the charge, perhaps, would be objectionable. However, we think there was evidence in the case tending to show a change of condition. The plaintiff offered and the court admitted in evidence generally, without qualification, four enlarged photographs of the place where the injury occurred. Of course, upon objection the admission of these photographs should, and no doubt would have been restricted and their use limited to the purpose of illustrating the testimony. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916, and cases cited. However, no objection was made to the admission of the photographs and map as substantive evidence. Counsel on both sides were able and painstaking trial lawyers. We may assume that each, for his own reason, was satisfied to have the photographs and map introduced as substantive evidence. The examination and cross-examination with respect to them tend to confirm this view.

These photographs showed the curb or wall around the depression to have been shattered at both ends and iron upright pipes broken off. Parts of these pipes remained imbedded in the concrete. These broken pipes, in view of the city ordinance requiring a railing or fence around depressions, were sufficient to permit the inference that at some time a railing may have been installed and later broken. From the judge's charge it appears that such had been the contention of plaintiff's counsel.

In addition, the record fails to show when the excavating for the walk was done — whether before or after the surfacing of Lot No. 7 out of which it was carved, or whether in fact there had been a protecting rail around the walk. These matters were within the peculiar knowledge of the appellant. Its silence no doubt furnished plaintiff's counsel some basis for the contention there had been at some time a change in condition — a broken and unrepaired rail leaving the pit unprotected. In this view of the evidence, a permissible one we think, the court's charge as to change of condition was permissible, if not required.

In the judgment of the Superior Court of Buncombe County, we find No Error.

MRS. LOU BELLE DAVIS (EMPLOYEE) v. DEVIL DOG MANUFACTURING COMPANY (EMPLOYER); AND NATIONWIDE MUTUAL INSURANCE COMPANY (CARRIER.)

(Filed 25 February, 1959.)

Master and Servant § 40c—

Where the employer provides a parking lot on its premises next to its factory and permits its employees to park their cars in the lot, an injury received by an employee in a fall while she was walking from her parked car on her way to the other part of the employer's premises where she actually worked, is an injury arising out of and in the course of her employment within the purview of G.S. 97-2(f).

APPEAL by defendants from *Crissman, J.*, July Assigned Civil Term 1958 of WAKE. This case was argued as Case No. 461 at the Fall Term 1958.

A proceeding for workmen's compensation.

The Hearing Commissioner's findings of fact and conclusions of law are summarized: The jurisdictional facts found were based on a stipulation of the parties. On 26 June 1957 Mrs. Lou Belle Davis had been an employee of the Devil Dog Manufacturing Company for about 15 months. Her employer's plant is situate on U. S. Highway 64 east of the Town of Zebulon. Claimant lives near the Town of Middlesex, and drove her husband's automobile to and from work. No part of the cost of her transportation to and from work was provided by her employer. During her entire time of employment she parked the automobile in a parking lot provided by her employer. This parking lot is about 70 feet from the entrance to her employer's plant. There is a walkway of red clay and loose gravel leading from the parking lot to the plant's entrance. About half way from the parking lot to the plant's entrance is a trench or ditch crossing this walkway, and an incline leads down into this trench or ditch from both directions of the walkway. All of the above property is under the maintenance and supervision of the employer. Approximately 75 per cent of the employees of the Devil Dog Manufacturing Company used this parking lot with its consent and acquiescence.

The work day of claimant and her fellow employees is from 7:30 a. m. to 4:00 p. m., and these are the only hours for which they are paid. All employees must be at their machines ready for work at 7:30 a. m.

On 26 June 1957 about 7:25 a. m. claimant parked her automobile in the usual manner in the parking lot provided by her employer, got out of the automobile, and walked east to the plant entrance. Due to prior rain the walkway was wet. As she was walking down the incline

from the parking lot, and when she was about 30 feet from her automobile and 40 feet from the plant entrance, her foot slipped and she fell, breaking her right ankle, which was an injury by accident arising out of and in the course of her employment.

At the date of the hearing claimant had not reached the end of the healing period, and her permanent disability, if any, was not ready to be rated. Claimant has been temporarily totally disabled by reason of her injury.

The Hearing Commissioner concluded as a matter of law that claimant sustained an injury by accident arising out of and in the course of her employment, and made an award of compensation to claimant for temporary total disability.

On appeal to the Full Commission all the defendants' assignments of error were overruled, and the findings of fact, conclusions of law and award of compensation by the Hearing Commissioner were affirmed, and the defendants appealed to the Superior Court.

In the Superior Court the order of the Full Commission was in all respects affirmed, and the defendants appealed to the Supreme Court.

E. J. Wellons for plaintiff, appellee.
Teague, Johnson and Patterson for defendants, appellants.

PARKER, J. The defendants' brief states "there is no dispute as to the facts," and the sole question for decision is "did the accident which plaintiff (claimant) sustained arise out of and in the course of her employment?"

"Where a parking lot constitutes a part of an employer's premises, or is provided by him, and an injury is sustained by an employee in a fall, or otherwise, while in such lot or while passing between it and his working place, or area, such injury has been held, in some circumstances and by some authorities, to arise out of, or in the course of, the employment, notwithstanding the employer was not obliged by the contract of employment to furnish a parking lot, and the employee was not obliged to come to work in an automobile. However, the contrary view has also been taken. . . ." 99 C.J.S., Workmen's Compensation, §234, f, Parking Lots. For substantially similar statements see 58 Am. Jur., Workmen's Compensation, p. 725; and Annotation 159 A.L.R. 1395 *et seq.*

In Larson's The Law of Workmen's Compensation, Vol. I, pp. 199-200, it is written: "One category in which compensation is almost always awarded is that in which the employee travels along or across a public road between two portions of his employer's premises, whether

going and coming, or pursuing his active duties. Parking lot cases are an increasingly common example in this category. It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises."

The facts in the instant case are nearly on all fours with the facts in *John Rogers's* Case, 318 Mass. 308, 61 N.E. 2d 341, 159 A.L.R. 1394. The Massachusetts statute, Annotated Laws of Massachusetts, Vol. 4-B, Ch. 152, Workmen's Compensation, §26, provides "if an employee . . . ,receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer . . . , he shall be paid compensation. . . ." This statute also provides for compensation to an employee while using a motor vehicle "in the performance of work in connection with the business affairs or undertakings of his employer." The crucial findings of facts of that case were these: "The employee worked in a hat factory. He was accustomed to come to work in an automobile of a fellow employee which would be parked in a 'parking lot' owned and 'furnished' by the employer where the employer permitted its employees to park. At the time of the injury the automobile was parked as usual in the 'parking lot.' The employee left it to go to work, and while still on the lot and 'going down an incline,' he fell and broke an ankle. 'It was no part of the duty of the employee to use an automobile to reach his work.' The furnishing of the 'parking lot' was 'no part of the contract of employment.' Although the board did not expressly find that this lot was opposite the employer's factory, the uncontradicted evidence both of the employee and of the insurer was to that effect, and that fact seems to have been assumed. It was necessary, however, to walk a short distance down the street to the plant entrance." The Massachusetts Supreme Judicial Court said: "These facts require as matter of law a decree for the employee. Although the employee was not obliged to come to work in an automobile, and the employer was not obliged by contract to furnish the 'parking lot,' yet it is plain that it did furnish the lot as an incident of the employment, and that the employee, while actually on his employer's premises and on his way to the place where his day's work was to be performed by a route which he was permitted and expected to take, fell and was injured. It is of no consequence that a street intervened between the part of the employer's premises where the employee fell and the part where he was to work. The 'parking lot' was used as an adjunct to the factory. The case stands just as it would if the automobile had been parked on the same lot on which the factory

building stood and the employee had fallen while walking from the automobile to the factory door. The injury arose out of and in the course of the employment." While our statute does not contain all the provisions of the Massachusetts statute, it has a similar provision that a compensable injury means "only injury by accident arising out of and in the course of the employment," G.S. 97-2(f), and the decision seems to be based on a provision in the Massachusetts statute similar to our statute.

In *Hughes v. American Brass Co.* 141 Conn. 231, 104 A. 2d 896, the defendant maintained a parking lot near its casting shop for the convenience of its employees. The officials of the defendant knew that it was the custom of its employees to park their cars in the parking lot, and had consented to it, and acquiesced in it for about 25 years prior to December 1952. On 4 December 1952 claimant drove his car to the parking lot, parked it there, walked 10 or 15 paces toward the gatehouse on the bridge to report for work, slipped and fell on a slippery patch of snow or ice and was injured. The Connecticut statute, General Statutes of Connecticut, Revision of 1958, Vol. VI, Ch. 566, Workmen's Compensation Act, § 31-139, provides, " 'Arising out of and in the course of his employment' means an accidental injury happening to an employee . . . originating while he has been engaged in the line of his duty in the business or affairs of the employer upon the employer's premises. . . . A personal injury shall not be deemed to arise out of the employment unless causally traceable to the employment other than through weakened resistance or lowered vitality." The Court said in finding no error in a judgment of the Superior Court sustaining a finding and award of compensation for his injury to claimant: "Upon the facts found, it is clear that the accident resulting in the plaintiff's injury, which thus occurred in the course of his employment, was a natural and necessary incident or consequence of the employment, or of the conditions under which it was carried on, though not foreseen or expected. The essential causal connection appears, therefore, to support the further conclusion that the accidental injury arose out of the employment. And where, as here, benefit to the employer was involved, this is so even though the particular act of the plaintiff was merely permitted rather than required."

Federal Insurance Company v. Coram, 95 Ga. App. 622, 98 S.E. 2d 214 (1957), was a proceeding under Workmen's Compensation Act to recover compensation for disability due to injury sustained by nurse's aid, while walking to parking lot on employer's premises en route to her home after completing her day's work. The employer, John D. Archbold Memorial Hospital, furnished the parking lot for

the convenience of its patients, visitors and employees. The injured employee had the right and privilege to park her car in said parking lot but was not required to do so. The employer did not furnish her transportation. The Court affirmed a judgment of the Superior Court affirming the full board's award of compensation, and said: "The finding that the accident arose out of and in the course of employment was authorized. The parking facilities were furnished by the employer for the use of the claimant employee and were furnished as an incident of employment. Where an employer furnishes an employee parking facilities on the employer's premises, it is, of course, necessary for the employee, before he can commence his actual employment duties, to park his automobile and walk from that portion of the employer's premises to that other portion of the premises where he performs his actual employment duties. We think this situation is analogous to one where the employee first reports to one part of the employer's premises for instructions, assignment, clock punching, drawing tools, etc., and then must proceed to another portion of the premises to begin his actual duties. See *Employers Ins. Co. of Alabama v. Bass,* 81 Ga. App. 306, 58 S.E. 2d 516. The 'rest period' and 'lunch hour' cases are not applicable here. The reasoning behind such cases is that during a rest period or lunch hour, an employee is spending such time for his personal benefit and pleasure. In the instant case it cannot be said that in proceeding from that portion of the premises where she parked, to her immediate work area and in returning therefrom, the claimant was on a purely personal mission. We think that going to and from the parking lot in order to reach and leave her immediate working area was a necessary incident to the claimant's employment."

For other parking lot cases in which under Workmen's Compensation Acts an award of compensation was decreed to an employee injured on a parking lot owned or maintained by the employer or while passing between the lot and the employer's working place as being an injury by accident arising out of and in the course of the employee's employment, see: *Teague v. Boeing Airplane Co.,* 181 Kan. 434, 312 P. 2d 220 (1957); *Buerkle v. United Parcel Service,* 26 N.J. Super. 404, 98 A. 2d 327; *Dewar v. General Motors Corp.,* 19 N.J. Misc. 297, 19 A. 2d 194; *Krovosucky v. Ind. Com.,* 74 Ohio App. 86, 57 N.E. 2d 607; *E. I. du Pont de Nemours & Co. v. Redding,* 194 Okla. 52, 147 P. 2d 166. See also *Murphy v. Miettinen,* 317 Mass. 633, 59 N.E. 2d 252.

In *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862, the deceased employee lived in a house on his employer's farm, and was employed to feed the livestock at a barn. The employer's farm was situate on both sides of N. C. Highway 32. The deceased employee crossed the high-

way, went to the barn, and fed the livestock. He then started across the highway to go to his home, and near the edge of the highway was struck by a car and killed. This Court in affirming an award of compensation held that his injury and death arose out of and in the course of his employment.

In *Morgan v. Cloth Mills*, 207 N.C. 317, 177 S.E. 165, the deceased employee was a piece worker in a cotton mill. On the morning of the accident he reported for work at the usual time, and was told to return at 11:00 or 12:00 o'clock. He said he would go home and return. Shortly thereafter he was found unconscious near a platform at an entrance to the mill, with indications that he had slipped on some ice or stumbled over some lumber or a hand truck on the unlighted platform and had fallen to the frozen ground fracturing his skull, which injury caused death. This Court held that the evidence was sufficient to support the Industrial Commission's finding that the employee's death resulted from an accident arising out of and in the course of his employment. See also *Gordon v. Chair Co.*, 205 N.C. 739, 172 S.E. 485, where an award of compensation was affirmed, when an employee went to a platform at the front of the mill to tell his son not to wait for him, and there slipped on ice and fell.

The defendants' brief cites a number of our cases. None of these cases have any reference to a parking lot owned or maintained by the employer, except *Horn v. Furniture Co.*, 245 N.C. 173, 95 S.E. 2d 521. In the *Horn* case claimant was struck by an automobile on the highway while going to lunch to a place of his own free choosing. All of these cases are distinguishable, and are not applicable here.

We are well aware of the cases which hold that while an employee is traveling to and from the employer's premises in transportation furnished solely by the employee and over a route chosen solely by the employee, he is not in the course of his employment, and an accident occurring during such time is not compensable. These cases are clearly not in point in the instant case, because the claimant here was not away from her employer's premises and traveling a route of her own choosing.

The employer in this case maintained and supervised a parking lot about 70 feet from the entrance to its plant. About 75 per cent of its employees used this parking lot for their automobiles when at work, with its consent and acquiescence. Clearly this parking lot was maintained and furnished by the employer for the benefit of its employees. Claimant parked her automobile on the parking lot maintained and provided by her employer for its employees, and about five minutes before she was to begin work was walking on her employer's premises

to another portion of its premises where she actually worked, when she fell and was injured by accident. It seems clear that claimant's going from this parking lot to her working area, all on her employer's premises, was a necessary incident to her employment, and there was a causal connection between her employment and the injury she received with the result that the injury by accident she suffered arose out of and in the course of her employment. She is, therefore, entitled to compensation under the North Carolina Workmen's Compensation Act.

The judgment of the Superior Court is

Affirmed.

CITY OF SALISBURY v. M. C. BARNHARDT; M. C. BARNHARDT, JR.; T. P. SHINN AND SALISBURY MARBLE & GRANITE COMPANY, INC.

(Filed 25 February, 1959.)

1. Appeal and Error § 22—

Where there are no exceptions to the admission of evidence or to the facts found, it will be presumed that the findings are supported by competent evidence and are binding.

2. Appeal and Error § 21—

An exception to the signing of the judgment presents the questions whether the facts found support the judgment and whether error of law appears upon the face of the record.

3. Dedication § 2—

The use of a portion of the width of a dedicated street constitutes an acceptance of the dedication of the entire width of the street, and the nonuser of a portion thereof does not constitute an abandonment, but the municipality has the right at anytime thereafter to use the full width of the street as the growing necessities of the public may require.

4. Municipal Corporations § 25b—

Nonuser of a portion of the width of a dedicated street does not constitute an abandonment of the unused portion by the municipality even though such portion is left unused upon the construction of a new street from the used portion of the dedicated street, nor does such circumstance constitute a relocation of the street so as to constitute an abandonment of any portion of the dedicated street.

5. Adverse Possession § 14—

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. G.S. 1-45.

6. Dedication § 2: Municipal Corporations § 25b—

The fact that a municipality has permitted an owner of land adjacent to a street, dedicated to and accepted by the public, to erect and maintain for a number of years a granite wall on a portion of the width of the street and has assessed the property for improvements for curbing and guttering a new street bordering the unused portion of the dedicated street, does not estop the municipality, upon the later improvement of the dedicated street for its full width, from asserting title for the entire width of the dedicated street.

7. Municipal Corporations § 30—

It is not required that land abut directly on a part of a street that has been improved in order to subject it to liability for assessments, as where a lot abuts one street opposite a "y" intersection with a new street.

APPEAL by defendants from *Olive, J.*, March Term 1958 of ROWAN.

This case as No. 521 was argued at the Fall Term 1958 of this Court.

This is an action instituted by the plaintiff, City of Salisbury, against the defendants for the purpose of requiring the defendants to remove from a small triangular strip of property a granite wall which was erected thereon by the defendants in the year 1935.

In the hearing below it was stipulated that a jury trial might be waived and that the judge might hear the evidence, find the facts, and render judgment.

From the stipulations agreed upon by counsel for the plaintiff and for the defendants, from evidence introduced from the pleadings, and from the testimony of witnesses, the essential findings of fact made by the trial court and set out in the judgment, from which appeal is taken, are as follows:

"1. That South Main Street as shown upon the map of the property of Samuel R. Harrison, as surveyed by C. M. Miller, C. S. in December 1901, and recorded in the office of the Register of Deeds of Rowan County in Book of Maps No. 1 at page No. 41, is a dedicated public street, in the City of Salisbury, opened, accepted, and used by the public and accepted and maintained by the plaintiff City, prior to the year 1925 and since said date, except that the triangular strip of land which is the subject of the controversy in this action has not been so used or maintained since 1925.

"2. That the defendants, M. C. Barnhardt, M. C. Barnhardt, Jr., and T. P. Shinn, are the owners of lots 4 and 5 as shown upon the map of the said property of Samuel R. Harrison, and are also the owners of the corporate defendant, and that said defendants ac-

quired title to said lots by mesne conveyances from said Samuel R. Harrison, the original subdivider.

"3. That said lots 4 and 5, as aforesaid, abut said South Main Street, shown on said map, and are located at the Southeast corner of the intersection of said South Main Street and Vance Street in the City of Salisbury, North Carolina.

"4. That none of the defendants herein acquired any interest in said lots until May 19, 1924, as to lot number 4, and May 25th, 1925, as to lot number 5. That thereafter the individual defendants became the owners of said lots through various conveyances * * *.

"5. That none of the deeds, aforesaid, included the strip of land in controversy.

"6. That in June of the year 1916, the governing body of the plaintiff City created Local Improvement District No. 3, pursuant to Chapter 56 of the Public Laws of 1915, embracing that part of South Main Street in the City of Salisbury from Thomas Street South to the intersection of Vance Street for the purpose of curbing, guttering, and paving said street and the levying of assessments against the abutting owners for a part of the costs thereof.

"7. That lots 4 and 5, as aforesaid, were assessed by the governing body of the plaintiff City, for a part of the costs of said improvements * * *.

"8. That in October of the year 1916, the Board of Aldermen of the plaintiff City ordered that a street be opened and improved from South Main Street at its intersection with Vance Street South through property owned by the plaintiff City, and which was a part of the cemetery property, to Fulton Street.

"9. That in conjunction with the paving of South Main Street within the boundaries of the Local Improvement District No. 3, as aforesaid, which was completed in 1917, the street ordered to be opened and improved by the Board of Aldermen in October of the year 1916, as aforesaid, was opened, paved, curbed, and guttered, and was thereafter known as South Main Street and that the street shown on the Harrison Map, as aforesaid, became known as Old South Main Street.

"10 That the construction of the new street left unused as a street that portion of the right of way of Old South Main Street which is the strip of land shown upon the blueprint attached to the plaintiff's complaint and marked Plaintiff's EXHIBIT A, and which is the subject of the controversy in this action.

"11. That between the years 1925 and 1935 the defendants planted shrubbery on the strip of land shown on said blueprint.
"12. That in 1935, the defendants constructed a granite wall on a portion of said strip and that the location of said wall in relation to the street is shown on said blueprint marked Plaintiff's EXHIBIT A.
"13. That no demand was made upon the defendants to remove said wall and vacate said strip of land until November 1956, and that said wall is still standing.
"14. That since 1925, no part of the triangular strip, which is the subject of the controversy in this action, has been used as a street, or sidewalk or highway.
"15. That in 1936, the North Carolina Highway & Public Works Commission, at the request and approval of the plaintiff City, widened South Main Street, but no widening was done in front of the strip of land in controversy in this action.
(16 omitted.)
"17. That entrances were made over the curb and sidewalk from the paved portion of South Main Street into Old South Main Street.
"18. That both the sewer line and a water line are located in said Old South Main Street but not in the strip of land in controversy.
"19. That improvements to Old South Main Street, consisting of the paving, curbing, and guttering of same, were commenced prior to the institution of this action and are partially completed.
"20. That no part of the street shown on the map of the property of Samuel R. Harrison, as aforesaid, has ever been withdrawn by the dedicator, nor by anyone claiming under him, pursuant to G.S. 136-96, nor has said street or any portion thereof been closed pursuant to G.S. 153-9(17)."

From the foregoing findings of fact, the court concluded as a matter of law that the strip of land which is the subject of controversy in this action has not been abandoned by the plaintiff City and that the defendants are not entitled to the possession of any part thereof. Judgment was entered accordingly, and the defendants appeal, assigning error.

J. W. Ellis and John C. Kesler, attorneys for plaintiff.
Walser & Brinkley, Craige & Craige, attorneys for defendants.

DENNY, J. In the hearing below no exceptions were taken to the

admission of evidence or to the facts as found by the court. Hence, such findings are presumed to be supported by competent evidence and are binding on appeal. *Goldsboro v. R.R.*, 246 N.C. 101, 97 S.E. 2d 486, and cited cases. The exception to the signing of the judgment, however, presents these questions: (1) Do the facts found support the judgment; and (2) does any error of law appear upon the face of the record? *Goldsboro v. R.R., supra; Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320.

The defendants' property, conveyed to them as lots 4 and 5, as laid out on the Harrison map hereinabove described, abuts on South Main Street for a distance of 120 feet. The new street opened in 1916 from South Main Street at its intersection with Vance Street through property owned by the plaintiff City to Fulton Street, left an unimproved area of the street in front of lots 4 and 5 two feet wide at the intersection with Vance Street and 14 feet wide at the southwestern corner of lot 5, this area being wholly within the boundaries of South Main Street as laid out on the aforesaid map. When the new street was opened and designated South Main Street in 1916, the street shown on the Harrison map, south of Vance Street, became known as Old South Main Street. It has never been closed or abandoned but has been used continuously as a public street. However, traffic has been diverted from Old South Main Street into the new portion of South Main Street around the area or triangle in controversy. If Old South Main Street is improved and paved as contemplated, the City must utilize the area in controversy, otherwise this triangle will jut out into the street at the intersection with Old South Main Street with the new portion of South Main Street as constructed in 1916.

The defendants stipulated that no deed conveying lots 4 and 5 from the original subdivider or any mesne conveyances in their chain of title, including the last one dated 2 February 1957, included the strip of land in controversy or any portion thereof. Consequently, the defendants claim no paper title to the area involved in this action.

It was further stipulated and found as a fact in the hearing below that no part of the street shown on the aforesaid map has ever been withdrawn by the dedicator, nor by anyone claiming under him, pursuant to G.S. 136-96, nor has said street or any portion thereof been closed pursuant to G.S. 153-9 (17).

Moreover, G.S. 1-45 provides as follows: "No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in

any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations."

Exceptions to this statute have been recognized in at least two situations: (1) where a street has been dedicated and the municipality never accepted the dedication; and (2) where the dedicated street or streets, if accepted, had been abandoned. *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664, and cases cited therein.

In our opinion, on the facts found below, there is no evidence on this record to support the view that in opening the new street in 1916, which is now known as South Main Street, constituted a relocation of the street shown on the map referred to herein, or that it constituted an abandonment of any portion thereof. The cases of *Moore v. Meroney,* 154 N.C. 158, 69 S.E. 838 and *Cahoon v. Roughton,* 215 N.C. 116, 1 S.E. 2d 362, cited by the appellants, are not controlling on the facts in this case.

When a street has been dedicated and a municipality has opened it, and it has been used continuously for many years, although the use may not have extended to the full width of the street, the unused portion has not by reason of nonuser lost the character of a street for which it was originally dedicated. *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13; *Spicer v. Goldsboro,* 226 N.C. 557, 39 S.E. 2d 526.

In 25 Am. Jur., Highways, section 112, page 410, *et seq.,* it is said: "Abandonment will not ordinarily be implied from mere nonuser when the public need has not required the use. Statutes in some states provide that roads not worked or used for a specified number of years cease to be highways, or that the entire abandonment of a highway for a specified number of years shall work a discontinuance thereof, but the mere diversion of travel from a small portion of the way which the public authorities have failed to make passable will not work a discontinuance thereof under such a provision, even though continued for the statutory period. Some courts hold that a marginal portion of a street or highway may be lost by nonuser. Others, however, take the position that mere nonuser of a portion of the width of the way will not work an abandonment of the public rights therein; that if the way is originally laid out as of a certain width, the public is entitled to a way of that width, notwithstanding the worked part and the part actually used by travelers may have been less than that; and that the traveled path may also from time to time be widened or otherwise improved, as the growing necessities of the public may re-

quire, within the limits of the way as originally laid out."

It is also said in 26 C.J.S., Dedication, section 63 b, page 556: "The fact that a municipality improves or directs improvement of part only of the property dedicated does not constitute an abandonment of the balance; and it has similarly been held that the public use of only a part of land dedicated for a public highway does not constitute an abandonment of the unused portion. Even nonuser of a portion of a street, fenced in with abutting property, has been held not to constitute an abandonment of the street by the public."

Likewise, in 39 C.J.S., Highways, section 131 b, page 1068, we find the following statement: "If a highway is legally laid out and established, the mere fact that the public does not use it to its entire width will not of itself constitute an abandonment of any portion thereof. The rule is the same whether or not the road is fenced by the adjoining landowners. Encroachments on a highway continually used cannot be legalized by mere lapse of time; the limited use will not lessen the right of the public to use the entire width of the road whenever the increased travel and exigencies of the public render this desirable."

In *Sipe v. Alley,* 117 Va. 819, 86 S.E. 122, the defendant had enclosed part of a public street with a fence and this condition had existed for a long period of time. In holding that this was not an abandonment of the street or of the enclosed portion thereof, the Supreme Court of Appeals of Virginia said: "Delay in opening a street is not an abandonment thereof, except so far as statutory or charter provisions fix a rule to the contrary. Nor is a mere nonuser of a portion of a street fenced in with abutting property an abandonment of the street by the public. Some private use of the public way is not infrequently accorded abutting owners until the public use requires its surrender. *Town of Basic City v. Bell,* 114 Va. 157, 76 S.E. 336."

In the case of *Kelroy v. City of Clear Lake,* 232 Iowa 161, 5 N.W. 2d 12, the Court said: "It has been held many times that the fencing in of a street or the planting of trees, shrubs, flowers and grass are not such permanent improvements as work an estoppel even though the city does not complain. *Kuehl v. Bittendorf,* 179 Iowa, 1, 8, 9, and citations, 161 N.W. 28; *Christopherson v. Incorporated Town,* 178 Iowa 893, 898, 901, 160 N.W. 691."

The facts as found in the hearing below do not disclose any affirmative acts on the part of the plaintiff that in our opinion misled these defendants or that would justify the conclusion that the plaintiff had abandoned the area of land in controversy, and we so hold.

We further hold that the facts in this case are not of the character that would justify holding that the defendants are entitled to prevail

under the doctrine of equitable estoppel. The fact that the defendants saw fit to construct an attractive, ornamental wall instead of an ordinary, or an ornamental, fence enclosing the area in controversy will not be construed to be such an improvement that its removal will constitute an injustice to these defendants. They knew for many years prior to the time they constructed the wall exactly where their lines were with respect to the street and that they were constructing the wall within the boundaries of the street as laid out on the Harrison map. McQuillin, Municipal Corporations, Vol. 11, section 30.181, page 98, *et seq.* The facts in this case are clearly distinguishable from those in *Lee v. Walker, supra.*

25 Am. Jur., Highways, section 115, page 413, *et seq.*, states: " • • • to constitute an estoppel against the public the acts relied on must be such as to work a fraud or injustice if the public is not held to be estopped. Obviously, one who knowingly encroaches upon a highway is not within the protection of the rule. If the boundaries are fixed by a recorded map, subsequent purchasers of lots abutting thereon are charged with notice thereof, and the fact that they purchase under the impression that a fence encroaching on the street is on the boundary line thereof will not affect the public rights, provided the municipality has done nothing to mislead them."

Moreover, the fact that lots 4 and 5 were assessed for the improvements made in 1916 does not constitute an estoppel, it rather confirms the fact that the City claimed the land now in controversy as property dedicated for street purposes. *Anderson v. Albemarle,* 182 N.C. 434, 109 S.E. 262.

In the last cited case, this Court, speaking through *Clark, C.J.*, said: "Land need not necessarily abut directly on the part of the street that has been improved to subject it to liability for its share of the cost of improvement. Indeed, premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street though the owner of the premises is not the owner of the bed of the stream, and he is liable to assessment provided he has the right of ingress and egress over the intervening land to the improvement." Cf. *Winston-Salem v. Smith,* 216 N.C. 1, 3 S.E. 2d 328 and *In re Assessments,* 243 N.C. 494, 91 S.E. 2d 171.

The judgment of the court below is

Affirmed.

MYRNA E. TYSON, BY HER NEXT FRIEND, JOAB L. TYSON v. LONG MANUFACTURING COMPANY, INC.: AND FRANK ALLEN AND W. A. ALLEN, t/a FARMVILLE IMPLEMENT COMPANY.

(Filed 25 February, 1959.)

1. Sales § 30—

A manufacturer owes to the ultimate user the duty not to construct the article with hidden defects which might result in injury, and to give notice of any concealed dangers, but ordinarily the manufacturer is not liable for injuries from patent dangers.

2. Same—

The seller can have no greater liability for injury to the user of the article manufactured, resulting from alleged defect in its manufacture, than the manufacturer itself.

3. Same—

Plaintiff's evidence tended to show that she was injured while working on a tobacco harvester when, by reason of the sudden lurching of the machine, she was thrown off balance and her thumb caught in a sprocket which was only partially protected by a guard. Plaintiff testified to the effect that she understood the operation of the harvester, that it was simple, and that there was nothing to keep her from seeing the open sprocket. *Held:* Nonsuit in her action against the manufacturer and seller was properly entered, since there is no evidence of a latent defect or concealed danger or that the harvester was inherently dangerous when used for its intended purpose.

4. Same: Negligence § 18—

Evidence that after plaintiff was injured when her thumb was caught in an open sprocket wheel, the manufacturer in later models substituted a solid disc sprocket wheel, is incompetent for the purpose of showing negligence of the manufacturer and seller on the occasion in controversy.

5. Appeal and Error § 41—

The exclusion of evidence cannot be prejudicial when the judgment of nonsuit would have to be affirmed even though the excluded evidence be considered.

APPEAL by plaintiff from *Sharp, S. J.*, 6 October Term 1958 of PITT.

Civil action for damages for injury to the thumb on the left hand of Myrna E. Tyson, allegedly caused by the actionable negligence of the defendants.

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

Charles H. Whedbee and James & Speight for plaintiff, appellant.

Sam B. Underwood, Jr., and Henry C. Bourne for defendants, appellees.

PARKER, J. Plaintiff's thumb on her left hand was injured on 22 July 1955, while she was looping tobacco as an employee of Carlton Young on a Silent Flame Tobacco Harvester manufactured by the defendant Long Manufacturing Company, Inc., and sold to Carlton Young or his father by the defendant Farmville Implement Company.

Plaintiff's injuries occurred while the tobacco harvester being driven across a tobacco field by Carlton Young was in operation harvesting green tobacco leaves from the stalk. This machine was 12½ feet high, and about 6 feet above the ground it had a platform 10 feet wide and 14 feet long. Four people were on the machine under the platform pulling the tobacco leaves from the stalk. Plaintiff and Christine Hall were standing on the platform on opposite sides of the conveyor chain looping the tobacco leaves, when they reached them. The machine operated on a continuous chain principle. This conveyor chain made horizontal runs over a sprocket at the back of the machine to a sprocket at the front, passing by the loopers. When the four people on the machine under the platform pulled the tobacco leaves from the stalk, they put them in clips holding a bundle of tobacco leaves attached to the conveyor chain. The clips were about 20 inches apart on plaintiff's side of the conveyor chain. They alternated on the opposite side. A stick some 12 or 18 inches lower than the horizontal run of the conveyor chain was between it and the loopers. The loopers' work was done when the conveyor chain passed them on its horizontal run.

This is plaintiff's testimony as to how her injury occurred: "It had been raining. . . . The chain was in motion at the time. The chain runs from the back to the front. I was looping. The duty of the looper is to take the tobacco out of the chain and put it on the stick. In doing that I pull the tobacco from the clip. I wrap a thread around it. After I pull the tobacco and wrap the thread around it I put it on the stick. There is a holder for the stick here, and another holder back there. There is a forked stick arrangement to hold the tobacco so there was a stick between me and the chain. The holder is provided for the stick. I was pulling the tobacco out of the clip, looping it and then putting it on this stick about in here. Then when the machine lurched, it kind of threw me off, over against the stick; I caught my finger, caught in the sprocket between the holder and the guard and there wasn't anything I could do to get it out without crushing it. This perforated sprocket which is admitted to be from a Silent Flame machine is the type of wheel in which I caught my hand. My thumb caught up in here like this. Like this and see that the guard just covers half of it or maybe two-thirds."

Plaintiff at the time of her injury was 17 years old. She had been looping tobacco on a tobacco harvester or under a looping shed 3 or 4 years. She had worked on this tobacco harvester most of the summer in 1955, when they were putting in tobacco, and was familiar with its operation. She testified on cross-examination: "I pulled the bundles off with my left hand and tied them with my right around the stick. . . . I was standing facing the chain and facing the tobacco as it came toward me. . . . The tying thread was behind me. . . . The bundle of tobacco I was reaching for was approximately where the paper bag is. When the machine lurched I fell up against the stick, and I got my finger caught there in the sprocket. The bundle of tobacco wasn't quite ten inches from it. . . . The tobacco was in the clip up against the guard on the sprocket. It just was. It just had gotten to it. I was far enough back that I could see the tobacco in this clip at the time I reached for it. I did see it. I could see the sprocket from where I was standing, but I was watching the tobacco; I mean I had never noticed the sprocket close enough to notice that it had holes in it. . . . If it had been a solid wheel or sprocket I never would have caught my finger, or if it had had a guard. It was not a solid sprocket, no sir. It did not have a guard all the way across it. It did not have anything there to keep me from seeing it. I understand the operation of that conveyor chain moving over the sprocket. It is a simple operation. The lurch of the machine threw me off balance and my hand into the sprocket."

When the tobacco harvester is in operation in a tobacco field, it moves slowly.

In substance these are plaintiff's allegations of negligence: The Silent Flame Tobacco Harvester was negligently constructed in that it had a sprocket with holes large enough for a person's thumb to be inserted therein and inadequately guarded, that the sprocket and guard were so constructed that the imminent danger therein was not readily observable and appreciated by a reasonably prudent person, and constituted a concealed danger, which was the proximate cause of plaintiff's injuries. That such negligence of the manufacturer, Long Manufacturing Company, Inc., was imputed to the seller, its co-defendant Farmville Implement Company.

In *Campo v. Scofield*, 301 N.Y. 468, 95 N.E. 2d 802, the Court said: "The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must

allege and prove the existence of a latent defect or a danger not known to plaintiff or other users." The first sentence quoted from this New York case is quoted by this Court in *Kientz v. Carlton,* 245 N.C. 236, 241, 96 S.E. 2d 14, 18.

In the *Campo v. Scofield case,* plaintiff working on his son's farm, was engaged in feeding onions into an "onion topping" machine, when his hands became caught in revolving steel rollers and were badly injured. He sued upon the theory that the manufacturer was negligent in not providing guards. The Court held that the complaint failed to state a cause of action. The gist of the holding is that a manufacturer is under no duty to protect the user against a danger which is perfectly obvious. The Court said: "If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof."

In *Yaun v. Allis-Chalmers Mfg. Co.,* 253 Wis. 558, 34 N.W. 2d 853, plaintiff, a farm hand, was injured when he slipped without negligence and fell so that his fingers were caught in the unguarded rollers of a pick-up hay baler manufactured by the defendant. The supervisor of inspectors for the Industrial Commission of Wisconsin testified for plaintiff that in his opinion a hood type covering of the rollers similar to that used on combines and harvesters would have prevented plaintiff's accident. In reversing a judgment for plaintiff, the Court said: "The respondent contends that 'The rule of law governing this case is that a manufacturer of a product is liable to a user thereof who sustains injuries by reason of the manufacturer failing to exercise reasonable care in the adoption of a safe plan or design, where such failure renders said product imminently dangerous to life and limb when used in a manner and for a purpose for which it is manufactured, whether the danger be opened or hidden.' The cases do not support the respondent's rule. . . . We are forced to the conclusion that the hay baler when used as intended was not a thing of danger. There is no basis in the record for a finding that the respondent's injuries resulted from negligence of the manufacturer."

In *Stevens v. Allis-Chalmers Mfg. Co.,* 151 Kan. 638, 100 P. 2d 723, plaintiff, a farmer, was severely injured by coming in contact with a whirling middle universal joint in open and plain view between the tractor and the combine and was not guarded, which was a part of a "take-off" shaft for delivering power from a farm tractor to a

small harvester-thresher familiarly known as a "combine." The Court said: "The two leading cases upon the liability of manufacturers for defects which made the products dangerous are *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N.E. 1050, Ann. Cas. 1916C 440, L.R.A. 1916F 696; and *Huset v. J. I. Case Threshing Mach. Co.*, 8 Cir., 120 F. 865, 61 L.R.A. 303. In the *Buick Motor Co.* case, supra, *Mr. Justice Cardozo* wrote the opinion of the majority of the court holding the defendant manufacturer liable for injury caused by a defective automobile wheel, which defendant could have discovered by proper inspection. The difference between the *Buick Motor Co.* case and the case at bar is, of course, that in that case the plaintiff did not know of the danger of the defective wheel. In *Huset v. J. I. Case Threshing Mach. Co., supra,* it was alleged that the manufacturer had knowingly covered up a defect in the machine and plaintiff was injured thereby. Judge Sanborn carefully limits his holding to such a case,—thereby differing from the *Buick Motor Co.* case, *supra.* Of course, the plaintiff in the *Huset* case did not have a chance to observe the defect or danger in the machine as plaintiff did in the instant case." The Kansas Supreme Court reversed a judgment for plaintiff with instructions to enter a judgment for the defendants. Plaintiff in the case here cites in his brief, and relies on the *MacPherson v. Buick Motor Co.* case.

In *Kientz v. Carlton, supra,* plaintiff, an employee of Carlton, was injured when his left foot went under the raised back portion of a mower and came in contact with the rotating blade. Carlton bought the mower from Sears, Roebuck and Company. Plaintiff sued both. In affirming a judgment of involuntary nonsuit entered against the plaintiff in the trial court, the Court said in respect to the case against Sears, Roebuck and Company: "In our opinion the evidence is insufficient to support a finding that this mower was an inherently dangerous instrumentality and that Sears should have reasonably foreseen that injurious consequences were probable if operated by a person who was not himself at fault. . . . The absence of the several alleged safety features was obvious, not latent. . . . Absent an express warranty, certainly no greater duty would rest upon the seller than upon the manufacturer of such a machine."

In cases dealing with a manufacturer's liability for injuries to remote users, the courts have always stressed the duty of guarding against *hidden* defects and of giving notice of concealed dangers. *Rosebrock v. General Electric Co.*, 236 N. Y. 227, 140 N.E. 571; *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N.E. 1050; *Statler v. George A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N.E. 1063;

Jamieson v. Woodward & Lothrop, 247 F. 2d 23. As was said in *Lane v. City of Lewiston,* 91 Me. 292, 39 A. 999, "no one needs notice of what he already knows."

Plaintiff was experienced in looping tobacco on a tobacco harvester, and had been working on the tobacco harvester on which she was injured most of the summer in 1955, when tobacco was being pulled. There is no evidence of negligence in the design or construction of the machine. Entirely lacking is the slightest evidence that the sprockets and conveyor chain on the platform of the tobacco harvester had a latent defect or a danger concealed from plaintiff, or that they were in operation inherently dangerous to her. She testified on cross-examination: "It was not a solid sprocket, no sir. It did not have a guard all the way across it. It did not have anything there to keep me from seeing it. I understand the operation of that conveyor chain moving over the sprocket. It is a simple operation." Further, in our opinion, the evidence is insufficient to show that the defendants foresaw or should reasonably have foreseen danger and injurious consequences to a looper on this tobacco harvester from a perforated sprocket with half of it or maybe two-thirds of it covered with a guard, and plainly visible, when the tobacco harvester was being used for its intended purpose.

We find no evidence of negligence upon which a verdict for plaintiff could be based.

The appellant assigns as error that the trial court refused to permit testimony before the jury that later models of the Silent Flame Tobacco Harvester manufactured by the Long Manufacturing Company, Inc. had solid disc sprocket wheels. This evidence was offered for the avowed purpose of showing that defendants were negligent on the particular occasion in controversy. It was properly excluded. *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Shelton v. R.R.,* 193 N.C. 670, 139 S.E. 232; *Aiken v. Mfg. Co.,* 146 N.C. 324, 59 S.E. 696.

In *Pontifex v. Sears, Roebuck & Co.,* 226 F. 2d 909, the Court said: "We do not think, however, that it can be held to be negligence to sell an old model machine not equipped with a safety device of later models." To the same effect see *Kientz v. Carlton, supra.*

The appellant further assigns as error the exclusion of testimony of Ada Grey Harris to the effect that her finger was injured in 1955 by being caught, in some way not shown by the evidence, in a hole in a sprocket of a tobacco harvester having the same kind of sprocket and conveyor chain as the machine here, when she was looping tobacco.

Had such evidence been allowed it could not have affected our decision.

The judgment of nonsuit below is

Affirmed.

IN THE MATTER OF THE WILL OF AMOS GASTON SMITH, DECEASED.

(Filed 25 February, 1959.)

1. Dower § 3—

The wife of a devisee of the remainder interest in lands is not entitled to dower so long as the prior life estate created by testator remains in existence, and therefore the devisee may convey his remainder, or it may be conveyed by operation of law, during the existence of the life estate without the joinder of the devisee's wife, and such conveyance divests the wife of the devisee of all claim to dower in the lands.

2. Vendor and Purchaser § 19—

Where a consent judgment obligates the life tenant and remainderman under a will to convey lands to the caveator upon the payment of a sum stipulated, it is the duty of the life tenant and remainderman to prepare, execute and tender a proper deed for delivery upon the payment of the sum stipulated, and since the wife of the remainderman has no dower interest in the lands, the fact that she did not sign the consent judgment constitutes neither a justifiable nor a legal excuse for their failure to do so. But even if the wife of the remainderman had a right of dower, the caveator would be entitled to demand conveyance and have the agreed purchase price abated to the extent of the value of her dower.

3. Judgments § 17d—

A consent judgment that propounders should execute and deliver to caveator a deed to certain lands upon payment by the caveator of the sum stipulated, does not constitute a transfer of title within the contemplation of G.S. 1-227 and G.S. 1-228, even though such judgment may be sufficient to support an order for specific performance in an action brought for that purpose, and the judgment does not in itself entitle caveator to an order for possession.

4. Contempt of Court § 3—

A breach of contract, even though it be embodied in a consent judgment, is not punishable for contempt under G.S. 5-8.

APPEAL by propounders from *Nettles, J.*, August Civil Term 1958 of MECKLENBURG. This case as No. 255 was argued at the Fall Term 1958 of this Court.

Amos Gaston Smith, late of the county of Mecklenburg, died testate

on 25 January 1955. The last will and testament of Amos Gaston Smith, deceased, dated 9 November 1953, in pertinent part reads as follows:

"ITEM TWO. I will and bequeath to my son, Tuttle Gaston Smith, the sum of One Dollar * * *.

"ITEM THREE; I will, devise and bequeath all of my property of every sort, kind, and description, both real and personal * * * to my wife, Rena Goodman Smith, for and during her natural life.

"ITEM FOUR. I will, devise and bequeath unto my son, Vernie Goodman (the said Vernie Goodman, herein described, is my actual son although he is known and described as Vernie Goodman), a vested remainder in fee simple in and to all of my property of every sort, kind and description, both real and personal * * *, subject to the life estate of my said wife as set out in the preceding item."

Vernie Goodman, who was named as executor of the aforesaid will, filed the same for probate before the Clerk of the Superior Court of Mecklenburg County on 24 February 1955 and the same was probated in common form. At the time the caveat was filed on 16 October 1956, neither Vernie Goodman nor any other person had qualified as executor of said will.

The caveator alleged that the execution of the said paper writing and the signature of the said Amos Gaston Smith thereto were obtained by undue influence and at the time of the purported execution of said paper writing the said Amos Gaston Smith did not have sufficient mental capacity to make a will.

When the caveat proceeding came on for hearing, the court entered the following judgment:

"This cause coming on for trial and being heard before the Honorable Zeb V. Nettles and a jury at the January 20, 1958 Regular A Term of the Superior Court of Mecklenburg County, upon the propounders, Vernie Goodman and Mrs. Rena Goodman Smith, having offered a will for probate before the Clerk of the Superior Court of Mecklenburg County and upon a caveat to said will having been filed by the caveator, Tuttle Gaston Smith, and the matter having been transferred to the Civil Issue Docket of the Superior Court of Mecklenburg County upon the issue of *devisavit vel non*, and an issue having been submitted to the jury and answered as follows:

'1. Is the paper writing dated November 9, 1953, propounded in this matter, and every part thereof, the last will and testament of Amos Gaston Smith? Answer: Yes.'

"And it appearing to the court that all of the parties interested in the estate of Amos Gaston Smith are before the court and have

personally appeared in open court and are over the age of 21 years; and it further appearing to the court, and the court finding as a fact that the parties hereto, Mrs. Rena Goodman Smith and Vernie Goodman, as propounders, and Tuttle Gaston Smith, as caveator, have agreed upon a settlement of said estate of the deceased, Amos Gaston Smith, and have agreed that the property of Amos Gaston Smith, both real and personal, is to be distributed subject to the following terms and conditions; (Then follows eight paragraphs of the agreement as to how the personal property of the testator was to be divided, the amounts the propounders shall pay on the funeral expenses and hospital bills of the testator, and the amounts the caveator shall pay. The paragraphs with respect to the sale of the real estate, of which the testator died seized, to the caveator for $3,500, are set out below.)
* * *

"4. That upon the payment of the said $3,500 to the propounders herein, the said propounders, Mrs. Rena Goodman Smith and Vernie Goodman, shall execute and deliver to the caveator, Tuttle Gaston Smith, a fee simple deed for all of their right, title, and interest in and to the real property of Amos Gaston Smith consisting of approximately 49 acres, more or less * * *.

"7. That the terms of this agreement shall be complied with by all parties hereto in not less than 60 days from the date hereof and not more than 90 days from the date hereof."

The court then entered the following decrees:

"It is therefore ordered, adjudged, and decreed that the said paper writing identified as the last will and testament of Amos Gaston Smith be, and the same is hereby declared to be the last will and testament of the said Amos Gaston Smith.

"It is further ordered, adjudged and decreed that the parties hereto, Rena Goodman Smith, Vernie Goodman, and Tuttle Gaston Smith be, and they are hereby directed to comply with the eight (8) enumerated provisions of their agreement as heretofore set out.

"It is further ordered, adjudged and decreed that the said sum of $3,500 to be paid to the propounders herein shall be in the form of a certified or a bank cashier's check payable to Rena Goodman Smith and Vernie Goodman, and that said check shall be delivered to B. Kermit Caldwell, attorney for said propounders and that the delivery of said sum of $3,500 and the execution and delivery of said deed from the propounders to the caveator shall be a simultaneous transaction.

"It is further ordered, adjudged and decreed that if said sum of $3,500 is not paid by Tuttle Gaston Smith to the propounders as pro-

vided herein within ninety (90) days from the date of this judgment, then the propounders shall not be required to transfer said real property to the caveator, Tuttle Gaston Smith."

This judgment was consented to by Rena Goodman Smith, Vernie Goodman, Tuttle Gaston Smith, and by the attorneys appearing for the respective parties.

Tender of a certified check in the sum of $3,500 was made by the caveator to the attorney for the propounders within the time fixed in the consent judgment, but the propounders failed and refused to prepare and tender a deed in accordance with the terms of said judgment. Whereupon, an order was issued to show cause, if any, why the caveator, Tuttle Gaston Smith, should not be given possession of the lands in controversy and why the propounders should not be attached for contempt.

At the hearing on the order to show cause, the respective parties submitted various affidavits and letters from which the court found the pertinent facts and rendered judgment as set forth below:

" * * * that the caveators (sic) tendered to the propounders and their attorney, B. Kermit Caldwell, a certified check in the amount of $3,500 within the 90 days provided in the said judgment and have agreed that they will accept a deed without warranty to the said lands from the propounders; that the propounders have failed and refused to convey their right, title and interest in said property as ordered * * *.

"Now, therefore, it is ordered, adjudged and decreed that the caveators (sic) shall place in the hands of the Clerk of the Superior Court of Mecklenburg County, North Carolina, certified funds in the amount of $3,500 to be held by him until such time as propounders shall deliver to Tuttle Smith a deed as directed in the judgment of January 20, 1958. If the propounders shall deliver such deed to the said Tuttle Gaston Smith, as directed in the order of January 20, 1958, then the Clerk of the Superior Court of Mecklenburg County is ordered to pay to the propounders the said $3,500; and

"It is further ordered that the propounders shall vacate the said 49½ acres of land, and that the caveators (sic) shall be placed in possession of same; * * *

"And it is further found that the propounder, Rena Goodman Smith, is in contempt of this court, in that she has wilfully failed and refused to perform those acts and things directed in the judgment of this court dated January 20, 1958, in that she has failed and refused to execute a deed to Tuttle Gaston Smith of all her right, title and interest in the 49½ acres of land of the estate of Amos Gaston Smith;

that the court reserves, for the time being, judgment for this contempt of court.

"And it is further found that the propounder, Vernie Goodman, is now out of the State of North Carolina and is therefore not subject to the orders of this court."

From the judgment entered the propounders appeal, assigning error.

C. M. Llewellyn, M. B. Sherrin, Jr., for propounders.
Payne & Hedrick for caveator.

DENNY, J. The propounders' first exception and assignment of error is to the finding of fact that the caveator tendered to the propounders and their attorney a certified check in the sum of $3,500 within the 90 days as provided in the consent judgment; that the caveator has agreed to accept a deed without warranty to the said lands from the propounders; that the propounders have failed and refused to convey their right, title and interest in the property in controversy as directed in said judgment.

The propounder appellants do not contend that the caveator failed to tender the $3,500 within the time required by the term of the consent judgment, but they contend that since their attorney refused to prepare a deed in accordance with the provisions of the agreement set out in the judgment, on the ground that he did not represent the wife of Vernie Goodman, who was not a party to the consent judgment, and that since Tuttle Gaston Smith thereafter presented a warranty deed for the propounders to sign, that the tender was thereby made conditional. We do not so construe the contract. It was the legal duty of the propounders to have a deed to all their right, title and interest in the lands in controversy prepared, executed and ready for delivery to the caveator when he tendered the certified check for $3,500, in accordance with the requirements of the consent judgment. It was agreed that the tender of the certified check and the delivery of the deed would be a simultaneous transaction.

The fact that the propounders refused to prepare a deed as called for in the agreement and incorporated in the consent judgment, because the wife of Vernie Goodman did not sign the consent judgment, constitutes neither a justifiable nor a legal excuse for their failure to prepare, execute and tender a proper deed. *Bethell v. McKinney*, 164 N.C. 71, 80 S.E. 162.

The vested remainder which Vernie Goodman has in the lands in controversy, under the provisions of the last will and testament of Amos Gaston Smith, is not subject to dower so long as the life estate

in the lands held by Rena Goodman Smith, his mother, remains in existence. *Weir v. Humphries,* 39 N.C. 264; *Royster v. Royster,* 61 N.C. 226; *Houston v. Smith,* 88 N.C. 312; *Redding v. Vogt,* 140 N.C. 562, 53 S.E. 337, 6 Ann. Cas. 312; *Thomas v. Bunch,* 158 N.C. 175, 73 S.E. 899; 17A Am. Jur., Dower, section 52, page 321. Therefore, a husband may convey his reversion or remainder either personally or it may be conveyed by operation of law, during the existence or continuance of an estate for life, without the joinder of his wife, and his wife thereby loses all claim to dower therein. *Geldhauser v. Schulz,* 93 N.J. Eq., 449, 116 A 791, 21 A.L.R. 1070, and 28 C.J.S., Dower, section 27, page 88, *et seq.*

Even if the wife of Vernie Goodman had a right of dower in the remainder vested in her husband and should refuse to join in the deed required by the terms of the consent judgment, the caveator, Tuttle Gaston Smith, under an appropriate order for specific performance on the part of the propounders, would be entitled to have the agreed purchase price abated to the extent of the value of Vernie Goodman's wife's dower. *Bethell v. McKinney, supra.*

The findings of fact to which the propounders excepted are supported by competent evidence and the assignment of error directed thereto is overruled.

The second assignment of error is directed to the conclusion of law by the court below that the caveator is entitled to the possession of the premises in dispute.

In our opinion, the consent judgment is not sufficient to constitute a transfer of title within the contemplation of G.S. 1-227 and G.S. 1-228, and we so hold. *Morris v. White,* 96 N.C. 91, 2 S.E. 254; *Skinner v. Terry,* 134 N.C. 305, 46 S.E. 517; *Evans v. Brendle,* 173 N.C. 149, 91 S.E. 723. Even so, the consent judgment, upon the facts found by the court below, is sufficient to support an order for specific performance in an action brought for that purpose. *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186; *Harper v. Battle,* 180 N.C. 375, 104 S.E. 658, 20 A.L.R. 357; *Knott v. Cutler,* 224 N.C. 427, 31 S.E. 2d 359.

The third and final assignment of error is to the conclusion of law that the propounder Rena Goodman Smith is in contempt of court and the entry of judgment to that effect.

We construe the consent judgment entered on 20 January 1958 with respect to the settlement of the estate of Amos Gaston Smith to be nothing more than a contract between the propounders on the one hand and the caveator on the other. The terms of the agreement, incorporated in the consent judgment, with the approval of the court, required Rena Goodman Smith and Vernie Goodman to convey all

their right, title and interest, in fee simple, in the real estate of which Amos Gaston Smith died seized, to Tuttle Gaston Smith: provided, Tuttle Gaston Smith tendered to the attorney for the propounders, within 90 days from 20 January 1958, a certified check payable to Rena Goodman Smith and Vernie Goodman in the sum of $3,500. However, if such check was not so tendered, the propounders were not to be obligated to so convey their right, title and interest in the said lands.

A breach of contract is not punishable for contempt under G.S. 5-8. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345; *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529; *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819.

The order below, insofar as it directs that Tuttle Gaston Smith be put in possession of the lands in controversy, and so much thereof as holds Rena Goodman Smith to be in contempt of court, is

Reversed.

CLYDE McPHERSON AND C. B. MOORE v. THE CITY COUNCIL OF THE CITY OF BURLINGTON, N. C.; THE CITY OF BURLINGTON, N. C.; H. C. POLLARD, MAYOR AND MEMBER OF THE CITY COUNCIL OF THE CITY OF BURLINGTON, N. C.; A. A. ALSTON, MAYOR PRO TEM AND MEMBER OF THE CITY COUNCIL OF THE CITY OF BURLINGTON, N. C.; ALLEN B. CAMMACK, MEMBER OF THE CITY COUNCIL OF THE CITY OF BURLINGTON, N. C.; PAUL J. CRAIG, MEMBER OF THE CITY COUNCIL OF THE CITY OF BURLINGTON, N. C.; AND WILLIAM LELOUDIS, MEMBER OF THE CITY COUNCIL OF THE CITY OF BURLINGTON, N. C.; AND THE CITY OF BURLINGTON, N. C.

(Filed 25 February, 1959.)

1. Pleadings § 17—

A demurrer for failure of the complaint to state a cause of action is properly overruled when the demurrer does not point out any defect in the complaint which would entitle defendants to a dismissal of the action.

2. Elections § 2—

It is the duty of a registrar to administer the oath prescribed by law to electors before registering them, but his failure to perform his duty in this respect will not deprive the elector of his right to vote or render his vote void after it has been cast.

3. Elections § 8—

The certificate of the County Board of Elections is *prima facie* evi-

dence of the correctness of the count and stands unless rebutted by proper and competent evidence.

4. Elections § 2—

The fact that neither the registrar nor the person appointed for one day in his stead are residents of the area in which the annexation election is held, does not prevent them from being at least *de facto* registrars, and in the absence of any evidence that the result of the election was affected by such irregularities, it is insufficient ground to void the election or any votes cast by persons registered by them.

APPEAL by defendants from *Sink, Emergency Judge,* July Civil Term 1958 of ALAMANCE. This case as No. 740 was argued at the Fall Term 1958 of this Court.

This is an action to have an annexation election which carried by a majority of 24 votes declared invalid and void.

The complaint alleges numerous alleged irregularities in the annexation election held on 16 April 1957. The pertinent allegations of the complaint may be summarized as follows: (1) That the election was not conducted in the area to be annexed; (2) that all votes cast were invalid because a person not appointed judge acted in place of the judge officially appointed; (3) that four persons ineligible to vote voted and one person eligible to vote was unlawfully prevented from voting; (4) that all persons who voted, whether eligible or not, were not qualified to vote because they were not properly registered for the reason that: (a) some of them were registered by a registrar who was not a resident of the area to be annexed and therefore not a voter therein; (b) he was not appointed at an official meeting; (c) the rest of them were registered by a person who was not officially appointed registrar and who was not a resident of the area to be annexed and therefore not a voter therein. (5) Although not alleged in the complaint, the plaintiffs introduced evidence to the effect that some of the voters were not given any oath at the time of their registration, and the others took the oath without the use of a Bible.

There was no evidence introduced in support of the allegations summarized as (1), (2), and (3) above.

The evidence tends to show that on 28 February 1957 the County Board of Elections appointed Coley R. Mann registrar for the election to be held on 16 April 1957, which election was to determine whether or not the described area known as Grabur Heights should be annexed as a part of the City of Burlington, and that Leo Rice and C. H McPherson were appointed as judges of said election. The evidence discloses that Leo Rice declined to serve and that, upon recom-

mendation of Coley R. Mann, the Chairman of the County Board of Elections appointed John W. Hockaday to serve in his place.

The evidence further discloses that on the first day the books were open for registration for the election to be held on 16 April 1957, Coley R. Mann was acting as registrar of another election in the North Graham precinct; that the Chairman of the County Board of Elections appointed Mrs. Carlesley Mann Ivey, daughter of Coley R. Mann, to act as registrar on that day; that North Graham precinct constituted a major portion of the area to be annexed, and from that area 277 persons out of a total of 345 who registered for the election resided in the North Graham precinct, the other 68 residing in the area proposed to be annexed came from the South Graham and South Burlington precincts.

It is admitted that Mrs. Ivey did not administer the oath to those she registered. The evidence further tends to show that Coley R. Mann is the regular registrar in North Graham precinct and has been for many years; that he was sworn in as the registrar for the special annexation election held on 16 April 1957 and acted as such and that he administered the required oath to those he registered but did not use a Bible.

Coley R. Mann as registrar, and John W. Hockaday and C. H. McPherson as judges, certified in their official return, over their signatures, to the County Board of Elections, that 171 votes were cast in the election for the extension of the corporate limits of the City of Burlington, and 147 votes were cast against such extension. Likewise, the certificate of the County Board of Elections, showing its canvass of the results as set out in the certificate of the registrar and judges of said election, was also admitted in evidence.

The defendants' motion for nonsuit at the close of plaintiffs' evidence was denied. Motion was renewed at the close of all the evidence and again denied.

After all the evidence was in, the respective parties agreed that the case might be withdrawn from the jury and the following issue answered by the judge: "Was the election held on April 16, 1957, upon the question of whether the Grabur Heights area described in the complaint should be annexed to the City of Burlington, invalid as alleged in the complaint? Answer: Yes."

Based on the foregoing issue and the answer thereto, the court entered judgment to the effect that the election held on 16 April 1957 was null and void and that the defendants are restrained and enjoined from giving effect to said election.

The defendants appeal, assigning error.

W. D. Madry, W. L. Shoffner, H. Clay Hemrick for defendant, appellants.

No counsel contra.

DENNY, J. The appellants' first assignment of error is to the failure of the court below to sustain their demurrer *ore tenus* on the ground that the complaint does not state a cause of action.

The demurrer interposed in the court below was properly overruled. It fails to point out any defect in the complaint which would entitle the defendants to a dismissal of the action. *Ledwell v. Proctor,* 221 N.C. 161, 19 S.E. 2d 234; McIntosh, North Carolina Practice and Procedure, 2nd Ed., Volume 1, Demurrer, section 1195, page 654. Cf. *Garner v. Newport,* 246 N.C. 449, 98 S.E. 2d 505.

The third assignment of error is directed to the failure of the court below to sustain their motion for judgment as of nonsuit at the close of all the evidence.

We note that the court below in denying the motion for judgment as of nonsuit, stated: "The court is of the opinion there is no qualification • • • where there is no oath administered * * * except the form prescribed by statute without the use of a Bible."

It is the duty of a registrar to administer the oath prescribed by law to electors before registering them, but his failure to perform his duty in this respect will not deprive the elector of his right to vote or render his vote void after it has been cast. *Quinn v. Lattimore,* 120 N.C. 426, 26 S.E. 638, 58 Am. St. Rep. 797; *Gibson v. Commissioners,* 163 N.C. 510, 79 S.E. 976; *Woodall v. Highway Commission,* 176 N.C. 377, 97 S.E. 226; *Davis v. Bd. of Education,* 186 N.C. 227, 119 S.E. 372; *Plott v. Commissioners,* 187 N.C. 125, 121 S.E. 190; *Glenn v. Culbreth,* 197 N.C. 675, 150 S.E. 332.

In *Gibson v. Commissioners, supra,* it is said: " * * • a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance of the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of sufferage liable to be defeated, without the fault of the elector, by fraud, caprice, ignorance, or negligence of the registrars * * *. A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the State and that of the United States is directed to registrars, and to them alone; and if they through inadvertence register a qualified voter, who is entitled to register and vote without admin-

istering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers."

In the case of *Quinn v. Lattimore, supra,* the Court said: "It appears that a number of persons were registered by other persons than the regularly appointed registrars; in one instance, by the son of the registrar in the absence of his father; and in another case by Williams, the register of deeds, with whom the registrar had left the registration books. These registrations were irregularly made and might have been rejected and erased by the registrars. But it would not have been fair for them to have done this without notifying the parties, so registered, in time for them to have registered again. But instead of their doing this, they retained these names on their books, which they and the judges of election used on the day of election, thereby ratifying and approving these registrations. And it would now be a fraud on the electors, as well as on the parties for whom they voted and also upon the State, to reject these votes for this irregularity. These votes cannot be rejected for this reason. * * *

"A vote received and deposited by the judges of election is presumed to be a legal vote, although the voter may not have complied with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and this cannot be shown by showing that the registration law had not been complied with. Pain on Elections, sec. 360. A party offering to vote without registration may be refused this right by the judges for not complying with the registration law. But, if the party is allowed to vote and his vote is received and deposited, the vote will not afterwards be held to be illegal, if he is otherwise qualified to vote. * * * And where a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected. * * * If a voter is registered in one township, he has no right to register and vote in another. But if he is allowed to do so, his vote received and counted, and he is otherwise qualified, and votes at no other place, his vote should not be thrown out on that account. * * * It is the right of parties to have the fairness of elections inquired into for the protection of honest electors. But such legislation is not to be regarded as hostile to the right of a free exercise of the right of franchise, and should receive such construction by the courts as will be conducive to a full and fair expression of the will of the qualified voters. * * * "

Likewise, in the case of *Woodall v. Highway Commission, supra,* this Court quoted with approval from McCrary on Elections (3rd Ed.), section 216, page 143, the following: "In the courts of the coun-

try the ruling has been uniform, and the validity of the acts of officers of election, who are such *de facto* only, so far as they affect third persons and the public, is nowhere questioned. The doctrine that whole communities of electors may be disfranchised * * * because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the decisions of our judicial tribunals."

In McQuillin, Municipal Corporations, 2nd Ed., Volume 3, section 12.10, page 76, *et seq.*, it is said: " * * * laws merely regulating the manner of conducting an election are usually regarded as directory, and hence a departure from the mode prescribed will not ordinarily vitiate the election. But whether or not the provisions are mandatory or directory, the rule usually applied is that mere informalities or irregularities in an election which do not affect the result will not invalidate it, for the courts prefer to give effect to the popular will whenever possible," citing *S. v. Nicholson*, 102 N.C. 465, 9 S.E. 545.

There is nothing in the evidence adduced in the trial below to support the view that any person voted in the election involved in this controversy who was not entitled to vote therein, or that any person was prevented from voting, by reason of any act complained of by these plaintiffs, who was entitled to vote.

No challenge on any ground was lodged against any of the 345 persons who registered for this election, either on challenge day or on the day of the election.

Moreover, when Coley R. Mann, who was acting as registrar, and John W. Hockaday and C. H. McPherson, who were acting as judges of the election, counted the ballots cast and declared the results thereof by certificate to the County Board of Elections, such declaration is *prima facie* evidence of the correctness of the count until rebutted by proper and competent evidence. *Quinn v. Lattimore, supra.*

Due to the conflict in the official duties of Coley R. Mann as the regular registrar of the North Graham precinct and as registrar of the area involved in the special annexation election, his daughter, Mrs. Ivey, was appointed registrar for one day by the Chairman of the County Board of Elections. G.S. 163-17. Neither Mrs. Ivey nor her father resided in the area in which the annexation election was held; nevertheless, it would seem that they were at least *de facto* registrars during the time they served as such, and in the absence of any evidence that the result of the election was affected thereby, their appointments will be deemed irregularities but insufficient to void the election. *Woodall v. Highway Commission, supra.*

We quote with approval what *Adams, J.*, speaking for this Court,

said with respect to irregularities in the holding of elections in the case of *Plott v. Commissioners, supra:* "While the alleged irregularities do not vitiate the election they fairly illustrate the spirit of indifference which characterizes the methods often adopted in the registration of voters. These lax methods, sometimes annoying, are always to be regretted and discouraged. We again refer to them for the purpose of emphasizing the importance of respecting the various statutes defining the qualification of voters, the prerequisites of registration, and the duty of registrars."

The foregoing admonition applies with equal force to county boards of election.

The judgment entered below is set aside and the ruling on motion for judgment as of nonsuit is

Reversed.

GROVER C. MATHENY, ADMINISTRATOR OF THE ESTATE OF JOHNNY MATHENY, DECEASED V. STONECUTTER MILLS CORPORATION

AND

CLYDE ERWIN, ADMINISTRATOR OF THE ESTATE OF ALBERT SANFORD ERWIN, V. STONECUTTER MILLS CORPORATION.

(Filed 25 February, 1959.)

1. Negligence § 4a—

It is not negligence *per se* for the owner of land to maintain a pond, pool, lake or reservoir thereon.

2. Negligence § 4b—

Where the owner of land has knowledge, actual or constructive, that children of tender years are in the habit of playing on his premises, it becomes his duty to exercise ordinary care to provide reasonably adequate protection against their injury, the standard of care being that care which a man of ordinary prudence would exercise under such circumstances.

3. Same—

The owner of land, even though he has knowledge that children of tender years are in the habit of playing thereon, is not under duty to render trespass by them impossible, but is required to take only such precautions, by way of erecting guards, fences or other means, as are reasonably sufficient to prevent trespassing by them, and he may not be held liable as an insurer of their safety.

4. Same— Evidence held insufficient to show negligent failure of owner of land to exercise due care to prevent injury to trespassing children.

Evidence tending to show that defendant maintained in good condition, around a reservoir on its premises, a metal fence of small mesh,

topped by strands of barbed wire, some seven feet high in all, that a hole found under the fence was closed prior to the injury, and that trespassers at the reservoir could not be readily seen by defendant's employees, *is held* insufficient to be submitted to the jury in an action to recover for the wrongful deaths of two children, nine and ten years of age, found drowned in the reservoir, notwithstanding evidence that children habitually played at the reservoir, that vines had been permitted to grow on the fence and that trees had been allowed to stand near it.

5. Appeal and Error § 41—

The exclusion of evidence will not be held prejudicial on appeal from judgment as of nonsuit when the excluded evidence is merely cumulative and could not have affected the decision.

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

APPEAL by plaintiffs from *Huskins, J.*, at September Term, 1958, of RUTHERFORD.

These actions were instituted for the alleged wrongful deaths on 22 May, 1957, of plaintiffs' intestates, Johnny Matheny and Albert Sanford Erwin, children ten and nine years of age, respectively. The actions were consolidated for trial.

The stipulation and plaintiffs' evidence tend to show the following facts:

The plaintiffs' intestates came to their deaths by drowning in an industrial reservoir located on defendant's property. The reservoir is near Dallas and Oak Streets in the town of Spindale. Defendant has industrial buildings facing two sides of the reservoir. These buildings have vents (no windows) toward the reservoir. Defendant's office is some distance away. Duke Power Company owns property on the third approach to the reservoir and has transformers thereon enclosed by a fence. On the fourth approach are dwellings fronting on Dallas Street. The reservoir is about 100 feet to the rear of these dwellings. Beyond the Duke Power Company property is a church and church property, including a recreation hall. A public school is nearby.

The reservoir is of concrete. The ends are perpendicular and the sides slope at an angle of 45 degrees. The water level is about three to four feet below the top or ground level of the reservoir. The water is murky, slimy, and has boards and debris floating thereon. The bottom is covered with boxes, limbs and debris. There are fish, frogs and tadpoles in the reservoir. The sides, both above and below the water level, are slick and slimy. Once in the water, a person cannot get out without assistance.

The reservoir is enclosed with a steel mesh fence six feet high on metal posts. The fence is about six to seven feet from the edge of the reservoir. On top of the fence are three strands of barbed wire on steel arms at an angle inward. The overall height of the fence is seven feet. The mesh of the fence is such that fingers may be inserted therein, but is not large enough to admit a hand or foot. The fence has no gate and completely encloses the reservoir. The fence is in good condition.

The fence is covered with honeysuckle vines, and at one place there is a grape vine. At two points there are trees or saplings, about three inches in circumference, inside the fence, with limbs extending through and over the fence. At a point near one of these trees a fence of Duke Power Company, about three to four feet high, connects with or comes near to the reservoir fence. Inside the reservoir enclosure weeds, grass, briars and vines cover the ground about knee deep and grow down to the edge of the reservoir.

The fence, enclosure and reservoir were generally in the condition described for many years prior to 22 May, 1957.

Children going to and from the recreation hall and school took a "short cut" as evidenced by a path in the grass within 100 feet of the reservoir. For many years, in the spring and summer children frequented the reservoir to fish, catch frogs and tadpoles, swim and play. This continued up to 22 May, 1957. They usually gained admission by climbing to the top of the Duke Power Company fence and from there to the top of the reservoir fence, with the assistance of vines and limbs. A path was worn in the grass up to this point in the reservoir fence, and the vines on the fence were worn. Occasionally the fence was scaled at a point where the other tree was located. On other occasions entrance was made under the fence at still another point. Entrance was made between the wire and planking below the fence. One person would press the wire upward and aside while another crawled under. It was possible for a person to get under the fence unassisted. It was preferable to go over the fence because "you wouldn't tear your clothes as easy." At another point there was a hole under the fence previously, but it was "patched up" before May, 1957.

About eleven years prior to May, 1957, an official of defendant corporation was notified that boys were fishing in the reservoir.

It does not appear from the evidence how or under what circumstances plaintiffs' intestates entered the reservoir. They lived about two and one-half blocks away and their bodies were found submerged in the reservoir.

The instant actions were instituted upon the theory that plaintiffs' intestates were drowned because of the actionable negligence of defendant in maintaining an attractive nuisance that lured these and other children, to the actual or constructive knowledge of defendant, and in failing to remove vines and trees from the fence, rid the enclosure of vines, briars and weeds, and drain and clear the pool.

When plaintiffs rested their cases, defendant moved for judgment as in case of nonsuit. The motion was allowed. From the judgment predicated on this ruling, plaintiffs appealed, assigning errors.

Hamrick & Hamrick for plaintiffs, appellants.

Harkins, Van Winkle, Walton & Buck and Hamrick & Jones for defendant, appellee.

MOORE, J. "The overwhelming weight of authority in this country is to the effect that ponds, pools, lakes, streams, reservoirs, and other bodies of water, do not *per se* constitute attractive nuisances. 56 Am. Jur., Water, Section 436, p. 850. 'The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its location,' 65 C.J.S., Negligence, Sec. 29 (12) j, p. 475. It is, therefore, not negligence *per se* to maintain (even) an unenclosed pond, pool, lake, or reservoir on one's premises." *Fitch v. Selwyn Village*, 234 N.C. 632, 68 S.E. 2d 255, and cases there cited. This principle was quoted with approval in *Stribbling v. Lamm*, 239 N.C. 529, 80 S.E. 2d 270.

A person has the right to maintain even an unenclosed pond or pool on his premises, and it is not negligence *per se* to do so. "When, however, he exercises this right and children of tender years are attracted thereto and it becomes a common resort of persons of tender years to which they go to play, and it appears that the owner knows or by the exercise of ordinary care should know that it is being so used, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes an act of negligence. Proximate cause is for the jury." *Barlow v. Gurney*, 224 N.C. 223, 29 S.E. 2d 681, and cases there cited.

The most satisfactory theory as applied to cases such as the one under consideration is that the landowner's liability rests upon the general legal standard of social conduct, i.e., due care under the circumstances. The owner or occupier of land must use such care as a man of ordinary prudence would use under the circumstances to prevent injury to others because of the dangerous condition of his premi-

ses when such condition is known, or should have been known, to him, and may be remedied and guarded against readily with reasonable cost, when the presence of other persons and their exposure to such hurt may be reasonably anticipated. 26 N.C.L. Rev., 228, and cases there cited.

No one is an insurer of the safety of children merely because he is the owner of places that may appeal to their youthful fancies. It is required only that he take reasonable precautions to prevent injury to them. He is not bound to make a trespass by or injury to children impossible. All that is required of him is to take such precautions, by way of erecting guards, providing fences or furnishing other means, as are reasonably sufficient to prevent trespassing by children. He need not take precautions against every conceivable danger to which an irrepressible spirit of adventure may lead a child. There is no duty to take precautions where to do so would be impracticable or unreasonable. The duty to safeguard against the danger is subject to the qualification that it can be done without serious inconvenience and without great expense to the owner. 38 Am. Jur. Negligence, Sec. 147, p. 812.

McMillin v. Stockyards, 179 Ky. 140, 200 S.W. 328, is a case in point. The defendant maintained a cattle dip containing water and chemicals. The dip was enclosed by a solid fence, but the gate thereto was sometimes left open. A six-year old boy entered through the open gate and came to his death by falling into the dip. Boys in the neighborhood habitually played around the dip but were ordered away when seen there. There was judgment for the defendant. Speaking to the subject the Court said: "The owner need not keep gates that are on his inclosed premises continually locked, and need not build his fence so high that no person can climb over it; nor is he required to have servants continually on the lookout for trespassing children. He need only exercise reasonable care, considering all of the surrounding conditions and circumstances. . . ."

Plaintiffs cite *Starling v. Cotton Mills,* 168 N.C. 229, 84 S.E. 2d 388, and *Price v. Water Co.,* 50 P. 450, in support of their position. But in the former case defendant had allowed its fence to rot in places with openings large enough to admit the passage of children; and in the latter case there was a kind of stile over the fence.

In the instant case the defendant erected a reasonable safeguard—a metal fence of small mesh, topped by three strands of barbed wire —in all seven feet high. There was no gate. The fence was kept in good condition. It was difficult to furrow under and to climb over. A hole found under the fence was "patched up" before the time in ques-

tion. There were no windows in defendant's buildings facing the reservoir. The office was some distance away. Trespassers at the reservoir could not be readily seen by defendant's employees. Defendant was under no duty to place a watchman at the reservoir or to keep the enclosure within the fence as befits a lawn. We think the trial court was correct in granting the motions for judgment as in case of nonsuit.

The appellants' brief brings forward a number of assignments of error with respect to testimony excluded upon the trial. These have been carefully examined. Had such testimony been allowed, it would have been merely cumulative and could not have affected the decision on this appeal. The other assignments of error are merely academic in this case in view of the decision herein.

The judgment of nonsuit is

Affirmed.

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

S. PEIRSON v. AMERICAN HARDWARE MUTUAL INSURANCE COMPANY.

(Filed 25 February, 1959.)

1. Insurance § 3—

If the language of an insurance contract is ambiguous and susceptible to two interpretations, the courts will give it that interpretation which is most favorable to insured.

2. Same—

If the language of an insurance contract is plain and unambiguous, the courts must give effect to the language, since the courts interpret but do not make contracts.

3. Same—

The words of an insurance contract must be given their ordinary and accepted meaning unless it is apparent another meaning is intended.

4. Same—

Each clause of an insurance contract must be given effect if this can be done by any reasonable construction, and differing clauses must harmonize if possible.

5. Insurance § 54—

A policy covering liability for medical expenses arising out of the use of any vehicle owned by insured and used principally in insured's

automobile dealer or garage business, or operations necessary or incidental thereto, does not cover medical expenses for insured's wife for injuries sustained while she was riding to a social function in an automobile owned and used by insured principally in his separate retail hardware mercantile business, notwithstanding that the vehicle was occasionally used in connection with the automobile dealer and garage business, since the vehicle was not used principally in the garage business or for a use incidental to such business. The word "incidental" defined.

PARKER, J., concurs in result.

APPEAL by defendant from *Morris, J.*, May 1958, Term of HALIFAX, docketed and argued as No. 178 at the Fall Term 1958.

Plaintiff seeks to recover medical expenditures made by him for his wife, incurred as a result of injuries she sustained in the operation by plaintiff of his automobile. Defendant issued to S. Peirson and N. G. Neville D.B.A.: Peirson - Neville Co. and S. Peirson and Co. its National Standard Garage Liability Policy, which obligated it to pay medical expenses resulting from injuries sustained within the insuring provisions of the policy. The case was here on a prior appeal at the Spring Term 1958. It was then remanded because the facts found were insufficient to determine the rights of the parties. See 248 N.C. 215, 102 S.E. 2d 800.

The parties, on the subsequent hearing in the Superior Court, again stipulated the facts as stated in the prior appeal. They stipulated additional material facts as follows:

"1. S. Peirson & Company is a retail business establishment located in a single store building . . . The premises of S. Peirson & Company are owned, maintained and used for the purpose of selling at retail hardware, building materials and supplies, seeds, feeds, fertilizer, hunting and fishing equipment, and similar farm and home supplies and appliances. The premises are not owned, maintained or used for the purpose of an automobile dealer, repair shop, service station, storage garage or parking place.

"2. Peirson-Neville Company, at all times pertinent hereto, was a retail farm equipment business located within and at the rear of the store building housing S. Peirson & Company. The two businesses were separated from each other by a wall or partition, in which wall or partition there was a door for passage from the storage room of S. Peirson & Company to the storage and display room of Peirson-Neville Company, Peirson-Neville Company fronting on Franklin Street. The premises of Peirson-Neville Company was owned, maintained and used for the purpose of selling, servicing, repairing, or storing farm

equipment such as farm tractors, wagons, balers, mowers, plows and related farm vehicles and implements, including farm trucks and automobiles.

"3. The 1952 Ford station wagon owned by S. Peirson was his personal vehicle, and was used by him in his personal and business transactions. At all times pertinent hereto, the said 1952 Ford station wagon was used principally in the operation of S. Peirson & Company. The said 1952 Ford station wagon was not used principally in the personal affairs of S. Peirson, nor in connection with the operation of Peirson-Neville Company; it was, however, occasionally used in connection with his personal affairs and Peirson-Neville Company."

When Mrs. Peirson was injured, the station wagon was being operated by Mr. Peirson to attend a social gathering in no way related to the businesses of S. Peirson and Co. or Peirson-Neville Co.

Based on the facts stipulated, the court rendered judgment for plaintiff. Defendant excepted and appealed.

Dickens & Dickens for plaintiff, appellee.
Battle, Winslow & Merrell for defendant, appellant.

RODMAN, J. The rights and obligations of the parties are fixed by the insuring provision of the policy which provides protection for liability resulting from: "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."

We have neither the right nor the desire to make contracts for litigants. When controversy arises as to the meaning of a contract of insurance, we must interpret it. If the language used is ambiguous and susceptible to two different interpretations, that interpretation is given which is most favorable to the insured. If, however, the language is plain and unambiguous, we must give effect to the language which the parties selected to create the asserted rights and obliga-

tions. The words used are given their ordinary, accepted meaning unless it is apparent another meaning is intended, and each is given effect. The object of interpretation should not be to find discord in differing clauses, but to harmonize all clauses if possible. *Rivers v. Insurance Co.*, 245 N.C. 461, 96 S.E. 2d 431; *Scarboro v. Ins. Co.*, 242 N.C. 444, 88 S.E. 2d 133; *Pruitt v. Ins. Co.*, 241 N.C. 725, 86 S.E. 2d 401; *Motor Co. v. Ins. Co.*, 233 N.C. 251, 63 S.E. 2d 538; *Gant v. Ins. Co.*, 197 N.C. 122, 147 S.E. 740; *McCain v. Ins. Co.*, 190 N.C. 549, 130 S.E. 186.

We examine the quoted insuring provisions in accord with established principles. It is apparent that liability is imposed for injuries resulting from the use of an automobile in either of two events: (1) where the automobile is used principally in the garage business even though not used for that purpose when the injury is inflicted; (2) when the automobile produces injury as a result of a use incidental to the garage business.

By stipulation of the parties the automobile was not being used for business purposes when Mrs. Peirson was injured. It is also stipulated that the automobile was not used principally in the business of automobile dealer, repair shop, service station, storage, or public parking place. On the contrary, it is established that the use for that purpose was only occasional and the principal use was in connection with plaintiff's mercantile business.

It is clear, therefore, the operation of the automobile when Mrs. Peirson was injured was not protected unless, as plaintiff contends, the operation of plaintiff's individual business of selling retail hardware, building materials, supplies, feeds, fertilizer, hunting and fishing equipment, and similar farm and home supplies and appliances was, in the language of the policy, an operation "necessary or incidental" to the business of "automobile dealer, repair shop, service station, storage garage or public parking place."

The facts stipulated establish that the mercantile business operated by plaintiff is neither necessary nor incidental to the business of servicing, repairing, or storing motor vehicles.

Clearly, neither business is necessary to the operation of the other if the word "necessary" is to be given its ordinary, accepted meaning of "A thing that is necessary or indispensable to some purpose; something that one cannot do without; a requisite, an essential." *Storm v. Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17.

Courts have frequently been called upon to interpret the word "incidental." In The Robin Goodfellow, 20 F 2d 924, it is said: " 'Incidental', obviously, means depending upon or appertaining to some-

thing else as primary. . . . Lord Dunevin in *Trustee of Harbor of Dundee v. Nicol* (1915) H.L.A.C. 550 said 'Incidental, in my view, means incident to the main purpose of the main business.' "

The Supreme Court of South Carolina, in *Archambault v. Sprouse,* 63 S.E. 2d 459, quotes with approval the definition of "incidental" in Black's Law Dictionary: "Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose."

In *Spiegel v. Felton,* 134 N.Y.S. 2d 242, the Court had under consideration the identical language here considered. There the insured was selling Christmas trees on his insured parking lot. Plaintiff was injured when he went to purchase a tree. The insurance company denied liability under its policy. The Court said: "Although it may be true that some parking lots in New York City conduct the sale of Christmas trees during the holiday season, it can hardly be said that the incidents connected with a parking lot include the sale of Christmas trees."

In *Boh v. Pan American Petroleum Corp.,* 128 F. 2d 864, the Court had under consideration provisions of a lease "for the purpose of operating thereon a gasoline service station and for the sale of tires, tubes, batteries and automobile accessories, and any other incidental commercial activity." The Court was called upon to determine whether the property could be used for commercial advertising in general. It said: "In our opinion, the use of the premises to advertise products wholly alien to the business conducted by the appellant was not an activity incidental to the operation of a filling station. If the parties had intended that the grant should be so broad, their purpose could have been easily accomplished by omitting the word *incidental.* Its inclusion as a descriptive adjective of limitation forcefully indicates that the parties intended to include only such commercial activities as are ordinarily connected with or related to the principal purpose of operating a gasoline service station."

In *Heritier v. Century Indemnity Co.,* 162 A. 573, the court was called upon to determine whether transportation of wedding parties was incidental to the business of a funeral director. It said: "Granted that many funeral directors may rent cars for wedding parties, it does not seem to us to be an incidental part of the funeral business. The incidents connected with burying the dead can hardly be said to be the conduct of a car livery business. That the two occupations may be followed by the same person does not make one the incident

of the other, but merely suggests the co-ordination of two sorts of activities.

"In small towns the same merchant frequently sells coal and ice, but the selling of ice is hardly incidental to the conduct of the coal business. Funeral directors were at one time better known as undertakers. When they made their own coffins they often used their spare time in making beds and furniture. Could it be said that the manufacture of beds was incidental to the burial of the dead?"

The selling of clothes made by others is not incident to the business of manufacturing and selling the clothes of that manufacturer. *Nicollet Nat. Bank v. Frisk-Turner Co.*, 74 N.W. 160.

Burk v. Mead, 64 N.E. 880, *Duke Anderson Drilling Co. v. Smith*, 141 P. 2d 565, *Builders' Club of Chicago v. United States*, 58 F. 2d 503, *Papani v. United States*, 84 F. 2d 160, likewise appropriately illustrate the meaning of the word "incidental."

Since plaintiff's automobile was not used principally in the business of repairing, servicing, etc. for which protection is provided by the policy, and the mercantile business operated by plaintiff as an individual is neither necessary nor incidental to the business of repairing, servicing, and storing protected by the policy; it follows that, upon the established facts, no liability rests on defendant.

Reversed.

PARKER, J., concurs in result.

R. L. CORBETT AND WIFE, CALLIE LILLIAN CORBETT v. S. L. CORBETT AND WIFE, MAUDE A. CORBETT; AND J. C. CORBETT AND WIFE, MARGARET CORBETT.

(Filed 25 February, 1959.)

1. Parties § 4: Partition § 4a—

Upon plea of sole seizin in partition proceedings, the mortgagee of the party pleading sole seizin is a proper, but not a necessary party, and whether such party should be joined rests in the discretion of the trial court.

2. Appeal and Error § 3—

The discretionary refusal to join a proper party is not appealable.

3. Appeal and Error § 12—

The court has power to proceed to trial after appeal from the court's discretionary refusal to join a proper party, since such appeal is premature and subject to dismissal.

4. Adverse Possession § 22—

It is competent for a person claiming title by adverse possession to introduce evidence that he had listed and paid taxes on the land as a circumstance, with other circumstances, tending to show claim of title.

5. Deeds § 7—

The registration of a deed by grantor is effective delivery to the grantee even though the grantee knows nothing of its execution or recording, since it will be presumed that the grantee will accept the deed made for his benefit in the absence of evidence to the contrary.

6. Cancellation and Rescission of Instruments § 7—

Heirs cannot attack the deed of an ancestor except for fraud or undue influence in securing the execution thereof.

7. Adverse Possession § 15—

Deed executed by the trustee to the purchaser at foreclosure sale, or by such purchaser to claimant, constitutes color of title even if the foreclosure is defective or void.

8. Adverse Possession § 8—

Where the owner of land executes and records a deed to her son and thereafter the land is purchased by another son at foreclosure of a prior deed of trust executed by her, the fact that she continues to reside on the property until her death as a member of the household is insufficient to reestablish title in her, and only the grantee son is entitled to attack the foreclosure.

9. Mortgages § 39b—

Where the grantee of the mortgagor acquiesces in the foreclosure of a prior deed of trust executed by his grantor and accepts from the purchaser in payment of a lien on the property monies borrowed by the purchaser on a subsequent deed of trust, he is estopped from attacking the title of the purchaser.

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

APPEAL by plaintiffs from *Moore (Clifton L.) J.*, October Term 1958, of PITT.

This action was instituted on 14 June 1949 as a partition proceeding involving lands formerly owned by Addie O. Corbett. Plaintiffs alleged that R. L. Corbett, S. L. Corbett, and J. C. Corbett, are tenants in common in the lands sought to be partitioned. However, S. L. Corbett, in his answer, alleged that Addie O. Corbett conveyed said lands away in 1921; that she has not owned said lands since that time; and that he purchased said tract of land in his own right in fee simple in 1929, and has owned said tract of land since that time and is now the sole and absolute owner thereof. Therefore, the sole issue for determination in the hearing below was one of title. J. C.

Corbett filed no answer or other pleading asserting any interest in the property.

1. Addie O. Corbett died on 11 May 1947, and it is admitted that R. L. Corbett, S. L. Corbett, and J. C. Corbett, are the sole heirs at law and next of kin of Addie O. Corbett, deceased.

2. Prior to 12 February 1921, Addie O. Corbett held the fee simple title to the 90.7 acres of land involved in this controversy; all persons claiming an interest therein are parties to this proceeding and each of the said parties is 21 or more years of age.

3. Addie O. Corbett executed a deed of trust dated 22 December 1919 to F. M. Wooten and John A. Coke, Jr., Trustees for the Life Insurance Company of Virginia, which is recorded in the office of the Register of Deeds, in Book M-13, at page 275, and securing ten bonds of even date, nine of which were for $300.00 each and the tenth for $3,300.00 (The words "duly recorded" used hereinafter shall mean recorded in the office of the Register of Deeds of Pitt County.) This deed of trust was canceled of record on 10 October 1940.

4. On 24 December 1919, Addie O. Corbett mortgaged the same lands to J. L. Fountain and R. A. Fountain to secure a note in the amount of $2,806.93 said mortgage being duly recorded in Book Y-13, at page 12, on 27 December 1920.

5. On 31 December 1919, Addie O. Corbett mortgaged the lands in question to T. J. Moore, Cashier, securing a $1,500.00 note, said mortgage being duly recorded in Book M-13, at page 300, on 31 December 1919.

6. On 12 February 1921, Addie O. Corbett by warranty deed conveyed to J. C. Corbett the lands involved herein for $100.00 and other valuable consideration, said deed being duly recorded in Book S-13, at page 544, on 12 February 1921.

7. S. L. Corbett, sometime prior to 1929, purchased the note secured by the mortgage deed to T. J. Moore, Cashier, referred to and described in paragraph 5 hereinabove, and caused the same to be assigned to him. Thereafter, this mortgage deed was foreclosed and S. O. Worthington became the last and highest bidder therefor in the sum of $6,000.00. The property was conveyed to him on 23 April 1929 and the deed duly recorded in Book X-17, at page 14, on 27 April 1929. On 1 May 1929, S. O. Worthington and his wife conveyed this property to S. L. Corbett for a consideration of $6,000.00. This deed was filed for registration in the office of the Register of Deeds of Pitt County on 1 May 1929 and was duly recorded in Book X-17, at page 22.

8. S. L. Corbett, unmarried, executed a deed of trust to W. O. Mc-

Gibbony, Trustee for the Federal Land Bank of Columbia, dated 28 September 1940, and duly recorded in book Q-23, at page 511, securing an indebtedness in the sum of $2,200.00. This instrument was canceled 18 January 1954.

9. S. L. Corbett, unmarried, executed a deed of trust to W. O. McGibbony, Trustee for the Land Bank Commissioner, dated 28 September 1940, securing the sum of $1,800.00. This instrument was duly recorded in Book Q-23, at page 513, and was canceled on 18 January 1954.

10. S. L. Corbett and wife, Maude A. Corbett, executed a deed of trust dated 23 November 1953 to W. O. McGibbony, Trustee, securing indebtedness to the Federal Land Bank of Columbia in the sum of $5,000.00, which deed was duly recorded in Book L-27, at page 62, on 1 December 1953. This instrument has not been canceled of record.

It was stipulated that the descriptions in all the foregoing instruments are the same descriptions and the same lands described in the petition.

11. J. C. Corbett testified that he knew his mother had executed to him a deed for the premises but he never took possession thereof; nor did he take any action to have the deed set aside or canceled. The evidence does show, however, that he purchased the $3,300.00 bond, secured by the deed of trust executed by his mother to the Trustees for the Life Insurance Company of Virginia, and had it assigned to him. The defendant S. L. Corbett paid him the amount he had invested, in the sum of $3,300.00, and S. L. Corbett paid the accumulated interest due on the bond to the original holder thereof. This amount was paid out of the proceeds from the loans from the Federal Land Bank of Columbia, secured by deeds of trust executed by S. L. Corbett on the premises involved.

The evidence tends to show that S. L. Corbett gave up his work as a tobacco auctioneer in 1922 and returned home and lived in the ancestral home with his mother until her death in 1947; that after 1929, S. L. Corbett made all contracts with tenants and handled all other contracts relating to the farm as owner; that prior to 1929 he listed the property for taxes in the name of J. C. Corbett and since 1929 he has listed the farm for taxes in his own name and has paid the taxes thereon. The evidence further shows that in making tobacco allotments on the farm, the agreements were made with S. L. Corbett as owner.

At the close of all the evidence the defendant S. L. Corbett moved

for judgment as of nonsuit. The motion was allowed. The plaintiffs appeal, assigning error.

Jones, Reed & Griffin for plaintiffs.

James & Speight, W. H. Watson, and M. E. Cavendish for defendants.

DENNY, J. The plaintiffs' first assignment of error is to the overruling of their motion to make W. O. McGibbony, Trustee, and the Federal Land Bank of Columbia, South Carolina, parties defendant in this action.

In McIntosh, North Carolina Practice and Procedure, section 209, page 184, it is said: "Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court." McIntosh, Practice and Procedure, 2nd Ed., section 584, page 292; *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659; *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

"The making of new parties defendant where they are not necessary is a matter within the discretion of the trial judge, and his refusal is not reviewable." *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859.

We hold that the parties sought to be brought in and made parties defendant are not necessary parties in the determination of the rights litigated between the present parties. Hence, this assignment of error is overruled.

The ninth assignment of error is directed to the refusal of the court below to continue the case pending appeal from the ruling on the motion to make additional parties.

There is no merit in this assignment of error. The court below having exercised its discretion in denying the motion to make additional parties, who are not necessary parties, but at most only proper parties, an appeal therefrom would have been premature and subject to dismissal. The ruling of the court below did not impair any substantial right of the plaintiffs which would warrant an appeal. *McPherson v. Morrisette,* 243 N.C. 626, 91 S.E. 2d 574; *Burgess v. Trevathan, supra; Shelby v. Lackey,* 235 N.C. 343, 69 S.E. 2d 607; *Horne v. Horne,* 205 N.C. 309, 171 S.E. 91; *Bank v. McCraw,* 203 N.C. 860,

166 S.E. 790; *Trust Co. v. Whitehurst,* 201 N.C. 504, 160 S.E. 757; *Spruill v. Bank,* 163 N.C. 43, 79 S.E. 262.

The plaintiffs' sixth and seventh assignments of error are directed to the admission of evidence to the effect that from 1922 until 1929 the lands in controversy were listed for taxes in the name of J. C. Corbett, and since 1929 the lands have been listed for taxes in the name of S. L. Corbett and the taxes have been paid by him.

The listing and payment of taxes, while not sufficient alone to show adverse possession, evidence of such listing and payment of taxes is competent and may be considered in connection with other circumstances as tending to show claim of title. *Sessoms v. McDonald,* 237 N.C. 720, 75 S.E. 2d 904; *Perry v. Alford,* 225 N.C. 146, 33 S.E. 2d 665; *Pasley v. Richardson,* 119 N.C. 449, 26 S.E. 32; *Ellis v. Harris,* 106 N.C. 395, 11 S.E. 248. These assignments of error are overruled.

The eighth assignment of error is based on the exception to the allowance of S. L. Corbett's motion for judgment as of nonsuit.

In connection with this assignment of error we deem it appropriate to consider the character and effect of the deed executed by Addie O. Corbett to J. C. Corbett. In the first place, this Court has held that there is an effective delivery of a deed when the grantor causes the instrument to be recorded, notwithstanding the grantee knew nothing of its execution or of its having been filed of record. *Buchanan v. Clark,* 164 N.C. 56, 80 S.E. 424; *Robbins v. Rascoe,* 120 N.C. 79, 26 S.E. 807, 36 L.R.A. 238, 58 Am. St. Rep. 774; *Phillips v. Houston,* 50 N.C. 302.

Where a deed is executed and recorded, it is presumed that the grantee therein will accept the deed made for his benefit. This is so, although the transaction occurs without the grantee's knowledge. Such presumption will prevail in the absence of evidence to the contrary. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Buchanan v. Clark, supra; Robbins v. Rascoe, supra;* 16 Am. Jur., Deeds, section 389, page 658.

Heirs cannot attack the deed of an ancestor except for fraud or undue influence in securing the execution thereof. *Gadsby v. Dyer,* 91 N.C. 311. There is no allegation of fraud or undue influence pleaded in this proceeding.

Moreover, the deed from S. O. Worthington and wife to S. L. Corbett would constitute color of title if it be conceded, which it is not, that the foreclosure pursuant to which S. O. Worthington obtained his deed to the premises was defective or even void. *Trust Co. v. Parker,* 235 N.C. 326, 69 S.E. 2d 841; *Garner v. Horner,* 191 N.C. 539, 132

S.E. 290; *Best v. Utley*, 189 N.C. 356, 127 S.E. 337; *Whitten v. Peace*, 188 N.C. 298, 124 S.E. 571.

The appellants contend that Addie O. Corbett was in possession of the lands involved herein until her death in 1947. However, in our opinion, since she conveyed the lands to her son, J. C. Corbett, in 1921, and caused the deed to be duly filed of record, the circumstances and character of her possession under the facts disclosed on this record were not such as to re-establish title in her, and we so hold. Consequently, the only person in a position to attack the foreclosure pursuant to which S. L. Corbett now holds title, was J. C. Corbett. Even so, since he acquiesced in the foreclosure and the execution by S. L. Corbett of the deeds of trust to W. O. McGibbony, Trustee for the Land Bank and the Bank Commissioner, by accepting the major portion of the proceeds derived from said loans in settlement of a lien against the lands held by him as assignee, he is estopped from attacking S. L. Corbett's title.

We have carefully examined the remaining exceptions and assignments of error and in our opinion no prejudicial error has been made to appear that would warrant a reversal of the judgment entered below. The ruling of the court below on the motion for judgment as of nonsuit is

Affirmed.

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

M. G. WRIGHT v. EVELYN H. WRIGHT McMULLAN EXECUTRIX OF THE ESTATE OF FLEETWOOD WRIGHT

AND

M. G. WRIGHT v. DOLLY MAE WRIGHT, EXECUTRIX OF THE ESTATE OF ERNEST WRIGHT.

(Filed 25 February, 1959.)

1. Evidence § 2—

Federal regulations having general application and legal effect and published in the Federal Register must be given judicial notice. 44 USCA 307.

2. Gifts § 1—

The ownership of U. S. Savings Bonds, Series E, is fixed by the U. S. Treasury regulations in effect when the bonds are issued, irrespective of state laws relating to gifts *inter vivos* or *causa mortis*.

3. Same—

Where the purchaser of U. S. Savings Bonds has them issued and registered in the name of his son and retains them in his possession, the son, or upon the son's death, his personal representative, is entitled

to the proceeds of the bonds under Federal regulations, irrespective of the purchaser's mistake as to the legal consequences flowing from his intentional and deliberate act in having the bonds so issued and registered, there being no mistake of fact in regard thereto.

4. Reformation of Instruments § 1—

Where the purchaser of U. S. Bonds has them issued in the name of his son and retains possession thereof, he may not, upon the subsequent death of the son, assert ownership of the funds upon his contention that he intended merely to set aside the funds which could be made a gift at some future time should he so desire, since a party may not avoid the legal effect of his acts because of ignorance of law unless there be some fraud or circumvention.

APPEAL by plaintiff from *Bundy, J.*, September 1958 Term of PASQUOTANK.

These actions were instituted to obtain declaratory judgments (G.S. 1-253 *et seq.*) determining the ownership of four matured U. S. Savings Bonds, Series E.

On 16 April 1948 plaintiff purchased from Guaranty Bank & Trust Company, as issuing agent, two bonds with a matured value of $1,000 each and two bonds of a matured value of $500.00 each. He caused one $1,000 bond and one $500 to be registered in the name of his son Fleetwood Wright. The other bonds were, at his direction, registered in the name of his son Ernest Wright.

Fleetwood Wright died testate 16 January 1957. His widow qualified and is now acting as executrix of his will.

Ernest Wright died testate 6 July 1957. His widow qualified and is now acting as executrix of his will.

Neither son was informed of the purchase and registration of the bonds in their names. Plaintiff has had exclusive possession of the bonds from the date of issue.

Plaintiff alleges in section 4 of each complaint:

"That plaintiff's purpose in purchasing said bonds in the name of his son was to set aside at that time and in that manner the funds which could be the subject of a gift at some time in the future should plaintiff wish to make a gift to his son, or, if not made the subject of a gift prior to plaintiff's death or otherwise disposed of, that the bonds would become the property of his son at plaintiff's death. That plaintiff did not intend to vest title to the bonds in his son when the same were purchased, and he had not so intended at any time prior to his son's death. That plaintiff's said son is now deceased and plaintiff wishes to redeem the aforesaid bonds for cash."

Defendants, in their answers, asserted ownership of the bonds and

the right to collect the amount owing thereon by virtue of the regulations pursuant to which the bonds were issued.

The causes were consolidated. Defendants moved for judgment on the pleadings. The court thereupon adjudged defendants were entitled to the bonds registered in the names of their deceased husbands. Plaintiff excepted and appealed.

LeRoy, Goodwin & Wells for plaintiff, appellant.
Worth & Horner and J. W. Jennette for defendant appellees.

RODMAN, J. The statute authorizing the sale of savings bonds expressly provides that they shall be issued subject to such terms and conditions as the Secretary of the Treasury may prescribe. 31 USCA 757C.

Regulations having general application and legal effect must be published in the Federal Register, 44 USCA 305. The contents of the Federal Register must be judicially noticed, 44 USCA 307. Periodically these regulations are codified and published as Code of Federal Regulations (C F R).

Ownership of the bonds is fixed by the regulations in effect when the bonds were issued. *Jones v. Callahan,* 242 N.C. 566, 89 S.E. 2d 111; *Watkins v. Shaw,* 234 N.C. 96, 65 S.E. 2d 881; *Ervin v. Conn,* 225 N.C. 267, 34 S.E. 2d 402; *Lee v. Anderson,* 218 P 2d 732 (Ariz.); *Davies v. Beach,* 168 P 2d 452 (Cal.); *Harvey v. Rackliffe,* 41 A 2d 455, 161 A.L.R. 296 (Maine); *In re Briley's Estate,* 21 So. 2d 595 (Fla.); *Connell v. Bauer,* 61 N.W. 2d 177, 40 A.L.R. 2d 776 (Minn.) The regulations in effect when the bonds here in question were issued appear in 31 CFR 1949 ed.

Pertinent to the decision of this case, the regulations provide:

(1) "United States Savings Bonds are issued only in registered form. The name and post office (mailing) address of the owner, as well as the name of the co-owner or designated beneficiary, if any, and the date as of which the bond is issued will be inscribed thereon at the time of issue by an authorized issuing agent. The form of registration used must express the actual ownership of and interest in the bond and, except as otherwise specifically provided in the regulations in this part, will be considered as conclusive of such ownership and interest." 315.2.

(2) Bonds of Series E may be registered only in the names of individuals and may be registered in one of three forms: (a) in the name of one person, (b) in the name of two (but not more than two) persons in the alternative as co-owners, e.g., "John A. Jones or Mrs. Ella

S. Jones." No other form of registration establishing co-ownership is authorized. (c) in the name of one (but not more than one) person, payable on death to one (but not more than one) other person, e.g., "John A. Jones, payable on death to Miss Mary E. Jones." 315.4

(3) "A claim against an owner or co-owner of a savings bond and conflicting claims as to ownership of or interest in such bond as between co-owners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made, upon presentation and surrender of the bond, except as follows:

"(a) No such proceedings will be recognized if they would give effect to an attempted voluntary transfer *inter vivos* of the bond or would defeat or impair the rights of survivorship conferred by the regulations in this part upon a surviving co-owner or beneficiary.

"(b) A judgment creditor, a trustee in bankruptcy or a receiver of an insolvent's estate will have the right to payment (but not to reissue) and a judgment creditor will be limited to payment at the redemption value current thirty days after the termination of the judicial proceedings or current at the time the bond is received, whichever is smaller.

"(c) If a debtor, or bankrupt, or insolvent, is not the sole owner of the bond, payment will be made only to the extent of his interest therein, which must be determined by the court or otherwise validly established.

"A divorce decree ratifying or confirming a property agreement between husband and wife or otherwise settling their respective interests in savings bonds, will be recognized and will not be regarded as a proceeding giving effect to an attempted voluntary transfer for the purpose of this section." 315.13

(Subsequent to the issuance of these bonds the regulations have been amended to permit a valid gift *causa mortis*.)

(4) "A savings bond registered in the name of one person in his own right without a co-owner or beneficiary, or to which one person is entitled in his own right under regulations in this part, will be paid to such person during his lifetime upon a duly executed request for payment. Upon the death of the owner, such bond, if not previously redeemed, will be considered as belonging to his estate and will be paid or reissued accordingly." 315.43

(5) 315.45 makes provision for payment of bonds registered in the names of co-owners and 315.46 makes provision for payment of bonds registered in the name of a designated person, payable on death to a named beneficiary.

(6) "Reissue of a savings bond will be restricted to a form of registration permitted by the regulations in effect on the date of original issue of the bond and will be made only upon surrender of the bond and only in accordance with the provisions of the regulations in this part. Reissue of a savings bond in a different name or in a different form of registration will be made only in the following instances:

"(a) To correct an error in the original issue, upon appropriate request, supported by satisfactory proof of such error unless the error is made by the issuing agent.

"(b) To show a change in the name of an owner, co-owner or designated beneficiary, upon his request, supported by satisfactory proof of the change of name if for any reason other than marriage." 315.32

The regulations by clear and unmistakable language fix ownership by the form of registration. These bonds could not be the subject of a gift *inter vivos* or *causa mortis*. State laws fixing the requirements for a valid gift have no application to these bonds.

No judgment can have validity which nullifies regulations issued by the Treasury Department within the authority granted by Congress in the exercise of its constitutional powers.

The regulations make provision for the correction of errors in the form of registration. Plaintiff here does not allege any mistake in the form of registration. To the contrary he expressly avers that the bonds were registered in accordance with his specific direction. He merely says his intentional act produces a different legal consequence from that contemplated when he acted. His mistake as to the legal consequences flowing from his deliberate and intentional act cannot destroy the force and effect of the law.

In the language of *Barnhill, J. (later C.J.)*, in *Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E. 2d 651: "(T)he distinction between rules of construction and rules of law controlling construction must be kept in mind. While all other rules of construction must yield to the primary 'intent' rule, the intent must yield to conflicting rules of law controlling construction such as the rule in *Shelley's* case and the rule against perpetuities."

"It is settled that mere ignorance of law, unless there be some fraud or circumvention, is not a ground for relief in equity to *set aside* conveyances or avoid the legal effect of acts which have been done." *Foulkes v. Foulkes*, 55 N.C. 260; *Bledsoe v. Nixon*, 68 N.C. 521; *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488; *Edgerton v. Harrison*, 230 N.C. 158, 52 S.E. 2d 357; *Griffin v. Springer*, 244 N.C. 95, 92 S.E. 2d 682; 12 Am. Jur. 633, 634.

Plaintiff and the United States are bound by the contract which obligated the United States to pay the stipulated amounts to the registered owner or on his death to his estate. *Ervin v. Conn, supra; Ibey v. Ibey,* 43 A 2d 157 (N.H.); *Parkinson v. Wood,* 30 N.W. 2d 813 (Mich.); *Myers v. Hardin,* 186 S.W. 2d 925 (Ark.); *Knight v. Wingate,* 52 S.E. 2d 604 (Ga.); *In re Haas' Estate,* 77 A 2d 523 (N.J.).

The registered owner of these bonds occupies a position similar to a beneficiary in a policy of insurance where the right to change the beneficiary has not been reserved by the insured. In such a situation the insured has no power to substitute himself as the beneficiary or to defeat the right of the named beneficiary to collect upon the happening of the designated event. *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19; *Wooten v. Odd Fellows,* 176 N.C. 52, 96 S.E. 654; *Walser v. Ins. Co.,* 175 N.C. 350, 95 S.E. 542.

Under the regulations plaintiff, had he elected to do so, could have reserved the right to change the beneficiary of the contract. He elected not to do so. His election then made is now binding.

Affirmed.

W. H. PENNY AND WIFE, PAULINE B. PENNY; ROY S. WHITFIELD AND WIFE, BERNICE WHITFIELD; THOMAS H. McCAULEY; E. WELDON HERNDON AND WIFE, ROBENA J. HERNDON; IRVING W. PAGE AND WIFE, EULA P. PAGE; AND J. P. CARLTON AND WIFE, IVEY M. CARLTON v. CITY OF DURHAM, A MUNICIPAL CORPORATION; EDISON H. JOHNSON, BUILDING AND PLUMBING INSPECTOR OF THE CITY OF DURHAM; AND NORTHLAND INVESTMENT COMPANY, INC., A CORPORATION.

(Filed 25 February, 1959.)

1. Pleadings § 15—

A demurrer admits, for the purpose of testing the pleading, the truth of factual averments properly alleged and such relevant inferences of fact as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader.

2. Municipal Corporations § 37—

It is not required that zoning district lines coincide with property lines, regardless of the area involved. G.S. 160-173.

3. Same—

As a general rule, the words of a zoning ordinance will be given their ordinary meaning and significance.

4. Same—

Zoning ordinances are in derogation of the right of private property, and exemptions must be liberally construed in favor of the property owner.

5. Same—

The zoning ordinance in question, passed by a majority vote, rezoned applicant's property lying more than 150 feet from the street, but left the zoning regulations unchanged as to applicant's property abutting the street to a depth of 150 feet therefrom. The owners of more than 20 per cent of the footage on the opposite side of the street from applicant's property had protested the change. *Held:* Protestants' property does not lie "directly opposite" the property rezoned within the purview of G.S. 160-176, and therefore it was not required that the zoning ordinance be passed by three-fourths of the members of the city council. The term "directly opposite" defined.

APPEAL by plaintiffs from *McKinnon, J.*, July Civil Term, 1958, of DURHAM, docketed and argued as No. 669 at the Fall Term, 1958.

This action was instituted to have declared illegal and void an ordinance of the City of Durham rezoning a parcel of land belonging to defendant, Northland Investment Company, Inc., and reclassifying same as business property, and to restrain the use thereof for business purposes. The defendants severally demurred to plaintiffs' complaint on the ground that it did not state causes of action against them.

The complaint alleges, in substance, the following facts pertinent to this appeal (the paragraphing is ours and does not conform to the paragraph numbering of the complaint):

(1) Plaintiffs are owners and occupants of residences located in the City of Durham on property immediately abutting the south side of Club Boulevard (a public street), extending 100 feet from the street frontage on the south side of Club Boulevard. The defendant, Northland Investment Company, Inc., (hereinafter referred to as Northland) owns approximately 31 acres of land lying on the north side of and abutting Club Boulevard, and fronting 912.7 feet on Club Boulevard. The property of plaintiffs lies across the Boulevard from and directly opposite Northland's property fronting on the Boulevard. Plaintiffs are the owners of more than twenty per cent of the area of the lots directly opposite said land of Northland and extending at least 100 feet from the southern line of Club Boulevard.

(2) On 2 December, 1957, and for many years prior thereto, the land of defendant, Northland, and the area including the property of plaintiffs, together with the neighborhood adjacent thereto, had,

by valid ordinance of the City of Durham, been zoned for one-family residence usage only.

(3) On or about 20 August, 1957, defendant, Northland, applied to the Planning and Zoning Commission of the City of Durham for a change for its property from a residential zone to a local community commercial zone for a shopping center to be known as Northgage Shopping Center. From time to time the application of Northland was changed with respect to the area to be rezoned. In its final form the application excluded from the area to be rezoned the land abutting on Club Boulevard and fronting on same 912.7 feet and extending northwardly from the Boulevard to a line parallel with the Boulevard and 150 feet northwardly therefrom, thus forming a "buffer strip" 150 feet wide intervening between the Boulevard and the area to be rezoned.

(4) The plaintiffs, together with some 200 others, signed and presented to the Planning and Zoning Commission a protest against the rezoning applied for by Northland, and appeared in person and through counsel and presented said written protest and oral protest at all public meetings of the Commission with respect to Northland's application.

(5) The Commission officially approved the application of Northland in its final form and recommended to the Durham City Council that an ordinance be adopted to rezone the Northland property for a shopping center in accordance with said application.

(6) The Durham City Council consists of thirteen members. By a vote of seven "ayes" and five "noes" the Council adopted such ordinance at its regular meeting 2 December, 1957, and the Mayor ruled that said ordinance had been lawfully adopted.

(7) The enforcement of such ordinance would injuriously affect the value and desirability of plaintiffs' property and irreparably damage plaintiffs. The ordinance was not legally adopted in accordance with G.S. 160-176. The creation of a "buffer strip" was merely to circumvent the law. The City of Durham should be restrained from enforcing the ordinance; Northland from constructing or permitting to be constructed a shopping center on its property; and defendant, Building and Plumbing Inspector, from issuing permits for construction of buildings for a shopping center.

On 30 July, 1958, the matter came on to be heard before Judge McKinnon upon the demurrers of defendants. From judgment sustaining said demurrers plaintiffs excepted and appealed.

Reade, Fuller, Newsom & Graham for plaintiffs, appellants.

C. V. Jones, for appellees, City of Durham and Edison H. Johnson, Building Inspector.

E. C. Brooks, Jr., E. K. Powe and Eugene C. Brooks, III, for appellee, Northland Investment Company, Inc.

MOORE, J. A demurrer admits, for the purpose of testing the pleadings, the truth of factual averments properly alleged and such relevant inferences of fact as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *Bailey v. McGill*, 247 N.C. 286, 100 S. E. 2d 860.

In the court below the plaintiffs based their case upon the alleged illegality of the rezoning ordinance of 2 December, 1957. As set out in the judgment appealed from, plaintiffs assigned as the sole ground for their contention that said ordinance is illegal "that their property is directly opposite the property which was rezoned by said ordinance, within the meaning of G.S. 160-176, which requires the affirmative vote of three-fourths of the members of the City Council to change a zone when the owners of twenty per cent or more of the lots directly opposite the area, the zone of which is sought to be changed, filed written protest against such change; and that since said ordinance did not receive a three-fourths vote . . . it was not validly adopted. . . ."

The pertinent part of G.S. 160-176 is as follows: "Such regulations, restrictions and boundaries (fixed by a zoning ordinance) may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change, signed by the owners of twenty per cent or more . . . of the area of the lots . . . directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by favorable vote of three-fourths of all the members of the legislative body of such municipality." The portion in parentheses was inserted by us for sake of clarity.

It will be observed that the rezoning ordinance in question did not receive a favorable vote of three-fourths of all the members of the Durham City Council, but was adopted by a majority vote of seven to five. If the property of plaintiffs is "directly opposite" the rezoned property of defendant, Northland, the rezoning ordinance is invalid. If not "directly opposite," such ordinance is valid. It is to be kept in mind that Club Boulevard and the buffer strip 150 feet wide intervenes between the property of plaintiffs and Northland's rezoned property.

The fact that Northland owns both the "buffer strip" and the re-

zoned area and that both are parts of one tract of land makes no difference in this case. We must consider the matter in the same manner as if these areas were under separate ownership. The "Zoning Regulations" provide that the City "may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article." G.S. 160-173. To hold that zoning district lines must coincide with property lines, regardless of area involved, would be to render the act largely ineffective.

To reach a solution, it is necessary to determine the meaning of the expression "directly opposite" as used under the circumstances in this case. Webster's New International Dictionary, Second Edition, Unabridged, defines "opposite" as "on opposite sides; in an opposed position. Across an intervening space from and usually facing or on the same level with; as . . . to live opposite the post office." It defines "directly" to mean, "in a straight line; at right angles to a surface; Vertically, as opposed to obliquely; without anything intervening; straightway; next in order."

If the statute had used the word "opposite" alone, clearly it could be said that plaintiffs' property and the rezoned property are opposite in the sense of being "across an intervening space" from each other, or in the sense of being "on opposite sides" of the intervening space. This definitive analysis, however, if carried to its logical conclusion, might lead to an absurdity. In this sense two tracts of land several miles apart might be said to lie opposite across any given number of intervening areas.

Even if the foregoing application is made of the word "opposite," this word is qualified by the word "directly," and some meaning must be given to the word "directly" when used conjunctively with the word "opposite." To express it another way, the legislature would not have used the word "directly" as a mere redundancy; it was intended to modify, limit or enlarge the word "opposite." It seems to us that the only definitions of "directly" that would, under the circumstances in this case, really modify "opposite" are: "without anything intervening; next in order."

So it is our opinion that the expression "directly opposite" when applied to the lands in this case means those tracts of land on opposite sides of the street with only the street intervening. This seems to be the most natural and logical and best understood application of the expression. With reference to zoning "the law is disposed to interpret language in the light of surrounding circumstances and to give to words their ordinary meaning and significance." *In re: Builders Supply Co.*, 202 N.C. 496, 163 S.E. 462.

In the case of *Tow-boat Company v. Grant,* 2 Mon. 287, 15 A. 706 (Penn.) a charge of the lower court was approved as to what was "opposite" the town of Sunbury. The trial court said: "Suppose you were to move this town straight across the river, what would you strike? That is just what is opposite." The charge further stated: "Of course, taken literally, everything in this world is opposite something else, and if you take this broad signification the whole western hemisphere is opposite to the town of Sunbury, if you keep widening it out; but the act does not mean that."

The word "directly" is defined, "in a direct way; without anything intervening; not by secondary, but by direct, means" in the following cases, though the factual situations are quite different: *Clark v. Warner,* 85 Okla. 153, 204 P. 929, 934; *Olsen v. Oil Co.,* 188 Cal. 20, 204 P. 393, 396; *Life & Accident Ins. Co., v. Campbell,* 18 Tenn. App 452, 79 S.W. 2d 292, 296. See also Black's Law Dictionary.

The case of *Land Co. v. Realty Co.,* 167 Md. 185 172 A. 911, is directly on all fours with the instant case. The statutory provisions involved are the same as in G.S. 160-176. In that case the rezoned land had between it and the street on the south a parcel of land 222 feet and more in width. In deciding that the plaintiff owners across the street had no standing to require a three-fourths vote of the City Council, the court said: ". . . the plaintiff is not the owner of any lots or area of land within 100 feet of any boundary line of the area included in the change proposed by the new ordinance that became effective upon its passage. All of the land of the plaintiff is *south* of Thirty-Fifth street, and the area of the lots included in the proposed change is everywhere at least 222 feet *north* of Thirty-Fifth street, so the width of that street and a parcel of land 220 feet wide are between the plaintiff's land and the area changed."

It must be kept in mind that "Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they must be liberally construed in favor of such owner." *In re: Builders Supply Co., supra.*

The rezoning ordinance of 2 December, 1957, in question in this case was regularly adopted and is legal and valid. Upon the record before us, the "buffer strip" is still zoned for one-family residence usage. Whatever the ultimate intention of Northland, the law is adequate to meet any exigency that may arise.

In view of the decision in this case, it is unnecessary to discuss or decide the right to injunctive relief in situations similar to the one at bar, should ordinances be declared invalid.

Affirmed.

MICA INDUSTRIES, INC. v. L. S. PENLAND AND J. HARRY THOMAS, SHERIFF OF MACON COUNTY, N. C.

(Filed 25 February, 1959.)

1. Execution § 1—

Only the property of the judgment debtor may be levied on and sold under execution, and a levy on property of a person other than the judgment debtor constitutes a trespass. G.S. 1-315.

2. Execution § 7—

The owner of property seized by an officer under execution against another may maintain an action against the officer seizing the property to recover possession, and may recover in such action damages, if any, sustained on account of the wrongful seizure and detention of its property.

3. Trover and Conversion § 1—

The owner of personalty may maintain an action to recover its possession against a person wrongfully seizing it, and may also, even by amendment, assert a cause of action to recover damages sustained on account of the wrongful seizure and detention of the property. G.S. 1-230.

4. Execution § 7—

The judgment creditor, nothing else appearing, is not liable on account of the sheriff's wrongful seizure and detention of property not belonging to the judgment debtor, but if he induces the sheriff to wrongfully seize the property of a stranger, he is equally liable with the sheriff for damages sustained by the owner of the property on account thereof.

5. Pleadings § 22—

Where no statute of limitations is involved, it is permissible to allow a plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. G.S. 1-163.

6. Corporations § 25—

Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended less than a year prior to the institution of the action, do not disclose that the corporation did not have legal capacity to institute the action. G.S. 105-230, G.S. 55-114(4).

7. Pleadings § 15—

A demurrer admits the facts properly pleaded solely for the purpose of passing on the demurrer.

APPEAL by plaintiff from *Sink, Emergency J.*, August Special Term, 1958, of MACON.

Civil action instituted March 15, 1958, to recover (1) described articles of personal property, and (2) damages on account of alleged wrongful seizure and detention thereof, heard below on demurrer to amended complaint.

Plaintiff, in its original complaint, alleged, *inter alia,* these facts:

Plaintiff has been (since its purchase thereof in 1954) and is now the owner of said personalty and entitled to the immediate possession thereof. Purporting to act under an execution issued to satisfy a judgment rendered in an action entitled *"Lawrence S. Penland, Employee, Plaintiff, v. Minerals Processing Company, Employer, Defendant,"* defendant sheriff wrongfully (1) levied on and took possession of said personalty, (2) refused to surrender possession thereof to plaintiff upon its demand therefor, and (3) advertised an execution sale thereof. Defendant Penland wrongfully informed defendant sheriff that said personalty belonged to Minerals Processing Company, the judgment debtor, and directed defendant sheriff to levy thereon. Minerals Processing Company does not and never did own said personalty.

Plaintiff then prayed that defendants be restrained from selling said personalty, that defendant sheriff be required to hold said personalty "until the further orders of the Court," and "for such other and further relief as the Court may deem just and proper."

A temporary restraining order issued March 15, 1958, was, by consent order of April 21, 1958, continued in full force and effect until the final hearing.

Defendants demurred in writing to said original complaint on the ground that plaintiff's remedy, if any, was by "intervention" in the cause in which the judgment was rendered and not by independent action.

On June 9, 1958, Judge Campbell overruled defendants' said written demurrer. Whereupon, defendants demurred *ore tenus* "on the ground that the Complaint does not state a cause of action." Judge Campbell sustained the demurrer *ore tenus* and granted leave to plaintiff to amend its complaint.

In its amendment to complaint, plaintiff, after adopting without modification all of its original allegations, alleged (1) that it was and had been the *sole* owner of said personalty, (2) that said personalty had deteriorated and depreciated in value while in the wrongful possession of defendants, and (3) that it would suffer irreparable damages if the sale were not restrained. Except as indicated, the amendment reiterates and amplifies allegations of the original complaint.

Plaintiff then prayed, *inter alia,* that it be adjudged the owner and entitled to the immediate possession of said personalty, and that it recover $500.00 damages on account of the deterioration thereof while in the wrongful possession of defendants.

Defendants demurred to the amended complaint, specifying as grounds of objection the following:

"(1) That it appears from the face of the complaint that Mica Industries, Inc., the plaintiff herein, did not at the time this action was instituted on the 15th day of March, 1958, and does not now have the legal capacity to sue; that it was not at said time, and is not now, a valid and legally existing corporation.

"(2) That it appears from the amendment to the complaint as filed on the 25th day of June, 1958, that a new, separate and distinct cause of action has been attempted to be set up against the defendants, which attempted new cause of action substantially changes the plaintiff's alleged claim.

"(3) That the complaint as amended does not state a cause of action."

Judge Sink's judgment, after recitals, provides: "After reading the pleadings, it is ordered by the Court that the demurrer be sustained."

Plaintiff excepted and appealed.

Jones & Jones and Ward & Bennett for plaintiff, appellant.

Marcellus Buchanan and J. H. Stockton for defendants, appellees.

BOBBITT, J. The only question presented is whether the court erred in sustaining the demurrer to amended complaint. (The judgment did not dissolve the restraining order, nor did it dismiss the action.)

Plaintiff does not attack the judgment or the execution. But the judgment is against Minerals Processing Company, not against plaintiff; and the execution authorizes the sheriff to levy on and to sell property of Minerals Processing Company, not property of plaintiff.

Only property of the judgment debtor may be levied on and sold under execution. G.S. 1-315. A levy made on property of a person other than the judgment debtor constitutes a trespass. 33 C.J.S., Executions § 453; 21 Am. Jur., Executions § 138.

If, as alleged, the sheriff wrongfully levied on, took possession of and refused to surrender property owned solely by plaintiff, what legal remedies were available to plaintiff?

1. Plaintiff was entitled to recover its property from the person or persons in wrongful possession thereof; and, in an action therefor, the ancillary remedy of claim and delivery, G.S. 1-472 *et seq.*, was available. *Jones v. Ward*, 77 N.C. 337; *Churchill v. Lee*, 77 N.C. 341; *Mitchell v. Sims*, 124 N.C. 411, 32 S.E. 735; *Bowen v. King*, 146 N.C. 385, 392, 59 S.E. 1044.

In *Jones v. Ward, supra*, the basis of decision is well stated in the

headnote as follows: "An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person."

While it did not seek immediate possession under claim and delivery proceedings, it is noted that plaintiff alleged that the property had not been seized under an execution or attachment "against the property of the plaintiff." G.S. 1-473(4).

2. Plaintiff was entitled to recover damages, if any, sustained by plaintiff on account of the wrongful seizure and detention of its property. *Leavering v. Smith,* 115 N.C. 385, 20 S.E. 446; *Martin v. Buffaloe,* 128 N.C. 305, 38 S.E. 902; *Bowen v. King, supra;* 80 C.J.S., Sheriffs and Constables §§ 146, 147; 47 Am. Jur., Sheriffs, Police and Constables §§ 44, 48.

Moreover, plaintiff was entitled, in a single action, to recover both possession and damages. G.S. 1-230; *Bowen v. King, supra.*

Whether plaintiff, a stranger to Penland's action against Minerals Processing Company, could have intervened therein, is not before us. In this connection, see 33 C.J.S., Executions § 165.

The fact that Penland was the judgment creditor, standing alone, would not impose liability on account of the sheriff's wrongful seizure and detention of plaintiff's property. *Draper v. Buxton,* 90 N.C. 182. However, as stated in 33 C.J.S., Executions § 456: "All persons who have anything to do with the wrongful issuance or levy of an execution, including persons who procure, direct, or assist in the commission of the wrongful act by the officer, are liable to the person injured thereby. Even a stranger or person not a party to the suit who officiously directs an officer in making a wrongful levy, or who accompanies an officer and assists him in the commission of the wrongful act, is equally liable with the officer for the injury sustained." If, as alleged, Penland induced the sheriff to commit the alleged wrongful acts, he is equally liable with the sheriff for damages sustained by plaintiff on account thereof. 21 Am. Jur., Executions § 641; Annotation: 91 A.L.R. 922 *et seq.,* and supplemental decisions.

Upon these legal principles, the amended complaint states facts sufficient to constitute a cause of action.

Defendants' contention that the amended complaint is demurrable because it introduced "a new, separate and distinct cause of action," is without merit.

Whether, strictly speaking, plaintiff, by alleging that it had been damaged by defendants' alleged wrongful acts, thereby introduced a new cause of action, need not be discussed; for, absent the bar of an applicable statute of limitations, it was permissible under G.S.

1-163 to allow plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. *Stamey v. Membership Corp.*, 249 N.C. 90, 93, 105 S.E. 2d 282; *Perkins v. Langdon*, 233 N.C. 240, 63 S.E. 2d 565. Here, plaintiff's so-called new cause of action is based primarily on the identical facts originally alleged.

Finally, we consider defendants' contention that it appears on the face of the complaint that plaintiff did not on March 15, 1958, have the legal capacity to sue. This contention is directed to the allegations of paragraph 1 of the original complaint, viz.:

"1. That the plaintiff is a corporation duly chartered, organized and existing under the laws of the State of North Carolina, and that while its authority to carry on its regular business as contemplated by its charter was suspended temporarily on the 10th day of December, 1957, this action is instituted in the name of said corporation within two years from the date of its suspension by authority duly given by its directors for the purpose of preserving the assets of said corporation."

While the quoted allegations do not so state, we accept, for present purposes, defendants' contention that it appears therefrom that plaintiff's charter was temporarily suspended by the Secretary of State under G.S. 105-230. Whether plaintiff's charter has been restored as provided in G.S. 105-232 does not appear. We are concerned only with plaintiff's status when this action was commenced.

Upon the present record, we are not disposed to undertake to define precisely the legal effect of a temporary suspension of charter under G.S. 105-230. Suffice to say, we are of the opinion and hold that the facts alleged, considered in the light most favorable to plaintiff, do not disclose that plaintiff did not have the legal capacity on March 15, 1958, to institute and prosecute this action. G.S. 55-114(4), enacted by Ch. 1371, Session Laws of 1955, effective July 1, 1957.

We are not presently concerned with whether plaintiff can establish the facts alleged. For the purpose of testing the sufficiency of the amended complaint, the facts alleged are deemed admitted by the demurrer.

For the reasons stated the judgment sustaining demurrer to amended complaint is reversed.

Reversed.

COLUMBUS COUNTY v. D. W. THOMPSON AND WIFE, LULA THOMPSON.

(Filed 25 February, 1959.)

1. Judgments § 25—

A judge of the Superior Court has original as well as appellate jurisdiction to set aside a default judgment.

2. Process § 2—

Under G.S. 1-89, prior to the 1939 amendment, the service of summons more than ten days after its issuance in tax foreclosure proceedings, without any *alias* or *pluries* summons, is tantamount to nonservice, since the summons has lost its validity at the time of service.

3. Judgments § 27b—

Where there is no valid service, the judgment is void.

4. Same—

A void judgment is a nullity and neither the lapse of time nor a general appearance can give it validity.

5. Appeal and Error § 22—

An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion is a broadside exception and ineffectual because of noncompliance with the Rules of Court. Rules of Practice in the Supreme Court Nos. 19(3) and 21.

6. Appeal and Error § 21—

An appeal itself will be treated as an exception to the judgment.

7. Same—

An exception to the signing of the judgment presents for review the questions whether the facts found support the judgment and whether any error of law appears on the face of the record, but it does not present for review the evidence upon which the findings are based.

8. Appeal and Error § 49—

The determinative question was the date summons was served in the action. The trial court found that the record offered by movant was erroneous on its face as to the dates of issuance and service of summons, and could not be relied upon as a true and correct copy of the proceedings. *Held:* The court should have found with particularity the controlling facts in order that it may be determined on appeal whether the facts found support the judgment.

9. Appeal and Error § 55—

Where the court does not find sufficient facts to support the judgment, the cause must be remanded.

APPEAL by defendant D. W. Thompson and movant Herbert Ransom from *Seawell, J.*, March Term 1958 of COLUMBUS. Argued as Case No. 613 Fall Term 1958.

COLUMBUS COUNTY *v.* THOMPSON.

Civil action to foreclose tax sale certificates, heard on motion of the defendant D. W. Thompson, to which motion Herbert Ransom made himself a party and adopted it as his own, to vacate a judgment by default entered therein on 28 July 1929 by the Clerk of the Superior Court of Columbus County, appointing a commissioner, and ordering a sale of the land described in the complaint at public auction. This judgment is recorded in Judgment Docket 12, pages 64 and 65. On 25 August 1930 the commissioner reported to the court that Columbus County became the last and highest bidder. The motion does not request that the final decree of confirmation by the Clerk dated 2 March 1940, ordering a deed for said land to be executed and delivered to Columbus County, and the deed apparently executed pursuant thereto, be vacated.

It would seem from an answer to the motion filed by Flossie H. Robinson and Mary Wade Robinson, although no deeds are copied in the Record, that Columbus County on 2 December 1948 conveyed by deed the land, or some part of it, to Wade H. Robinson, and that Wade H. Robinson died leaving as his sole heirs Flossie Robinson, widow, and Mary Wade Robinson, daughter.

It would also seem from the Record, although again no deeds appear in the Record, that D. W. Thompson and wife conveyed by deed this land to Ernest R. Ashley, who conveyed it by deed dated 12 July 1957 to Herbert Ransom.

The motion filed by D. W. Thompson, and adopted as his own by Herbert Ransom, avers that the judgment by default entered on 28 July 1930 is void for lack of jurisdiction for that "the summons was not served on the defendant D. W. Thompson after its issue within the time required by law and this defect appears from the record of the officer's return." The motion alleges three other grounds to vacate this judgment, but as no evidence was offered in support thereof, they are not set forth.

The only evidence at the hearing was introduced by D. W. Thompson and Herbert Ransom, and consisted of the judgment dated 28 July 1930, Chapter 334, Public Laws of North Carolina, Session 1929, and Chapter 66, Public Laws of North Carolina, Session 1927.

The judgment dated 28 July 1930 recites, *inter alia,* that a verified complaint was filed in the Clerk's Office on 29 November 1929 and a summons was issued from his office on said date, and returned with the following endorsement:

> "Received Nov. 27, 1929, Served Dec. 20, 1929, by delivering a copy of the within summons and a copy of the complaint to

each of the following defendants: D. W. Thompson & wife Lula Thompson.

JOHN W. HALL, Sheriff Col. Co.
By M. W. HOBBS, D. S."

This judgment also recites that no answer or demurrer has been filed to the complaint, and that the time for filing same has expired.

Judge Seawell's judgment recites that the movants offered in evidence the judgment dated 28 July 1930, and then follows in his judgment the following language: "and the Court finds as a fact that the original papers in said judgment have been lost or misplaced and cannot be found, and that the record as offered by the movant is on its face erroneous as to dates of the issuance of summons, service of summons, and filing of complaint, and cannot be relied upon as a true and correct copy of the proceedings in said cause, and that said judgment has remained of record since July 28, 1930, and should not at this late date be disturbed or set aside without clear, strong and convincing proof, and that after the rendition of the said judgment that none of the purported owners of said land ever listed same for taxes and treated and considered said judgment as valid; It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that plaintiff's (sic) motion be and the same is hereby denied."

From the judgment, the defendant D. W. Thompson and the movant Herbert Ransom appeal.

John K. Burns for appellants D. W. Thompson and Herbert Ransom.

Sankey W. Robinson and James Dick Proctor for appellees Flossie H. Robinson and Mary Wade Robinson.

PARKER, J. Judge Seawell had jurisdiction to hear the motion, for the reason that the jurisdiction of the Superior Court Judge on a motion to set aside a judgment by default entered by the Clerk is original as well as appellate. *Rich v. R. R.*, 244 N.C. 175, 92 S.E. 2d 768; *Moody v. Howell*, 229 N.C. 198, 49 S.E. 2d 233; *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329.

In this action to foreclose tax sale certificates held by Columbus County, the complaint avers that the land therein described was listed for the year 1927 in the names of D. W. Thompson and wife, ... Thompson. Chapter 334, Public Laws of North Carolina, Session 1929, which was the statute in force at the time, provided that

D. W. Thompson and his wife shall be made defendants, and shall be served with process as in civil actions.

Chapter 66, Public Laws of North Carolina, Session 1927, which was in force in 1930, required the sheriff to whom the summons was addressed for service in this tax foreclosure action to serve it on the defendants within ten days after the date of its issue. Chapter 15, Public Laws of North Carolina, Session 1939, amended the ten days requirement, and enlarged the time for service of summons in tax foreclosure actions to within sixty days after the date of its issue. This is the present law. G.S. 1-89.

There is no suggestion in the instant case of the issuance and service on the defendants of any *alias* or *pluries* summons. The defendants neither answered nor demurred. The judgment entered was a default judgment.

The authority of the sheriff to serve the summons in this case on the defendants was limited by the statute in force at the time to within ten days after the date of its issue. If the sheriff failed to serve the summons addressed to him upon the defendants within the time prescribed by the statute, and this appears from the sheriff's return on the copy of the summons, this summons had lost its vitality and was *functus officio* when the sheriff served it. *Green v. Chrismon*, 223 N.C. 724, 28 S.E. 2d 215. As was said in *Atwood v. Atwood*, 233 N.C. 208, 63 S.E. 2d 103: "Hence it appears from the return of the sheriff that what he did as to service of the summons was at a time when the life of the summons had expired, and when he had no authority to serve it. Thus, the return, in a legal sense, is tantamount to a return of non-service."

Where there is no service of process, the court has no jurisdiction, and its judgment is void. A void judgment is a nullity, and no rights can be based thereon. *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E. 2d 709; *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460 " 'The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid.' 31 Am. Jur., 66; Anno. 81 A. S. R., 559." Now 30-A Am. Jur., 170. *Monroe v. Niven*, 221 N.C. 362, 20 S.E. 2d 311. See also, *Com'rs. of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144.

An appearance to vacate a judgment entered by default cannot validate such default judgment, if it is void because rendered when the court had no jurisdiction. *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239; *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283.

This is the sole assignment of error of the appellants: "That the court erred in finding that the evidence was insufficient to sustain the motion of movants and entering an order denying movants' mo-

tion to set aside and vacate judgment No. 15368."

The assignment of error "that the court erred in finding that the evidence was insufficient to sustain the motion of movants" is not supported by an exception, and is broadside, in that it does not specifically and distinctly point out the alleged error so that in the assignment of error we can see the alleged error made by the judge. It is ineffectual because of noncompliance with the rules and decisions of this Court. Rule 19(3) and Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 544 *et seq.; Caldwell v. Bradford,* 248 N.C. 48, 102 S.E. 2d 399; *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427.

The appeal entries state that the movants except to the signing of the judgment, and appeal to the Supreme Court. The appeal itself will be treated as an exception to the judgment. *Ellis v. R.R.,* 241 N.C. 747, 86 S.E. 2d 406; *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797.

An exception to the signing of the judgment brings up for review two questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record? *City of Salisbury v. Barnhardt,* 249 N.C. 549, ... S.E. 2d ..... ; *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53. It does not bring up for review the evidence upon which the findings are based. *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602; *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609.

The motion and answer thereto raised questions of fact. It was the duty of the court "to hear the evidence, find the facts and render judgment." *Harrington v. Rice, supra.*

The trial judge found that "the record as offered by the movant is on its face erroneous as to dates of the issuance of summons, service of summons, and filing of complaint, and cannot be relied upon as a true and correct copy of the proceedings in said cause." This is a conclusion, and not a finding of facts. The judge should have found with particularity the facts, so that we can determine whether the facts found support the judgment.

The trial court found as a fact "that after the rendition of the said judgment that none of the purported owners of said land ever listed same for taxes and treated and considered said judgment as valid." Whether Herbert Ransom, and his predecessor in title Ernest R. Ashley ever listed the land for taxes, and whether they and the Robinsons treated and considered said judgment as valid are not before us for decision, on the motion of appellants directed solely to the alleged

lack of jurisdiction of the court to render the judgment by default, because the service of summons upon the defendants was not made within the time required by statute from the time of its issuance. Herbert Ransom and the Robinsons, if they so desire, can litigate their contentions another day and in another proceeding.

We are of opinion that the court below has not sufficiently found the facts so that we can accurately and safely pass upon the judgment denying appellants' motion.

Error and Remanded.

GUILFORD BUILDERS SUPPLY COMPANY, INC. v. GEORGE W. REYNOLDS, J. T. REYNOLDS, RACHEL L. REYNOLDS, VARINA M. REYNOLDS AND EDYTHE REYNOLDS.

(Filed 25 February, 1959.)

1. Corporations § 12—

Where the evidence discloses that the plaintiff sold goods to an individual on such individual's credit alone, and refused to extend credit to the corporation in which the individual was an officer, plaintiff may not contend that because the purported corporation was nonexistent at the time, the officers and directors thereof were personally liable, since such principle obtains in proper instances only when the stockholders, officers and directors continue to obtain credit for and on behalf of a purported but nonexistent corporation.

2. Partnership § 1a—

Evidence that the husband was in the building and land development business, that his wife owned certain realty, and that she executed deeds for her land as directed by her husband, but that she never received payment for property transferred by her and that the only money received by her from her husband over the period in question was for her support, is insufficient to justify a holding that she is liable as a partner or otherwise for building materials purchased by her husband.

APPEAL by plaintiff from *Johnston, J.*, March 10, 1958 Regular Civil Term of GUILFORD (Greensboro Division). This case as No. 604 was argued at the Fall Term 1958 of this Court.

This action was originally instituted 9 May 1957 against J. T. Reynolds, George W. Reynolds, and Oakmont, Inc., an alleged corporation, to recover an unpaid balance due the plaintiff for building materials allegedly sold to the defendants in 1956 and 1957 in the sum of $18,442.63.

It was alleged in the original complaint that sometime prior to

June 1956 the plaintiff entered into an express oral contract with the defendants, J. T. Reynolds and George W. Reynolds, who were officers and agents of the defendant Oakmont, Inc., and who were acting on behalf of themselves, individually, and as agents of the defendant Oakmont, Inc., whereby plaintiff agreed to furnish certain building supplies to the three defendants; that defendants, J. T. Reynolds and George W. Reynolds, acting for themselves, individually and in the course and scope of their duty and authority as agents of Oakmont, Inc., agreed to promptly pay for the building supplies so ordered by them and furnished by the plaintiff; that defendant Oakmont, Inc., through its officers and agents, the individual defendants, agreed to promptly pay for the building supplies so ordered by them and furnished by the plaintiff.

Subsequent to the filing of the complaint in this action, the corporate defendant filed a voluntary petition in bankruptcy. The plaintiff filed no claim with the trustee in bankruptcy against Oakmont, Inc.

With the permission of the court, the plaintiff took a voluntary nonsuit as to Oakmont, Inc. The plaintiff was permitted to make Rachel L. Reynolds (wife of J. T. Reynolds), Edythe Reynolds (daughter of J. T. and Rachel Reynolds), and Varina M. Reynolds (wife of George W. Reynolds), parties defendant, and allowed to amend its complaint.

The amended complaint alleges that during the times herein complained of, the defendants were associated together for the purpose of carrying on as co-owners a real estate development and construction business for profit. The complaint further alleges: "That sometime prior to June 1956, the defendant J. T. Reynolds came to the plaintiff's place of business and at said time acting on behalf of himself individually and on behalf of the other defendants entered into an express oral agreement with the plaintiff whereby the plaintiff agreed to furnish building materials and supplies to J. T. Reynolds, who was acting for himself individually and for the other defendants, said building materials and supplies to be used by the defendants in the course of their real estate, development and construction business; that said building materials and supplies so ordered were to be paid for promptly."

The defendants filed answer and denied liability, but did not deny that the plaintiff had furnished building materials and supplies amounting to $18,442.63, none of which had been paid.

The plaintiff's evidence tends to show that all the items of building materials furnished by the plaintiff, and for which it has not been paid, in the sum of $18,442.63, were charged to J. T. Reynolds

on its books; that the certificate of incorporation of Oakmont, Inc. was issued by the Secretary of State on 3 March 1947 and that such certificate was suspended on 2 February 1948 for failure to file required reports and pay franchise taxes due the State of North Carolina as required by law. It is conceded that the corporation for all corporate purposes expired under the statute on 2 February 1953.

Albert W. Christiansen, President of the plaintiff corporation, testified that, "In 1955, Mr. Reynolds came to my office and said that he was going to do quite a bit of building out in the Lawndale section and he would like to purchase some building supplies from us. I told him * * * we surely did appreciate it, but with our previous experiences we couldn't do business with Oakmont, Inc., but we would be glad to do business with Mr. J. T. Reynolds. After I told Mr. Reynolds that we could not do business with Oakmont, Inc., he agreed to go along on that basis. * * * After this conversation in 1955, we began to sell building supplies to the Reynoldses. * * * At the time of the conference in 1955, Mr. George H. Thompson was present with Mr. Reynolds and me. * * * I have with me a ledger sheet covering all transactions with either Oakmont, Inc. or with J. T. Reynolds. No ledger sheet after the year 1949 reflects any transactions in the name of Oakmont, Inc. There has been no charges made on the ledger sheets or in any other way to Oakmont, Inc. * * * Since 1949 all purchases made by J. T. Reynolds or anyone on his behalf have been charged to J. T. Reynolds. * * *

"When suit was instituted against J. T. Reynolds, George Reynolds and Oakmont, Inc., I did not know that Oakmont, Inc. was not incorporated. After the bankruptcy hearing it was learned that Oakmont, Inc. was not incorporated and I thought that the individual Reynolds defendants in this action owed me as individuals. At the time of furnishing the materials we were looking to Mr. Reynolds for our money. No, Mr. Reynolds never told me that we could expect any money from Oakmont, Inc. Mr. Reynolds is the man I was dealing with at the time of furnishing the materials and subsequently and with whom I had conversations and I was looking for my money from Mr. Reynolds."

Mr. George H. Thompson, Vice President of the plaintiff, testified, "I heard Mr. Christiansen testify with regard to a conversation with Mr. J. T. Reynolds. I was in the office at the time. * * * Mr. Reynolds, I think, wanted to order some materials and the past was brought up about Oakmont, Inc. So Mr. Christiansen and Mr. Reynolds agreed that all bills were to be made to Mr. Reynolds at that time. * * * As a result of the conversation * * * all articles that were delivered were charged to J. T. Reynolds. To my knowledge no

charges were made to Miss Edythe Reynolds, Miss Varina Reynolds or Mrs. Rachel Reynolds. To my knowledge no charges were made to George W. Reynolds."

At the close of plaintiff's evidence, counsel for the defendants moved for judgment as of nonsuit. Motion allowed as to all defendants except J. T. Reynolds. Plaintiff accepted.

Jury returned a verdict against J. T. Reynolds in the sum of $18,442.63, with interest from 1 May 1957.

Judgment was accordingly entered and the plaintiff appeals, assigning error.

Rollins & Rollins; Smith, Moore, Smith, Schell & Hunter, and Richmond G. Bernhardt, Jr., for plaintiff.

Hoyle & Hoyle, and J. Sam Johnson, Jr., for defendants.

DENNY, J. The appellant's only exceptions and assignments of error are directed to the allowance of the defendants' motion for judgment as of nonsuit as to the respective defendants on behalf of whom the motion was sustained.

In addition to the evidence set out above, the plaintiff introduced adverse examinations of all the defendants. These adverse examinations established the fact that Oakmont, Inc. never held any corporate meetings after the meeting of 21 March 1947, at which meeting the incorporators elected J. T. Reynolds, G. W. Reynolds, and Edythe Reynolds, directors of the corporation. On the same day, the directors elected J. T. Reynolds, President; G. W. Reynolds, Vice President; and Edythe Reynolds, Secretary-Treasurer.

It appears from the adverse examination of Mrs. Rachel L. Reynolds that she owned some real estate on which her husband built some houses and that Mrs. Reynolds signed deeds conveying the property in accordance with the request of her husband; that she has never received any payment for property transferred by her; that the only money she has received from her husband over the period in question has been for her support.

The appellants contend (1) that all these defendants who were stockholders of Oakmont, Inc. are liable individually and as partners to the plaintiff, because at the time the materials were furnished, such parties were trading under the name of Oakmont, Inc., a purported corporation, whose charter had been suspended on 2 February 1948 and whose existence for all purposes expired by law on 2 February 1953, G.S. 105-230 and G.S. 105-232; and (2) that there is sufficient evidence to be submitted to a jury on the issue that Rachel L. Reynolds was liable as a partner with some or all the defendants,

or that she was liable as an undisclosed principal of the defendant J. T. Reynolds.

Under certain circumstances, stockholders, officers and directors may be held liable as individuals or partners when such stockholders, officers and directors permit the charter of the corporation to expire, and continue to obtain credit for and on behalf of a purported but non-existent corporation.

In Volume 13 of Fletcher Cyc. of the Law of Private Corporations, section 6648, page 1378, *et seq.*, we find the following: "Members of a pretended corporation which is neither a *de jure* nor a *de facto* corporation are generally held personally and individually liable, unless otherwise provided by statute, for the debts of the pretended corporation, unless the creditor is estopped to attack the corporate existence of the apparent corporation, without any reference to whether the persons sought to be held liable, actively participated in contracting the debt," citing *Wood v. Staton*, 174 N.C. 245, 93 S.E. 790, 794, which holds that where a claimant has extended credit to an alleged corporation, "unless there is one, either *de jure* or *de facto*, the members can, ordinarily, be held liable as partners."

In the instant case, however, there is not a scintilla of evidence tending to show that the defendants obtained the materials from the plaintiff on the credit of Oakmont, Inc. Plaintiff's evidence is expressly to the contrary. It was agreed between the president of the plaintiff corporation and the defendant J. T. Reynolds that the plaintiff corporation would not extend credit in any amount to Oakmont, Inc., but that credit would be extended to J. T. Reynolds; that it was extended to him and that he and he alone was the one to whom the plaintiff looked for its money. Therefore, the plaintiff's first contention is without merit.

As to the second contention, we find nothing in the evidence that would justify a holding that Rachel L. Reynolds is liable as a partner or otherwise for debts arising out of the contract between the plaintiff and the defendant J. T. Reynolds. *Rothrock v. Naylor*, 223 N.C. 782, 28 S.E. 2d 572.

The ruling of the court below in sustaining the defendants' mo tion for judgment as of nonsuit as to all the defendants, except J. T Reynolds, is

Affirmed.

ALFRED JEFFERSON FISHER, BY ISRAEL FISHER, HIS FATHER AND NEXT FRIEND v. TAYLOR MOTOR COMPANY, INC.

(Filed 25 February, 1959.)

1. Infants § 2—

Where an infant buys a car and wrecks it, he may disaffirm the contract and recover that part of the purchase price furnished by him, less the value of the car in its wrecked condition, notwithstanding that the father of the infant, prior to the wreck, in stating that he had paid a part of the purchase price, made no complaint or suggestion of nonage or other disability of his son.

2. Pleadings § 28—

A motion for judgment on the pleadings is in the nature of a demurrer and may be allowed only when the pleading of the opposite party fails to present any material issue of fact.

3. Infants § 2—

Where defendant, in a suit by an infant to recover the purchase price of an article upon disaffirmance of the contract of sale, controverts the amount of the purchase price furnished by the infant, an issue of fact is raised for the determination of the jury, and plaintiff is not entitled to judgment on the pleadings, notwithstanding the question of minority is not controverted.

4. Same: Constitutional Law § 10—

Whether the law as to the liability of an infant on a contract of sale of an automobile should be changed is not a question for the Court, since the Court interprets and does not make the law.

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

APPEAL by both plaintiff and defendant from *Moore (C. L.) J.*, at August Term 1958 of PAMLICO.

Civil action to recover of defendant refund of purchase price of automobile to plaintiff, a minor.

Plaintiff alleges in his complaint, substantially the following:

That he, the plaintiff, a minor, whose residence is with his father in Pamlico County, North Carolina, purchased a 1953 Oldsmobile automobile from defendant, a corporation, organized and doing business under the laws of North Carolina, with principal office in New Bern, North Carolina, for the sum of $750.00, which he paid; that, as he is informed, advised and believes, he is entitled to have the purchase price of the automobile returned to him; that he notified defendant of his desire to return the automobile, and rescinded the contract and requested the return of purchase price, but defendant refused to make a refund of the purchase price with interest or to receive the automobile; and he prays judgment.

Defendant, while admitting its corporate existence and that plain-

tiff purchased a 1953 Oldsmobile, denies in material aspects other allegations.

And for another and further defense and as a cross-action against plaintiff, defendant makes substantially these averments: That plaintiff represented himself to be of full age and fully able to contract; that thereupon defendant agreed to sell him the automobile referred to in the pleadings for the sum of $750.00 and said amount of money was paid; that before defendant could furnish title certificate, the father of plaintiff came to defendant and represented that he had provided out of his own funds a large part of the money given for the automobile; that no complaint or suggestion of nonage or other disability was made to defendant until after plaintiff had taken and operated the automobile in violation of the criminal laws of North Carolina,—"resulting in said automobile being entirely wrecked and destroyed, causing same to become of no value"; that the first complaint received by defendant about the transaction was "a demand by letter dated January 8, 1958, addressed to defendant, claiming that said plaintiff was a minor, demanding the return of the purchase price" but that no tender has been made of the automobile or any part of it to defendant; and that "by reason of the wrongful acts, torts and crimes of the plaintiff, the said automobile has been wholly and completely destroyed, and that by reason of said acts the defendant is relieved of any liability to plaintiff." And defendant further alleges upon information and belief that a large part of the purchase money paid for the automobile was not the property of plaintiff but of other parties, and defendant is not liable for such sums as were so supplied.

Wherefore, defendant prays that he go without day, etc.

The court allowed plaintiff to amend his complaint to allege that at the time of disaffirmance of the contract by plaintiff, the property was no longer in his possession and had no value.

And the record and case on appeal show that in this case the counsel for the respective parties agreed on the answers to all of these issues, except the fourth, and had the court to write in the answers so that there was only one issue, the fourth, for the jury, and the jury answered that issue as indicated below:

"1. Was the plaintiff, Alfred Fisher, under 21 years of age on August 29, 1957? Answer: Yes.

"2. Did the plaintiff, Alfred Fisher, purchase an automobile from the defendant, Taylor Motor Company, on August 29, 1957? Answer: Yes.

"3. Did the plaintiff pay the sum of $750.00 for said automobile? Answer: Yes.
"4. How much of the money paid for said automobile belonged to the plaintiff, Alfred Fisher? Answer: $600.00.
"5. On what date did the plaintiff, Alfred Fisher, cause notice to be given to the defendant, Taylor Motor Company that he disaffirmed said contract of purchase? Answer: January 8, 1958.
"6. Was said automobile injured and damaged because of the negligence and unlawful act of the plaintiff, Alfred Fisher, on December 28, 1957? Answer: Yes.
"7. What was the reasonable market value of said automobile on December 28, 1957, prior to the injury and damage of said automobile by the negligence and unlawful act of the plaintiff? Answer: $400.00.
"8. Did the plaintiff return or tender the said damaged automobile to the defendant at the time of the disaffirmance of the contract by him? Answer: No.
"9. What was the value of said automobile on the date the plaintiff gave notice to the defendant of his disaffirmance of his contract of purchase? Answer: $50.00.

Thus in effect the issues so answered by agreement constitute stipulation of facts, so to speak. And upon these facts and the verdict the court adjudged that plaintiff have and recover of the defendant the sum of $550.00, with interest thereon from the 8th day of January, 1958, together with the costs of the action to be taxed by the Clerk.

The defendant and the plaintiff each except to the judgment, and appeals to Supreme Court and assigns error.

Robert G. Bowers, Norris C. Reed, Jr., for plaintiff, appellant.
R. E. Whitehurst for defendant, appellant.

WINBORNE, C. J. The relative rights of plaintiff and of defendant, in such cases, are well defined in principles of law announced by and prevailing in this Court. See *Collins v. Norfleet-Baggs*, 197 N.C. 659, 150 S.E. 177; *Morris Plan Co. v. Palmer*, 185 N.C. 109, 116 S.E. 261; *McCormick v. Crotts*, 198 N.C. 664, 153 S.E. 152; *Coker v. Bank*, 208 N.C. 41, 178 S.E. 863; *Barger v. Finance Corp.*, 221 N.C. 64, 18 S.E. 2d 826, and cases therein cited.

As to what the rights of the parties are when an infant elects to disaffirm a contract relative to the sale or purchase of personal property, other than as authorized by statute or for necessaries, this Court in the *Collins* case, *supra*, in opinion by *Stacy, C. J.*, declared, in per-

tinent part: "1. An infant may avoid such a contract either during his minority or upon arrival at full age * * *

"2. Upon such avoidance, the infant may recover the consideration paid by him, either in money or property, with the limitation that he must restore whatever part of that which came to him under the contract he still has, or account for so much of its value as may have been invested in other property which he has in hand or owns and controls * * *

"3. But the infant is not required to account for the use or depreciation of the property while in his possession, or for its loss, if squandered or destroyed, for this is the very improvidence against which the law seeks to protect him * * *

"4. The infant, however, would be liable for any tortious use or disposition of the property after such avoidance and before its surrender to those from whom it was obtained * * *."

In the light of these principles, applied to facts of case in hand, the plaintiff at the time an infant, was entitled, during his minority, to disaffirm the contract made by him with defendant for the purchase of the automobile in question. And upon such avoidance he was entitled to recover the consideration paid by him, either in money or property, with the limitation that he restore whatever part he still has of the automobile which came to him under the contract.

And the jury, upon the pleadings, supported by evidence tending to show controversy as to the fact, having found that only $600.00 of the money which was paid for the automobile belonged to plaintiff, and the parties having by the answer to the ninth issue stipulated that the value of the automobile, on date (January 8, 1958) plaintiff gave notice to defendant of his disaffirmance of the contract of purchase, was $50.00, plaintiff was entitled to judgment for the $600.00, less the $50.00, or $550.00, with interest and costs as rendered by the trial judge.

Now, as to plaintiff's appeal, from denial of his motion for judgment on the pleading:

In this connection a motion for judgment on the pleadings is in the nature of a demurrer, and is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384, and cases cited.

Applying this principle, it may not be held that the pleadings here raise no issue as to what was amount of the purchase price plaintiff paid.

Lastly, as to defendant's appeal: While confessing awareness of

the general law with reference to contracts with infants, defendant, through its counsel, thinks "that the time has come when the courts should make a distinction in dealing with articles such as automobiles which an infant is permitted under statute to drive and for which an infant is responsible to the State and to society for a violation of the rights by which an automobile may be operated." It is not so written. This Court interprets and does not make the law.

Since neither plaintiff nor defendant prevails in this Court on points upon which the judgment is challenged, each party will bear the cost of his own brief, and the remaining cost of appeal will be taxed by the Clerk equally upon plaintiff and defendant.

Hence on plaintiff's appeal—No Error.

On defendant's appeal—No Error.

MOORE J., took no part in consideration or decision of this appeal.

ADELE H. PAUL v. S. E. DIXON AND WIFE, RHODA SCOTT DIXON, DALLAS CRAWFORD DIXON AND SHIRLEY ELVA DIXON.

(Filed 25 February, 1959.)

1. Pleadings § 19c—

Where all the defendants join in a demurrer to the complaint upon the ground that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to any one of the defendants.

2. Quieting Title § 1—Complaint held sufficient to allege cause of action to quiet title.

Allegations to the effect that prior to the deed executed to plaintiff by husband and wife, the husband and wife had conveyed by registered deed other lands to the wife and others, but that the description included a portion of the lands conveyed to plaintiff, and praying that if the deed to the defendants conveyed a part of the land thereafter conveyed to plaintiff, by design, the interest of the *femme* grantor-grantee be reduced under the equity of marshalling, in order to exonerate that part conveyed by her to plaintiff, or that if the description was erroneous in including a part of the lands conveyed to plaintiff, the cloud on plaintiff's title should be removed, *held* sufficient to state a cause of action against the *femme* grantor-grantee, at least.

APPEAL by plaintiff from *Moore (C. L.) J.*, at August 1958 Term of PAMLICO.

Civil action to declare plaintiff owner of certain land described

in complaint, freed and discharged of claim of defendants Rhoda Scott Dixon and Dallas Crawford Dixon and Shirley Elva Dixon,—heard upon demurrer entered jointly by defendants.

Plaintiff, Adele H. Paul, widow of Zack H. Paul, who died 16 July, 1954, alleges in her complaint substantially the following: (Paragraph numbers of complaint disregarded)

1. That, as alleged in paragraph 3 of complaint, on April 17, 1944, S. E. Dixon and wife, Rhoda S. Dixon, executed and delivered to Zack H. Paul and wife, Adele H. Paul, a deed conveying certain land therein described, with full covenants of seizin, right to convey, free from encumbrances, warranting to defend the title to the same against all other persons whomsoever, said deed being recorded in the office of Register of Deeds of Pamlico in Deed Book 109, p. 578.

2. That plaintiff, jointly with her husband, Zack H. Paul, so long as he lived, and individually since his death, has been in possession of the aforesaid lands, occupying and improving same until the present time; and that no other person than plaintiff or her husband has paid taxes thereon since the conveyance to them.

3. "That recently and within less than a year of this date, the plaintiff's attention was called to a deed, dated August 15, 1939, which is of record in the office of the Register of Deeds of Pamlico County in Book 95, page 404, from S. E. Dixon and wife, Rhoda Scott Dixon, to Rhoda Scott Dixon, Dallas Crawford Dixon and Shirley Elva Dixon * * * conveying * * * three tracts of land," therein described, the third tract of which purports to convey certain portion of the lands described in the deed from S. E. Dixon and wife, Rhoda S. Dixon, to Zack H. Paul and wife, Adele H. Paul, "while the remainder of said description covers other lands adjacent to or near the lands conveyed by S. E. Dixon and wife, Rhoda S. Dixon, to Zack H. Paul and wife, Adele H. Paul." And plaintiff, upon information and belief, alleges, "that either by inadvertence or mistake of the draftsman, or by design unknown to the plaintiff or her husband, the lands described in the deed to her husband and to herself were also contained in the description in the deed from defendant S. E. Dixon and wife, Rhoda Scott Dixon, to their co-defendants and to Rhoda Scott Dixon."

4. And upon information and belief plaintiff also alleges, "that the above situation and transaction is such that the plaintiff is entitled to have the lands conveyed to her and her husband exonerated from any claim by the defendants or any one of them, and that in equity and under the doctrine of marshalling, any rights which the defendants, Dallas Crawford Dixon and Shirley Elva Dixon might have or

claim to have in the lands conveyed to the plaintiff and her husband, Zack H. Paul, should be transferred to the lands not covered by that deed but conveyed to Rhoda Scott Dixon, Dallas Crawford Dixon and Shirley Elva Dixon, jointly, and that the rights, if any, of Rhoda Scott Dixon should be diminished because of her warranty as to the lands conveyed to the plaintiff and her husband.

5. And that if the court should find that the aforesaid descriptions were made by inadvertence or by error, the same constitutes a cloud upon plaintiff's title, and she is entitled to have same removed.

Wherefore, plaintiff prays judgment.

Defendants demur to the complaint for that "The complaint does not state facts sufficient to constitute a cause of action against the defendants in that it appears from the face of the complaint that at the time of the execution and delivery of the deed to the plaintiff and her husband on April 17, 1944, that there was a deed of record in Pamlico County in Book 95, at page 404, Pamlico Registry, dated August 15, 1939, which conveyed undivided interest in said lands to the defendants Rhoda Scott Dixon, Shirley Elva Dixon and Dallas Crawford Dixon, and that Rhoda Scott Dixon could only have had a one-third undivided interest to convey to the plaintiff and her husband, and the same was notice of said fact to all the world"; and, further, that "It appears upon the face of the complaint that in law Mrs. Adele H. Paul is the legal and equitable owner of a one-third undivided interest in the land referred to in paragraph 3 of the complaint only, and is a tenant in common with Dallas Crawford Dixon and Shirley Elva Dixon."

Defendants, therefore, pray that the action be dismissed.

The court being of opinion that said demurrer should be sustained as to Shirley Elva Dixon and Dallas Crawford Dixon, entered judgment in accordance therewith, granting to plaintiff leave to amend her complaint and plead as she may be advised.

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

J. W. Beaman and R. E. Whitehurst for plaintiff, appellant.
Robert G. Bowers for defendants, appellees.

WINBORNE, C. J. Decisions of this Court hold that where all the defendants join in a demurrer to the complaint upon the ground that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to any one of the defendants. *Conant v. Barnard*, 103 N.C. 315, 9 S.E.

575; *Loughran v. Giles,* 110 N.C. 423, 14 S.E. 966; *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874; *Caho v. N & S Ry. Co.,* 147 N.C. 20, 60 S.E. 640; *Hipp v. Farrell,* 169 N.C. 551, 86 S.E. 570; *Winders v. Southerland,* 174 N.C. 235, 93 S.E. 726.

See also McIntosh's N.C. P & P, Sec. 449, page 463, and McIntosh's N.C. P & P Second Edition, Sec. 1195 on page 655.

In *Conant v. Barnard, supra, Avery, J.,* writing for the Court, it is declared that "When the defendants united in a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action they all placed themselves in the same boat and must sink or swim together. The current of authority is in favor of this just and salutary rule of pleading, where the new system has been adopted. 'A demurrer by two or more, if there is a cause of action against any one of them will be overruled,' " citing authorities.

And in the *Caho* case, *supra,* the Court in opinion by *Connor, J.,* had this to say: "The defendants having joined in the demurrer, if the complaint states a cause of action against either of them, it must be overruled * * * If, therefore, a cause of action is stated against the Pamlico, Oriental and Western RR Company, we may not inquire whether any is stated against its co-defendants who joined in the demurrer, but must adjudge that they answer over."

Moreover in *Hipp v. Farrell, supra, Hoke,* J., writing for the Court, declared: "Again, it is held with us that where two or more are sued as jointly responsible for a wrong, a joint demurrer filed will be held bad, if a cause of action is stated against either of the defendants," citing the *Caho* case, *supra.* To same effect is opinion by *Clark, C. J.,* in *Winders v. Southerland, supra.*

In the light of the allegations in the complaint in present case, it appears clear that plaintiff alleges a cause of action against defendant, Rhoda Scott Dixon. Therefore, applying the above holding of this Court, "We may not inquire," as stated in the *Caho* case, *supra,* "whether any is stated against its co-defendants who joined in the demurrer, but must adjudge that they answer over."

Indeed, in so holding there is no conflict with the decision in *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860. There the three defendants filed separate demurrers.

Hence in sustaining the demurrer as to defendants Dallas Crawford Dixon and Shirley Elva Dixon there is error and, in this respect, the judgment below is

Reversed.

MOORE, J., took no part in consideration or decision of this appeal.

JOHN L. MOORE, JR. v. AMERICAN NATIONAL FIRE INSURANCE COMPANY OF NEW YORK

(Filed 25 February, 1959.)

1. Insurance § 92—

Testimony to the effect that in raising insured's house in constructing a basement, the house was underpinned so that it was even more solidly on its foundations than before, and that winds of a hurricane shook the house and then lifted it up and caused it to crash to the ground, *is held* sufficient to sustain the jury's verdict that the damage was the direct and proximate result of windstorm and that insured had not increased the hazard, and to justify recovery on the windstorm policy sued on.

2. Trial § 22c—

Discrepancies and contradictions in plaintiff's evidence are for the jury and not the court, and do not justify nonsuit.

APPEAL by defendant from *Armstrong, J.*, at March 17, 1958 Term of FORSYTH— docketed and argued as No. 383 at the Fall Term 1958 of this Court.

Civil action to recover on a standard fire insurance policy with extended coverage against windstorm.

On December 15, 1955, defendant American National Fire Insurance Company of New York issued to plaintiff a standard fire insurance policy insuring in an amount not exceeding $6,000.00 a one-story frame, metal roof dwelling owned by plaintiff and situated on the east side of Jackson Avenue in Winston-Salem, N. C.

The insurance policy, in pertinent part, contains these provisions:

"The coverage of this policy is extended to include direct loss by windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles and smoke.

"Provisions applicable only to windstorm and hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather, or (b) snow storm, tidal wave, overflow or ice, whether driven by wind or not.

"Conditions suspending or restricting insurance * * * Unless otherwise provided in writing hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured."

In the case on appeal the parties have "stipulated that the policy of fire insurance issued in this case was in the form prescribed by the statutes of North Carolina and that the rider or endorsement thereon extending the coverage thereon included windstorm damage

as set out in the case on appeal," and was in effect on September 26, 1956.

Plaintiff alleges that at approximately 10 o'clock on the morning of September 26, 1956, as a result of a windstorm, the dwelling house covered by this policy of insurance was lifted from its foundation and blown 3 or 4 feet in a southerly direction causing it to crash to the ground, damaging and destroying the house, for which he asks to recover of defendant $6,000.00.

Defendant, answering, denies these allegations of the complaint, and avers that any damage to plaintiff's dwelling house was due solely and proximately to excessive rainfall, causing water to pool under the rear of the house, and the pillars upon which the house was resting to give way and the house to fall; and that it is not liable for any damage to plaintiff's house caused directly or indirectly by high water or overflow, whether driven by wind or not.

And defendant further avers, as an affirmative defense to plaintiff's cause of action, that plaintiff, after the policy came in force, raised the house off and above its original foundation and moved it two or three feet and increased the risk that the house would fall, and pleaded G.S. 58-176, and provisions of the policy, against liability.

And upon the trial in Superior Court plaintiff, as witness in his own behalf, testified in part as follows: " * * * Before September 26, 1956, I had been having some work done on my house. I was in the process of putting in a basement, so that I might install central heating. We had just about completed excavating the dirt from beneath the house. I had employed a contractor, Daniel Mack, to jack up my house, in order to take the dirt out from underneath the house * * * On September 26th there were three stacks of pins supporting the house on each side * * * through the middle was a cement slab or a footing * * * at the bottom of the basement * * * Before the storm there were four what I call posts resting on the cement slab that ran east and west * * * They were square posts, made of oak timber, and they were standing on that cement slab * * * straight up to the house * * * The house was resting on the timbers and on the six pins and on the posts in the middle. I was going to bring the wall up later * * * I was just waiting there to complete it when the 26th came * * * My house seemed to be more steadier, seem to be more solid after those timbers were run under there than it did before. It had no sign of shaking or vibration when we moved around in the house."

Daniel Mack testified in part: " * * * Some few weeks before September 26, 1956, I did some work at the John L. Moore, Jr., house.

I raised his house from 2½ to 3 foot and shoved it over about * * * 2 or 3 foot * * * south about 3 foot. I raised his house to be underpinned, and in raising his house I put timber under the house, sufficient timber to hold the house to be underpinned for a full sized basement. My timber was from 36 to 40 foot long * * * The house measured about 25 foot across and about 30 foot back * * * and my beam was sitting 6 foot up on the bank * * * ."

And John L. Moore, Sr., 81 years old, father of plaintiff, testified in part: " * * * On the morning of September 26th, 1956, I was in the house * * * The wind was blowing * * * and it blowed so I went to the door, and the wind was so strong I couldn't open the door, and then, immediately after that, the storm shook the house once or twice pretty heavy, and I got scared in there, wasn't nobody there but me. Then another storm come, after I went to the door, and just lifted the house up and 'sot' it over on the basement. It was about 10 o'clock when the house went over."

Plaintiff offered evidence in detail as to the weather conditions, on the fringe of Hurricane Flossie, the winds and rain in the vicinity of plaintiff's house at the time when the house is alleged to have been blown over.

Defendant rested its case without offering evidence, reserving exception to denial of its motion for judgment as of nonsuit aptly made.

The case was submitted to the jury on these issues, which were answered by the jury as indicated:

"1. Was the dwelling house of the plaintiff, John L. Moore, Jr. damaged as the direct and proximate result of windstorm, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, after the last renewal period, to-wit: December 2, 1955, increase the hazard, as alleged in the Answer? Answer: No.

"3. What amount of damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,700.00."

From the judgment in accordance therewith in favor of plaintiff, defendant excepts thereto and appeals therefrom to the Supreme Court and assigns error.

Hastings, Booe & Mitchell for plaintiff, appellee.
Deal, Hutchins & Minor, Ed. Pullen for defendant, appellant.

WINBORNE, C. J. Taking the evidence offered by plaintiff, as shown in case on appeal, in the light most favorable to him and giving to him the benefit of every reasonable intendment upon the evi-

dence and every inference to be drawn therefrom as is done in considering a motion for judgment as of nonsuit, this Court is of opinion and holds that the evidence is sufficient to support the verdict returned by the jury, and the judgment rendered thereon.

In this connection, testimony of the three witnesses, quoted hereinabove if believed, is sufficient to justify a finding of the jury that the dwelling house of plaintiff was damaged as the direct and proximate result of windstorm, as alleged in the complaint, and that plaintiff did not increase the hazard, as alleged in the answer. See *Wood v. Ins. Co.*, 245 N.C. 383, 96 S.E. 2d 28.

It may be there are discrepancies and contradictions in plaintiff's evidence, some of which are pointed out by defendant in brief filed in this Court, but they are "for the twelve and not for the Court." See *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793; *Brafford v. Cook*, 232 N.C. 699, 62 S.E. 2d 327; *Gales v. Smith*, 249 N.C. 263, 106 S.E. 2d 164, and cases cited.

Indeed the case is largely one for the jury, to whom it appears from the case on appeal it was presented in a charge free from prejudicial error. In the trial and judgment on the verdict there is

No Error.

BLAKE C. LEWIS, A RESIDENT AND TAXPAYER OF BEAUFORT COUNTY, IN HIS OWN INTEREST AND IN THE INTEREST OF ALL OTHER RESIDENTS AND TAXPAYERS OF BEAUFORT COUNTY, WHO MAY MAKE THEMSELVES PARTIES TO THIS ACTION v. BEAUFORT COUNTY, A. D. SWINDELL, W. A. MAGEE, JR., JULIAN S. CUTLER, ALTON CAYTON AND SAM T. MOORE, CONSTITUTING THE BOARD OF COMMISSIONERS OF BEAUFORT COUNTY, THE FIRST NAMED BEING CHAIRMAN OF THE BOARD OF COMMISSIONERS, AND W. A. BLOUNT, JR., COUNTY ACCOUNTANT.

(Filed 25 February, 1959.)

Hospitals § 2: Taxation § 10½—

Where a bond order, approved by the voters of the county, authorizes the issuance of bonds in an aggregate amount to finance a new building or buildings to be used as a public hospital and the acquisition of a suitable site therefor, the use of the proceeds of the bonds is limited by the bond order, and the county may not use the surplus left after completing the project contemplated in the bond order toward the construction of a clinic in another municipality of the county.

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

APPEAL by defendants from *Stevens, J.*, December Term, 1958, of BEAUFORT.

Plaintiff, a resident and taxpayer, brought this action to enjoin defendants from using any part of the proceeds of $650,000.00 of Beaufort County Hospital Bonds for the construction of a clinic in the Town of Aurora.

Upon waiver of jury trial, the court found the facts; and defendants do not challenge any of the findings of fact set forth in the judgment.

At an election held June 4, 1955, the electors of Beaufort County approved a bond order adopted by the Board of Commissioners on April 18, 1955, and thereby authorized the issuance of Beaufort County bonds "of the maximum aggregate principal amount of $650,000 to finance the erection and equipment of a new building or buildings to be used as a public hospital, and the acquisition of a suitable site therefor," and in addition authorized (1) the levy of an annual tax sufficient to pay the principal and interest thereof, and (2) the levy of a special tax not exceeding ten cents annually upon each one hundred dollars assessed valuation of taxable property "to finance the cost of operating, equipping, and maintaining a public hospital for the use of the inhabitants of said County."

Beaufort County acquired a site near Washington, N. C. A fully equipped hospital, now in operation, has been erected thereon. The hospital has been fully paid for out of the proceeds of hospital bonds so authorized and of a bond anticipation note, "together with other funds contributed to the defendants by the Federal Government or its agencies and by others."

A surplus of more than $14,000.00 of the hospital bonds so authorized remain unissued.

On October 6, 1958, the Board of Commissioners adopted the following resolution:

"That up to $14,000 of the proceeds of the Beaufort County Hospital Bonds be used and expended for the purpose of constructing a clinic in the Town of Aurora, to serve Aurora and the adjoining area as a medical facility, the clinic to be under the supervision and control of the governing body of the Beaufort County Hospital, title to the land and building of the clinic to be in Beaufort County."

The Town of Aurora, a municipal corporation, is in Beaufort County, located about thirty miles from Washington, N. C.

Judge Stevens, concluding as a matter of law that "the use of funds from the issuance of the hospital bonds or any part thereof for the construction of a clinic in the Town of Aurora will constitute

a material variance from the wording and meaning of the bond order itself," enjoined defendants from making such use thereof.

Defendants excepted and appealed.

L. E. Mercer for plaintiff, appellee.
L. H. Ross for defendants, appellants.

BOBBITT, J. Judge Stevens held that "the issuance of the hospital bonds under the authority of the bond order and said election for the procurement of a site and the erection of buildings for a general hospital in Beaufort County was in every respect regular and valid." The findings of fact show compliance with G.S. 153-77 *et seq.*

The proposition approved by the electors on June 4, 1955, as indicated above, and similar provisions in the bond order, indicate plainly that the sole purpose of the bond issue was to acquire *a* suitable site and to erect and equip *a* hospital thereon.

The bond order is based on the determination by the Board of Commissioners that "in order to provide an adequate public hospital for the inhabitants of said County, it will be necessary to erect and equip a new building or buildings to be used as a public hospital and acquire a suitable site therefor, and that it will be necessary to expend for such purpose not less than $650,000, in addition to any funds which may be contributed by the Federal Government or any of its agencies or by others."

The project for which the bonds were authorized has been fully completed. To accomplish the sole purpose for which the bonds were authorized, it was not necessary to issue the *maximum* of $650,000.00.

The construction of a clinic in Aurora is not a project in lieu of that originally contemplated. Here, no transfer or reallocation of funds from one project to another on account of changed conditions, to accomplish the general purpose of the bond issue, is involved. The proposal to construct the clinic in Aurora is an additional project.

An entirely different question was presented to this Court in *Mauldin v. McAden,* 234 N.C. 501, 67 S.E. 2d 647, and *Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890, and *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714, and *Waldrop v. Hodges,* 230 N. C. 370, 53 S. E. 2d 263, and *Atkins v. McAden,* 229 N. C. 752, 51 S. E. 2d 484. In those cases, decision turned on whether subsequent findings in the light of changing educational needs warranted the transfer or reallocation of funds from one project to another within the general purpose (school plant facilities) for which the bonds were authorized.

As stated by *Barnhill, J.* (later C. J.), in *Waldrop v. Hodges, supra*:

"While the defendants have a limited authority, under certain conditions, to transfer or allocate funds from one project to another, *included within the general purpose for which bonds are authorized,* the transfer must be to a project included in the general purpose as stated in the bond resolution and notice of election."

In *Worley v. Johnston County,* 231 N.C. 592, 58 S.E. 2d 99, this Court upheld the use of an unexpended surplus of $36,000.00 (of a hospital bond issue of $275,000.00) for the erection *on the hospital grounds* of a building to provide housing for nursing, technical and other hospital service, for use *in connection with the main hospital building.* Such separate building was considered an integral part of the hospital plant.

In *Rider v. Lenoir County,* 236 N.C. 620, 73 S.E. 2d 913, the electors, approving a bond order, authorized a maximum of $465,000.00 of hospital bonds. The bond order contained a declaration or representation that "it will be necessary to expend for such purpose not to exceed $465,000.00 in addition to any funds which may be contributed by the Federal Government or any of its agencies or by other persons or associations." This Court held that the authority conferred contemplated that no more than $465,000.00 of county funds would be expended for such purpose and that the Board of Commissioners had no authority to appropriate $138,713.80 of unallocated nontax moneys *to supplement* the proceeds of the $465,000.00 bond issue.

Here, when the electors authorized the maximum of $650,000.00 of hospital bonds, the clear import of the words used was that Beaufort County, within the specified limitation, would issue the amount of bonds necessary to obtain funds to accomplish the declared purpose.

As stated by *Barnhill, J.* (later C. J.), in *Parker v. Anson County,* 237 N.C. 78, 87, 74 S.E. 2d 338: "Fair play demands that defendants keep faith with the electors and use the proceeds for the purposes for which the bonds were authorized, *Waldrop v. Hodges, supra,* unless some sound and compelling reason is made to appear why the original plan should be modified or one of the projects included therein should be abandoned."

If and when authorized as provided in G.S. 153-77 *et seq.,* (G.S. 153-77(d), G.S. 131-126.18(c)) Beaufort County may issue bonds and use the proceeds thereof for the construction of a clinic in Aurora; but it may not use therefor any part of the proceeds of bonds authorized for a different (completed) project.

In our opinion, Judge Stevens' ruling was correct. Hence, the judgment is affirmed.

Affirmed.

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

STATE v. JOHN BUDDY GOODE, JR.

(Filed 25 February, 1959.)

1. Homicide § 18—

Under the facts of the instant case, testimony of uncommunicated threats *held* competent under authority of *S. v. Minton*, 228 N.C. 15.

2. Homicide § 27—

Defendant's evidence was to the effect that he shot and felled one person and that another person, who was in the company of the felled person, ran to the felled person and reached for the felled person's gun, and that defendant then shot the second person, inflicting fatal injury. *Held:* An instruction basing defendant's right of self-defense upon whether the second person was making an unlawful and felonious assault upon defendant is prejudicial, since defendant's evidence, at most, tends to show that he had ground to believe that the second person was about to commit a felonious assault upon him.

3. Same: Homicide § 9—

A person has the right to kill in self-defense if he believes and has reasonable grounds for the belief, that he is about to be assaulted with a shotgun, even though no actual assault has been made, and that it is necessary for him to kill to save himself from death or great bodily harm, it being for the jury to determine the reasonableness of the belief upon the facts and circumstances as they appeared to defendant at the time of the killing.

APPEAL by defendant from *Huskins, J.*, November Term 1958 of RUTHERFORD.

Criminal prosecution for murder.

Jury Verdict: Guilty of manslaughter as charged in the bill of indictment.

From a judgment of imprisonment the defendant appeals.

Malcolm B. Seawell, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Hamrick & Hamrick for defendant, appellant.

PARKER, J. The defendant offered evidence tending to show that the defendant may have killed Lon Abrams in self-defense, which evidence was sufficient to carry the case to the jury, *ultra* any uncommunicated threats made a brief time before the homicide by Lon Abrams against the defendant.

Shortly before the fatal shooting Lon Abrams, armed with a shotgun, came to the house of J. T. Woods. The defendant assigns as error that the trial court, on motion of the solicitor for the State, excluded the testimony of his witness Ernestine Woods to the effect that there at J. T. Woods' house she heard Lon Abrams say "I'm going to kill that yellow man," and also heard him say to Clem Goode tell the defendant "to stick his head out of the door, and he would blow it off." These threats were not communicated to the defendant prior to the homicide.

Under the facts of the instant case the exclusion of these uncommunicated threats was prejudicial error and entitles the defendant to a new trial, according to our decisions in *S. v. Baldwin*, 155 N.C. 494, 71 S.E. 212; *S. v. Dickey*, 206 N.C. 417, 174 S.E. 316; *S. v. Minton*, 228 N.C. 15, 44 S.E. 2d 346. The admission of this evidence in the light of the facts here seems to us logical and humane.

The defendant testified that he shot Aden Proctor, who had shot him with a shotgun, that Proctor fell, that Lon Abrams ran to Proctor and "went over for the shotgun," and he shot Lon Abrams. Abrams died from his wound. The trial court charged the jury that as an essential element of self-defense the defendant must satisfy the jury from the evidence that an unlawful and felonious assault was being made upon him at the time and that he believed and had reasonable grounds to believe that he was about to suffer death or great bodily harm. The defendant assigns this part of the charge as error.

The exception is well taken and must be sustained. The defendant's testimony does not show that Lon Abrams was making an unlawful and felonious assault upon him at the time. At the most it tends to show that he had reasonable grounds to believe that Lon Abrams was about to commit a felonious assault upon him with a shotgun, and that it appeared to him to be necessary to kill Lon Abrams to save himself from death or great bodily harm. There is a marked distinction between an actual necessity for killing and a reasonable apprehension of losing life or receiving great bodily harm. The plea of self-defense rests upon necessity, real or apparent. *S. v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620; *S. v. Robinson*, 213 N.C. 273, 195 S.E. 824; *S. v. Marshall*, 208 N.C. 127, 179 S.E. 427. The trial court should

have charged that if the defendant satisfied the jury from the evidence that he killed Lon Abrams in defense of himself, when not actually necessary to prevent death or great bodily harm, because he believed that Lon Abrams was about to assault him with a shotgun, and that it was necessary for him to kill Lon Abrams to prevent Lon Abrams from killing him or inflicting upon him great bodily harm, and had reasonable grounds for that belief, that would be excusable homicide: the reasonableness of this belief or apprehension must be judged from the facts and circumstances of the case as they appeared to the defendant at the time of the killing, but the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which the defendant acted. *S. v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519; *S. v. Robinson, supra; S. v. Pollard,* 168 N.C. 116, 83 S.E. 167; *S. v. Johnson,* 166 N.C. 392, 81 S.E. 941; *S. v. Barrett,* 132 N.C. 1005, 43 S.E. 832; *S. v. Nash,* 88 N.C. 618.

The Attorney General with commendable candor concedes error in the trial court's exclusion of the testimony of Ernestine Woods as to the above mentioned uncommunicated threats, and also concedes error in the charge on self-defense as set forth above.

The defendant is entitled to a

New Trial.

HERBERT RANSOM v. FLOSSIE H. ROBINSON AND MARY WADE ROBINSON.

(Filed 25 February, 1959.)

Trial § 5½: Judgments § 35—

Ordinarily, only the documents constituting the record proper are before the court at pretrial conference, and where the record on appeal fails to indicate that either party offered evidence or waived a jury trial, judgment of nonsuit on the ground of estoppel by a prior judgment, predicated upon findings of fact by the court, must be vacated and the cause remanded.

APPEAL by plaintiff from *Seawell, J.,* March Term, 1958, of COLUMBUS, docketed and argued as No. 614 at Fall Term, 1958.

Civil action instituted September 9, 1957, wherein plaintiff alleged that he was the owner and in possession of described land in Western Prong Township, Columbus County, containing 26 acres; and that defendants, by cutting and removing timber, had unlawfully and wilfully trespassed thereon.

Answering, defendants denied plaintiff's allegations and pleaded ownership; and, upon allegations narrated below, pleaded estoppel by judgment.

Defendants asserted ownership as heirs of Wade H. Robinson. They alleged that Wade H. Robinson had instituted a prior action in Columbus Superior Court against Ernest R. Ashley; that the 26 acres in controversy herein were included in the lands *contended for* by Wade H. Robinson in said prior action; that, while said prior action was pending, Columbus County claimed title to said lands by virtue of a deed made to it pursuant to a tax foreclosure against D. W. Thompson, but on February 2, 1948, prior to judgment, Wade H. Robinson obtained a deed for said lands from Columbus County; that the judgment in said prior action, rendered at February Term, 1949, adjudged Wade H. Robinson the owner of said lands; and that, after the death of Wade H. Robinson, plaintiff herein, with full knowledge of the facts, procured a deed for said lands from Ernest R. Ashley.

Judge Seawell's judgment provides:

"This cause . . . being heard upon the cross motions of the plaintiff and defendants that Judgment No. 27593 in the case of *Wade H. Robinson v. Ernest Ashley* be adjudged an estoppel to further proceedings in said cause, and there being offered in evidence the complaint, answer, judgment, map of court survey, and deeds recorded in Book 179, page 441, and page 548; Book 212, page 31, the Court finds as a fact that said parties agreed upon a judgment in said action settling all of the matters in controversy, and at the time of the rendition of said judgment the defendant E. R. Ashley had of record a deed from D. W. Thompson to him, recorded in Book 179, page 441, conveying to him the same lands as are described in judgment No. 15368, and that the plaintiff Wade Robinson likewise at said time held a deed from Columbus County, recorded in Book 179, page 548, conveying the lands described in judgment No. 15368 to him, and that it was the purpose and the intention of said judgment to settle all matters in dispute between the plaintiff and defendant, and that thereafter the said E. R. Ashley did not list any of said lands now in controversy for taxation, but same were listed by the said Wade H. Robinson, and that thereafter the said Wade H. Robinson died and said defendants succeeded to his rights as his sole heirs, and that the plaintiff Herbert Ransom secured from Ernest Ashley purported deed dated July 12, 1957, recorded in Deed Book 212, page 31, Columbus County Registry, and that said Herbert Ransom was a close neighbor and lived in

the community where said disputed lands are located, and that he is estopped by Judgment No. 27593 and by the conduct of the parties from asserting any right under the deed to him from Ernest Ashley;

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff Herbert Ransom is estopped by Judgment No. 27593 and that his cause of action be, and the same is hereby dismissed as of nonsuit, and the said plaintiff taxed with the cost of this action, and that the money deposited with the Clerk of Superior Court for timber be paid to the defendants."

Plaintiff excepted to said judgment, and to "the findings of fact contained therein," and appealed.

John K. Burns for plaintiff, appellant.

Sankey W. Robinson and James Dick Proctor for defendants, appellees.

BOBBITT, J. Presumably, "the cross motions" were made *ore tenus.* No motion appears in the record.

There was no jury trial. Nothing in the record shows that the parties waived a jury trial and agreed that the court hear the evidence and find the facts. The case was not submitted on an agreed statement of facts. There were no stipulations.

The case on appeal refers to the hearing as a pre-trial hearing. "Unless otherwise provided by stipulation, only the documents constituting the record proper are before the court at pretrial conference." *Reid v. Holden,* 242 N.C. 408, 412, 88 S.E. 2d 125.

The record, under the caption "PLAINTIFF'S EVIDENCE," shows certain documents identified as plaintiff's exhibits. Exhibit A is judgment No. 27593, entered in prior action by *Wade H. Robinson, plaintiff, v. Ernest R. Ashley, defendant,* and attached map purporting to show the contentions of the respective parties. Exhibit B is the answer filed by Ernest R. Ashley in said prior action. Exhibit C is deed dated December 9, 1947, registered in Book 179, page 441, from D. W. Thompson to E. R. Ashley. Exhibit D is deed dated July 12, 1957, registered in Book 212, page 31, from Ernest R. Ashley and wife, Itlean Ashley, to Herbert Ransom. While the judgment indicates the complaint in said prior action was considered by Judge Seawell, that complaint is not in the record nor does it appear that it was identified as an exhibit.

These documents constitute all the "evidence" appearing in the record. Nothing appears to indicate that either party offered any testimony.

The judgment is predicated upon the court's findings of fact. The facts found do not appear from the record proper nor do they appear from the documents *treated as evidence.*

Under the circumstances narrated, it was error for the court to make *any* findings of fact; and plaintiff's exception is deemed sufficient to raise this question.

Our impression is that the record does not fully or accurately disclose what occurred when the cause was heard by Judge Seawell. Even so, the judgment as of nonsuit, predicated on findings of fact made by the court, must be held erroneous.

Upon this record, we express no opinion as to the legal significance of the judgment entered in the prior action by *Wade H. Robinson v. Ernest R. Ashley.*

The judgment is vacated and the cause is remanded for determination in accordance with approved practice.

Error and remanded.

STATE v. G. THURMAN WAGONER.

(Filed 25 February, 1959.)

1. Criminal Law § 107—

It is the duty of the court to charge the jury on a material aspect of the case presented by the evidence, even in the absence of prayers for special instructions.

2. Homicide § 20—

The State's evidence tending to show that defendant intentionally shot his antagonist with a pistol, inflicting fatal injury, is sufficient to take the case to the jury on a charge of murder in the second degree.

3. Homicide § 27—

Where defendant testifies that he did not know whether he pulled the trigger or whether his antagonist pulled the trigger in the scuffle, but that the pistol was fired in the scuffle, and that defendant did not intend to shoot his antagonist, but merely had the weapon to ward his antagonist off, his antagonist having on previous occasions assaulted defendant, the evidence is sufficient to require an instruction to the jury on the defense of an accidental killing.

4. Same: Criminal Law § 107—

Equivocation in defendant's testimony and evidence of contradictory statements made by him go to the weight of the testimony and do not relieve the court of the duty to submit to the jury a defense presented by defendant's evidence.

APPEAL by defendant from *Bickett, J.*, March, 1958 Criminal Term, ALAMANCE Superior Court.

Criminal prosecution upon a bill of indictment in which the defendant was charged with the murder of his son, O. Glenn Wagoner. The jury heard the evidence offered by both the State and the defendant and returned a verdict of guilty of murder in the second degree. From the judgment imposing a prison sentence of not less than 15 years nor more than 20 years, the defendant appealed.

Malcolm B. Seawell, Attorney General, T. W. Bruton, Assistant Attorney General, for the State.

Emerson T. Sanders for defendant, appellant.

HIGGINS, J. The defendant contends the evidence before the jury was sufficient to present the question whether the killing was unintentional—the result of an accident. The court did not charge the jury upon that feature of the case. The Attorney General, on the argument, frankly conceded that if the evidence is sufficient to raise the issue of fact, whether the killing was accidental, the court's failure to charge with respect thereto is reversible error. Special prayer for the instruction was not required. *State v. Brady*, 236 N.C. 295, 72 S.E. 2d 675; *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53.

The evidence in the case disclosed the deceased was killed by a pistol shot fired while the weapon was in the hand of the defendant—the father of the deceased. The defendant is 70 years old. The deceased was 48. The defendant, the deceased, and the latter's wife lived in the same house. On the fatal day all were drinking. The deceased and the defendant engaged in a quarrel. There was evidence the deceased threatened to assault the defendant and that on previous occasions he had actually done so—twice with a weapon—always when one or both were drinking. The State offered evidence, including a statement made by the defendant to the investigating officer, tending to show the shooting was intentional.

The evidence was ample to go to the jury on the charge of murder in the second degree—a killing which proximately resulted from the intentional shooting with a pistol. *State v. Adams*, 241 N.C. 559,

85 S.E. 2d 918; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562. But there was also evidence tending to show the shooting was accidental. The defendant testified: "I didn't pull the trigger as I knows of, I didn't mean to if I did. I don't know whether I pulled the trigger or not . . . in the scuffle. I don't know how it happened . . . I don't know whether he fired it or I fired it. It was done in that scuffle . . . I wouldn't have had it done for anything in the world. . . . The pistol went off in the scuffle. I had the pistol pointed directly down side of me . . . I got the pistol . . . to ward him off. I thought by him seeing it he would stay off of me."

The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both. Election is not required. The defendant may rely on more than one defense. When a case of murder in the second degree is made out, the defendant "must establish to the satisfaction of the jury (*State v. Willis,* 63 N. C. 26) the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or which will excuse it altogether on the ground of self-defense, unavoidable accident or misadventure." *State v. Keaton,* 206 N.C. 682, 175 S.E. 296; citing numerous cases.

The decision in *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402, is not in conflict. In the *Crisp* case the defendant claimed the shooting was accidental. His counsel announced in open court the defendant would not rely on, or claim he shot in, self-defense. Therefore, the trial court properly refused to permit his counsel to argue self-defense to the jury. The stipulation rendered the law of self-defense irrelevant.

Admittedly the defendant's evidence of an accidental shooting is not without some equivocation. However, that goes to its weight, which is for the jury. *Lake v. Express Co.,* 249 N.C. 410; *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294; *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463. The contradictory statements made by the defendant to the investigating officer do not cancel out the testimony given in the trial. Evidence of contradictory statements bear on the weight to be given to the testimony—likewise for the jury.

We hold the evidence in the case, a part of which we have quoted, was sufficient to require the court to charge as to the legal effect of an accidental killing. Failure of the court so to do entitles the defendant to a

New Trial.

LELIA BRIGGS v. LACY DICKEY, EXECUTOR OF THE ESTATE OF L. F. TROXLER, DECEASED.

(Filed 25 February, 1959.)

Executors and Administrators § 24a: Pleadings § 31— Allegations presenting matter which may become material on the trial held erroneously stricken.

In an action to recover the reasonable value of personal services rendered decedent in reliance on decedent's verbal contract to devise certain lands to plaintiff, allegations in the answer that decedent did in fact devise a part of the lands to plaintiff, that plaintiff knew of the provisions of the will, and by her acts and conduct accepted the provision in full satisfaction, or, at least, that the value of the property actually devised should be treated as *pro tanto* payment for any amount found due for the services, *held* erroneously stricken on motion, since it cannot be determined prior to the introduction of evidence that they are irrelevant, redundant, or that their retention would unjustly prejudice plaintiff's cause.

CERTIORARI to review an order of *Johnston, J.*, entered in the above-entitled cause at the June 2, 1958 Civil Term, GUILFORD Superior Court.

Bethea and Robinson, By: Norwood E. Robinson for plaintiff, appellee.

John D. Xanthos, Rufus W. Reynolds for defendant, appellant.

HIGGINS, J. The plaintiff sued on *quantum meruit* for the value of services rendered by her to the defendant's testator and his wife beginning March 4, 1949, and ending September 30, 1957. She alleged she rendered the services in consideration of a promise on the part of the defendant's testator that he would devise to her a certain described farm containing 75 acres in Guilford County; that he accepted the services but failed to make the devise as promised; that her services were reasonably worth $10,200.00, for which she asked judgment.

After a denial of the material allegations of the complaint, the defendant, as a part of his further defense, alleged in brief summary: The testator executed his will in which he devised approximately half the farm to the plaintiff; that the devise was in consideration of and in payment for her services; that he fully advised her of the terms of his will more than three years prior to his death; that she entered into possession of the land so devised and improved the same and used it as her own during the lifetime of the testator, "and agreed

by her acts and conduct to receive said devise in satisfaction for any services . . . rendered"; that she is estopped to deny payment, having elected to accept the devise; that if she is entitled to recover anything for services, the value of the property devised to her should be treated as *pro tanto* payment on any amount found to be due. The superior court, by order, struck from the defendant's further defense the allegations above summarized. The *writ of certiorari* brought the order here for review.

The rules of law applicable to motions to strike pleadings are set forth and fully discussed in many decisions of this Court. *Hayes v. Wilmington*, 243 N.C. 548, 91 S.E. 2d 690; *Daniel v. Gardner*, 240 N.C. 249, 81 S.E. 2d 660; *Dixie Lines v. Grannick*, 238 N.C. 552, 78 S.E. 2d 410; *Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645. Pleadings may be stricken if they are unduly repetitious, redundant, or prejudicial.

The stricken portions of the defendant's pleading involve matters which may constitute a complete or a partial defense to the plaintiff's claim. We cannot say at this stage of the proceeding that they are irrelevant, redundant, or that their retention would be unjustly prejudicial to the plaintiff's cause. The language of this Court in the case of *Hildebrand v. Telephone Co.*, 216 N.C. 235, 4 S.E. 2d 439, seems to be appropriate here: "However, without intimating an opinion upon the sufficiency as a defense of the matters set up in the paragraphs of the further answer which were ordered stricken out, or deciding their legal effect, we think the allegations should be permitted to remain in the defendant's pleading; and that the court should not cut off at the outset an alleged defense which may or may not become material at the trial. The matter can be more properly presented for judicial determination when the evidence is offered at the hearing."

The motion to strike should have been denied. The order allowing it is

Reversed.

ELEANOR KING MOONEYHAM v. A. O. MOONEYHAM.

(Filed 25 February, 1959.)

1. Judgments § 27b—

The finding of a meritorious defense is essential to the validity of an order setting aside a judgment for surprise under G.S. 1-220.

2. Appeal and Error § 33—

Upon appeal from an order setting aside a default judgment upon

the court's finding of surprise and a meritorious defense, the verified answer of defendant, attached to the motion to set aside, is a necessary part of the record proper, since in its absence it cannot be determined whether the finding of a meritorious defense was supported by evidence. Rule of Practice in the Supreme Court No. 19(1).

8. Appeal and Error § 34—

Responsibility for sending up the necessary parts of the record proper is upon the appellant, and his failure to send up necessary parts of the record proper necessitates dismissal of the appeal.

APPEAL by plaintiff from *Patton, J.*, August Term, 1958, of BUNCOMBE.

This is an action for alimony without divorce under G.S. 50-16. Upon defendant's failure to file answer in time, the Clerk of the Superior Court, on motion of plaintiff without notice to defendant, entered judgment by default and inquiry. G.S. 1-212. In apt time defendant moved, in writing, to set aside the clerk's judgment under G.S. 1-220. The motion recited that verified answer of defendant was attached thereto and made a part thereof. The motion came on for hearing before Judge Patton. The court found as a fact that defendant had a meritorious defense and that the judgment had been entered "to the surprise of the defendant"; and the court set aside the clerk's judgment. To Judge Patton's judgment plaintiff excepted and appealed.

Williams & Williams and James N. Golding for plaintiff, appellant.
Harry C. Martin for defendant, appellee.

MOORE, J. The defendant moved in this Court to dismiss the appeal for failure of plaintiff appellant to send up defendant's verified answer as a part of the transcript of the record proper, in compliance with Rule 19, section (1), of our Rules of Practice. The verified answer which had been attached to defendant's motion to set aside the clerk's judgment was not sent as a part of the transcript of the record proper. Indeed, it was admitted by plaintiff's counsel here that the record with respect to a motion to strike and alimony *pendente lite* were not made a part of the transcript, because counsel deemed that these were not necessary to an understanding of the exceptions relied on.

The proffered answer was attached to and made a part of the motion heard by Judge Patton and was a part of the record proper. We must assume that the Judge below considered it. Plaintiff excepted to the finding that the defendant had a meritorious defense. Such

finding was essential to the validity of Judge Patton's judgment. *Moore v. Deal*, 239 N.C. 224, 79 S.E. 2d 507; *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 849. Whether there was error in this finding, this Court cannot determine without the proffered answer before it. Therefore this answer, omitted from the transcript, is an essential part of the record proper in this case. Under Rule 19, section (1), only such records may be omitted as are "not involved and not necessary to an understanding of the exceptions relied on."

No case on appeal was served on defendant. The appeal came up on the record proper. The responsibility for sending the necessary parts of the record proper is upon the appellant.

"Failure to send up necessary parts of the record proper has uniformly resulted in dismissal of the appeal." *Allen v. Allen*, 235 N.C. 554, 70 S.E. 2d 505. See also *Thrush v. Thrush*, 245 N.C. 63, 94 S.E. 2d 897; *Pace v. Pace*, 244 N.C. 698, 94 S.E. 2d 819; *Griffin v. Barnes*, 242 N.C. 306, 87 S.E. 2d 560; *Goodman v. Goodman*, 208 N.C. 416, 181 S.E. 328.

This case stands as if no appeal had been taken from Judge Patton's judgment. The defendant may file his answer within thirty days from the date this opinion is certified to the Superior Court.

Appeal dismissed.

CONSTANCE ZAYTOUN LAMAR v. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A CORPORATION

(Filed 25 February, 1959.)

Insurance § 42—

Death of a soldier in action during the "Korean Conflict" occurs while he is in the military service in time of war, "whether such war be declared or undeclared" within the exclusion of a double indemnity provision in a life insurance policy.

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

APPEAL by plaintiff from *Moore (C. L.) J.*, at November 1958 Term of CRAVEN.

Civil action to recover on insurance policy No. 4390754, known as an ordinary insurance policy issued by defendant, on the life of Thomas C. Lamar in principal amount of $5,000.00 payable at his death to Constance Zaytoun Lamar, his wife, with "supplementary provision" for additional benefit of $5,000.00 on death caused "di-

rectly, independently and exclusively of all other causes, by a bodily injury sustained solely by external, violent, and accidental means * * * " subject to the condition that no such additional benefit will be payable "if death * * * occurs while the insured is in military, naval or air service * * * in time of war, whether such war be declared or undeclared."

And the parties stipulate that insured was a reserve officer in the United States Army, recalled into service, occasioned by what is commonly called "The Korean Conflict," and ordered to Korea by Presidential Proclamation, and thereafter "on or about October 17, 1951, was killed in action during said armed conflict which was then in progress between the Armed Forces of the United States and those of North Korea, as a result of being struck by shrapnel or gun fire."

And defendant has paid plaintiff, as beneficiary under said policy, the sum of Five Thousand Dollars, but has refused to pay any additional amount by reason of the supplemental provision attached to the policy hereinabove set out.

The parties waived a jury trial, and filed a stipulation containing the facts, and asked the court to declare the law arising thereon and to enter judgment accordingly. Thereupon the trial judge held that plaintiff is not entitled to recover herein, and that defendant is entitled to recover of plaintiff and surety on her cost bond all costs incurred herein as taxed by the Clerk of Superior Court.

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

Barden, Stith & McCotter for plaintiff, appellant.
Varser, McIntyre, Henry & Hedgpeth for defendant, appellee.

PER CURIAM. Upon the facts stipulated by the parties, the conclusion reached by the trial court follows as clearly as does the night follow the day. Citation of authority is not required to sustain the judgment below. Hence it is

Affirmed.

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

MARGARET A. FULCHER v. H. C. SMITH AND WIFE STELLA SMITH.

(Filed 25 February, 1959.)

Venue §§ 1a, 2a—

Allegations to the effect that plaintiff leased a store building and purchased a stock of merchandise situate therein, that thereafter defendant lessor made improper proposals as a condition to her right to remain in possession of the premises, that his demands put her in fear of bodily harm so that she was forced for her safety to abandon her leasehold rights and sell her stock of merchandise at a loss, state a transitory cause of action for assault, and plaintiff is entitled to institute the action in the county of her residence.

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

APPEAL by defendants from *Moore (C. L.), J.*, September-October 1958 Term of CRAVEN.

This action was begun 20 February 1957. The complaint in substance alleges these facts: (1) Plaintiff, a resident of Craven County, in November 1956 leased from defendants a store building situate in Pitt County and purchased a stock of merchandise situate therein. (2) Shortly after plaintiff took possession, defendant H. C. Smith threatened her, demanding that she submit to sexual intercourse with him as a condition to her right to remain in possession of the demised premises. His demands and threats put her in fear of bodily harm. (3) The assaults were repeated in such manner and to such extent as finally to force plaintiff, for her safety to abandon her leasehold rights and sell her stock of merchandise for less than its actual value. She seeks compensation and punitive damages.

Defendants in apt time filed with the clerk a motion to remove as a matter of right. The clerk denied the motion. On appeal from the clerk, the judge held the action was properly instituted in Craven County and denied the motion. Defendants excepted and appealed.

Cecil D. May and Ward and Tucker, for plaintiff, appellee.

James & Hite and Barden, Smith & McCotter, for defendants, appellants.

PER CURIAM. The cause of action stated is for an assault. The lease and plaintiff's occupancy pursuant thereto merely afforded an opportunity for an assault. The forced abandonment of plaintiff's property to escape defendant's advances is but an element of damages. The action is transitory, not local. *Clay Co. v. Clay Co.*, 203 N.C. 12,

164 S.E. 341; *Causey v. Morris*, 195 N.C. 532, 142 S.E. 783.
Affirmed.

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

CARL LEE RAGLAND AND WIFE, BEULAH P. RAGLAND, v. MARTIN KELLOGG, JR., TRUSTEE, AND JAMES E. GARRETT AND WIFE, MYRTLE B. GARRETT.

(Filed 25 February, 1959.)

APPEAL by defendants from order of *Morris, J., Resident Judge* of the First Judicial District, heard August 23, 1958, by consent, in Chambers at Currituck, North Carolina. From DARE.

Civil action to restrain foreclosure of deed of trust constituting lien on plaintiff's land.

On June 9, 1958, Martin Kellogg, Trustee, advertised a foreclosure sale on account of plaintiffs' failure to pay 1957 taxes. Plaintiffs paid the 1957 taxes on June 16, 1958, and instituted this action on July 2, 1958. A temporary restraining order was issued July 3, 1958; and the question before Judge Morris was whether the temporary restraining order should be continued in effect until final hearing on the merits.

Upon the amended complaint, exhibits and affidavits, Judge Morris found as facts "that there is probable cause that the plaintiffs will be able to make out their case on final hearing and . . . that serious questions of fact are raised to be passed on by a jury at the final hearing." Thereupon, by his order of August 23, 1958, Judge Morris continued in full force and effect the said temporary order and restrained further foreclosure proceedings until the final hearing and determination of the cause.

Defendants excepted and appealed.

McCown & McCown for plaintiffs, appellees.
Frank B. Aycock, Jr., for defendants, appellants.

PER CURIAM. The only question now presented is whether the evidence was sufficient to support Judge Morris' findings of fact and interlocutory order. The record requires an affirmative answer.

It is noted that plaintiffs, as required by Judge Morris, filed a $1,000.00 bond, affording protection to defendants in the event it is determined on final hearing that the restraining order *pendente lite*

was improvidently entered and that defendants suffered damages on account thereof.

Whether defendants' demurrer to amended complaint was properly overruled is not presented. No petition for *certiorari* was filed. Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766. Even so, since plaintiffs' right to the restraining order *pendente lite* is based upon the facts alleged in their amended complaint, it may be implied that this Court is of opinion that defendants' said demurrer was properly overruled.

Affirmed.

STATE v. JIMMIE C. EVANS.

(Filed 25 February, 1959.)

APPEAL by defendant from *Moore, J.*, November Term, 1958, PITT Superior Court.

Criminal prosecution upon indictment charging felonious assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. Upon the defendant's plea of not guilty, the court and jury heard evidence of numerous witnesses, both for the State and for the defendant. From a verdict of guilty of assault with a deadly weapon and judgment thereon, the defendant appealed.

Malcolm B. Seawell, Attorney General, Claude L. Love, Assistant Attorney General, for the State.

Jones, Reed & Griffin for defendant, appellant.

PER CURIAM. The impeaching questions asked by the solicitor do not transgress the rules of fair cross-examination. Likewise, the questions by the court were of a clarifying nature only. The assignments of error relating to both are without merit.

The trial court was correct in ruling the evidence made out a case for the jury on the felony charge, which included the lesser offense of which the defendant was convicted.

No Error.

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

PAMLICO COUNTY v. JENNIE DAVIS (WIDOW), GRANT MOYE AND WIFE, BEATRICE MOYE; DONALD MOYE (UNMARRIED), AND JAMES MOYE (UNMARRIED).

(Filed 4 March, 1959.)

1. Appeal and Error § 19—

The rules governing appeals are mandatory, and an assignment of error which does not conform to Rules 19(3) and 21 presents no question for review.

2. Appeal and Error § 21a—

An assignment of error to the refusal of the court to allow motion to nonsuit and referring to the pertinent exception is sufficient, and requires an examination of the evidence to ascertain if there is any sufficient evidence to support the claim.

3. Betterments § 1—

A party claiming betterments has the burden of establishing that he made permanent improvements on the land under *bona fide* belief of good title and that he had reasonable grounds for such belief.

4. Same—

Evidence that the land in question was farm land which had been abandoned and had become a piece of waste-land, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, is sufficient to show "permanent improvements" within the purview of G.S. 1-340.

5. Same—

Permanent improvements made by the purchaser in possession under an unenforceable contract to convey is sufficient claim of title to support a claim for betterments, and the statute of frauds may not be asserted to defeat such claim.

6. Same—

Evidence that claimant went into possession of an abandoned farm, which had been permitted to become waste-land, under contract with the county to convey to him, the county having purchased at a tax foreclosure sale, that claimant expended a large sum of money in making permanent improvements over a period of three years, paid part of the purchase money, and that during the course of these improvements no one made an adverse claim, is sufficient to be submitted to the jury on the question whether the improvements were made under a *bona fide* belief of good title or right thereto.

7. Same—

Evidence that claimant went into possession under a contract by the county to convey and that the county had purchased the land at a tax foreclosure sale, constitutes claimant in effect a purchaser at a judicial sale, and is sufficient evidence that he had reasonable grounds to be-

lieve he had good title or right thereto to support his claim for betterments.

8. Judicial Sales § 7—

The purchaser at a judicial sale is not under duty to employ counsel to examine the proceeding.

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

APPEAL by movants from *Moore (C. L.), J.*, August 1958 Term of PAMLICO.

In May 1943 summons issued from the Superior Court of Pamlico County in a civil action in which Jennie Davis, Grant Moye and wife, Donald Moye and James Moye were named as defendants. The action was instituted by Pamlico County to enforce payment of taxes assessed for the years 1929 through 1942 against a tract of land listed in the name of Henry Moye. Plaintiff prayed for a sale and foreclosure of the right of defendants as heirs at law of the tax debtor to redeem.

A decree of foreclosure was entered and the property sold to Pamlico County in 1946. It contracted in 1950 to convey the property to Paul J. Daniels for $453.19, part in cash, with the remainder in annual installments.

In March 1953 the named defendants and others, as heirs at law of the delinquent taxpayer, filed a motion asking the court to set aside the decrees of foreclosure and confirmation and to declare the deed to Pamlico County and its contract with Daniels void for the asserted reason that no process had ever been served on movants. Copy of the motion and process were served on Paul J. Daniels.

Pamlico County asserted the validity of the tax foreclosure proceeding and its obligation to convey. Daniels answered that he contracted in good faith to purchase and, relying on his contract, had made valuable permanent improvements to the property. He asked for compensation for the improvements so made, if the court should hold he could not acquire good title.

The motion was heard by the clerk in August 1955. He found that service had been properly made on Grant Moye and wife and Jennie Davis, two of the five heirs of Henry Moye. He also found that Daniels in 1950 contracted to purchase the land from the County, immediately took possession, and had been in possession since the contract was made. No exception was taken to this finding of fact. The seventh finding was that Daniels had made permanent improvements on the property amounting to $2,554.75. Movants excepted to this

finding of fact. Based on his findings, the clerk adjudged the sale valid as to the 2/5 interest owned by the heirs served, invalid as to the 3/5 interest not served. He denied relief to the parties served, allowed the motion of those not served to vacate the judgment subject to payment to Daniels for their pro rata part of the betterments in the amount determined by him to have been made.

Movants appealed to the Superior Court in term. The appeal was heard by Bundy, J., August 1955 Term.

Judge Bundy's order recites the findings made by the clerk with respect to the improvements. It then says: "The Clerk was satisfied with the probable truth of the allegations that permanent improvements have been made on said land, and so is this Court, but the amount of same to be allowed is for a jury to determine under G.S. 1-340.

"IT IS THEREFORE ORDERED that this cause be docketed for trial before a jury to determine and assess the allowance to Paul J. Daniels for the improvements and betterments, if any, against the interest in said land of the defendants not served, over and above the value of the use and occupation of the land."

At the August 1958 Term the court submitted six issues to the jury for the purpose of determining Daniels' right to and the value of the claimed improvements. No exception was taken to the issues submitted. The jury found Daniels had made improvements under a title believed to be good, which belief was based on reasonable grounds. It fixed the value of the improvements, rental value, and taxes paid by Daniels.

Judgment was entered based on the verdict. Movants excepted and appealed.

B. B. Hollowell for Pamlico County and R. E. Whitehurst for Paul Daniels.

Taylor & Mitchell and Robert D. Glass for defendants, appellants.

RODMAN, J. Typical of movants' assignments is the seventh, which reads:

"The trial Court committed prejudicial and reversible error in its charge to the jury by instructing the jury upon the law of betterments and permanent improvements, in that no evidence upon the instant record justified instructions upon said law or the submission to the jury of an issue on a question of betterments and improvements; to which error EXCEPTIONS 9, 10, 11, 12, 15, 16, 17, 18, 19, and 20 (R pp 78-85, 92-98) are directed."

The assignments of error do not conform to Rules 19 (3) and 21 of this Court. We have repeatedly called attention to these rules. They are mandatory. *Nichols v. McFarland,* 249 N.C. 125; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *Tillis v. Cotton Mills,* 244 N.C. 587, 94 S.E. 2d 600; *Armstrong v. Howard,* 244 N.C. 598, 94 S.E. 2d 594; *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; *Byrd v. Southerland,* 186 N.C. 384, 119 S.E. 2; *Rogers v. Jones,* 172 N.C. 156, 90 S.E. 117.

Assignment No. 4 directed to exception 7 for that the court refused to allow movants' motion to nonsuit Daniels' claim for betterments, although grouped with exceptions relating to the charge, is sufficient to require us to examine the evidence to ascertain if there is any evidence to support the claim for betterments. *Allen v. Allen,* 244 N.C. 446, 94 S.E. 2d 325; *Register v. Power Co.,* 165 N.C. 234, 81 S.E. 326.

Protection is, by statute, G.S. 1-340, afforded one who makes permanent improvements to property, believing that he has good title to the property so improved.

The statute has been interpreted to impose on claimant the burden of establishing (1) that he made permanent improvements, (2) *bona fide* belief of good title when the improvements were made, and (3) reasonable grounds for such belief. *Pritchard v. Williams,* 176 N.C. 108, 96 S.E. 733; *Rogers v. Timberlake,* 223 N.C. 59, 25 S.E. 2d 167. Issues were submitted to obtain answers to these questions.

What are permanent improvements entitling claimant to reimbursement was considered in *Pritchard v. Williams,* 181 N.C. 46, 106 S.E. 144. The improvements for which Daniels is seeking compensation is the redemption of abandoned farm land by ditching, clearing, building roads on the property, and similar work, making it again susceptible of profitable cultivation. Claimant testified: "When I moved on the land it was grown up, it had laid out for several years; the ditches were filled up; it was just an old piece of waste-land laid out, and grown up." He detailed amounts expended to put it back in a profitable state of cultivation. The jury was instructed as to what was necessary to constitute a permanent improvement. The charge was patterned on *Pritchard v. Williams, supra* (181 N.C. 46). Movants did not except to those portions of the charge. Witnesses testified to the substantial enhancement in the value of the property resulting from the work done by claimant. We are of the opinion the

evidence was sufficient for a jury to find that work was done constituting "permanent improvements" as those words are used in the statute. 42 C.J.S. 422, 423; 27 Am. Jur. 273, 274.

Indeed, we do not understand movants to seriously controvert that proposition. Their motion for nonsuit is based on the assertion that claimant has failed to establish any title to which a *bona fide* belief could attach; therefore there could be no reasonable grounds for such belief.

The motion to vacate the order of sale alleges the contract to convey, the amount to be paid, and partial performance. The County has not pleaded the statute of frauds. It admits its obligation to Daniels. We are not called upon to determine whether a court would decree specific performance of a contract by a governmental agency. It has been settled law in this State for more than a century that an unenforceable contract to convey is sufficient claim of title to support a claim for betterments. *Albea v. Griffin,* 22 N.C. 9, which has been repeatedly cited with approval; see Shepard's N. C. Citations. *Dupree v. Moore,* 227 N.C. 626, 44 S.E. 2d 37; *Knowles v. Wallace,* 210 N.C. 603, 188 S.E. 195; *Insurance Co. v. Cordon,* 208 N.C. 723, 182 S.E. 496; *Baker v. Carson,* 21 N.C. 381. Here the terms of the contract and the property to be conveyed are admitted. The statute of frauds would not have defeated Daniels' claim if the County had refused to convey and sought to take possession.

Movants cannot assert the statute of frauds to defeat Daniels' claim for improvements.

Movants in their brief also argue that the motion to nonsuit should have been allowed for want of evidence establishing a *bona fide* belief of good title or right thereto and total absence of any basis for such a belief if in fact held.

We think the evidence ample to require submission of these questions to the jury. It tends to establish these facts: Daniels lived about a quarter of a mile from the property. The owner had apparently abandoned it because of its run-down condition. Taxes assessed against the property had not been paid for twenty years. A court of general jurisdiction had ordered the land sold. The County had purchased. No one had come forward to redeem. The contract price was the fair market value. Daniels asserts his good faith. He paid part of the purchase money. He spent three years and in excess of $2,500 in permanently improving the property. During the course of these improvements no one made an adverse claim. Not until the improvements were complete was there an assertion that he did not have good title.

Except when intended as a gift, one does not ordinarily expend substantial sums to improve property unless he has a *bona fide* belief in his ownership. There is plenary evidence of *bona fide* belief.

Did Daniels have reasonable grounds for his belief? Daniels was in effect a purchaser at a judicial sale. There is no suggestion that he had knowledge of anything which would impair his right to the property. To hold that one who bids at a judicial sale acts imprudently and unreasonably unless he employs counsel to examine the proceeding would place such a burden on judicial sales as to destroy their efficacy. The law imposes no such burden. *Cherry v. Woolard,* 244 N.C. 603, 94 S.E. 2d 562; *Jeffreys v. Hocutt,* 195 N.C. 339, 142 S.E. 226. Nor can it be said that one who relies on the integrity of public officials acts imprudently.

The evidence compelled the court to submit the disputed questions to the jury.

No Error.

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

STATE v. WALTER R. SMITH AND STATE v. WILLIAM AUGBURN.

(Filed 4 March, 1959.)

1. Criminal Law § 70—

Defendants admitted that on the afternoon in question they were riding in a particular car, but denied they were at the scene or committed the crime. The court admitted testimony of a witness that a boy, who was at the scene of the crime, told the witness that he saw a car of like make and color leave the scene immediately after the crime was committed. *Held:* The testimony was incompetent as hearsay, and since it related to a controverted and material fact, its admission was prejudicial.

2. Criminal Law § 159—

An assignment of error not supported by any argument or authority in the brief is deemed abandoned.

3. Burglary § 4—

Evidence in this case *held* sufficient to be submitted to the jury on the charge of burglary in the first degree, and there was no evidence that the offense was burglary in the second degree.

4. Burglary § 6—

G.S. 15-171, requiring the court in a prosecution for burglary in the

first degree to submit the question of defendant's guilt of burglary in the second degree, notwithstanding the absence of any evidence of defendant's guilt of such degree of the crime, was repealed by Chapter 100, Session Laws of 1953.

APPEAL by defendants from *Frizzelle, J.*, October Term, 1958, of HALIFAX.

Criminal prosecution on separate (identical) two-count bills of indictment against Walter R. Smith and William Augburn, respectively, consolidated (by consent) for trial.

The first count charges the defendant therein named with the capital felony of burglary in the first degree, specifically that he "on the 25th day of August A. D. 1958, about the hour of 8 p.m. in the night of the same day, with force and arms, at and in the county aforesaid the dwelling house of one C. C. Tynes, there situate, and then and there actually occupied by one C. C. Tynes and George Cherry feloniously and burglariously did break and enter, with intent, the goods and chattels of the said C. C. Tynes in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away money and other goods against the peace and dignity of the State."

The second count, which relates to the same occasion, charges the defendant therein named with the larceny of $180.00.

Upon arraignment, defendants entered pleas of not guilty.

The State offered evidence tending to show that defendants committed the crimes charged. The testimony of defendants and of witnesses offered by defendants tended to establish alibis.

The jury, as to each defendant, returned verdicts as follows: On the first count, guilty of burglary in the second degree; on the second count, guilty.

The court pronounced judgment, as to each defendant, as follows: On the first count, imprisonment "in the State's Prison for a term of not less than 25 years nor more than 30 years"; on the second count, imprisonment "in the State's Prison for a term of not less than 12 months nor more than two years," this sentence to run concurrently with the sentence imposed on the first count.

Defendants excepted and appealed.

Attorney General Seawell and Assistant Attorney General McGalliard, for the State.

Fountain, Fountain, Bridgers & Horton for defendants, appellants.

BOBBITT, J. The prosecuting witness, C. C. Tynes, testified that

two masked men, whom he did not know and had not previously seen, obtained entrance by fraud and forced their way into his home and repeatedly assaulted him (one holding a shotgun on him) until they got his money and two watches. This occurred, after dark, on the night of Monday, August 25, 1958.

Tynes lived in Halifax County, 2½ miles from Hobgood and 10 or 10½ miles from Scotland Neck. Tynes and George Cherry, an eight year old boy, the son of Tynes' wife's sister, were the only occupants of the Tynes home when the crimes were committed.

Tynes testified: "I did not see the automobile when it left. . . . He (George Cherry) got up and looked out the window when the automobile drove off."

Neighbors called the officers. Tynes, who had been injured, was taken to the hospital.

On the following Friday, Tynes went to the Halifax County Jail. Meanwhile, defendants and Theodore Augburn, brother of defendant William Augburn, had been arrested and charged with first degree burglary. At the Halifax County Jail, three men were brought into the presence of Tynes. He identified the defendants as the two men who had forced their way into his home and assaulted and robbed him.

There was evidence that Theodore Augburn owned a 1952 "two-toned red and dark colored Buick Roadmaster." "The Buick car is red on the bottom and the top is black."

Defendants, also Theodore Augburn, were taken into custody on Monday night, August 25th, in Scotland Neck. All denied knowledge of the crime. However, all admitted that they had been riding that afternoon (to and from Durham) in Theodore's Buick.

An investigating officer was permitted to testify, over objection, that the little boy (presumably George Cherry) *told* him out there (at Tynes' house) that night "about a red Buick car going away from there," and that, based on this information and on information that "these two defendants had been riding around in a red Buick," he radioed instructions to another officer in Scotland Neck to pick up the defendants and Theodore Augburn.

George Cherry did not testify. He lived with his mother in Tarboro. When the trial was in progress, George Cherry was in school.

Whether Theodore's red Buick was in front of Tynes' house and was driven therefrom immediately after the crimes were committed was a material and sharply controverted fact. It was so regarded by the State. Indeed, the State, by testimony as to tire tracks "out in the mud in front of Mr. Tynes' house," undertook to identify Theodore's red Buick as the car used by the perpetrators of the crimes.

But there was no testimony, except the statement attributed to George Cherry, that anyone had seen a red Buick at the Tynes home at or about the time the crimes were committed.

The testimony that the little boy *said* that he saw a red Buick going away from the Tynes home, whether considered alone or in conjunction with the evidence as to tire tracks, strongly supported the State's contention. The statement attributed to the boy materially influenced the investigating officer's decision to order the arrest of defendants. It is not unreasonable to assume that the jury gave equal weight thereto.

Since the probative value of the challenged testimony depends wholly upon the truth of the matters asserted by the little boy in the statement attributed to him, it is clear that it was incompetent as hearsay and should have been excluded. *Gurganus v. Trust Co.*, 246 N.C. 655, 658, 100 S.E. 2d 81, and cases cited; *S. v. Ward*, 241 N.C. 706, 86 S.E. 2d 275, and cases cited; Stansbury, North Carolina Evidence, § 138. Its admission, over defendants' objection, was prejudicial and entitles defendants to a new trial.

The court, in charging the jury, reviewed the respective contentions with reference to the failure of the State to call George Cherry as a witness. These portions of the charge would seem to accentuate rather than to dispel the prejudicial effect of the incompetent evidence.

Defendants assigned as error the denial of their motion for judgment of nonsuit as to burglary in the first degree. In their brief, no reason or argument is stated and no authority is cited in support of this assignment. While this assignment is deemed abandoned, *S. v. Gordon*, 241 N.C. 356, 362, 85 S.E. 2d 322, it seems appropriate to say that the evidence, when considered in the light most favorable to the State, was sufficient to warrant the submission of burglary in the first degree. (As to entry obtained by fraud, see *S. v. Johnson*, 61 N.C. 186; *S. v. Foster*, 129 N.C. 704, 40 S.E. 209; 2 Wharton's Criminal Law and Procedure (1957), § 415.) Indeed, there was no evidence of burglary in the *second* degree. *S. v. McAfee*, 247 N.C. 98, 100 S.E. 2d 249.

There was plenary evidence that two men committed the crimes charged in the bills of indictment. Upon trial, the crucial question was whether defendants were the men involved. It is unnecessary to review the evidence offered by defendants except to say that it tends to show that each of them was elsewhere, not at the Tynes home, when the alleged crimes were committed.

Since a new trial is awarded for the reason stated, we do not consider defendants' other assignments of error. However, it seems ap-

propriate to call attention to the fact that (former) G.S. 15-171, which was explained and applied by the court in charging the jury, was repealed by Ch. 100, Session Laws of 1953. See *S. v. McAfee, supra.*

New trial.

STATE v. ROBERT S. TREADAWAY.

(Filed 4 March, 1959.)

Criminal Law § 83—

In a prosecution for operating a motor vehicle on a public street while under the influence of intoxicating liquor, the exclusion of testimony that the prosecuting witness was biased because interested adversely to defendant in a civil action arising out of the operation of the vehicle by defendant at the time in question, *held* erroneous on authority of *S. v. Hart*, 239 N.C. 709.

APPEAL by defendant from *Burgwyn, Emergency Judge,* September Criminal Term 1958 of GASTON.

The defendant was tried upon a warrant in the Municipal Court of the City of Gastonia, charging him with operating a motor vehicle upon the public streets of the City of Gastonia on 5 April 1958, while under the influence of intoxicating liquor. He was found guilty and upon the sentence imposed appealed to the Superior Court, where he was tried *de novo* on the original warrant.

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

Attorney General Seawell, Assistant Attorney General Bruton, for the State.

Childers & Fowler for defendant.

PER CURIAM. The defendant assigns as error the refusal of the court below to admit testimony tending to show that the prosecuting witness, Peter J. Mandamis, was biased against the defendant or was interested adversely to him in that he is claiming damages as a result of injuries sustained when the defendant ran into his automobile on the occasion he is charged with driving a motor vehicle upon the public streets of Gastonia while under the influence of intoxicating liquor

We think the exclusion of this evidence was erroneous. Therefore, the defendant is entitled to a new trial and it is so ordered on authority of *S. v. Hart,* 239 N.C. 709, 80 S.E. 2d 901.

New Trial.

STATE OF NORTH CAROLINA, ON RELATION OF THE NORTH CAROLINA MILK COMMISSION v. M. O. GALLOWAY.

(Filed 18 March, 1959.)

1. Appeal and Error § 49—

Where the findings of fact of the lower court are supported by substantial competent evidence and stipulations of the parties, such findings are binding and conclusive on appeal.

2. Agriculture § 15—

The N. C. Milk Commission is empowered to fix the transportation rates for hauling milk of producers to processing plants. G.S. 106-266.8 (c), (g), (j).

3. Agriculture § 14: Constitutional Law § 7—

The statute conferring upon the N. C. Milk Commission power to fix prices in respect to milk and its products in intrastate business, prescribes the standards for the guidance of the Commission, leaving to the Commission only its proper administrative function, and therefore the Act is a constitutional delegation of power, G.S. 106-266.8 (j), with further protection against abuse of such power by provision for appeal and a hearing *de novo* in the Superior Court. G.S. 106-266.17.

4. Agriculture § 14: Constitutional Law §§ 20, 24—

An order of the N. C. Milk Commission prescribing a uniform hauling charge equal upon all producers delivering milk to a certain distributor, regardless of the distance or route, is not arbitrary nor discriminatory and is relevant to the legislative purpose of the Milk Commission Act, and such regulation, replacing a system of charges varying in accordance with the routes of the milk trucks, does not deny a producer the equal protection of the laws or deprive him of property without due process of law, even though he is subject under the regulation to a higher charge than he was under the old system. Constitution of North Carolina, Article I, Section 7 and Article I, Section 17; 14th Amendment to the Constitution of the U. S.

5. Constitutional Law § 6—

Outside the power granted to the Federal Government, the power of the Legislature of North Carolina to enact statutes is without limit, except as restrained by the Constitution of North Carolina.

6. Constitutional Law § 10—

The courts will not pronounce an act of the General Assembly unconstitutional unless it is plainly so.

RODMAN, J., not sitting.

APPEAL by M. O. Galloway from *Patton, J.*, November-December Civil Term 1958 of BUNCOMBE.

This proceeding arises from an order entered on 8 April 1958 by the North Carolina Milk Commission instituting a uniform hauling charge per cwt. for each producer delivering milk to Biltmore Dairies, Asheville Plant, regardless of his volume of milk or distance from the plant, to become effective on 1 April 1958.

On 18 April 1958 M. O. Galloway, the appellant, a milk producer and a member of Biltmore Producers Association residing in Buncombe County, pursuant to G.S. 106-266.17, appealed from said order to the Superior Court of Buncombe County. On the same day Judge Zeb V. Nettles, Resident Judge of the Buncombe County Judicial District, acting under the authority vested in him by the same section of the General Statutes, entered a special order staying the enforcement of the order of the North Carolina Milk Commission pending the final adjudication of Galloway's appeal.

Pursuant to the same section of the General Statutes, the proceeding was placed on the civil issue docket of the Superior Court of Buncombe County, and heard *de novo* under the same rules as are prescribed for the trial of civil actions.

When the proceeding came on to be heard before Judge Patton, all the parties stipulated and agreed to a waiver of trial by jury, and that the Judge should find the facts, make conclusions of law, and render judgment. G.S. 1-184 and 1-185.

The substance of the findings of fact are these:

Biltmore Dairy Farms (also called in the Record, Biltmore Dairies, and hereafter to be called Biltmore) is a duly licensed distributor of milk and its products in Area 8, with its processing plant for this area situate near Asheville, Buncombe County. Area 8 comprises Buncombe, Haywood, Cherokee and a number of other counties in Western North Carolina. M. O. Galloway, a resident of Buncombe County, is a milk producer, who sells all of his milk to Biltmore.

A year prior to April 1957 Biltmore notified its producers to install bulk milk tanks on their farms, so that beginning on 1 April 1957 it might load their milk in bulk tank trucks by pumping the milk from the tanks into the trucks. This system has a number of advantages over the old system of picking up the milk in cans, and

has been instituted in recent years by many milk distributors in North Carolina and other states. On 1 April 1957 the new system went into effect. To gather the milk, Biltmore had 8 trucks: 7 of which follow regular routes, and one is a relief truck. The routes were worked out by Biltmore's field man, Mr. Fox.

Driver Farnsworth covers routes 1 and 4, and picks up milk from producers in Buncombe and Henderson Counties, particularly in the Fletcher and South Buncombe areas. Driver Moore covers routes 2 and 16, and the producers on his routes are also in Buncombe and Henderson Counties. Driver Prince has routes 3, 5, 8 and 15, and the producers on his routes are in Rutherford, McDowell, Haywood, Burke and Buncombe Counties. Driver Morgan covers routes 6 and 17 with producers in Madison, Buncombe, Transylvania and Henderson Counties. Driver Edwards covers routes 7 and 10 with producers in Madison, Yancey and Buncombe Counties. Driver Horton (formerly Driver Corn) covers route 11 with producers in Polk, Rutherford and Spartanburg (South Carolina) Counties. Driver Harrell has routes 9 and 14 with producers in Yancey and Mitchell Counties.

The North Carolina Milk Commission (hereafter called Milk Commission) has established a minimum price of $6.55 cwt. to be paid by the distributor to the producer for Class I milk f. o. b. the distributor's plant, with lesser prices for lower classes of milk. The cost of transporting the milk from the farm to the distributor's plant to be paid by the producer. The transportation of milk from the farm of the producer to the distributor's plant is handled in various ways in North Carolina, e. g. by contract haulers, but in all cases the producer pays for the hauling.

"Since Biltmore began hauling all its producers' milk in April, 1957, it has charged its producers for hauling on the following basis: The cost of operating each of the seven regular trucks is computed and the cost is then allocated among the producers served by that truck so that each producer on the routes served by that particular truck pays the same weight per hundred pounds; however, the rate charged the individual producer varies considerably depending upon the route to which he is assigned. Biltmore's figures reflect that during the months from April, 1957, to January, 1958, (Exhibit 'A' in the Stipulation) the cost of operating the Farnsworth truck on routes 1 and 4 was $11,683.65; 6,912,400 pounds of milk were transported, and thus the rate per 100 pounds for producers on routes 1 and 4 was 16.9 cents. The next lowest rate was charged the producers served by the Moore truck, routes 2 and 16, to wit, 25.8 cents. The highest rate was charged

the producers on the Corn truck, 30.2 cents. The average rate charged all producers was 26 cents for this period. The recapitulation of all charges from April, 1957, through October, 1958, (Exhibit 'B-1') reflects a charge of 17 cents on the Farnsworth route, 31 cents on the Corn route and Prince route, with rates on the other routes being 27 cents or 29 cents and the average rate being 26 cents.

"Under the system of hauling charges made by Biltmore since April, 1957, a number of inequities have resulted. The producers on the Farnsworth route have been charged 17 cents per cwt. compared to the average rate of 26 cents (Exhibit 'B'); whereas all other producers have been charged more than the average, ranging from 27 cents to 31 cents. The same two counties were served by the Moore routes and the Farnsworth routes, to wit, Buncombe and Henderson; yet the Moore route producers were charged 27 cents, the Farnsworth producers 17 cents. The Buncombe County producers who happened to be assigned to the Prince routes have paid a higher rate (31 cents) than the Yancey and Mitchell Counties producers on the Harrell routes (29 cents) and likewise higher than the Madison, Transylvania and Henderson producers on the Morgan route (27 cents). The Buncombe County producers on the Moore, Prince, Morgan and Edwards routes have all been forced to pay at least 10 cents more per cwt. than the Henderson County producers on the Farnsworth routes. Many of the routes touch each other at some point. Route #11 going to South Carolina goes right past certain producers who are on the Farnsworth low-price routes; likewise, the Morgan route to Transylvania County goes past the farms of certain producers on the Farnsworth routes. The luck of a certain producer in being assigned to one route as compared to another route may mean a difference of 10 cents to 14 cents per cwt. in his hauling charges, and the evidence showed that Biltmore has on several occasions changed producers from one route to another. For example, Max Carland was switched from another route to the Farnsworth route, though the location of his farm was not changed, and this resulted in a saving of 10 cents per cwt. on his hauling charges.

"Exhibit 'D' reflects the losses that certain producers on the Farnsworth route would suffer if Biltmore charged all its producers the same price for hauling. The producers on the Farnsworth route would suffer a loss as indicated; however, all the producers on the other six routes would realize a gain. The names of two producers were omitted from Exhibit 'D', to wit, Biltmore Dairy Farms' own herd, and the herd of Biltmore's General Manager E. D. Mitchell. Both these herds were assigned to the Farnsworth route and would lose substantially

(9 cents per cwt.) if a change were made from the present system of hauling charges to a system of charging each producer an equal rate per cwt. The production of the Biltmore herd is about four times that of the second largest producer on the Farnsworth route, to wit, Fairfield Farms, and the production of the E. D. Mitchell herd ranks third ahead of the production of Frank Burgin. It appears from the figures on Exhibit 'D' that the defendant M. O. Galloway would have been charged an additional $73.47 in 1957, and an additional $235.93 for the period from January through September, 1958, had Biltmore been charging all producers the same price for hauling."

Biltmore Producers Association, dissatisfied with Biltmore's hauling charges, petitioned the Milk Commission to hold a hearing in respect to these charges. After the Milk Commission had mailed a notice of such hearing to all milk producers in Area 8, it held a public hearing on 18 March 1958 in the Buncombe County Courthouse. M. O. Galloway received a notice of the hearing, but did not attend. At this hearing substantially all who spoke favored a uniform hauling charge for all producers, regardless of route to which the producer is assigned, distance from the plant or volume of milk. "Following the hearing the Milk Commission ordered Biltmore to cease its existing system of hauling charges and to institute a system of uniform hauling charges per cwt. to all producers for all milk delivered to its Asheville plant on and after 1 April 1958." Within due time M. O. Galloway appealed to the superior court. No appeal was taken by any other producer or by Biltmore.

The judge's conclusions of law are stated separately and in substance are as follows:

One. The Milk Commission Act, and in particular subsections (b), (c), (d), (g) and (j) of G.S. 106-266.8, give ample authority to the Milk Commission (and to this Court upon appeal) to enter an order regulating the charges made by Biltmore for hauling its producers' milk from the farm to the plant. Without such authority, the delegation of the power to the Milk Commission to fix prices to be paid producers by distributors would be meaningless, inasmuch as a distributor by unreasonable hauling charges could prevent the producer from receiving reasonable compensation for his milk.

Two. The delegation of this power to the Milk Commission does not contravene either the State or Federal Constitution.

Three. The present system of hauling charges used by Biltmore is not fair, equitable or reasonable for the reasons set out in the Court's findings of fact.

Four. An order directing Biltmore Dairy Farms to cease its exist-

ing system of hauling charges and to institute a new system whereby the cost of hauling the milk from farm to plant is divided equally among all producers so that each producer is charged the same rate per cwt. of milk regardless of route to which he is assigned, distance from the plant, or volume of milk, would in the judgment of this Court constitute a fair and reasonable regulation of the transportation by Biltmore Dairy Farms of the milk of its producers from the farm to the plant.

Whereupon the judge entered judgment decreeing and adjudging "that Biltmore Dairy Farms cease forthwith its existing system of hauling charges and institute a new system whereby the total cost of hauling all its producers' milk from the farm to its Asheville plant is divided by the total number of pounds of milk hauled to establish a rate per cwt. of milk which shall be applied to all its producers so that each producer is charged the same rate per cwt. of milk regardless of the route to which he is assigned, his distance from the plant, or the volume of his milk, the new system of hauling charges to apply to all milk picked up by Biltmore on or after December 1, 1958."

From the judgment M. O. Galloway appealed.

Harris, Poe & Cheshire for plaintiff, appellee.
Lee & Lee for defendant, appellant.

PARKER, J. The findings of fact by the Trial Judge are amply supported by substantial competent evidence and stipulations entered into by the parties. Therefore, such findings of fact are as binding as the verdict of a jury, and are conclusive on appeal. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; *St. George v. Hanson*, 239 N. C. 259, 78 S.E. 2d 885; *Trust Co. v. Finance Co.*, 238 N.C. 478, 78 S.E. 2d 327. The appellant in his brief makes no argument to the contrary.

The appellant in his brief states that all his assignments of error deal directly with (1) the power of the Court under the State Milk Commission Act to fix transportation rates for hauling milk of producers to the processing plant, and (2) whether the judgment violates appellant's rights under Article I, Section 7, and Article I, Section 17 of the North Carolina Constitution, and Section 1 of the 14th Amendment to the United States Constitution. Appellant does not contend that the Act as a whole is unconstitutional.

The question for our determination is, whether the language of the Act creating the North Carolina Milk Commission and conferring upon it the power to supervise, regulate and control the milk industry

empowered the Milk Commission to fix the transportation rates for hauling milk of the producers to the processing plant, and if so, does the judgment entered violate appellant's rights as set forth in the parts of the State and Federal Constitutions specified by him in his brief. That Act was first enacted in 1953. Chapter 1338, 1953 Session Laws of North Carolina. With subsequent amendments it has been codified as Article 28B, Chapter 106, Agriculture, G.S. of N.C., Sections 106-266.6 to 106-266.21, inclusive.

The considerations which impelled the General Assembly to adopt the Act are found in its preamble on page 1323, Acts of 1953. The preamble states: "The facts herein set forth in this preamble are declared to be matters of legislative finding and determination." Among the facts set forth in the preamble to the Act are these: "Milk is a primary and necessary food for the children and adult population of the State. . . . It is vital to the public health and welfare of the people of the State that the production, transportation, processing, storage, distribution and sale of milk shall be carried on in a fair, just and equitable manner with purity of content, and the milk industry is a business or industry affecting the public health and interest; that it is necessary for the safety, health and welfare of the people of the State that this industry be subjected to some governmental restrictions, regulations and methods of inspection; that it is necessary to suppress unfair, unjust and destructive trade practices which are now being carried on in the production, marketing and distribution of milk and which tends to create a hazardous and dangerous condition with reference to the health and welfare of the people of the State." Other facts stated in the preamble, as well as the Act itself, make it plain that the General Assembly was also concerned with suppressing unfair and destructive trade practices, and with stabilizing the milk industry, so as to enable the producers to secure a fair price for their milk. These recitals in the preamble set the framework for the legislation.

There is no inherent power in the State Milk Commission to fix transportation rates for hauling milk of producers to a processing plant. If it has such power, it must be found in the Act.

G.S. 106-266.8 declares the North Carolina Milk Commission to be an instrumentality of the State of North Carolina, and vested with power:

"(b) To investigate all matters pertaining to the production, processing, storage, distribution, and sale of milk for consumption in the State of North Carolina.

"(c) To supervise and regulate the transportation, processing, stor-

age, distribution, delivery and sale of milk for consumption. . . .

"(d) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors as between themselves, or that may arise between them as groups.

"(g) To hold hearings, make and adopt rules and regulations and/or orders necessary to carry out the purposes of this article. . . .

"(j) The Commission after public hearing and investigation, may fix prices to be paid producers and/or associations of producers by distributors in any market or markets, and may also fix different prices for different grades or classes of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk the Commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operating, processing, storage and delivery charges, the prices of other foods and other commodities, and the welfare of the general public.

"(m) The Commission may define after a public hearing what shall constitute a natural market area and define and fix limits of the milk shed or territorial area within which milk shall be produced to supply any such market area. . . ."

The Act in G.S. 106-266.6 defines "Market" as meaning "any city, town, or village of the State, or any two or more cities and/or towns and/or villages and surrounding territory designated by the Commission as a natural marketing area."

Our Act follows closely the Virginia Act on the same subject. Much of the language is verbatim in the two statutes. G.S. 106-266.8 (b), (c), (d) and (g), and Code of Virginia, Section 3-352 (b), (c), (d) and (g) are nearly verbatim. "Market" as defined in G.S. 106-266.6 is identical with "Market" as defined in Code of Virginia, Section 3-346.

G.S. 106-266.8(j), as above set forth, grants the State Milk Commission the power to fix prices to be paid producers of milk by distributors. The Virginia Act in Section 3-359 gives identical power to its Milk Commission in the same words, with this proviso that the Virginia Milk Commission has the additional power to "fix the minimum and maximum wholesale and retail prices to be charged for milk in any market."

In *Southside Coop. Milk Pro. Ass'n. v. State Milk Commission,* 198 Va. 108, 92 S.E. 2d 351 (April 1956), the Court said: "The Commission, under Code, Section 3-352(c) has supervisory authority over all the facets of the industry, including transportation and delivery

. . . In view of the very broad powers conferred upon the Commission to make, adopt, and enforce all rules, regulations, or orders necessary to carry out the provisions of the Act, Section 3-352(g), we do not think that the designation of places for delivery of milk to the distributor, and the regulation of hauling allowances to distributors for transporting such milk to their processing plants are beyond the authority of the Commission. We find nothing in the evidence to justify the contention that the Commission has been unreasonable, arbitrary or discriminatory in designating certain producers to make delivery at Norfolk and others at Amelia, nor do we find that the effect of setting different prices based on the cost of hauling is in violation of the Act under consideration. We cannot say that the Commission, in an overall view of all the facts and circumstances involved, including a consideration of the interests of the industry and the public, exceeded its authority or abused its discretion in entering the orders complained of."

The validity of the Virginia Statute was sustained by the Supreme Court of Appeals of Virginia. *Reynolds v. Milk Commission of Virginia,* 163 Va. 957, 179 S.E. 507. A large part of the opinion was devoted to the constitutionality of such regulation of the milk industry, rather than to a consideration of the validity of specific provisions of the Act. It would seem from a study of the opinion that the Court held that legislative power had not been invalidly delegated to the Commission. The Federal District Court, with a Circuit Judge and two District Judges sitting and with Circuit Judge Soper writing the opinion, also sustained the Virginia Act. *Highland Farms Dairy v. Agnew,* 16 F. Supp. 575 (E. D. Va. 1936), which decision was affirmed by the United States Supreme Court, *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 81 L. Ed. 835. In 1950 the validity of the Virginia Act was again sustained by the Supreme Court of Appeals of Virginia, this time against attacks on specific grounds, one of which was that the Act unlawfully delegated to private persons the power of legislation. *Board of Supervisors, Etc. v. State Milk Commission,* 191 Va. 1, 60 S.E. 2d 35.

G.S. 106-266.8(c) gives to the State Milk Commission the specific power to supervise and regulate almost the entire milk industry, including the transportation of milk for consumption. G.S. 106-266.8(j) gives to the Milk Commission express power, after public hearing and investigation, to fix prices to be paid producers of milk by distributors, and establishes sufficient standards for its guidance by setting forth in the statute a reasonably clear formula to govern the Milk Commission in determining the reasonableness of the prices to be

paid to the producers of milk by the distributors. This leaves to the Milk Commission its proper administrative function. There is a sedulous protection against abuse of power by the Milk Commission provided in G.S. 106-266.17, which requires that when an appeal is taken from an order of the Milk Commission, the proceeding shall be heard *de novo* in the Superior Court. If the Milk Commission should not have the power to regulate and to fix transportation rates for the distributor hauling milk of the producers to the processing plant, as the Trial Court aptly said in its judgment, "the delegation of the power to the Milk Commission to fix prices to be paid producers by distributors would be meaningless, inasmuch as a distributor by unreasonable hauling charges could prevent the producer (sic) from receiving reasonable compensation for his milk." In view of the very broad powers conferred upon the Milk Commission by G.S. 106-266(g) to hold hearings, make and adopt rules and regulations and orders necessary to carry out the purposes of the Act, we hold that the Milk Commission, and the Superior Court on appeal, had the power, fairly implied from the language of the Act and essential to putting into effect its declared purposes and objects, to regulate and to fix transportation rates for distributors in North Carolina hauling milk of their producers in North Carolina to their processing plant in North Carolina — all intrastate business—, and that sufficient standards for their guidance in regulating and fixing such hauling prices is to be fairly implied from G.S. 106-266.8(j).

It appears from the findings of fact that some of the milk hauled on Route 11 comes from Spartanburg County, South Carolina. The question whether the transportation-fixing regulation can be made applicable to this milk brought from South Carolina without violating the commerce clause of the Federal Constitution is not presented for decision, and that question is expressly reserved for decision. if and when it should arise. *Baldwin v. Seelig,* 294 U.S. 511, 79 L. Ed. 1032, 101 A.L.R. 55.

A State Legislature, in the exercise of the police power, may delegate to a Milk Control Commission or Board the power to fix prices in respect to milk and its products on intrastate business, so long as the Legislature sets the standard in the Act, leaving to the Commission or Board its proper administrative function. 22 Am. Jur., Food, p. 865; Annotations: 101 A.L.R. 65; 110 A.L.R. 646; 119 A.L.R. 245, where the cases are assembled. The authority of a State Legislature, in the exercise of the police power, to regulate the price of milk through the agency of an administrative board was upheld in *Nebbia v. New York,* 291 U.S. 502, 78 L. Ed. 940, 89 A.L.R. 1469. The same

principle of law applies to the regulation of hauling rates here, and the granting of such power to the Milk Commission here is not an unlawful delegation of legislative power.

The new system of rates for hauling milk by the distributor in the instant case replaced a system of hauling charges manifestly unfair. The transportation rates for hauling milk decreed here are neither arbitrary, nor discriminatory, nor irrelevant to the legislative purpose of the Act. When such is the case, regulations of the prices are generally regarded as within the constitutional powers of the States, and as not denying the equal protection of the laws. 16A C.J.S., Constitutional Law, p. 370; 22 Am. Jur., Food, p. 865; *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 80 L. Ed. 669; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 79 L. Ed. 259; *Nebbia v. New York, supra;* Annotations: 101 A.L.R. 72; 110 A.L.R. 654; 119 A.L.R. 249; 11 Am. Jur., Constitutional Law, Section 282; *Knudsen Creamery Co. of California v. Brock*, 37 Cal. 2d 485, 234 P. 2d 26 — rehearing denied 26 July 1951.

In *Hood v. Du Mond*, 336 U. S. 525, 93 L. Ed. 865, it is said: "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this Court as within the powers of the State over its internal commerce as against the claim that they violated the Fourteenth Amendment."

So far as this appellant and other milk producers in North Carolina affected by the judgment entered here are concerned, the parts of the Act challenged on appeal are constitutional, and the judgment deprives him and them of no rights given them by Article I, Section 17, of the State Constitution and by Section 1 of the 14th Amendment to the Federal Constitution.

Article I, Section 7, of the North Carolina Constitution and Article I, Section 4, of the Virginia Constitution are substantially identical. The Virginia Supreme Court of Appeals has sustained their Act in *Reynolds v. Milk Commission of Virginia, supra,* and in *Board of Supervisors, Etc. v. State Milk Commission, supra.* The same Virginia Act has been sustained in *Highland Farms Dairy v. Agnew, supra,* in the Federal District Court of Virginia and in the U. S. Supreme

Court. Our Act does not violate Article I, Section 7, of the State Constitution.

Outside the power granted to the Federal Government, the power of the Legislature of North Carolina to enact statutes is without limit, except as restrained by the Constitution of North Carolina. Courts ought not to pronounce any act of the Legislature unconstitutional unless it is plainly so.

To sustain the contentions of the appellant would strike at the heart and purpose of the legislation, and would seriously hamper the North Carolina Milk Commission, and the Superior Court on appeal, in exercising the powers and duties conferred upon them by the Act.

The judgment appealed from is affirmed, with this reservation that the question as to whether the transportation-fixing regulations here can be made applicable to the milk hauled from South Carolina without violating the commerce clause of the Federal Constitution is not presented on this appeal for decision, and is not decided.

Affirmed.

RODMAN, J., not sitting.

HELEN W. SMITH, PETITIONER, v. JOHN B. SMITH AND MINNIE M. SMITH, DEFENDANTS.

(Filed 18 March, 1959.)

1. Estoppel § 6—

A contradictory allegation in a pleading filed in a prior action cannot form the basis of an estoppel unless pleaded with certainty and particularity.

2. Reformation of Instruments § 1—

Allegation that the wife's name was inserted in a deed to the husband "through error" is insufficient to support a reformation of the deed, since reformation will not be granted for mistake of one party, but only for mutual mistake resulting in the failure of the instrument to express the true intent of the parties, or mistake of one party induced by the fraud of the other.

3. Pleadings § 7—

New matter constituting an affirmative defense must be alleged with the same clearness and conciseness as is required of allegations in the complaint. G.S. 1-135.

4. Tenants in Common § 2: Partition § 1c: Husband and Wife § 17—

An estate by the entireties is converted to a tenancy in common by

decree of absolute divorce, and the wife may thereafter maintain proceedings for partition.

5. Deeds § 11—

When the terms of a deed are unambiguous, the intention of the parties must, ordinarily, be gathered from the language of the instrument itself, but in proper instances consideration may be given to other instruments executed contemporaneously therewith, the attending circumstances and the situation of the parties at the time.

6. Same—

The practical construction placed upon a deed by the parties thereto before a controversy arises will ordinarily be given weight by the courts in arriving at the true meaning and intent of the language.

7. Same: Evidence § 27—

The parol evidence rule applies to the construction of deeds, and a conveyance cannot be contradicted by a parol agreement, nor, in the absence of fraud, mistake or undue influence, can the provisions of a deed be set aside by parol testimony.

8. Appeal and Error § 49—

A finding of fact which is based upon incompetent testimony is not binding.

9. Deeds § 11: Evidence § 27: Husband and Wife § 14—

In determining whether a deed executed by a mother to her son and the son's wife created an estate by the entireties or merely partitioned the land between the mother and the son, who were tenants in common, parol testimony of the parties after controversy arose as to their intentions may not be considered insofar as such testimony tends to contradict the plain provisions of the deed.

10. Deeds § 8—

A deed in proper form unsupported by any consideration is good and will convey the land described therein, except as against creditors and innocent purchasers for value.

11. Husband and Wife § 14—

A conveyance of land to husband and wife, nothing else appearing, creates an estate by the entireties.

12. Same: Partition § 7—

Where tenants in common exchange deeds for the purpose of allotting to each his or her share of the land, the deeds employed merely sever the unity of possession and create no new title, and therefore if any one of such deeds names the tenant and his spouse as grantees, no estate by the entireties is thereby created, even though the grantee consents thereto, since the grantees must be jointly named and jointly entitled in order to create an estate by the entireties.

13. Same—

Mother and son were tenants in common. The son and his wife con-

veyed to the mother the son's entire interest in the lands, and the mother executed deed for a portion of the land to the son and his wife, "creating an estate by the entirety." There was no evidence that the portion conveyed to the son amounted to one-half the lands. *Held:* The deed executed by the mother to the son and his wife created an estate by the entireties, even though both deeds were executed contemporaneously, this being consonant with the intention of the parties as disclosed by the evidence and the facts and circumstances surrounding the parties at the time.

APPEAL by plaintiff from *Fountain, S. J.,* August 1958 Term of GASTON.

This case was here at the Spring Term, 1958, and is reported as *Smith v. Smith,* 248 N.C. 194, 102 S.E. 2d 868. The cause was therein remanded for further hearing since "the facts before the court were insufficient to sustain the judgment."

The following uncontroverted facts are gleaned from the stipulations and findings of facts in the case:

1. Benjamin Franklin Smith died intestate in 1914, seized in fee of a tract of land in Southpoint Township, Gaston County, containing 26.25 acres. He was survived by his widow, Minnie M. Smith, and his sons, Frank Rhyne Smith and John B. Smith, his only heirs at law. In 1933 Frank Rhyne Smith conveyed to Minnie M. Smith all his interest, right and title in and to said tract of land.

2. John B. Smith married Helen Weathers on 5 August, 1949.

3. On 15 September, 1949, J. B. (John B.) Smith and wife, Helen Smith, conveyed to Minnie M. Smith, by deed of bargain and sale with general covenants and warranties, the entire 26.25 acre tract (except two small parcels theretofore sold to Goshen Cemetery and Stowe Spinning Company). This deed recites "consideration of One Dollar, Love and Affection (Deed of Gift)." It was filed for recordation on 17 September, 1949, at 9:45 a. m., and recorded in Book 546 at page 467, Registry of Gaston County.

4. On 15 September, 1949, Minnie M. Smith conveyed to "J. B. Smith and wife, Helen W. Smith, Creating an Estate by the Entirety," by deed of bargain and sale, with general covenants and warranties, 7.14 acres of said tract. This deed recites "consideration of One Dollar, Love and Affection—Deed of Gift." It was filed for recordation on 17 September, 1949, at 9:45 a. m., and recorded in Book 546 at page 468, Registry of Gaston County. A paragraph, immediately following the description and preceding the habendum clause, purports to reserve to grantor a life estate in a four-room house and the lot on which it is located, but there is no reference to this provision elsewhere in the deed.

5. Helen W. Smith and John B. Smith were divorced (*a vinculo*) by judgment of the Superior Court of Gaston County on 13 October, 1955, and Helen W. Smith has remarried since the institution of this proceeding.

6. On 3 November, 1955, Helen W. Smith instituted this proceeding for sale of said 7.14 acre tract for partition. The defendants, John B. Smith and Minnie M. Smith, filed answer denying that plaintiff owned or was entitled to any interest or estate in said tract and alleging "that her name was put on the deed through error."

At the August 1958 Term of Gaston County Superior Court the parties waived trial by jury (G.S. 1-184) and agreed that the Judge might hear the evidence, find the facts, make his conclusions of law and enter judgment.

In addition to those above recited, the Judge found the following facts:

"5. That prior to and after the marriage of Helen W. Schelper to John B. Smith, it was the intention of those two parties that John B. Smith should make provision to create an estate by the entirety or otherwise secure to Helen W. Smith one-half of his interest in his land.

"6. That Minnie M. Smith, the widow of B. F. Smith, had since the death of her husband and prior to the marriage of John B. Smith and Helen W. Schelper maintained and looked after the land involved in this controversy; (and after the marriage of John B. Smith and Helen W. Schelper, it was her intention that John B. Smith should have his share of the lands held by himself and Minnie M. Smith in severalty, and to that end she and John B. Smith executed the deed referred to in the fourth stipulation and the fifth stipulation for the purpose of effecting a division of their interest in the property, so that each should hold his and her share in severalty.)"

"10. That the execution of the deeds between J. B. Smith and wife, Helen W. Smith, and Minnie M. Smith on September 15, 1949, was one simultaneous transaction, (and that no consideration passed between the parties other than their desire and intention to own their respective shares in the land in severalty.)

"11. That in an action brought by Helen W. Smith against J. B. Smith, in which Helen W. Smith sought alimony, the defendant John Smith alleged that the 7.14 acres of land had been conveyed to his wife and himself by the entireties. No other portion of the pleading and no other portion of the record in that action was introduced in evidence."

Upon the stipulations and facts found, the court concluded as a matter of law:

"1. That the deeds executed by Minnie Smith and J. B. Smith and wife, Helen W. Smith, now Helen W. Schelper, dated September 14, 1949, effected, brought about and produced a division between the then tenants in common and created no new estate in either of the parties in and to the land described in the respective deeds.

"2. That even though J. B. Smith intended to create an estate by the entirety as between himself and Helen W. Smith, he never executed any instrument to put such intention into effect.

"3. That the deed from Minnie M. Smith to J. B. Smith and wife, Helen Smith, dated September 15, 1949, and recorded in Book 546, page 468, in the Gaston County Public Registry, does not create an estate by the entirety in J. B. Smith and Helen Smith, and the plaintiff is not now a tenant in common with J. B. Smith and has not and does not own any interest in the lands described in said deed.

"4. That J. B. Smith is not now estopped to claim title to the land described in the deed from Minnie M. Smith to J. B. Smith and wife, Helen W. Smith, which is referred to in the preceding paragraph."

The plaintiff excepted to the portions of Findings of Fact 6 and 10 which appear in parentheses, to the conclusions of law, and to the signing of the judgment.

From judgment, declaring that plaintiff "has no interest" in the *locus in quo,* plaintiff appealed and assigned error.

Max L. Childers, Henry L. Fowler, Jr., and Hugh W. Johnston for plaintiff, appellant.

Ernest R. Warren and Julius T. Sanders for defendants, appellees.

MOORE, J. Before reaching the main question involved, it is thought advisable to dispose of two preliminary matters.

1. The plaintiff did not file a reply and did not plead as an estoppel the admission of the defendant John B. Smith in his answer in a former suit for alimony, that he and plaintiff owned the *locus in quo* as tenants by the entireties.

"An estoppel is new matter and must generally be pleaded as a defense, and no advantage can be taken of it under a general denial; and this applies to estoppels by record or judgment, estoppels by deed, and estoppels in *pais,* or equitable estoppels. 'An estoppel which "shutteth a man's mouth to speak the truth" should be pleaded with certainty and particularity. The court should be able to see from the pleadings what facts are relied upon to work the estoppel.' When a party has an opportunity to plead an estoppel, and omits to do so,

he waives the benefit of it; . . . if the party seeking the benefit of the estoppel will not rely upon it, he will answer to the fact and again put it in issue, the estoppel, when offered in evidence to the jury, loses its conclusive character, becomes mere evidence and like all other evidence may be repelled by opposite proof, . . ." McIntosh, North Carolina Practice and Procedure (Second Edition), Vol. 1, Sec. 1236 (7), pp. 673, 674. *Miller v. Casualty Co.*, 245 N.C. 526, 96 S.E. 2d 860; *Wilkins v. Suttles*, 114 N.C. 550, 19 S.E. 606.

2. The defendants alleged in their further answer the mere conclusion that plaintiff's name was inserted in the deed from Minnie M. Smith "through error." Such allegation is insufficient to support a reformation of the deed for mutual mistake of fact, for the mistake on one part and fraud on the other, or for mistake of the draftsman.

"The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draftsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation." *Crawford v. Willoughby*, 192 N.C. 269, 271, 134 S.E. 494.

"The answer must contain any new matter relied on by the defendant as constituting an affirmative defense. G.S. 1-135. Setting forth new matter as a defense is an affirmative pleading on the part of the defendant and the facts should be alleged with the same clearness and conciseness as in the complaint." *Cohoon v. Swain*, 216 N.C. 317, 320, 5 S.E. 2d 1; McIntosh, North Carolina Practice and Procedure (Second Edition), Vol. 1, Sec. 1236, p. 668.

The main question involved on this appeal is whether or not the plaintiff was a tenant in common with the defendants in the 7.14 acre tract described in the petition at the time of the institution of the proceeding. *Smith v. Smith, supra.*

If the deed from Minnie M. Smith to J. B. Smith and wife, Helen W. Smith, vested in the grantees an estate by the entireties, the answer is that she was a tenant in common at the time the proceeding was instituted. Plaintiff and John B. Smith were divorced 3 November, 1955. "An absolute divorce destroys the unity of husband and

wife, and therefore converts an estate by the entirety into a tenancy in common." *Davis v. Bass,* 188 N.C. 200, 207, 124 S.E. 566.

In order to determine the intent and effect of the deed from Minnie M. Smith to John B. Smith and wife, Helen W. Smith, it must be considered in conjunction with the deed from John B. Smith and wife, Helen W. Smith. These deeds together constitute a "simultaneous transaction." All instruments executed at the same time and relating to the same subject may be construed together in order to effectuate the intention. *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Howell v. Howell,* 29 N.C. 491.

In construing a deed and determining the intention of the parties, ordinarily the intention must be gathered from the language of the deed itself when its terms are unambiguous. However, there are instances in which consideration should be given to the instruments made contemporaneously therewith, the circumstances attending the execution of the deed, and to the situation of the parties at the time. ". . . it is an elementary rule of construction that the intention of the parties shall prevail unless it is in conflict with some unyielding canon of construction or settled rule of property, or is repugnant to the terms of the grant. Such intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at the time — the tendency of modern decisions being to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining in the manner indicated the intention of the parties." *Seawell v. Hall,* 185 N.C. 80, 82, 116 S.E. 189. See also *Monk v. Kornegay,* 224 N.C. 194, 29 S.E. 2d 754.

The practical construction placed upon a written instrument by the parties thereto before the controversy arose is ordinarily given great weight by the courts in arriving at the true meaning and intent of the language employed in the contract. *Banks v. Mineral Corp.,* 202 N.C. 408, 163 S.E. 108.

"A conveyance of land must be in writing and comply with certain formalities, and its principal function is to evidence the transfer of a particular interest in land. . . . an agreement which contradicts express provisions of the deed . . . which 'would change the essential nature' of a deed absolute, may not be shown." Stansbury, North Carolina Evidence, Sec. 255, pp. 512 and 514. The Parol Evidence Rule applies in litigation involving the construction of the nature and quality of estates conveyed by deed. *Heaton v. Kilpatrick,* 195 N.C. 708, 143 S.E. 644; *Flynt v. Conrad,* 61 N.C. 190. A conveyance

cannot be contradicted by a parol agreement, nor, in the absence of proof of fraud, mistake, or undue influence, can a deed solemnly executed and proven be set aside by parol testimony. *Walters v. Walters,* 172 N.C. 328, 90 S.E. 304; *Mfg. Co. v. Mfg. Co.,* 161 N.C. 430, 77 S.E. 233. "It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. (Citing authorities) As against the recollection of the parties, whose memories may fail them, the written word abides. (Citing authority) The rule undoubtedly makes for the sanctity and security of contracts." *Insurance Co. v. Morehead,* 209 N.C. 174, 175, 183 S.E. 606, and cases there cited.

"Where facts are found by the court, if supported by *competent* evidence, such findings are as conclusive as the verdict of a jury." (Emphasis ours) *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486. In the instant case, the declaration of the parties after the controversy arose and their testimony as to their intentions with respect to the effect of the deeds and the estates thereby created, may not be considered in so far as such tend to contradict the plain provisions of the deeds themselves. The deeds, the circumstances attending the execution thereof, and the situation of the parties at the time are to be considered.

The question of "consideration" is unimportant in this case. A close blood relationship constitutes a good consideration for conveyance of land. And a deed in proper form is good and will convey the land described therein without any consideration, except as against creditors or innocent purchasers for value. *Little v. Little,* 205 N.C. 1, 169 S.E. 799; *Exum v. Lynch,* 188 N.C. 392, 125 S.E. 15; *Howard v. Turner,* 125 N.C. 107, 34 S.E. 229.

The following facts are important in the decision of this case. Minnie M. Smith and John B. Smith are mother and son. Prior to the execution of the deeds in question they were owners in fee and tenants in common of the tract of land of which the *locus in quo* was a part, and Minnie M. Smith had a dower right in the one-half undivided interest of John B. Smith. The deeds were made less than two months after the marriage of John B. Smith to the plaintiff. Minnie M. Smith had been in possession of the entire tract of land prior to the execution of the deeds. John B. Smith and wife, Helen W. Smith, conveyed the entire tract of land to Minnie M. Smith. And thereupon Minnie M. Smith conveyed 7.14 acres thereof to John B. Smith and wife, Helen W. Smith. The deeds were dated, executed and filed for recordation simultaneously. The deed to Minnie M. Smith appears

first in the registry, and the deed to John B. Smith and wife, Helen W. Smith, follows immediately.

Where a conveyance of land is made to a husband and wife, nothing else appearing, it creates an estate by the entireties. *Davis v. Bass, supra.*

But the defendants contend that the deeds in question in this case were for the sole purpose of partitioning the tract of land owned by them as tenants in common, created no new title, and had the effect only of severing the unity of possession.

This Court has consistently held that where tenants in common divide the common land and by exchange of deeds allot to each his or her share of the land, the deeds employed create no new title and serve only to sever the unity of possession. And if any of such deeds names the tenant and his wife or the tenant and her husband as grantees, no estate by the entireties is thereby created, even if they are so named with the consent of the tenant. The grantees must be both jointly named and jointly entitled. *Elledge v. Welch,* 238 N.C. 61, 76 S.E. 2d 340; *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918; *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474; *Burroughs v. Womble,* 205 N.C. 432, 171 S.E. 616; *Crocker v. Vann,* 192 N.C. 422, 135 S.E. 127; *Garris v. Tripp,* 192 N.C. 211, 134 S.E. 461; *Speas v. Woodhouse,* 162 N.C. 66, 77 S.E. 1000; *Sprinkle v. Spainhour,* 149 N.C. 223, 62 S.E. 910; *Harrison v. Ray,* 108 N.C. 215, 12 S.E. 993. In the instant case, if Minnie M. Smith and John B. Smith had exchanged deeds and each had conveyed to the other thereby a *moiety* of the land, the controlling principle would be clear.

A partition deed assigns to the heir or co-tenant only what is already his. He acquires no title to the land by such deed. He already has title by inheritance from the ancestor or by the deed of conveyance to the tenants in common. The partition deed merely fixes the boundaries to his share that he may hold it in severalty. If the partition deed is made to cotenant and spouse, there is created no estate by the entireties. There is no unity of time and title, and the grantees are not jointly named and jointly entitled. "When coparceners mutually agree to, and do voluntarily, divide an estate held by them in common, and assign to each his or her share therein, it is obvious that they convey nothing of their own to such coparcener, but merely designate the boundaries in severalty to that which was already his or her own by virtue of the joint deed, or by descent from the common ancestor." *Snyder v. Elliott* (1902) 171 Mo. 362, 71 S.W. 826, 132 A.L.R. 638.

We should consider what is meant by the expression "jointly en-

titled." It cannot be construed to mean that both the husband and wife had paid a substantial and valuable consideration for the conveyance, nor that both of them, jointly or individually, had some equity, right, title, interest, or estate in the land before the conveyance was made. Where a husband owns land and conveys it to a third party (strawman) who in turn conveys it to said husband and his wife, such conveyance creates an estate by the entireties. 132 A.L.R. 641 and cases there cited, and 173 A.L.R. 1219 and cases there cited. Indeed, this is the device customarily used in creating such an estate in land owned by one spouse, when it is desired that it be held by the entireties. Conveyance to a trustee for the benefit of husband and wife creates an estate by the entireties. *Akin v. Bank*, 227 N.C. 453, 42 S.E. 2d 518. It was held in *Woolard v. Smith*, 244 N.C. 489, 94 S.E. 2d 466, that a husband owning land may create an estate by the entireties by deeding the land to himself and wife. If one tenant in common conveys his share to another tenant in common and the wife of the other tenant in common, the grantees hold such share as tenants by the entireties. *Morton v. Lumber Co.*, 154 N.C. 278, 70 S.E. 467. In none of such cases is there a requirement that the wife pay consideration or that she own some pre-existing right in or to the land.

"In its usual sense, to entitle is to give a right or title." Black's Law Dictionary. It comes to this: Were the instruments in question capable, by their nature and under the circumstances existing at the time of their execution, of passing a new title or creating a new estate? The answer is yes. The deeds are silent with reference to any partition of land; there is no indication of the relative values of the tract conveyed and the tract retained by Minnie M. Smith. The deed to Minnie M. Smith conveys the entire tract. At this point she is the sole owner in fee of the entire tract. She could have conveyed title to a part or all of it to anyone. The conveyance from her was accepted by John B. Smith as written, so far as the record is concerned, without question until this controversy arose. Minnie M. Smith was in a position comparable to that of the mother in *Edwards v. Batts*, 245 N.C. 693, 97 S.E. 2d 101. She had title to the land and conveyed it to John B. Smith and wife, Helen W. Smith, "Creating an Estate by the Entirety." The plaintiff and John B. Smith were "both jointly named and jointly entitled." We find nothing in the circumstances surrounding the execution of the deeds or in the situation of the parties at the time inconsistent with our conclusion that it was the intention of the parties to create an estate by the entireties in John B. Smith and wife, Helen W. Smith. The pertinent and competent facts bear-

ing upon the situation tend to support our conclusion as to the intention of the parties.

The authorities in other jurisdictions are not in accord.

In *Dixon v. Becker* (1938), 134 Fla. 547, 184 So. 114, 132 A.L.R. 640, there was an agreement to partition deceased's property between his only heirs, a son and daughter. The daughter conveyed her undivided half interest in a portion of the land to the son, and the son conveyed to the daughter and her husband the other portion of the land, in which the daughter already had an undivided half interest. The court held that as to the one-half undivided interest conveyed by the son there was a tenancy by the entireties. The court, in explanation of its decision said: ". . . the record shows that it was her intention to take as much of the estate as she was in position to take as an estate by the entireties."

In *Powell v. Powell* (1916), 267 Mo. 117, 183 S.W. 625, 132 A.L.R. 639, decedent's heirs, to effect a partition of his land, executed deeds to his widow, who simultaneously executed deeds back to each heir for his or her share of the land. The deed, for a daughter's share, at her direction, was made to herself and husband. There were four heirs involved. The court held that no estate by the entireties was created. The court said: "It is clear that the mother . . . was selected as a mere conduit in their partitioning of the estate. . . . It is clear that the land conveyed to defendant and his wife was the portion of her father's estate coming to her and no more."

It is clear in such cases that the courts look to the intention of the parties as disclosed by their situations at the time, the facts and circumstances surrounding the execution of the deeds and the facts to be drawn from the deeds themselves.

If the defendant, John B. Smith, could convey to a third party and create an estate by the entireties by accepting a deed to himself and wife, from the third party, we see no reason why this third party could not be his mother in this case. She was vested with the entire title. She conveys what was clearly intended as an estate by the entireties. Under this deed the grantees were jointly named and jointly entitled and the unities of time and title appear.

The plaintiff now owns a one-half undivided interest in fee in the *locus in quo* as a tenant in common with John B. Smith and is entitled to maintain her proceeding for partition.

The legal status of the purported life estate of Minnie M. Smith in the house and lot is not before us. However, attention is called to the principles enunciated in the following cases: *Burns v. Crump,* 245 N.C. 360, 95 S.E. 2d 906; *Edwards v. Butler,* 244 N.C. 205, 92

S.E. 2d 922; *Hardison v. Lilley,* 238 N.C. 309, 78 S.E. 2d 111; *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391; *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783; *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869; *Swaim v. Swaim,* 235 N.C. 277, 69 S.E. 2d 534; *Pilley v. Smith,* 230 N.C. 62, 51 S.E. 2d 923; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *McNeill v. Blevins,* 222 N.C. 170, 22 S.E. 2d 268.

The judgment below is reversed and the cause is remanded for further proceedings in accordance with law and the decision in this case.

Reversed and remanded.

DURHAM LUMBER COMPANY, INC. v. WRENN-WILSON CONSTRUCTION COMPANY.

(Filed 18 March, 1959.)

1. Contracts § 29—

In an action to recover the unpaid portion of the contract price for materials furnished, the defendant, under his denial of plaintiff's alleged performance, may show, in diminution of plaintiff's recovery, the reasonable cost of supplying omissions, if any, and of remedying defects, if any; and, if such costs exceed the unpaid portion of the contract price, the defendant may, by counterclaim, recover the amount of such excess.

2. Trial § 36—

The court is required to submit such issues as are necessary to settle the material controversies arising on the pleadings, including new matter alleged in the answer, so that the verdict will support a final judgment, but within this rule the form and number of the issues are within the sound discretion of the trial court.

3. Contracts § 25—

In this action by a subcontractor against the main contractor to recover the balance due on contract for materials, defendant set up as a counterclaim six items based on omissions and defects in the materials furnished by plaintiff. *Held:* Regardless of the form of the issues the burden was upon defendant to prove the items constituting his counterclaim, and therefore the refusal of the court to submit the single issue tendered by defendant as to the amount due on the counterclaim, and the submission of separate issues as to the amount due plaintiff on the contract and the amounts due defendant on each of the items comprising the counterclaim, will not be held for error.

4. Evidence § 9—

The burden of proving a counterclaim alleged in the answer is upon defendant.

5. Contracts § 12—

Where the obligations of the parties to a contract are expressed in clear and unambiguous language, they are determinable as questions of law, but when the matter relates to defects and omissions on the part of plaintiff in furnishing the materials specified by the contract, and there is conflicting evidence as to whether the materials furnished actually met the specifications, the question is properly submitted to the jury.

6. Same—

In plaintiff's action to recover the balance of the contract price for materials furnished, where the contract is clear that plaintiff, as a matter of law, was not required to furnish certain items under the terms of the agreement, defendant cannot be prejudiced by the submission of issues relating thereto and the finding by the jury thereon in favor of plaintiff.

7. Same—

Conduct of the parties giving practical interpretation of their agreement will be considered by the courts when called upon to construe the contract.

8. Contracts § 29—

Where the evidence is susceptible to the construction that plaintiff, in furnishing glazed sash, was not under contractual duty to paint same for the protection of the putty, that the sash was rejected by the architect because the putty had dried out and cracked because of want of protective paint, but that the defect was the result of defendant contractor's failure to paint and cover up the putty within a reasonable time after the glazed sash was exposed to the elements, the question of whether the putty cracked because of faulty materials or workmanship provided by plaintiff or because of defendant's neglect, is for the determination of the jury.

APPEAL by defendant from *McKinnon, J.*, July-August Civil-Criminal Term, 1958, of DURHAM, docketed and argued as No. 667 at Fall Term, 1958.

Civil action, involving plaintiff's action and defendant's counterclaim, growing out of a written contract between plaintiff (subcontractor) and defendant (general contractor), whereby plaintiff agreed to furnish to defendant certain building materials for use in the construction of the Commerce Building, North Carolina College, Durham, N. C.

Plaintiff, alleging performance, instituted this action to recover an unpaid balance of $3,123.45 on contract price.

Defendant, answering, denied "as shall be more fully set forth in the further answer, defense and counterclaim," that plaintiff had performed its contract obligations.

Defendant alleged, "AS A FURTHER ANSWER, DEFENSE AND COUNTERCLAIM," that, by reason of plaintiff's failure to perform its contract in respect of six specific items, defendant was required to perform plaintiff's obligations with reference thereto; and, on account thereof, defendant was entitled to recover as damages a total of $3,774.48, "back charges" for said six items. Defendant alleged that the "back charges" exceeded by $651.45 the unpaid balance on the contract price and that it was entitled to recover $651.45 as damages on account of plaintiff's said breach of contract.

Plaintiff, by reply, denied that it had failed to perform its contract obligations in respect of said six specific items.

These documents comprised the written contract:

1. A proposal (letter) dated March 27, 1954, from plaintiff to defendant, wherein plaintiff stated:

"We propose to furnish all doors, weatherstrip window units, gable frames, aluminum window screens, asbestos board for canopy, wood door frames as noted, wood railing, wood door bucks, telephone counter and booth, treating window frames with woodlife, handrail, bulletin and chalk trim, shelving, bookshelves, display cases, storage shelves, transoms, chair rail, for the sum of $17,565.00.

"Exceptions:

"Hardware, catwalk, wood wedges, metal of any kind, or anything else not considered millwork.

"Note: If alternate for finishing auditorium used add $905.00."

2. A purchase order dated June 16, 1954, from defendant to plaintiff, accepted by plaintiff under date of August 5, 1954, which provided:

"PLEASE ENTER OUR ORDER FOR THE FOLLOWING:
"Ship to Wrenn-Wilson Construction Company
Destination—Durham, N. C.
Care of—Commerce Building, North Carolina College
On or Before—As Required
F. O. B.
Via

"INVOICE IN DUPLICATE

"Furnish all millwork, screens and weatherstripped window units for the Commerce Building, North Carolina College, in strict accordance with plans and specifications as prepared by

H. Raymond Weeks, Inc., and in accordance with your proposal of March 27, 1954, modified verbally on June 16, 1954, for the lump sum of—$18,350.00.

"This order covers Alternates A, B and C as they may apply to your work; and further includes the fitting and weatherstripping of sash units and the furnishing of screens. *We do not install screens!*

"No sales tax is applicable to this job according to the 1949 Revenue Act, Chapter 105.

"You are to furnish us certificates showing proper coverage of Workmen's Compensation, Public Liability, and Property Damage insurance.

"Your relations to us will be in every way the same as our relations to the Architect and the Owner."

3. The "Contract Documents for Building Construction and Appurtenant Work. General. Commerce Building, North Carolina College at Durham, Durham, North Carolina." These voluminous documents define the general contractor's obligations in respect of the construction of said Commerce Building.

At trial, the controversy related solely to said six specific items. As indicated below, a separate issue was submitted as to each of these items.

Both plaintiff and defendant offered evidence in support of their respective contentions.

At the conclusion of the evidence, the court approved and submitted the seven issues set out below, to which defendant excepted.

Defendant also excepted to the court's refusal to approve and submit the one issue tendered by defendant, to wit: "What amount, if any, is the defendant entitled to recover from the plaintiff upon its counterclaim?"

The jury's verdict was as follows:

"1. In what amount, if any, is the defendant indebted to the plaintiff under the contract: Answer: $3,123.45. 2. In what amount, if any, is the plaintiff indebted to the defendant by reason of putting vent grills in doors and having to make openings larger to fit grills? Answer: None. 3. In what amount, if any, is the plaintiff indebted to the defendant by reason of furnishing and applying cork at display cases? Answer: $243.87. 4. In what amount, if any, is the plaintiff indebted to the defendant by reason of furnishing, fitting, hinging and putting pulls and catches on access doors to display cases? Answer: None. 5. In what amount, if any, is the plaintiff indebted to the de-

fendant by reason of priming of sash? Answer: None. 6. In what amount, if any, is the plaintiff indebted to the defendant by reason of reglazing rejected wood sash glazing? Answer: None. 7. In what amount, if any, is the plaintiff indebted to the defendant by reason of furnishing and placing rubber bumpers on doors? Answer: None."

Thereupon, the court adjudged that plaintiff have and recover of defendant the sum of $2,879.58 and that defendant pay the costs.

Defendant excepted and appealed.

Bryant, Lipton, Strayhorn & Bryant for plaintiff, appellee.

E. C. Brooks, Jr., and Eugene C. Brooks, III, for defendant, appellant.

BOBBITT, J. Where a building contract is substantially, but not exactly, performed, the amount recoverable by the contractor depends upon the nature of the defects or omissions. "Where the defects or omissions are of such a character as to be capable of being remedied, the proper rule for measuring the amount recoverable by the contractor is the contract price less the reasonable cost of remedying the defects or omissions so as to make the building conform to the contract." Annotations: 134 Am. St. Rep. 678, *684;* 23 A.L.R. 1435, *1436;* 38 A.L.R. 1383; 65 A.L.R. 1297, *1298.*

In an action to recover the unpaid portion of the contract price, the defendant, under his denial of plaintiff's alleged performance, may show, in diminution of plaintiff's recovery, the reasonable cost of supplying omissions, if any, and of remedying defects, if any; and, if such costs exceed the unpaid portion of the contract price, the defendant may, by counterclaim, recover the amount of such excess. *Howie v. Rea,* 70 N.C. 559; *Moss v. Knitting Mills,* 190 N.C. 644, 130 S.E. 635; *Mason v. Andrews,* 192 N.C. 135, 133 S.E. 402.

While under certain circumstances *quantum meruit* may be the measure of recovery, *Poe v. Town of Brevard,* 174 N.C. 710, 94 S.E. 420, "when it is said that in cases of this character the plaintiff may recover on a *quantum meruit* or *valebat,* nothing more is intended than that he may recover whatever he may be entitled to, not exceeding the price fixed by the special contract." Annotation: 134 Am. St. Rep. 678, *685.*

The general rule stated above is applicable here. Everything required to be done under the contract has been fully performed. If plaintiff breached its contract in respect of omissions or defects, defendant has supplied the omissions and has remedied the defects. The controversy turns on whether it had the right to do so *for the*

account of plaintiff. If so, defendant is entitled to "back charge" (defendant's expression) all reasonable amounts expended for such purpose.

The agreed case on appeal states: "The contract price between the plaintiff and the defendant, including certain extras, amounted to $19,103.08. The defendant paid to said plaintiff or received credit for all of said sum of money with the exception of $3,123.45." (Note: The record discloses that plaintiff has given defendant full credit for plaintiff's failure to comply with the contract in respect of certain items not involved in this controversy.)

Nothing else appearing, plaintiff was entitled to recover $3,123.45; but, under its (controverted) allegations, defendant was required to pay $3,774.48 to supply omissions and to remedy defects caused by plaintiff's failure to perform its contract obligations.

Defendant's assignments of error are based on exceptions to the issues and to the court's instructions as to burden of proof and other features.

G.S. 1-200 requires that the court submit such issues as are necessary to settle the material controversies arising on the pleadings, including new matter alleged in the answer, so that the answers thereto will support a final judgment. *Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d 912, and cases cited. "Ordinarily the form and number of the issues in the trial of a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to the jury in the form tendered by him." *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225; *O'Briant v. O'Briant,* 239 N.C. 101, 79 S.E. 2d 252, and cases cited.

Whether, considering the pleadings and the agreed facts, the first issue was necessary, need not be decided. Suffice to say, the submission of the first issue and the court's instructions thereon do not disclose prejudicial error; for the court made it quite plain that the issues were interrelated and that the respective rights of the parties in relation to the six controverted items would be determined, as was done, by the jury's answers to the subsequent issues.

An answer to the single issue tendered by defendant would have determined what amount, if any, defendant was entitled to recover from plaintiff on its alleged counterclaim for $651.45. The burden of proving its counterclaim was on defendant. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16. If this single issue had been submitted, defendant, to be entitled to an answer in its favor, would have been required to show that plaintiff had breached its contract in respect of one or more of said six specific items and that the reasonable cost of

supplying the omissions and of remedying the defects exceeded $3,123.45. The mere fact that the court, in its discretion, submitted a separate issue as to each of the six specific items in controversy would seem insufficient to affect the burden of proof; for these six issues, considered together, presented for determination the identical questions that would have been presented if the issue tendered by defendant had been submitted.

Here we need not determine the rule applicable if defendant had alleged the six controverted items solely as a defense, that is, in diminution of the amount plaintiff was entitled to recover. The issues submitted (except the first) arise on the allegations of defendant's "FURTHER ANSWER, DEFENSE AND COUNTERCLAIM" and plaintiff's reply thereto. The six controverted items are not alleged solely as a defense but are alleged as the basis for a recovery by defendant from plaintiff. Certainly the burden of proof is not divisible so that it would rest on plaintiff up to $3,123.45 and on defendant for any amount in excess of $3,123.45. Under the pleadings and admitted facts, when defendant elected to allege and to prosecute its counterclaim on the basis of the six controverted items, it thereby assumed the burden of proof with reference thereto for all purposes. Compare *Ice Co. v. Construction Co.*, 194 N.C. 407, 139 S.E. 771.

In considering the court's instructions relating to issues 2-7, inclusive, these facts are noted:

1. As to issues 2, 3, 4, 5 and 7, the court placed the burden of proof on defendant. As to issue 6, the court's instructions as to burden of proof will be discussed below.

2. The items involved in issues 2, 3, 4, 5 and 7 relate to alleged omissions. The item involved in issue 6 relates to alleged defective performance.

3. The third issue was answered in defendant's favor for the full amount ($243.87) alleged. The judgment gives defendant full credit therefor.

Unquestionably, as defendant contends, when the terms of a written contract are explicit, the legal obligations of the respective parties are determinable as questions of law. *Howland v. Stitzer*, 240 N.C. 689, 696, 84 S.E. 2d 167, and cases cited. The general rule, well established, is thus summarized in *Wallace v. Bellamy*, 199 N.C. 759, 763, 155 S.E. 856, as follows: "In the interpretation of contracts the general rule is that a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language; but if the terms are equivocal or ambiguous the jury may in proper

cases determine the meaning of the words in which the agreement is expressed."

The application of this general rule depends upon the facts of each case. For the reasons indicated below, the court did not err in failing to construe the contract in defendant's favor as a matter of law.

Defendant emphasizes this sentence in its purchase order of June 16, 1954: "Your relations to us will be in every way the same as our relations to the Architect and the Owner." We do not think this sentence may be reasonably construed as imposing upon plaintiff the obligation to do more than to furnish in accordance with the architect's plans and specifications the particular items covered by its written contract with defendant.

As to the second issue, we find nothing in the written contract or elsewhere obligating plaintiff to furnish the (metal) grills. If it be conceded that the evidence was sufficient to support a finding that the openings for the grills as provided by plaintiff did not comply with the plans and specifications, certainly the evidence did not require such finding.

As to the seventh issue, we find nothing in the contract or elsewhere obligating plaintiff to furnish and place rubber bumpers on doors, nor do we find any evidence that the doors as provided by plaintiff were not in accordance with the plans and specifications.

As to the fourth issue, plaintiff's proposal of March 27, 1954, referred to in the purchase order of June 16, 1954, specifically excepts from plaintiff's obligations: "Hardware, catwalk, wood wedges, metal of any kind, or anything else not considered millwork." The fact that defendant was obligated to furnish the items involved in this issue is beside the point. Plaintiff was obligated to furnish only those items embraced in its contract with defendant; and, as indicated, these items fall within the specific exceptions.

As to the fifth issue, these facts are noted: Plaintiff was obligated to furnish the window sash. Admittedly, this obligated plaintiff to place the glass in the sash and to put putty on the glass to hold it to the sash, an operation known as glazing. The controversy is whether plaintiff was obligated to prime the sash, that is, put on a first coat of paint. Defendant relies on this provision of the general contract: "Sash shall be primed and glazed *at* the factory." (Our italics) Admittedly, the priming was to be done and was done *at* plaintiff's place of business. However, it was not done by plaintiff; and plaintiff insists that it had no obligation to prime (paint) the sash. Plaintiff cites a provision of the general contract, under "PAINTING AND

FINISHING," which provides: "The following items will be primed by manufacturer: . . ." (Sash are *not* included.)

Plaintiff's evidence tends to show that it is in the lumber business, that no painting is done by it. Conflicting evidence was offered as to the general custom relating to the priming of sash by the manufacturer thereof. *McAden v. Craig*, 222 N.C. 497, 500, 24 S.E. 2d 1.

The evidence tends to show that the work proceeded as follows: After plaintiff had manufactured and inspected the sash, defendant was notified. Defendant arranged for and sent painters to plaintiff's place of business. Plaintiff made room for these painters to paint the sash at its place of business. When the painters finished their work the sash were then glazed by plaintiff and inspected. Thereafter the sash were delivered to the job.

We find nothing in the record to indicate that defendant contemplated making a "back charge" for its costs in having the priming done, or for any of the items involved in the issues discussed above, prior to its letter to plaintiff of September 30, 1955, when it advised plaintiff that the architect had rejected "the wood sash glazing," the controverted item involved in the sixth issue.

As to all controverted items except that involved in the sixth issue, the evidence tends strongly to support the view that the parties, by their conduct, interpreted the contract in accordance with plaintiff's present contentions. *Hughes v. Long*, 212 N.C. 236, 238, 193 S.E. 27; *Trust Co. v. Processing Co.*, 242 N.C. 370, 379, 88 S.E. 2d 233, and cases cited.

Having reached the conclusion that defendant has failed to show prejudicial error in respect of any of the issues discussed above, we direct attention now to the sixth issue. Defendant alleged that it had been required to pay $2,956.20 to have the rejected wood sash reglazed. Indeed, both in respect of amount and otherwise the principal controversy relates to the sixth issue.

Defendant offered evidence to the effect that the architect, by his letter of September 26, 1955, to defendant, rejected the window sash and required that the sash be reglazed; and that the reglazing was done by the Pritchard Glass Company at a cost to defendant of $2,956.20.

Defendant offered evidence to the effect that, when rejected, the putty had cracked and in places had fallen out; that water seeped behind the glass and wet the wood, thereby causing the wood to expand; and that this pushed the putty off and caused further deterioration.

The contract did not require "back bedding," that is, putty on the

inside as well as on the outside of the glass. The glazing compound used by plaintiff was approved by the architect. An employee of Pritchard Glass Company, witness for defendant, testified that the putty compound used by plaintiff "was just as good as what we used in reglazing the sash."

A witness for defendant testified: "I have an opinion satisfactory to myself, upon my inspection of the windows, that the glazing compound had dried up, and the oils had all evaporated from it. As a result of that, the water seeped through the windows into the inside of the building." Another witness for defendant testified: "Heat from the weather will draw the oils out of putty, and once the oil is drawn out of putty, the putty tends to become dry and brittle." A witness for plaintiff testified: "Putty should be painted over and covered up within ten to thirty days after installation, dependent upon the temperature of the air outside. In my opinion the cause of the putty having no oil in it came entirely from the exposure to the elements, to the heat, that is, it had been out there too long without any covering over it—without any protection."

Mr. O. Z. Wrenn, Jr., defendant's president and treasurer, testified: "It would sound reasonable that the windows were delivered as early in 1955 as February and March. At the time we wrote the Durham Lumber Company on September 30, 1955 the windows had not had an outside coat of paint put over the putty."

The crucial question involved in the sixth issue was whether the putty cracked and became defective because of faulty materials or workmanship provided by plaintiff or by defendant's negligent failure to paint over and cover up the putty within a reasonable time after the glazed sash was exposed to the elements. Upon conflicting evidence, this question was for jury determination. Consideration of the charge on the sixth issue does not disclose prejudicial error.

It is noteworthy that the court, bearing upon the sixth issue, instructed the jury as follows: "On that issue the burden is on the plaintiff to satisfy you by the greater weight of the evidence that it did perform its obligation in respect to the glazing and furnishing and making these windows, and that it did perform its contract in that respect." If the jury failed to so find, so the court instructed the jury, but found that plaintiff's default caused damage to defendant, then the jury's answer would be an amount equal to the reasonable cost of remedying the damage caused by plaintiff's default. In view of what is stated above in respect of the burden of proof, these instructions were not unfavorable to defendant.

It would serve no useful purpose to discuss in further detail de-

fendant's numerous assignments of error. Each has been carefully considered. Upon consideration of the whole case, we find no error prejudicial to defendant.

No error.

LELIA J. POPE, WIDOW OF JAMES LEONIDAS POPE, SR., DECEASED, EMPLOYEE, V. A. N. GOODSON, EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY CO., CARRIER.

(Filed 18 March, 1959.)

1. Master and Servant § 40c—

Injury or death caused by lightning may be compensable as arising out of the employment when the circumstances incident to the employment subject the employee to a greater hazard or risk than that to which he would otherwise have been exposed or to which the public in general is exposed.

2. Same—

Only those injuries by accident which arise out of and in the course of the employment are compensable under our Workmen's Compensation Act, and it is required that the injury be traceable to the employment as a contributing proximate cause.

3. Same—

Whether an injury by accident arises out of the employment is a mixed question of law and of fact.

4. Master and Servant § 51: Evidence § 43—

Where the hearing commissioner inquires into the qualification and competency of a witness presented as an expert in regard to lightning, his ruling that the witness is qualified as an expert will not be disturbed, there being nothing to show abuse of discretion.

5. Evidence § 51—

Where there is evidence that deceased was standing near a window and also that he was leaning with his left shoulder against the window casing, wearing wet clothing, when lightning came down the post or stud, the fact that hypothetical questions asked a lightning expert were predicated upon deceased's standing near the window, rather than against the casing, will not be held prejudicial.

6. Master and Servant § 40c— Evidence held sufficient to support conclusion that the incidents of employment exposed the employee to the risk of lightning greater than that of persons in general.

Evidence tending to show that a carpenter was caught in a storm while working, that he and other employees on the job went to a nearby

house under construction by the same employer to get out of the rain, that the house was practically complete, but that the electrical connections had not been made, and that the carpenter, while standing near a window in wet clothes, wearing a carpenter's nail apron with nails therein, a bolt of lightning struck the roof, ran down the post or stud of the window, struck the carpenter about his waistline and ran down his leg to the floor, killing him, that all damage to the clothes and marks on the body were from the waist down, that the nail apron was knocked off, a hole burned in it, and a majority of the nails in it fused, *is held* sufficient to support the conclusion that the circumstances of the carpenter's employment peculiarly exposed him to the risk of injury from lightning greater than that of others in the community, and to sustain an award of compensation.

APPEAL by defendants from *Bone, J.*, November Criminal Term 1958 of NEW HANOVER.

Proceeding under Workmen's Compensation Act to determine liability of defendants to widow, the sole dependent of James L. Pope, Sr., deceased employee of A. N. Goodson, heard at a criminal term by consent.

In addition to the jurisdictional determinations, based upon a stipulation of the parties, the operative findings of fact and conclusions of law of the Hearing Commissioner, affirmed by the Full Industrial Commission, and by the Superior Court Judge, follow:

On the morning of 15 August 1957 James L. Pope, Sr., a carpenter, was employed by A. N. Goodson, and was engaged with a fellow employee in nailing ceiling joists on a garage in the Town of Carolina Beach. Pope was wearing regular work clothes, and had tied around his waist a carpenter's cloth nail apron holding some #16 common nails and some #8 cut nails he was using in his work. While he was working, it began to rain, and his clothes became wet. As it continued to rain, Pope and his fellow employees went into a house adjacent to the garage, which was under construction by his employer from an officers' barracks brought from Fort Fisher, North Carolina. The house was a one-story, frame building without a chimney, 50 feet long, 25 feet wide, and 14 feet high from the ground to the outside plate. The house was covered, the flooring was in it, but the ceiling had not been put in, and the electrical connections had not been made. The windows had been installed. The doors were boarded up.

The other employees went to the back of the house, and sat down. Pope wearing his carpenter's nail apron walked to a window at the front of the house, and with his left side against the window casing was talking to his employer. After Pope had been in such position

about three or four minutes, a bolt of lightning struck the roof of the house immediately above his head. It knocked a hole in the roof six inches in diameter, then ran down the post against which Pope was leaning adjacent to the window, left the post, struck him about his waistline, and continued down his left leg to the floor, killing him.

The bolt of lightning burst Pope's left pants leg from the waist to the knees, knocked his left shoe from his foot, and his carpenter's nail apron six feet from his body, and burned a hole in the nail apron one and one-half inches in diameter. The nails in the nail apron were burned. His clothing above his waist was not damaged. The only marks on Pope's body were a half-inch cut on the inside of the hairline of his head on the right side coming down through his eyebrow and a severe burn on his left big toe.

"The deceased was exposed to a greater hazard from lightning on the occasion complained of than that to which the public generally was exposed; that he sustained an injury by accident arising out of and in the course of his employment on August 15, 1957, resulting in his death."

Upon the facts found and conclusions reached, the Industrial Commission awarded compensation, and this was affirmed on appeal to the Superior Court. From this latter ruling, the defendants appeal, assigning error.

J. H. Ferguson for plaintiff, appellee.
Hogue & Hogue and R. L. Savage for defendants, appellants.

PARKER, J. The question for decision is whether the record permits the inference that the death of Pope resulted from an injury by accident which arose out of and in the course of his employment. An affirmative answer would uphold the judgment below; a negative response would reverse it.

The generally recognized rule is that where the injured employee is by reason of his employment peculiarly or specially exposed to risk of injury from lightning—that is, one greater than other persons in the community,—death or injury resulting from this source usually is compensable as an injury by accident arising out and in the course of the employment. *Fields v. Plumbing Co.*, 224 N.C. 841, 32 S.E. 2d 623; 99 C.J.S., Workmen's Compensation, Section 252; 58 Am. Jur., Workmen's Compensation, Section 260; Annotations: 13 A.L.R. 977; 40 A.L.R. 401; 46 A.L.R. 1218; 53 A.L.R. 1084; 83 A.L.R. 235. The numerous cases cited in these Annotations from A.L.R. show that when we come to the question of if and when an accidental in-

jury or death due to a true Act of God in the form of a bolt of lightning (*Bennett v. R.R.*, 245 N.C. 261, 96 S.E. 2d 31—petition for *certiorari* to the United States Supreme Court denied 13 May 1957, 353 U.S. 958, 1 L. Ed. 2d 909) arises "out of" the employment we meet with a diversity of judicial opinion expressed by the courts of the land. A part of the apparent conflict, however, may be explained by the varying circumstances and facts of the cases.

In *Netherton v. Lightning Delivery Co.* (1927), 32 Ariz. 350, 258 P. 306, practically all the cases dealing with injuries from lightning up to that time are collected, and the rule is laid down by the Court as follows: "When the workman *by reason of his employment,* is more exposed to injury by lightning than are others in the same locality and not so engaged, the injury may be said to arise out of the employment; when, however, it appears that nothing in the nature of the employment has exposed him to any more danger than that shared in common by the general community, the injury does not arise out of the employment and is not compensable."

In *Fields v. Plumbing Co., supra,* our Court has said: "The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed."

Our Workmen's Compensation Act does not contemplate compensation for every injury an employee may receive during the time of his employment, but only those by accident arising out and in the course of his employment. This Court said in *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751, that: "Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. . . . The causative danger must be peculiar to the work and not common to the neighborhood."

Nebraska Seed Co. v. Ind. Com., 206 Wis. 199, 239 N.W. 432, was an action by plaintiffs to review an award by the Industrial Commission to Lena Andrews, as compensation for the death of Fred Anderson. Fred Anderson was in the employ of the Nebraska Seed Company. On the day of his death, and while his day's work was not yet completed, he, with others similarly employed, sought shelter for himself and team from a thunderstorm in a building about 40 rods from where they were working. The building stood on an elevation slightly higher than the surrounding ground. Anderson was killed by lightning shortly after getting his team and himself into the building; at the same time two other men and eight horses were killed.

The Industrial Commission held that at the time of Anderson's death he was performing services growing out of and incidental to his employment; that lightning is more apt to strike at higher elevations, such as the building into which Anderson took his team for shelter, and concluded that the death of Anderson resulted because of hazard substantially increased by his employment, and that his widow is entitled to the benefit provided for in the Workmen's Compensation Law. In affirming the judgment of the Circuit Court, the Supreme Court of Wisconsin said: "The building into which he entered was so situated, and its height above the surrounding surface was such, as to increase the danger from lightning. It all resulted in an unusual risk, of such an accident, incidental to the employment. The evidence sustains the findings and warrants the conclusion that the death of Anderson resulted from a hazard substantially increased by reason of his employment, and it follows the judgment must be affirmed."

In *Buhrkuhl v. F. T. O'Dell Const. Co.*, 232 Mo. App. 967, 95 S.W. 2d 843, an employee on a road construction job was directed by a foreman, together with co-employees, to unhitch horses and seek shelter from a storm. They took refuge in a barn taller than other buildings on the farm which, during progress of work, was regarded as a kind of headquarters. While in the barn, with horses and men wet from the rain, a bolt of lightning struck the barn killing Thomas Buhrkuhl and six of the horses. It was held that a barn taller than other buildings on isolated farm was more likely to be struck by lightning than ordinary objects in vicinity, and that the evidence was sufficient to sustain a finding that the employment brought about excessive exposure to lightning, and hence arose out of employment within the meaning of the compensation act.

In Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P. 2d 844, a pipeliner, while in the discharge of his duties, took refuge, with some of his associates, from a rainstorm in an old, dilapidated, frame house with a floor. The windows and doors were removed. It looked like no one had lived in it for quite a while. He intended to resume work after the storm. There was a piece of tin back of him. There was a wire fence on three sides, and about 25 feet away from the house. While in the house he was struck and injured by lightning. The Industrial Commission awarded him compensation. The Oklahoma Supreme Court, in an elaborate opinion analyzing many cases of injury and death by lightning in connection with Workmen's Compensation Acts, upheld the award.

Andrew v. Failsworth Industrial Society, Ltd., (1904), 2 K. B. 32, 90 L. T. 611, 73 L. J. K. B. N. S. 511, 68 J. P. 409, has been cited

extensively. The deceased, a bricklayer, was killed by lightning while working on a scaffolding at a height of about 23 feet from the ground. His position was held to have involved more than usual risk, because of the height of the scaffolding, and presumably its wet condition. The finding that the injury arose out of the employment was sustained on appeal. *Truck Ins. Exchange v. Ind. Accident Com'n.*, 77 Cal. App. 2d 461, 175 P. 2d 884, had substantially similar facts, a carpenter working on a wet roof, and a compensation award was upheld.

In *Fort Pierce Growers Ass'n v. Storey,* 158 Fla. 192, 29 So. 205, it was held that death of employee by lightning when he sought shelter under tarpaulin provided by employer, which was suspended between trees higher than surrounding growth, thereby increasing hazard of injury by lightning, resulted from a compensable accident arising out of and in the course of his employment.

In *Bauer's* Case, 314 Mass. 4, 49 N.E. 2d 118, an employee's clothes became wet during a rainstorm, while he was performing his duties. He went to employer's building on top of exposed hill where he stayed to change his clothes. While standing close to an iron bed and near to electric light and electric wiring, he was injured when lightning destroyed lights and electrical apparatus in building. The Supreme Judicial Court of Massachusetts reversed a decree of the Superior Court, and ordered a decree for the employee, holding that the employee sustained an injury arising out of and in the course of employment. The Court closed its opinion with these words: "We think that it could have been found, without expert evidence, that a person in wet clothes, standing close to an iron bed and near to an electric light and electric wiring, in a building on the top of an exposed hill, was in a position of unusual danger from lightning."

In *Chiulla De Luca v. Board of Park Com'rs.*, 94 Conn. 7, 107 A. 611, it was held that there was a personal injury arising out of and in the course of employment, where one employed to rake leaves in a park took shelter, during a thunderstorm of considerable violence, under a near-by tree, which was struck by lightning, and the workman killed. The Court said: "Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over was not only necessary to the preservation of the deceased's health, and perhaps his life, but was incident to the deceased's work, and was an act promoting the business of the master."

The defendants rely on *Fuqua v. Department of Highways,* 292 Ky. 783, 168 S.W. 2d 39, and *Deckard v. Trustees of Indiana University,* 92 Ind. App. 192, 172 N.E. 547. In both cases there was no

evidence which would show that the risk of being struck by lightning was increased by reason of the employment. There is such evidence in the instant case. As to the *Deckard* case, see *E. I. du Pont de Nemours Co. v. Lilly,* 226 Ind. 267, 79 N.E. 2d 387—a case which supports our position, and distinguishes the *Deckard* case, as we have.

In Larson's Workmen's Compensation Law, Vol. I, pp. 52-54, may be found a list of cases holding that the evidence was sufficient to show a special lightning hazard.

It would render this opinion unduly long were we to take up each case relating to injury or death due to lightning in Workmen's Compensation cases, and narrate its facts with the ruling of the court thereon, when all such information is readily obtainable from the sources to which we have called attention. There exists conflict in the opinions. But it would seem that the great majority of the courts have reached the conclusion that the workman is entitled to compensation for injuries produced by lightning in all cases where he was subjected to a danger from lightning greater than were the other people in the neighborhood; that is, Was the danger to which he was subjected one which was incident to the employment, or was it one to which other people, the public generally, in that neighborhood, were subjected?

Whether an injury by accident arose out of the employment is a mixed question of law and fact. *Horn v. Furniture Co.,* 245 N.C. 173, 95 S.E. 2d 521; *Poteete v. Pyrophyllite,* 240 N.C. 561, 82 S.E. 2d 693.

The evidence shows these facts: On the morning of 15 August 1957, Pope, a carpenter, and an employee of A. N. Goodson, was engaged with a fellow employee in nailing ceiling joists over a garage. He had tied around his waist a carpenter's nail apron containing some 16 penny nails and a few 8 penny nails he was using in his work. The 16 penny nails were made from iron and about 3¼ inches long. It began to rain. Goodson told Pope and the employee working with him, "there is no use to stay up there and get wet, work on the inside, we can do it later." Pope and other co-employees on the job went into a near-by house under construction by Goodson. This house was roofed, was enclosed with weatherboard, and was floored. The brickwork had not been done, and no chimney had been built. The electrical connections to the house had not been made. The windows were installed, and had panes and sashes in them. The door was nailed up. Goodson testified Pope's clothes were wet, when he came down from the top of the garage. Pope was wearing his nail apron, when he entered the house. L. J. Hilburn testified that Pope was standing near a window when the lightning struck the house. A. N. Goodson testi-

fied Pope was standing near a closed window that had the panes in it, when the lightning struck. J. H. Warick testified Pope was on the left side of the window leaning up against the window casing when lightning struck. Goodson was telling Pope what he wanted him to do. A bolt of lightning hit the house, knocking a hole through the roof about six inches in diameter. Goodson and Pope fell—Goodson was injured and Pope was killed. The window jamb down to the bottom of the window was split.

The top of Pope's pants was blown out from the waist to the knee. His left toe was burned. There was no damage to his clothes above the waistline. His left shoe was knocked off his foot, and his left sock was burning. His nail apron was knocked off, it had a hole burned in it, and a majority of the nails in it were fused.

R. Ladd Coble, a funeral director and embalmer, testified that after Pope's body was embalmed, dark streaks appeared, which appear on every body that has had electrical current go through it. These streaks never appear prior to embalming. The streaks on Pope's body were all below the naval area. In Coble's opinion the burn on Pope's left toe showed the lightning came out of that toe.

Defendants assign as error the refusal of the judge to sustain their assignment of error to the refusal of the Industrial Commission to sustain their assignment of error to the ruling of the Hearing Commissioner that Jerry A. Jones, Jr. was qualified as an expert witness to testify as to the effect lightning might have and its behavior. The qualifications and competency of this witness were fully inquired into by the Hearing Commissioner. There was substantial competent evidence to support the ruling of the Hearing Commissioner, and there is no showing that he abused his discretion in holding that he was an expert witness. This assignment of error is overruled. *In Re Humphrey*, 236 N.C. 142, 71 S.E. 2d 915, and the cases there cited.

Jones testified without objection that all metals and water are conductors of electricity. In response to a hypothetical question Jones testified in substance that if Pope was standing near a window in a house struck by lightning and was wearing wet clothing, that, in his opinion, would have caused him to be more susceptible to a blow of lightning. In response to another hypothetical question Jones testified if Pope was standing near a window in a house struck by lightning and wearing a nail apron around his waist containing nails that, in his opinion, the metal played an important part, because lightning seeks the path of least resistance, therefore, the metal being the nearest path of least resistance caused the lightning to go through to the ground. Then he was asked a hypothetical question based upon facts

in evidence as to whether he had an opinion as to what caused the lightning to strike Pope. He replied: "The charge in the earth was attracted by the charge from the cloud above, and it just so happened to come down at the exact point that the building was placed, striking the building. After it struck the building it followed the path of least resistance to the ground, Mr. Pope being in the line, in the path. It went through him to the ground mainly because of the metal in the nail bag that he had and the fact that he was wet."

Defendants assign as error the refusal of the judge to sustain their objections to the hypothetical questions, for the sole reason that each of the hypothetical questions used as one of its premises that Pope was standing near a window when the lightning struck the house, and "that all the evidence in the case shows that the deceased was leaning with his left shoulder against the window jamb and that the lightning came down the very post or stud against which he was leaning. Learned counsel have overlooked the testimony of L. J. Hilburn and A. N. Goodson, witnesses for claimant, both of whom testified Pope was standing near the window when the bolt of lightning struck. Goodson also testified Pope was standing with his left shoulder up against the window or right approximately against it. These assignments of error are overruled.

The evidence shows that Pope, when killed by lightning, by reason of his employment had on wet clothes, and had tied around his waist a nail apron containing nails, and that these circumstances, incidental to his employment, peculiarly exposed him to risk of injury from lightning greater than that of other persons in the community. Such being the case his death is compensable under our Workmen's Compensation Act as an injury by accident arising out of and in the course of his employment.

The evidence is sufficient to support the award.

All of the defendants' assignments of error are overruled. The judgment below is

Affirmed.

FREDERIC MARCH HARVELL v. EDWARD SCHEIDT, COMMISSIONER OF THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NORTH CAROLINA.

(Filed 18 March, 1959.)

1. Constitutional Law § 7—

While the General Assembly may delegate power to find facts or determine the existence or nonexistence of a factual situation on which the operation of a law is made to depend or an agency of government is to come into existence, the General Assembly may not delegate to an agency authority to apply or withhold the application of the law in its absolute or unguided discretion.

2. Automobiles § 1—

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon conditions prescribed by a valid statute.

3. Same—

The revocation or suspension of a driver's license is no part of the punishment for the violation of traffic laws, but is solely to protect the public and to impress the offender with the necessity for obedience to the traffic laws, not only for the safety of the public but also for his own safety as well.

4. Automobiles § 2: Constitutional Law § 7—

G.S. 20-16 (a) (5) contains no fixed standard or guide for the Department of Motor Vehicles in determining whether or not a driver is an habitual violator of the traffic laws, but leaves it solely in the discretion of the Department to determine when a driver is an habitual violator, and therefore the statute is an unconstitutional grant of legislative power.

APPEAL by petitioner from *Mallard, J.*, 2 May Regular Criminal Term 1958 of WAKE.

The respondent issued an order suspending petitioner's driver's license, pursuant to the provisions of G.S. 20-16 (a) (5), for a period of six months, from 7 December 1957 to 7 June 1958, based on records of the Department of Motor Vehicles indicating that the petitioner had been convicted of the following offenses: "(1) April 4, 1952, failure to stop for a stop sign. (2) July 26, 1953, failing to stop for a stop sign. (3) April 12, 1956, speeding in excess of 55 m.p.h. (4) March 14, 1957, speeding in excess of 70 m.p.h. (plea of nolo contendere). (5) September 9, 1957, improper passing. (6) October 31, 1957, failure to yield the right of way."

At the request of the petitioner, a hearing upon the suspension order was held at the Department of Motor Vehicles (hereinafter

called Department) on 16 December 1957 and as a result thereof the order of suspension was upheld but revised to cover the period from 16 December 1957 to 17 March 1958, the license not having been surrendered to the Department at the time of the hearing.

The petitioner appealed to the Superior Court, pursuant to the provisions of G.S. 20-25, contending that the acts of the respondent were arbitrary and unfounded in law. The petitioner did not surrender his driver's license until 31 December 1957.

The petitioner, having perfected his appeal in the Superior Court, moved the court to require the return of his driver's license pending the disposition of the appeal. The court granted the request and pointed out that the suspension as fixed by the Department would end at least 60 days before the appeal could be heard in the Supreme Court. The court by consent of the petitioner and the respondent entered an order, dated 13 January 1958, directing that the petitioner's license be returned to him pending final adjudication of the appeal.

This cause was heard on its merits, on the pleadings, and on facts stipulated by the parties. Among the stipulated facts pertinent to this appeal, in addition to those hereinabove set out, are the following:

Neither the respondent, Edward Scheidt, nor the Department, has adopted or promulgated any written rules and regulations designed to enforce or administer G.S. 20-16 (a) (5), but the Director of the Driver License Division of the Department has established a set of certain criteria for considering traffic violations of record and evaluating such violations for the purpose of administering G.S. 20-16 (a) (5); that said list of criteria has been furnished and is used by case-reviewing officers, hearing officers and the Director of the Driver License Division; that the list of traffic offenses and the evaluation numbers according to the gravity and seriousness of the offenses is as follows:

"6. Speeding over 55 MPH
6. Reckless driving
5. Violation resulting in accident
5. Passing stopped school bus
4. Failure to yield right of way
4. Passing at crest of hill, passing at intersection, passing on curves, improper passing
3. Driving on wrong side of road
3. Failure to stop for stop sign or signal
3. Speeding in restricted zone
2. Failure to give proper signal

2. Following too closely
2. Improper turns
2. Driving too closely
2. Improper lights, brakes, steering, etc.
1. All other violations
1. Non-moving violations creating a dangerous condition (overtime parking or loading zone violation not included)
2. Any accident."

In addition to the above criteria, the Director of the Driver License Division has further established an additional set of criteria to be considered in the suspension of a driver's license, pursuant to the provisions of G.S. 20-16 (a) (5), as follows:

"1—Age
2—Driving Experience
3—Examination Scores
4—Driving Record
    a—No. & frequency of violations
    b—No. & frequency of convictions
    c—Type of violation
5—Accidents
    a—Time & type of accident
    b—Experience
    c—Fault
6—Attitude."

The court below held that the defendant had been convicted of the traffic violations on the dates indicated hereinabove, and based on such violations the court found as a fact "that the petitioner is an habitual violator of the traffic laws of the State and that the order of suspension issued by the Department of Motor Vehicles should be affirmed." Judgment was entered accordingly, and the petitioner appeals, assigning error.

Attorney General Seawell, Assistant Attorney General Pullen for Department of Motor Vehicles.
Charles W. Daniel for petitioner.

DENNY, J. The question presented for determination on this appeal is whether or not the authority granted to the Commissioner of Motor Vehicles by the General Assembly in G.S. 20-16 (a) (5) to

revoke the petitioner's driver's license constitutes an unconstitutional delegation of legislative power.

G.S. 20-16 (a) provides: "The Department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee: * * * (5) Is an habitual violator of the traffic laws * * *."

It appears from the record that during a period of five years, six months, and twenty-seven days, the petitioner was convicted six times of various offenses in violation of the traffic laws, as hereinabove set out. During this period the petitioner accumulated twenty-six points under the point system set up by the Director of the Driver License Division of the Department. It further appears by stipulation that neither the Commissioner nor the Department has adopted or promulgated any written rules and regulations designed to enforce or administer G.S. 20-16 (a) (5).

Moreover, under the point system used by the Director of the Driver License Division of the Department there is nothing to indicate how many points a driver must accumulate or over what period of time he must accumulate them, before he is deemed an habitual violator of the traffic laws. Therefore, it must be conceded that neither under the point system presently used by the Department but not adopted by it, nor under the statute G.S. 20-16 (a) (5), is there any fixed standard or guide to which the Department must conform in order to determine when a driver is an habitual violator of the traffic laws. The Department is given the authority to suspend a driver's license without a preliminary hearing, upon a showing by its records or other satisfactory evidence that the licensee is an habitual violator of the traffic laws, but the number and character of such violations of the traffic laws and the period of time during which such violations may have occurred, upon which the Department may base its finding, are left soley to the discretion of the Department.

In the case of *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310, this Court, speaking through *Johnson, J.,* said: "Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. 11 Am. Jur., Constitutional Law, Sec. 234. See also *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S. E. 2d 896.

"As to this, it may be conceded that the line of demarkation between those essentially legislative functions which must be exercised by the Legislature itself, and those of an administrative nature, or involving mere details, which may be conferred upon another body or administrative agency, is sometimes vague and difficult to define or discern. *Provision Company v. Daves,* (190 N.C. 7) *supra.*

"Nevertheless, the legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. This principle is implicit in the general rule prohibiting the delegation of legislative power, and is affirmed by numerous authoritative decisions of this Court. *Motsinger v. Perryman,* (218 N.C. 15) *supra; Provision Company v. Daves, supra; S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *S. v. Curtis,* (230 N.C. 169 *supra.* See also Annotation, 79 L. Ed. 474, 487.

"In short, while the Legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion, 11 Am. Jur., Constitutional Law, Sec. 234." 60 C.J.S., Motor Vehicles, section 160, page 489.

In *South Carolina Highway Department v. Harbin,* 226 S.C. 585, 86 S.E. 2d 466, the Department had set up a point system without specific legislative authority and had adopted the practice that when the total of violation points charged against a driver reached a minimum of ten, the driver was interviewed by a member of the highway patrol for the purpose of determining whether the offender's license to drive should be suspended or whether it appeared from the circumstances he should be given another chance. If permitted to retain his license after the interview, any additional violation committed by him was deemed sufficient for an immediate suspension of his license. The statute involved was Section 46-172 of the 1952 Code of South Carolina, which read in pertinent part as follows: "For cause satisfactory to the Department it may suspend, cancel or revoke the driver's license of any person for a period of not more than one year."

The Supreme Court of South Carolina held the above statute was an unconstitutional delegation of legislative power. The Court said: " * * * in the grant of this authority, there is no standard except the personal judgment of the administrative officers of the Department."

The Court further held that the Department was without authority to adopt a Point System

In the case of *Thompson v. Smith,* 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604, the Supreme Court of Appeals held invalid an ordinance of the City of Lynchburg which, after providing for mandatory suspension of licenses for certain causes, authorized the Chief of Police "to revoke the permit of any driver who, in his opinion, becomes unfit to drive an automobile on the streets of the city, * * *." The Court said: "That portion of the ordinance here in question which authorizes the Chief of Police 'to revoke the permit of any driver who, in his opinion, becomes unfit to drive an automobile on the streets of the city,' fails to declare the policy of the law and fix the legal principles which are to control the discretion of the Chief of Police in the revocation of licenses what constitutes unfitness to drive an automobile on the streets of the city; and is void because it delegates powers essentially legislative to an administrative officer." See *Eastwood v. Wyoming Highway Department,* 76 Wyo. 247, 301P 2d 818. Cf. *Sturgill v. Beard* (Ky.), 303 S.W. 2d 908 and *Ross v. MacDuff,* 309 N.Y. 56, 127 N.E. 2d 806.

In *Butler v. Commonwealth,* 189 Va. 411, 53 S.E. 2d 152, the Court considered the constitutionality of Section 2154(a19) of the Virginia Code, Supp. 1948, which reads in pertinent part as follows: "Upon any reasonable ground appearing in the records of the Division, the Commissioner may, when he deems it necessary for the safety of the public on the highways of the State, and after notice and hearing as hereinbefore provided, suspend or revoke for a period not to exceed five years * * * the operator's or chauffeur's license of any person who is a violator of the provisions of the Motor Vehicle Code, as amended * * *."

Butler's license had been suspended pursuant to the above statute. He appealed to the Circuit Court where the case was submitted to a jury and the jury was instructed as follows: "If you believe from a preponderance of the evidence that James T. Butler is an habitual violator of the provisions of the Motor Vehicle Code or Motor Vehicle Laws, then you should find for the Commonwealth." The jury returned a verdict upholding the order of suspension made by the Commissioner.

The Attorney General insisted that if the records of the office of the Motor Vehicles Commissioner revealed that the appellant is an habitual violator of any of the provisions of the motor vehicle laws, this is all that is necessary to support the action of the Commissioner in any case. The Court said: "We cannot agree that this is true. In

the first place, there is no standard to determine what constitutes an 'habitual violator' of such laws, nor does the Attorney General's contention make it necessary that the particular provisions of law habitually violated are of such a nature that their violation will jeopardize the safety of the public on the highways, or that similar violations in the past have actually had such a result. For instance, a motor vehicle owner might habitually park his car longer than the time allowed by law. Such violations, however, could hardly be said ordinarily to impair the safety of the highways. The argument also leaves out of consideration the question of the duration of the suspension and whether the time fixed by the Commissioner is reasonably necessary to accomplish the legislative purpose." The Court held the statute valid and pointed out five controls or limitations upon the power of the Commissioner, which must be observed in connection with the suspension or revocation of an operator's license pursuant thereto.

The Court further pointed out, however, that while the instruction given the jury was erroneous, the statute contemplated that the trial court should hear the matter without a jury. The verdict below was reversed and remanded to the end that the trial court should hear the matter only on such evidence as related to the question whether it was necessary "for the safety of the public on the highways" to revoke the operator's license. *Lamb v. Clark,* 199 Va. 374, 99 S.E. 2d 597.

There seems to be serious differences of opinion as to the authority of a motor vehicle department to set up a point system without express legislative authority. Some of the courts hold that if such a system is to be used it must be set up by the Legislature. *South Carolina Highway Department v. Harbin, supra.* For *contra* opinion see *Sturgill v. Beard, supra.*

In Florida, the drivers' license statute provides for the suspension of an operator's license if the licensee: "Is an habitual violator of the traffic laws by virtue of having been convicted of five traffic laws (excluding parking meter fines),within an eighteen months period; maximum suspension period to be nine months; provided further, that any operator or chauffeur who shall have been convicted of more than eight traffic law violations (excluding parking meter fines) within a three year period shall have his license revoked for not less than one year by the department * * *." Section 322.27 (d) Volume 1, Florida Statutes of 1957.

A point system has been established by legislative action in Nebraska, Section 39-7, 128; and how the point system shall be applied

is set forth in Section 39-7,129, Revised Statutes of Nebraska, 1957 Cumm. Supp. *Durfee v. Ress,* 163 Neb. 768, 81 N.W. 2d 148.

In this jurisdiction, a license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon conditions prescribed by a valid statute. *In re Wright,* 228 N.C. 584, 46 S.E. 2d 696.

It is well to keep in mind that the suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. It will be deemed that the court or courts in which the licensee was convicted, meted out the appropriate punishment under the facts and circumstances of each case. The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee. However, the suspension or revocation of a driver's license should serve to impress such offender with the necessity for obedience to the traffic laws and regulations, not only for the safety of the public but for his own safety as well.

In light of the authorities cited herein, in our opinion, G.S. 20-16 (a) (5) does not contain any fixed standard or guide to which the Department must conform in order to determine whether or not a driver is an habitual violator of the traffic laws. But, on the contrary, the statute leaves it to the sole discretion of the Commissioner of the Department to determine when a driver is an habitual violator of such laws. This we hold to be an unconstitutional grant of legislative power.

The judgment of the court below is

Reversed.

LULA MAYE SKIPPER v. A. B. CHEATHAM AND MARY V. CHEATHAM, T/B/A SAUNDERS DRUG STORE.

(Filed 18 March, 1959.)

1. Negligence § 4f—

The proprietors of a store are not insurers of the safety of their customers.

2. Same—

There is no inference of negligence, nor does the doctrine of *res ipsa loquitur* apply to a fall by a patron on the premises of a store.

3. Same—

The duty of proprietors of a store is to exercise ordinary care to keep

the premises in a reasonably safe condition for the use of customers and to warn them of hidden dangers or unsafe conditions known to the proprietors or ascertainable by them through reasonable supervision or inspection.

4. Negligence § 16—

Negligence and proximate cause are legal conclusions from the facts, and therefore the complaint in an action to recover for negligent injury must allege particular facts sufficient to support these conclusions, and mere averments that the conditions constituted a "dangerous trap," or were hazardous, are ineffectual as mere legal conclusions.

5. Pleadings § 15—

A demurrer admits the facts alleged, but not the legal conclusions of the pleader.

6. Negligence § 4f— Complaint held insufficient to state cause of action to recover for fall of customer on store premises.

Allegations to the effect that plaintiff customer tripped and fell when her foot caught under scales maintained by defendants at the entrance of their store, that the entrance sloped and that the front part of the scales had been raised in order to make them level, and that the front part of the scales extended almost to the sidewalk, with further allegation that defendants knew or should have known that a multitude of people would be passing from time to time and that the condition created a dangerous hazard, *are held*, in the absence of any allegation that on the occasion in question plaintiff's ability to see the scales was obstructed or impaired, etc., insufficient to state a cause of action for negligence.

7. Negligence § 16: Pleadings § 20½—

Where a complaint, in an action to recover for negligent injury, is defective in failing to allege sufficient facts to support the legal conclusion of negligence, the cause should not be dismissed upon demurrer but plaintiff should be allowed to move for leave to amend, G.S. 1-131, since it is only when the allegations affirmatively disclose a defective cause of action that the action should be dismissed upon demurrer.

8. Negligence § 16—

In an action to recover for negligent injury, demurrer on the ground of contributory negligence may be allowed only if the facts alleged in the complaint affirmatively show contributory negligence as a matter of law, and it is not required that the pleading allege facts sufficient to negative contributory negligence.

APPEAL by plaintiff from *Bone, J.*, September Civil Term, 1958, of NEW HANOVER.

Personal injury action, heard below on demurrer to complaint.

Plaintiff's allegations may be summarized as follows:

A drugstore, operated by defendants, is located on the east side of Front Street, Wilmington, N. C. Plaintiff, a customer, entered this

store on January 18, 1957, about 10:00 a.m. She had a prescription filled and paid defendants therefor. She was to take the prescribed medicine to her mother.

Plaintiff's sister, by automobile, had brought plaintiff to the store. The sister was to wait for plaintiff and take her to their mother.

Plaintiff left the store and was walking in a westerly direction toward the sidewalk when suddenly her foot was caught under a set of penny scales and she was hurled to the inclined tile entrance to defendants' store and to the sidewalk. As she left the store, she was "looking for her sister." She "spied her sister waiting for her in the automobile, parked on the east side of Front Street near this Saunders Front Street Drug Store," and was "headed in that direction" when "her foot hooked" under said scales.

Defendants had placed the scales on their property at a point almost touching the sidewalk and derived an income "from the weighing charges when the scales were used by the public generally and by the defendants' customers."

On account of her fall, proximately caused by the negligence of defendants, plaintiff suffered painful, serious and permanent injuries.

Plaintiff alleged that "in so placing the weighing scales as to make them a hazard to the general public and this plaintiff in particular as a business invitee," defendants were negligent in that:

"a. Because of the slope of the entrance and exit from the sidewalk on the east side of Front Street to the interior of the store of Saunders Drug Store, the stand of the scales was so arranged, in order to be level, that the after or rear portion of the stand was flush with the entrance walkway but the forepart of the stand of the scales was raised an inch or more, resulting in a dangerous trap for the public generally and those using the store on business.

"b. . . . the scales were placed by the defendants at a spot almost contiguous with the public sidewalk on the east side of Front Street where the defendants knew or should have known that *oftentimes* there would be a multitude of people coming and going on the sidewalk and coming and going in and out of their drugstore, temporarily obscuring the vision of persons using the store and customers of the store, as well as others, thereby creating a hazardous and dangerous condition on their premises. (Our italics)

"c. . . . the dangerous placement of the scales . . . had existed for a long time to the knowledge of the defendants who did nothing to correct or remedy the dangerous condition thereby created, when they knew or should have known that such a condition was likely to cause injuries to the general public and in particular to the defendants' cus-

tomers and business invitees using the defendants' Front Street Drug Store.

Defendants demurred on the ground that the facts alleged by plaintiff (1) are not sufficient to constitute a cause of action against defendants for actionable negligence, and (2) affirmatively disclose contributory negligence as a matter of law.

The judgment of Judge Bone sustained the demurrer and *dismissed the action.*

Plaintiff excepted and appealed.

Aaron Goldberg and Rountree & Clark for plaintiff, appellant.
Poisson, Campbell & Marshall for defendants, appellees.

BOBBITT, J. Are the facts alleged, considered in the light most favorable to plaintiff, sufficient to support findings (1) that defendants were negligent in maintaining the scales in their store entrance, and (2) that such negligence proximately caused plaintiff's injury?

Defendants were not insurers of the safety of their customers. *Sledge v. Wagoner,* 248 N.C. 631, 104 S.E. 2d 195. The doctrine of *res ipsa loquitur* does not apply. *Copeland v. Phthisic,* 245 N.C. 580, 96 S.E. 2d 697. No inference of negligence arises from the mere fact of an accident or injury. *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821.

Defendants' legal duty was to exercise ordinary care to keep the entrance in a reasonably safe condition for the use of customers entering or leaving their store and to warn them of hidden dangers or unsafe conditions known to defendants or ascertainable by them through reasonable supervision or inspection. *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33; *Sledge v. Wagoner, supra.*

As stated by *Rodman, J.,* in *Harris v. Department Stores Co.,* 247 N.C. 195, 198, 100 S.E. 2d 323: "The law imposes liability on the owner of property for injuries sustained by an invitee which are caused by dangerous conditions known, or which should have been known, by the property owner but are unknown and not to be anticipated by the invitee."

"The law requires a storekeeper to maintain his storeroom and the entrance thereto in such a condition as a reasonably careful and prudent storekeeper would deem sufficient to protect customers from danger while exercising ordinary care for their own safety." *Tyler v. F. W. Woolworth Co.* (Wash.), 41 P. 2d 1093, 1094.

The cause of action consists of the facts alleged. G.S. 1-122;

Lassiter v. R. R., 136 N.C. 89, 48 S.E. 642. "The complaint must show that the particular facts charged as negligence were the efficient and proximate cause, or one of such causes, of the injury of which the plaintiff complains." *Stamey v. Membership Corp.*, 247 N.C. 640, 645, 101 S.E. 2d 814. The facts alleged, but not the pleader's legal conclusions, are deemed admitted where the sufficiency of a complaint is tested by demurrer. *Stamey v. Membership Corp., supra.*

As stated by *Johnson, J.*, in *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193: ". . . negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged."

Whether the scales constituted "a dangerous trap" or "a hazardous and dangerous condition" are legal conclusions. These expressions, incorporated in plaintiff's allegations, shed no light upon the facts and circumstances existing on the occasion of plaintiff's injury.

No facts descriptive of the scales or of the entrance to defendants' store are alleged except the following: The tile entrance sloped toward the sidewalk. In order to make the stand of the scales level, the front portion thereof, "almost contiguous with the public sidewalk," was raised an inch or more. The back portion thereof "was flush with the entrance walkway."

No facts are alleged: (1) as to the size and appearance of the scales; (2) as to the size and layout of the store entrance; (3) as to the space available as passageways in portions of the entrance elsewhere than in close proximity to the scales; (4) as to whether the scales were in some manner concealed or were in plain view; (5) as to whether any person other than plaintiff was using the entrance on the occasion of plaintiff's injury.

In *Smith v. Emporium Mercantile Co. (Minn.)*, 251 N.W. 265, the plaintiff fell when her foot struck a corner of a movable platform, used for displaying merchandise, which protruded into an aisle. The court said: "Where an ordinary device, such as this platform, customarily used in stores for the display of goods, is placed in a well-lighted position, is plainly observable, with nothing to conceal its presence and outlines, and with sufficient passageways going by it, the shopkeeper should not be held negligent as to one heedlessly colliding therewith. (Citations) To hold otherwise would impose too high a degree of care upon a shopkeeper and in effect make him an insurer of the safety of customers."

Whether defendants breached their legal duty to plaintiff must be

determined on the basis of the facts and circumstances existing on the occasion of plaintiff's injury. If, on other occasions, a person's ability to see the scales was obstructed or impaired, by crowded conditions in the entrance or otherwise, defendants' liability to a customer then injured by contact with the scales would be determined in relation to those circumstances and conditions.

Plaintiff, in her brief, contends that the facts alleged are sufficient to raise the inference "that the scales were momentarily obscured to plaintiff's vision by the crowd of people on the sidewalk and going to and fro in the entranceway to the defendants' place of business . . ." But we do not think any inference as to the *presence or absence* of persons in the entrance or on the sidewalk *on the occasion of plaintiff's injury* may be drawn from plaintiff's meager factual allegations.

Under the rules governing defendants' legal liability to plaintiff, stated above, we reach the conclusion that the facts alleged, nothing else appearing, are insufficient to support a finding that plaintiff's injury was proximately caused by negligence on the part of defendants. Hence, the demurrer was properly sustained.

Even so, the court was in error in dismissing plaintiff's action. The demurrer should have been sustained without prejudice to plaintiff's right to move for leave to amend her complaint. *Bank v. Gahagan,* 210 N.C. 464, 187 S.E. 580; *Stamey v. Membership Corp., supra,* 647.

Obviously, if plaintiff's injury was proximately caused by defendants' negligence, she has a good cause of action. The defect here is the deficiency in plaintiff's factual allegations. *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43, and cases cited. Hence, plaintiff may move for leave to amend in accordance with G.S. 1-131. When a demurrer is sustained, the action will be *then dismissed* only if the allegations of the complaint affirmatively disclose a defective cause of action, that is, that plaintiff has no cause of action against the defendant. *Mills v. Richardson,* 240 N.C. 187, 190, 81 S.E. 2d 409; *Burrell v. Transfer Co.,* 244 N.C. 662, 664, 94 S.E. 2d 829.

Defendants' contention that the facts alleged establish plaintiff's contributory negligence as a matter of law is untenable.

"In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." G.S. 1-139. Where contributory negligence is the ground of objection, the demurrer will be sustained "only where on the face of the complaint itself the contributory negligence of the plaintiff is patent and unquestionable." *Ramsey v. Furniture Co.,* 209 N.C. 165, 169, 183 S.E. 536, and cases cited. Defendants cannot rely upon plaintiff's failure

to allege facts sufficient to negative contributory negligence. The facts alleged must affirmatively show contributory negligence as a matter of law.

The allegations that, as plaintiff left the store, she was "looking for her sister," and that, when she "spied" her sister, waiting for her in a parked car, she "headed in that direction," are insufficient to establish plaintiff's contributory negligence as a matter of law.

While, as stated above, plaintiff did not allege, expressly or by implication, that her vision or ability to see the scales was obscured or impaired by other persons in the entrance or otherwise, it is equally true that she did not allege that the existing conditions were such that she saw or by the exercise of due care could have seen the scales and so could have avoided injury.

The portion of the judgment sustaining the demurrer is affirmed. However, the portion thereof dismissing the action is erroneous and should be stricken therefrom. It is so ordered. As so modified, the judgment is affirmed.

Modified and affirmed.

EMMA CARR, ADMINISTRATRIX OF ELIJAH CARR, JR., v. MATTHEW LEE.

(Filed 18 March, 1959.)

1. Trial § 22a—

On motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to her and to have the benefit of every reasonable inference to be drawn therefrom.

2. Automobiles § 39—

Physical facts at the scene of a collision may speak louder than the testimony of witnesses.

3. Automobiles § 17—

Where two vehicles approach an intersection at approximately the same time, or the vehicle on the right first enters the intersection, the vehicle on the right has the right of way. G.S. 20-155 (a) (b).

4. Same—

The right of way at an intersection means the right of a driver to continue his direction of travel in a lawful manner in preference to another vehicle approaching the intersection from a different direction.

5. Same—

A driver having the right of way at an intersection is under no duty to anticipate disobedience of law or negligence on the part of others, but in the absence of anything which puts him on notice, or should

put him on notice to the contrary, he is entitled to assume, and to act on the assumption, that others will obey the law, exercise reasonable care and yield to him the right of way.

6. Same—

A driver who has the right of way at an intersection does not have the absolute right of way in the sense that he is not bound to use ordinary care in the exercise of his right, and he is nevertheless required to keep a reasonable lookout, keep his vehicle under control, and take reasonable precautions to avoid injury to persons and property, or when he sees, or by the exercise of due care should see, that an approaching driver cannot or will not observe the traffic laws, he must use such care as an ordinarily prudent person would use under the same or similar circumstances to avoid collision and injury.

7. Automobiles § 7—

The driver of a motor vehicle is charged with the duty at all times of keeping such a lookout as an ordinarily prudent person would keep under the same or similar circumstances, and he is required not only to look but to see what ought to have been seen.

8. Automobiles § 41g— Evidence held insufficient to show negligence of driver of car entering intersection from the right as the proximate cause of collision at the intersection.

Plaintiff's evidence was to the effect that her intestate was riding in a car owned and driven by defendant, that defendant entered an intersection at a rate of some 15 miles per hour, that defendant's car was struck about the center of the intersection by a car entering the intersection from his left, that defendant's car came to rest near the intersection with damage to its left front, and that the other car came to rest against a building some 104 feet east of the intersection, with damage on its front and right front. Plaintiff also introduced statements of defendant on adverse examination that he had slowed down and looked and did not see any car approaching, and that a person could see a car approaching, with its headlights burning, from the direction that the other car actually did approach, 25 to 30 feet when within 25 feet of the intersection. *Held:* Nonsuit was correctly entered, since, even assuming that defendant's failure to see the approaching vehicle was negligent, the testimony and the physical facts at the scene adduce the sole conclusion that defendant, at the point at which he might have reasonably discovered that the other car would not stop and yield him the right of way, did not have time to apply his brakes and control his vehicle in such manner as to avoid the collision.

9. Death § 3—

Nonsuit is properly entered in an action for wrongful death when plaintiff's allegation that she was duly qualified and acting administratrix of the deceased is denied in the answer and plaintiff offers no evidence in support of her allegation. G.S. 28-173.

APPEAL by plaintiff from *Bone, J.*, October 1958 Civil Term of NEW HANOVER.

Plaintiff seeks damages for the alleged wrongful death of her intestate from injuries received in a collision between two motor vehicles at an intersection of streets in the city of Wilmington, on 19 January, 1957.

The action was instituted 10 March, 1958, against defendants Matthew Lee, Marion Wright, Jr., and Mattie Wright. Summons was not served on Marion Wright, Jr., and Mattie Wright, and there was a judgment of voluntary nonsuit as to them prior to the trial.

Plaintiff's evidence revealed:

Plaintiff's intestate, Elijah Carr, Jr., was a guest passenger in a Dodge pickup owned by Matthew Lee and being driven by him northwardly along Seventh Street. (Matthew Lee is hereinafter referred to as the defendant.) The Dodge pickup collided with a Buick sedan owned by Mattie Wright and being driven eastwardly on Church Street by Marion Wright, Jr. The collision occurred about 6:15 p.m. Seventh Street runs north and south, is 36 feet wide south of Church Street and 27 feet wide north of Church Street. Church Street is 27 feet wide and is straight throughout its length. These streets intersect at right angles and Church Street slopes downwardly from the intersection looking west. A street light was burning at the intersection and another 150 feet west on Church Street. The speed limit at the intersection is 35 miles per hour. The weather was clear and the street dry. There were no traffic control signs or devices at the intersection. There is a one-story dwelling at the southwest corner, 35 feet west of Seventh Street and 27½ feet south of Church Street. A tree, which had shed its leaves, is also at the southwest corner.

The collision took place about the center of the intersection. There were skid marks "as if a car had skidded sideways" from the center of the intersection toward, but not extending to, the curb at the northeast corner. The Dodge pickup came to rest, facing east, at, but not across, the curb on Church Street near the northeast corner of the intersection and near a tree. Its right front headlight was burning. The Buick came to rest off the street against a church 104 feet east of the intersection. The vehicles were extensively damaged, the Dodge pickup on the left front, the Buick on the front and right front. The headlights of the Buick were "torn completely out." The plaintiff's intestate was found hanging from the Dodge pickup and was pronounced dead upon arrival at the hospital.

The plaintiff offered in evidence the testimony of the defendant Lee taken upon prior adverse examination, as follows: The deceased and defendant worked as longshoremen. They were on their way

home from work. Defendant was driving. The deceased was sitting between defendant and another passenger. They were proceeding northwardly on Seventh Street. One-half block south of the Church Street intersection, they stopped to permit a car to back out. Defendant proceeded at 15 miles per hour, slackened speed at the Church Street intersection, and was struck by the Buick coming from his left. "I do not remember seeing a car. . . . moving east on Church Street. . . . All I can remember is the collision. . . . I don't remember anything after the accident. . . . I didn't see anything coming as I proceeded to cross the street. . . . I don't remember ever putting the brakes on. I don't remember ever seeing the car with which I had the collision. . . . I regained consciousness in the . . . hospital. . . . I had slowed down to see if anything was coming. That is about the last act I remember doing. . . . If a car had been coming up Church Street going east on Church with its lights on, there is no reason that I couldn't have seen it. I just put my foot on the brake to slow it down a little bit. I was traveling in second gear at that time. . . . Church Street was a dark street and Seventh Street was a dark street. . . . You could see about 25 to 30 feet down there from the position 25 feet back."

No eyewitnesses, other than the defendant, testified.

When plaintiff rested her case, defendant demurred to the evidence and moved for judgment of involuntary nonsuit. The motion was allowed. From judgment dismissing the action, plaintiff appealed, assigning error.

Everett, Everett & Everett and C. J. Gates for plaintiff, appellant.
Elkins & Calder and Royce S. McClelland for defendant, appellee.

MOORE, J. The sole question for decision in this case is whether or not the court erred in granting the motion for judgment of involuntary nonsuit.

The plaintiff contends that the evidence offered by her made out a *prima facie* case of actionable negligence.

The plaintiff is entitled to have the evidence considered in the light most favorable to her and to have the benefit of every reasonable inference to be drawn therefrom. *Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223.

The plaintiff asserts that the actionable negligence of the defendant consisted of his failure to maintain a reasonable lookout, failure to keep his motor vehicle under proper control, and failure to apply brakes.

There is no evidence in the case to support, inferentially or otherwise, the view that the Buick driven by Marion Wright, Jr., entered the intersection first. The defendant's testimony, offered by the plaintiff, discloses that he reduced speed and was driving at less than 15 miles per hour and in second gear at the time of the collision; that the collision took place about the center of the intersection; and that the Buick came from his left. This evidence is uncontradicted. There were no traffic signs at the intersection. Plaintiff solemnly alleges that Marion Wright, Jr., operated the Buick at an "unlawful speed of 50 miles per hour in a 35 mile zone . . . and permitted it to enter into said intersection . . . at such unlawful, dangerous and excessive rate of speed . . . and he failed properly to apply the brakes . . . and slacken its speed . . ." The physical evidence tends to bear out the testimony of defendant and the said allegations of plaintiff, or at least is not inconsistent therewith. This is particularly true as regards the respective distances traveled by the vehicles before coming to rest and the damaged parts of the vehicles. Physical facts at the scene of a collision often speak louder than testimony of witnesses. *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491.

The conclusion is inescapable that the vehicles entered the intersection at approximately the same time, or that the defendant's vehicle entered first. In either case the defendant had the right of way, that is, the right to proceed uninterruptedly in a lawful manner in the direction in which he was moving in preference to another approaching from a different direction into his path. *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532; G.S. 20-155 (a) (b). The defendant was under no duty to anticipate disobedience of law or negligence on the part of others, but in the absence of anything which put him on notice, or should have put him on notice, to the contrary, he was entitled to assume, and to act on the assumption, that others would obey the law, exercise reasonable care and yield to him the right of way. *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147.

However, one who has the right of way at an intersection does not have the absolute right of way in the sense that he is not bound to use ordinary care in the exercise of his right. When he sees, or by the exercise of due care should see, that an approaching driver cannot or will not observe the traffic laws, he must use such care as an ordinarily prudent person would use under the same or similar circumstances to avoid collision and injury. His duty under such circumstances consists in keeping a reasonable lookout, keeping his vehicle under control, and taking reasonable precautions to avoid injury to persons and property. *Primm v. King, supra; Caughron v.*

Walker, 243 N.C. 153, 90 S.E. 2d 305; *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383.

In the instant case the evidence discloses nothing which would have, if observed, reasonably put the defendant on notice of a possible collision in time for him to have taken measures to avoid it. See *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387.

It is true that the driver of a motor vehicle is charged with the duty at all times of keeping such a lookout as an ordinarily prudent person would keep under the same or similar circumstances. *Smith v. Kinston*, 249 N.C. 160, 105 S.E. 2d 648. The duty is not only to *look*, but to *see* what ought to have been seen. *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19.

The defendant testified that he looked westwardly on Church Street, but did not at any time before the collision see the Buick approaching. He stated that he could have seen it if its lights had been burning. In any event, it is impossible to understand how the defendant could have reasonably avoided the collision under the circumstances of this case even if he had seen the Buick approaching. He had the right to assume that a vehicle approaching from his left would stop and yield to him the right of way. Considering his position, the size of the intersection, the speed of the approaching vehicle, and the point at which he might have reasonably discovered that the Buick would not stop and yield the right of way, it would not have been reasonably possible for him to avoid the collision even if he had seen the approaching vehicle and realized the danger.

Assuming that his failure to see the approaching vehicle was negligence, it could not under the circumstances have been a proximate cause of the collision. *Marshburn v. Patterson*, 241 N.C. 441, 85 S.E. 2d 683.

As for the contention that defendant did not apply brakes, the matter of applying brakes is part and parcel of proper control. And proper control is the twin brother of reasonable lookout. When the duty of reasonable lookout has been performed and avoidable danger has been discovered, the duty to control arises. We have already said in effect that under the circumstances in this case the defendant could not have reasonably discovered the peril in time to control his vehicle in such manner as to avoid the collision.

Similar situations existed in *Brady v. Beverage Co.*, 242 N.C. 32, 86 S.E. 2d 901, and *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919. The principles applied in those cases have application here.

We point out that the defendant denied the allegation of plaintiff that she was the duly qualified and acting administratrix of the de-

ceased, Elijah Carr, Jr. No evidence was offered by plaintiff that she was such administratrix and had right to maintain the action. G.S. 28-173. The want of such evidence alone is sufficient to sustain the nonsuit even if there were no other ground for so doing.

Affirmed.

ELBERT BATSON AND WIFE, MABEL BATSON; WILBUR BATSON AND WIFE, ELEANOR BATSON; CECIL BATSON AND WIFE, GENEVA BATSON; THOMAS H. BATSON (SINGLE); MABEL JORDAN AND HUSBAND, GEORGE JORDAN; H. W. BATSON (SINGLE), HEIRS OF JOHN BATSON, DECEASED; AND MATTIE BATSON, WIDOW OF JOHN BATSON v. E. E. BELL AND WIFE, NANNIE C. BELL.

(Filed 18 March, 1959.)

1. Boundaries § 8—

What are the boundaries of a tract of land is a matter of law to be determined by the court from the description set out in the conveyance; where those boundaries are located on the ground is a factual question for the jury.

2. Boundaries § 3—

Ordinarily, the boundaries of a parcel of land should be determined by following the directions given in the deed in sequence, and a call may be reversed only to establish the location of a corner which cannot otherwise be located.

3. Boundaries § 2—

While course, distance and calls to fixed monuments will be harmonized if possible, if this cannot be done, a call to a natural monument will control course or distance.

4. Same—

An established line of another tract is such a monument as controls course and distance.

5. Same: Boundaries § 8— Evidence tending to establish line of adjacent grant as natural monument is sufficient predicate for location of boundary by jury.

Plaintiffs introduced in evidence their grant which called for the northern line of the "William B. Sidbury" grant as its southern boundary, and introduced evidence tending to locate the northern line of the "William B. Sidbury grant." *Held:* Plaintiffs had introduced evidence sufficient to permit the jury to find the northern line of that grant as their southern boundary, notwithstanding that this boundary would almost double the north-south line as called for in plaintiffs' grant and notwithstanding the absence of testimony that the William B. Sidbury line located by the witnesses was the same line called for in their grant,

there being no evidence that the line was not in fact the line referred to in their grant.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Bone, J.*, September 1958 Term of PENDER.

This is an action to determine ownership of 2.7 acres on Topsail Beach. Plaintiffs allege a trespass and adverse claim by defendants constituting a cloud on their title. Defendants admit the entry and adverse claim. They deny plaintiffs are the owners of the disputed area. Nonsuit was entered at the conclusion of plaintiffs' evidence. They excepted and appealed.

John J. Best and Wyatt E. Blake for plaintiff appellants.
Larkins & Brock and Ward & Tucker for defendant appellees.

RODMAN, J. Plaintiffs trace title to a grant to Jessie W. Batson for 51 acres dated 20 April 1859. Determinative of the appeal is this question: Have plaintiffs offered any evidence which will permit a jury to find that the disputed area lies within the boundaries of the Batson grant?

The rules applicable to the ascertainment of boundaries trace back to the early history of the State. They are firmly established by numerous consistent decisions.

What are the boundaries is a matter of law to be determined by the court from the description set out in the conveyance. Where those boundaries may be located on the ground is a factual question to be resolved by the jury. *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311; *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169; *Tatem v. Paine,* 11 N.C. 64.

The location of the boundaries of a parcel of land should be determined by following the directions and in the sequence given in the conveyance to each designated corner. If a particular corner is unknown and cannot be determined by adhering to the directions in the sequence specified, it is permissible to go to a subsequent known or established corner and by reversing the direction fix the location of the unknown corner. This backtracking is permissible only because it permits the location of an otherwise unknown corner. *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Lindsay v. Austin,* 139 N.C. 463; *Harry v. Graham,* 18 N.C. 76.

An effort should be made to harmonize all directions given for the location of a boundary; but if this is not possible and a conflict ex-

ists between course or distance or both and a fixed monument, natural or artificial, the call for the monument will control. The law presumes there is less likelihood of error in the call for a known and fixed point than a call for course or distance. *Trust Co. v. Miller*, 243 N.C. 1, 89 S.E. 2d 765; *Lance v. Cogdill*, 236 N.C. 134, 71 S.E. 2d 918; *Cherry v. Slade*, 7 N.C. 82; *Witherspoon v. Blanks*, 1 N.C. 157.

An established line of another tract is such a monument as controls course and distance. *Coffey v. Greer*, 241 N.C. 744, 86 S.E. 2d 441; *Newkirk v. Porter*, 237 N.C. 115, 74 S.E. 2d 235; *Lumber Co. v. Bernhardt*, 162 N.C. 460, 78 S.E. 485; *Dula v. McGhee*, 34 N.C. 332; *Smith v. Murphey*, 3 N.C. 183.

Plaintiffs put in evidence the Batson grant. It recites that the land granted adjoins that of Frederick Rhue. The specific description is:

"BEGINNING at a stake William B. Sidbury's corner on the sound running thence with said Sidbury's line across the Banks south twenty five east sixty six poles to a stake at the edge of the Ocean; thence with the edge of the Ocean north fifty three east one hundred and seven poles, to Frederick Rue's line; thence with Rue's line north twenty five, west eighty eight poles to Crooked Creek; thence with the meanders of said Creek to the Beginning."

The description declares the northern and southern boundaries are the lines of Rhue and Sidbury. The waters forming the eastern and western boundaries are natural boundaries and not controverted.

To establish the location of the northern boundary of the Batson grant plaintiffs offered in evidence a grant to Frederick Rhue dated 18 November 1854 for 114 acres on Topsail Banks. The description of that tract, so far as here pertinent, reads:

"BEGINNING at a stake at Cokel or Crooked Creek landing on the sound side, then south thirty-five east ninety two poles to the Ocean . . ." The parties are in agreement as to the correct location of the beginning corner of this grant. No controversy exists as to the correct manner of running from the beginning to the ocean. Three sides of the Batson grant are thus admitted—the water on the east and west and the Rhue line on the north. Only the southern line is in dispute. That is the first call in the Batson grant.

To establish the location of the first or southern line of the Batson grant plaintiffs offered in evidence grant No. 1740 to William B. Sidbury. This grant, dated 4 January 1844, is for 170 acres between Topsail Inlet and Stump Inlet. The description reads:

"BEGINNING on a dead cedar at the east end of a hammock near Cokel Creek Pond; thence South twenty three east fifty poles to a stake; thence south fifty west two hundred and sixty poles to a

stake between the hammock and the Atlantic; thence North twenty three west one hundred and sixty poles to a stake in the sound; thence to the beginning."

The first or Southern line of the Batson grant is shown on the map prepared by Blanchard, appointed by the court to survey plaintiffs' contention, as beginning at letter A on the sound. It runs thence south 23 east 50 poles to letter B. This line, extended another 14 poles to the ocean is indicated by the figure 1. This is the point which plaintiffs claim as the terminus of the first line of the Batson grant. From this point the distance along the ocean to the terminus of the first line of the Rhue grant is 3474.5 feet, or more than twice the distance called for in the Batson grant. If the line A— 1 is the first line of the Batson grant, the land in dispute is within its boundaries; but if the southern line of the Batson grant is only 107 poles from the Rhue line, the disputed area is outside the grant.

Plaintiffs offered evidence tending to fix the beginning point of grant No. 1740 to William B. Sidbury at point A on the Blanchard map and the line A-B as the first line of that grant. Witnesses testified to the location of the end of the hammock and Cokel Creek Pond called for in the Sidbury grant. They testified that line A-B was pointed out by disinterested witnesses more than fifty years ago, when no controversy existed with respect to the location of the Sidbury line. The competency of this evidence was not challenged. Defendants, by cross-examination, sought to show its want of probative value.

The parol testimony was, by the witnesses, limited to the location of the northern line of the William B. Sidbury grant. There was no testimony that it was the line of the Batson grant.

In this situation was it a question for the court or a jury to decide whether the William B. Sidbury line located by the witnesses was *the* William B. Sidbury line called for in the Batson grant?

There is no suggestion in record or brief that the first line of the William B. Sidbury grant is not in fact *the* William B. Sidbury line referred to in the Batson grant. Whether it is or is not the line of that grant was a question of fact for the jury. If the jury should so find, the jury would have to find that plaintiffs' location of that line was in fact the correct location. The evidence sufficed to require the submission of these questions to the jury. *Cherry v. Andrews,* 229 N.C. 333, 49 S.E. 2d 641; *Carter v. Vann,* 189 N.C. 252, 127 S.E. 244; *Hoge v. Lee,* 184 N.C. 44, 113 S.E. 776; *Gray v. Coleman,* 171 N.C. 344, 88 S.E. 489; *Pearce v. Waters,* 169 N.C. 240, 84 S.E. 339; *Lumber Co. v. Bernhardt, supra; Sherrod v. Battle,* 154 N.C. 345, 70

S.E. 834; *McNeely v. Laxton,* 149 N.C. 327, 63 S.E. 278; *Bonaparte v. Carter,* 106 N.C. 534; *Graybeal v. Powers,* 76 N.C. 66; *Hill v. Mason,* 52 N.C. 551; *Topping v. Sadler,* 50 N.C. 357; *Spruill v. Davenport,* 46 N.C. 203; *Hough v. Horne,* 20 N.C. 369; *Brooks v. Britt,* 15 N.C. 481.

A mere dispute as to the correct location of the first line did not, as appellee contends, require a reversal of the calls to determine the location. The discrepancy in distance is a factor which the jury can take into consideration in fixing the location.

Reversed.

MOORE, J., not sitting.

DAVID H. CAUBLE AND WIFE, HARRIET M. CAUBLE, ON BEHALF OF THEMSELVES AND ALL OTHER RESIDENTS AND PROPERTY OWNERS IN FAIRMOUNT PARK V. CARL J. BELL AND WIFE, LOLA BEATTY BELL AND THE SUN OIL COMPANY, A CORPORATION.

(Filed 18 March, 1959.)

1. Appeal and Error § 50—

While the court may review the findings of fact in injunction proceedings upon appeal from the granting or refusal of a temporary restraining order, where the court finds the facts by agreement of the parties upon the hearing upon the merits and issues a permanent restraining order on such findings, the findings are conclusive if supported by competent evidence, and the Supreme Court may review the evidence only to ascertain if there be any competent evidence to support the findings and whether the findings support the judgment.

2. Trial § 55—

Where a jury trial is waived and the facts are found by the court under agreement of the parties, the court's findings have the force and effect of a verdict by a jury.

3. Deeds § 19: Injunctions § 7—

Where the court, under agreement of the parties, finds upon the hearing on the merits that the subdivision in question had been developed under a uniform plan for residential purposes, conformed to within the area, and that the business development in the neighborhood was outside the restricted area, the findings support the issuance of order enjoining a land owner and his prospective purchaser from effecting a threatened violation of the restrictive covenants.

APPEAL by defendants from *Froneberger, J.,* in Chambers in GASTON County, December 23, 1958.

Plaintiffs, property owners in Fairmount Park, a residential subdivision of Gastonia, instituted this action for injunctive relief to restrain defendants Bell, likewise property owners in the subdivision, and Sun Oil Company, a prospective purchaser from the Bells, from violating covenants, appearing in deeds for lots in the subdivision, restricting the use of the property to residential purposes. Unless enjoined, defendants will erect a gasoline service station.

Defendants assert lack of a unified plan indicated by the sale of some lots by Hanna, who owned and subdivided the area, without any limitations with respect to the use of those lots and changes which have taken place in the area surrounding the subdivision since 1921 when it was laid out. They allege these changes are of such character and magnitude as to compel the court to refuse equitable relief, leaving plaintiffs to pursue such legal remedies, if any, as they may have.

A jury trial was waived. The court found the facts based on stipulations, affidavits, the pleadings, exhibits consisting of pictures taken in the area, and a map of the subdivision.

The court found: D. B. Hanna, in 1921, caused his land to be subdivided into 124 lots known as Fairmount Park Subdivision. A map of the subdivision was duly recorded in Gaston County. The deeds for 120 lots contained the restrictive covenants which plaintiffs seek to enforce. One deed for four lots on the extreme eastern edge of the subdivision did not contain these restrictions. ". . . (T)he said D. B. Hanna and wife, Minnie E. Hanna, subdivided said land, recorded the plats thereof, and included the covenants, conditions, and restrictions in the deeds to said lots in accordance with and pursuant to a general plan or scheme for the improvements and development of said subdivision and that the said restrictions, covenants, and conditions were a part of a uniform plan or scheme for the development of said property and was done to induce purchasers to pay higher prices for lots by reason of the restrictions and their mutual protection on such account.

"5. That the defendant, Carl J. Bell and wife, Lola Bell, purchased the property now owned by them with notice of the said restrictions and covenants in that the deed by which the defendants obtained said property and each and every deed in the defendants' chain of title contained specific reference to said covenants, conditions and restrictions.

"6. And the Court further finds as a fact that the restrictions, covenants, and conditions which were placed on said property in accordance with a uniform plan or scheme of development have never

been violated nor abandoned. However, outside of Fairmount Park there is a filling station situated across Franklin Avenue from the property of the defendants and there are numerous businesses adjoining Fairmount Park on the Eastern and Northwestern side; that Franklin Avenue is a heavily traveled street or highway and runs adjacent to Fairmount Park on the North Side; that the City of Gastonia has zoned the lots of the defendants as 'Neighborhood Trading;' and that while there are numerous businesses on the West and East of Fairmount Park there has been no invasion by businesses within the restricted area."

Based on the findings the court entered judgment enjoining the use of lots 1 and 2, Block 10, in violation of the covenants and restrictions applicable to Fairmount Park. Defendants excepted and appealed.

L. B. Hollowell and Verne E. Shive for plaintiff appellees.

Ernest R. Warren, Grady B. Stott, Hugh W. Johnston, and J. Bruce Morton for defendant appellants.

RODMAN, J. Defendants' first assignment of error is directed to the failure of the court to make findings of fact which conform to their views. They urge us to review the findings with a resultant picture presented by the use of their spectacles.

This asserted right to review and make other and additional findings is based on the fact that plaintiffs seek injunctive relief. This Court has the right to review findings made with respect to interlocutory orders denying or granting injunctive relief. *Cahoon v. Hyde County,* 207 N.C. 48, 175 S.E. 846; *Wentz v. Land Co.,* 193 N.C. 32, 135 S.E. 480; *Coates v. Wilkes,* 92 N.C. 376. This is true since only questions of fact are then considered.

The judgment here is a final determination of the rights of the parties. The mere fact that equitable (injunctive) relief is granted gives us no authority to modify findings determinative of issues of fact raised by the pleadings. *McGuinn v. High Point,* 217 N.C. 449, 8 S.E. 2d 462; *Galloway v. Stone,* 208 N.C. 739, 182 S.E. 333; *Barringer v. Trust Co.,* 207 N.C. 505, 177 S.E. 795; *Power Co. v. Power Co.,* 171 N.C. 248, 88 S.E. 349; *Coates v. Wilkes, supra.*

Issues of fact must be determined by a jury unless such trial is waived. G.S. 1-172; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384. When the right to a jury trial is waived, the facts found by the judge have the force and effect of a verdict by a jury. N. C. Const., Art. IV, sec. 13; *Rubber Co. v. Shaw,* 244 N.C. 170, 92 S.E. 2d 799; *Little v.*

Sheets, 239 N.C. 430, 80 S.E. 2d 44; *Woody v. Barnett*, 239 N.C. 420, 79 S.E. 2d 789; *Bryant v. Bryant*, 228 N.C. 287, 45 S.E. 2d 572.

Upon appropriate assignments of error we may examine the evidence to ascertain if there be any to support the verdict. We may likewise, upon appropriate assignments, ascertain if the verdict is sufficient to support the judgment, but we cannot enlarge or diminish findings which constitute the verdict. *Power Co. v. Power Co., supra.*

The pleadings raised issues of fact. The parties elected to waive jury trial and stipulated that the court "might hear the evidence, find the facts and enter the judgment." This stipulation indicates an understanding of the necessity for a determination of the issues of fact raised by the pleadings.

Upon an examination of the evidence we are convinced there is plenary evidence to justify the findings which the court made. The assignment directed to the insufficiency cannot be sustained.

The court found a uniform plan to develop the area, including the property of plaintiffs and defendants Bell, for residential purposes. Property owners within the area included in the plan have conformed to the covenants and plan. The business development is outside of this area and beyond the power of those in the restricted area to control.

Based on the findings supported as they are by the evidence, plaintiffs were entitled to injunctive relief to protect their property rights. *Reed v. Elmore*, 246 N.C. 221, 98 S.E. 2d 360; *Muilenburg v. Blevins*, 242 N.C. 271, 87 S.E. 2d 493; *Higdon v. Jaffa*, 231 N.C. 242, 56 S.E. 2d 661; *Vernon v. Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710; *Brenizer v. Stephens*, 220 N.C. 395, 17 S.E. 2d 471; *McLeskey v. Heinlein*, 200 N.C. 290, 156 S.E. 489.

Affirmed.

GEORGE R. MERCER v. RAY B. HILLIARD AND MONTGOMERY WARD COMPANY, INC.

(Filed 18 March, 1959.)

1. Pleadings §§ 20, 31—

A motion by plaintiff to strike the entire further answer and defense of defendant on the ground that the facts alleged therein do not constitute a legal defense, is, in effect, a demurrer to such further answer and defense.

2. Appeal and Error § 8—

An order allowing plaintiff's motion to strike a further answer and defense in its entirety on the ground that it does not constitute a bar or defense to plaintiff's action, is, like an order which sustains a demurrer to a plea in bar, appealable as affecting a substantial right. Rule of Practice in the Supreme Court No. 4(a).

3. Compromise and Settlement: Judgments §§ 33b, 33c— Consent judgment or judgment in retraxit pursuant to compromise with owner of parked car does not bar action by owner of car directly involved in the collision against the driver of the other car.

One of the cars involved in a collision struck a parked car as a result. In the action by the owner of the parked car, alleging negligence on the part of both drivers, a voluntary nonsuit was entered, with the consent of the owner of the parked car, pursuant to a compromise agreement reached between the owner of the parked car and the owner of one of the cars involved in the collision. In this action by the owner procuring the compromise agreement theretofore instituted against the driver of the other car and his employer, the judgment entered pursuant to the compromise was set up in the further answer and defense as a bar. *Held:* The further answer and defense was properly stricken on motion, since the judgment pursuant to the compromise could not bar plaintiff's action, even though it be considered a judgment in *retraxit* which would bar the owner of the parked car from again prosecuting her claim.

APPEAL by defendants from *Morris, J.*, December Civil Term, 1958, of WILSON.

Civil action instituted August 21, 1958, heard below on plaintiff's motion to strike defendants' "First Further Answer and Defense."

The background facts are these:

Plaintiff's action is to recover for damage to his automobile allegedly caused by the negligence of defendants. Defendants, in a joint answer, denied negligence and pleaded contributory negligence; and Hilliard, the individual defendant, alleged a counterclaim for damages for personal injuries and for damage to his automobile.

The controversy grows out of a collision between plaintiff's car and Hilliard's car on July 23, 1958, at a street intersection in Raleigh, N. C. Plaintiff's car, operated by his wife, was going west on New Bern Avenue. Hilliard was operating his car north on Person Street.

Hilliard was on business for the corporate defendant. Defendants alleged that, under the family purpose doctrine, plaintiff was legally responsible for the manner in which his wife operated his car.

Plaintiff alleged that the collision was caused by the negligent conduct of Hilliard. Defendants alleged that the collision was caused by the negligent conduct of Mrs. Sadie Lamm Mercer, plaintiff's wife.

In their "First Further Answer and Defense," a separate and dis-

tinct part of said joint answer, defendants alleged as *res judicata* and as a bar to plaintiff's right to maintain this action the facts summarized below.

After the present action was instituted, to wit, on or about September 4, 1958, Mrs. Margaret Strickland instituted a separate action in the Superior Court of Wake County against Mrs. Sadie Lamm Mercer, George Mercer and Ray Benton Hilliard. In her complaint therein, Mrs. Strickland alleged that, after the collision between the Mercer and Hilliard cars, the Mercer car struck her car, then properly parked on the north side of New Bern Avenue; and, alleging that the damage to her car was caused by the negligence of the three defendants, she asserted her right to recover from them the sum of $250.00.

No pleading was filed by any defendant in the *Strickland* case.

On or about September 16, 1958, in consideration of their payment to her of $165.00, Mrs. Strickland executed a release and thereby discharged the Mercers from liability on account of the damage done to her car. On September 17, 1958, a judgment was entered by the assistant clerk of superior court, which, after reciting that the plaintiff had elected to take a voluntary nonsuit, provided: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff be and she is hereby nonsuited and that she pay the cost of this action." This judgment bears the written consent of Mrs. Strickland and of her attorney.

Defendants alleged that the release executed by Mrs. Strickland and the said judgment were parts of the same transaction, namely, a transaction wherein "representatives of the said Mrs. Margaret Strickland and the plaintiff George H. Mercer and Sadie Lamm Mercer entered into a compromise settlement of said action."

Plaintiff's motion to strike *in its entirety* defendants' "First Further Answer and Defense," is based on these grounds:

"1. The allegations of said First Further Answer and Defense do not constitute *res judicata* of any of the issues involved in this action.

"2. The allegations of said First Further Answer and Defense are irrelevant, immaterial and prejudicial, and have no substantial relation to the controversy between the parties to this action, and present no legal defense to the plaintiff's cause of action."

After hearing, Judge Morris entered an order allowing plaintiff's said motion; and defendants excepted and appealed.

Gardner, Connor & Lee for plaintiff, appellee.

Dupree & Weaver and Lucas, Rand & Rose for defendants, appellants.

BOBBITT, J. The sole ground of plaintiff's motion is that the facts alleged by defendants do not constitute a legal defense to plaintiff's action. In substance, if not in form, plaintiff's motion is a demurrer to defendants' "First Further Answer and Defense," in its entirety, and will be so considered. *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673; *Etheridge v. Light Co.,* 249 N.C. 367, 106 S.E. 2d 560.

G.S. 1-141, in pertinent part, provides: "The plaintiff may in all cases demur to an answer containing new matter, where upon its face, it does not constitute a . . . defense; and he may demur to one or more of such defenses . . ., and reply to the residue." *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662; *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908.

"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 & Procedure, § 523; *Brown v. Clement Co.,* 217 N.C. 47, 6 S.E. 2d 842; *Solon Lodge v. Ionic Lodge,* 245 N.C. 281, 95 S.E. 2d 921.

An order or judgment which *sustains* a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom. G.S. 1-277; *Shelby v. R. R.,* 147 N.C. 537, 61 S.E. 377. Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is *overruled.*

The facts alleged by defendants do not constitute either an adjudication or an acknowledgment that negligence on the part of Mrs. Mercer proximately caused the collision between the Mercer and Hilliard cars. *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410.

The factual situation here illustrates the soundness of the reasons stated by *Ervin, J.,* in support of the decision in *Dixie Lines v. Grannick, supra.* Mrs. Strickland's action in Wake Superior Court involved a small property claim. The Mercers were residents of Wilson County. Independent of questions relating to legal liability, the inconvenience and the expense of fighting the *Strickland* case would seem sufficient practical ground to induce the Mercers to effect a compromise settlement of Mrs. Strickland's claim. Moreover, if plaintiff preferred, by effecting a compromise settlement thereof, to eliminate Mrs. Strickland's small property damage claim, so that the respective rights of the Mercers and of defendants *inter se* would be adjudicated in the separate action then pending between them rather than as a subordinate feature of the *Strickland* case, they were at liberty to do so.

Defendants undertake to distinguish *Dixie Lines v. Grannick, supra,*

on the ground that no court action or judgment was involved therein. This factual distinction is immaterial. In both cases there was an out of court compromise settlement. Having received the compromise consideration, and having executed a full release, Mrs. Strickland was *thereby* precluded from prosecuting her action. The judgment of voluntary nonsuit was only an incident in the consummation of the out of court compromise settlement.

It is noteworthy that the compromise settlement was between Mrs. Strickland and the Mercers. Defendants do not allege that they or either of them participated therein in any way. If it absolved defendants from liability to Mrs. Strickland, to this extent defendants have reason to be well pleased.

Defendants contend, citing *Steele v. Beaty*, 215 N.C. 680, 2 S.E. 2d 854, that the judgment was a *retraxit* rather than a simple judgment of voluntary nonsuit. In either event, it was not a judicial determination or adjudication of liability on the part of the Mercers. If a *retraxit*, its legal effect was to estop *Mrs. Strickland* from instituting another suit on the same cause of action.

The factual situations in *Coach Co. v. Stone*, 235 N.C. 619, 70 S.E. 2d 673, and in the cases cited therein, are stated and distinguished by *Ervin, J.*, in *Dixie Lines v. Grannick, supra*. Suffice to say, *Dixie Lines v. Grannick, supra*, on which the present decision is based, is expressly approved.

Affirmed.

ANASTASIA ANDREWS v. T. Z. SPROTT.

(Filed 18 March, 1959.)

1. Automobiles § 46: Trial § 31b—

A charge predicating plaintiff's right to recover in part upon defendant's operation of his car at a reckless rate of speed must be held prejudicial to plaintiff when plaintiff relies exclusively on other grounds for recovery and there is neither allegation nor evidence that defendant operated his car at a reckless rate of speed, since it is error to charge on an abstract principle of law not supported by any view of the evidence.

2. Automobiles § 46: Negligence § 20—

It is error for the court to charge the jury conjunctively as to all the specific allegations of negligence upon which plaintiff relied in order to answer the issue of negligence in the affirmative, since such charge places the burden of proving all of the allegations of negligence as a proximate cause of the injury in order to obtain an affirmative answer

to the issue, whereas proof of any one of them is sufficient for this purpose. The use of "and" instead of "or" is prejudicial in such instance.

APPEAL by plaintiff from *Froneberger, J.*, October 20, 1958 Schedule A Civil Term, MECKLENBURG Superior Court.

Civil action to recover damages for personal injury resulting from actionable negligence. The plaintiff alleged she was a passenger in an automobile driven by C. W. Leekley in the left or inside lane for east-bound traffic on East Fourth Street, City of Charlotte; that Leekley stopped in obedience to a traffic control light at the Trade Street intersection; that the defendant approached the intersection also driving east on East Fourth Street, but in the right-hand or outside traffic lane; that while he was in the act of stopping for the traffic light he suddenly and carelessly turned to his left, crossed his marked traffic lane and collided with Leekley's automobile, injuring the plaintiff; that the defendant was negligent in that he (1) crossed into the adjacent traffic lane in violation of a city ordinance, (2) failed to keep a proper lookout, (3) failed to keep his vehicle under proper control, and (4) failed to give a proper signal of his intended movement.

The defendant, by answer, denied negligence in all the particulars alleged and denied the plaintiff sustained injury. As a bar to the action he pleaded the plaintiff's contributory negligence, to which she filed a reply alleging the defendant had the last clear chance to avoid the injury.

The plaintiff introduced evidence, including the city ordinance, tending to support her allegations. The defendant also introduced evidence and testified in his own behalf that his automobile "pulled" to his left while he was in the act of stopping for the light because of a mechanical defect in the brakes of which he had no prior notice, and that his bumper barely scraped the side and fender of Leekley's automobile and that the contact was not sufficient to have injured the plaintiff.

Issues of negligence, contributory negligence, and damages were submitted. The jury answered the issue of negligence in favor of the defendant. From a judgment dismissing the action, the plaintiff appealed.

Bell, Bradley, Gebhardt & DeLaney, By: Ernest S. DeLaney, Jr., for plaintiff, appellant.

Craighill, Rendleman & Kennedy for defendant, appellee.

HIGGINS, J. The plaintiff, by her assignment of error No. 4, chal-

lenges the following portion of the court's charge: "Now, ladies and gentlemen of the jury, if you find from the evidence and by its greater weight as I have defined that term to you, that the defendant operated his car at a reckless rate of speed, that he operated his car with defective brakes, that he failed to keep a proper lookout, and failed to keep his car under control, and if you find that such negligence was the proximate cause of the collision and the resulting injury, then it would be your duty to answer the first issue yes. Otherwise, it would be your duty to answer it no."

The plaintiff argues she is prejudiced by the charge in two respects:

First, the court committed error in charging with respect to the defendant's operation of his car at a reckless rate of speed. Her objection seems to be valid. The complaint does not allege and the evidence does not show speed. It is error to charge on an abstract principle of law not supported by any view of the evidence. *Worley v. Motor Co.*, 246 N.C. 677, 100 S.E. 2d 70; *State v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921; *Williams v. Harris*, 137 N.C. 460, 49 S.E. 954.

Second, the court charged in the conjunctive as to all the specific allegations of negligence upon which the plaintiff relied. The effect was to require the jury to find the defendant guilty of all the acts of negligence detailed by the court in order to answer the first issue in favor of the plaintiff. The charge, in the manner given, placed upon the plaintiff the burden of showing speed, defective brakes, failure to keep a proper lookout, *and* failure to keep his car under control. The plaintiff was entitled to have the jury pass on the question whether the evidence showed the defendant, in any of the particulars alleged, had breached a legal duty which he owed to the plaintiff, and if so, whether such breach proximately caused her injury and damage. *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383; *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331; *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431. For additional cases, see Strong's North Carolina Index, Vol. 1, p. 232, n. 49.

The defendant seeks to uphold the instruction by application of the rule permitting, under certain circumstances, the interchange of the disjunctive "or" and the conjunctive "and." True, in the interpretation of wills, deeds, contracts, statutes, etc., the courts have permitted a switch of the words, but only when necessary to give effect to some manifest purpose and to carry out a definite intent. Substitution of the one word for the other is permissible only "when sense requires it." The jury heard what the judge charged. It did not hear what he intended to charge. By requiring the plaintiff to make good

on *all* negligent acts upon which she relied, the court required her to carry too great a burden. For this error, she is entitled to a New Trial.

CECIL TYSON AND WIFE, HESTER TYSON v. STATE HIGHWAY COMMISSION, MINNIE TYSON WINBORN AND HUSBAND, ROBERT WINBORN.

(Filed 18 March, 1959.)

Eminent Domain § 11—

In an action by the owner of an interest in lands against the State Highway Commission to recover compensation for the taking of a portion of the land, the joinder, as a respondent, of the owner of the other interest in the land cannot result in a misjoinder of parties and causes, since the action is to enforce a single right to recover compensation, and the joinder of all parties having an interest in the land is required by G.S. 40-12.

APPEAL by respondent State Highway Commission from *Bone, Resident Judge,* in chambers, 1 November 1958. WILSON.

Special proceeding for recovery of compensation for lands of petitioners appropriated by respondent for highway purposes, heard upon a demurrer.

A summary of the allegations of the petition follow:

Cecil Tyson is the owner of a farm containing 128.25 acres, and his wife has a dower interest therein. On 1 January 1957 the respondent appropriated a described part of it for highway purposes by virtue of the power of eminent domain vested in it by G.S. 40-12 *et seq.* and G.S. 136-19.

Cecil Tyson was the sole owner of a fee simple title to part of this farm, and was the owner of a one-half undivided interest in the remaining part of the farm. The respondent Minnie Tyson Winborn is the owner of the other one-half interest in the farm as a tenant in common with Cecil Tyson. Robert Winborn is her husband.

Petitioners have been damaged by the taking of said land and by damage to the remaining land, and have not been compensated by the State Highway Commission.

The petitioners pray that the court appoint commissioners to appraise the damages sustained by them as a result of the taking of their property by the State Highway Commission, and fix the compensation to which they are entitled.

The State Highway Commission demurred to the petition on the ground that there is a misjoinder of parties and causes.

The Clerk of the Court overruled the demurrer. On appeal Judge Bone overruled the demurrer, and the State Highway Commission appeals.

Thorp, Spruill, Thorp & Trotter for petitioners, appellees.

Malcolm B. Seawell, Attorney General, Kenneth Wooten, Jr., Assistant Attorney General, Glenn L. Hooper, Jr., Trial Attorney, and Lucas, Rand & Rose for State Highway Commission, appellant.

PER CURIAM. G.S. 40-12 required the petitioners to state in their petition the names of all parties who own or have, or claim to own or have, estates or interests in the land. The averments in the petition as to the respondents, Winborn, is in compliance with this statute. Petitioners seek no relief of any kind against the Winborns.

According to the allegations of the petition, the petitioners merely seek to enforce a single right, that is, to recover from the State Highway Commission compensation for lands of theirs appropriated by it for highway purposes.

There is no misjoinder of parties and causes, and Judge Bone correctly overruled the demurrer.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES COLE, JAMES GARLAND MARTIN AND OTHERS TO THE STATE UNKNOWN.

(Filed 25 March, 1959.)

1. Riot § 1—

The crimes of inciting a riot and participating in a riot are separate and distinct offenses against the public peace.

2. Same—

Defendants may not be convicted of inciting to riot unless the incitement results in a riot, and therefore in a prosecution for inciting a riot the State must show, in addition to incitement by defendants, that an unlawful assembly took place and that it was accompanied by actual force or violence, or that it had at least an apparent tendency thereto.

3. Riot § 2— Indictment held sufficient to charge defendants with inciting to riot.

An indictment charging that defendants, with others unknown armed with certain weapons, did assemble near a certain town for the purpose

of conducting a meeting and rally of the so-called Knights of the Ku Klux Klan, with the common intent to preach racial dissention and to coerce and intimidate the populace, after they had been warned that said meeting would cause violence and a breach of the peace, and that they wilfully and unlawfully did incite a riot, *held* sufficiently to allege that the assembly which defendants encouraged was for an unlawful purpose which would naturally lead to a riot, and therefore was sufficient to charge inciting to riot, without allegation that defendants attempted to mutually assist each other against lawful authority or engaged in any act of personal violence.

4. Unlawful Assembly—

An assembly for a lawful purpose may be converted into an unlawful assembly if at any time during the meeting the persons assembled act with a common intent, formed before or during the meeting, to obtain a purpose which will interfere with the rights of others by committing disorderly acts in such manner as to cause sane, firm and courageous persons in the neighborhood to apprehend a breach of the peace.

5. Riot § 2—

The evidence in this case *is held* sufficient to be submitted to the jury that defendants, armed with deadly weapons, encouraged and attended a meeting of the Ku Klux Klan in a neighborhood having a large number of Indian residents after inflammatory speeches, cross-burnings and newspaper reports thereof had incensed the Indians of the community to such an extent that the proposed meeting would tend to invoke a breach of the peace and incite to riot, and motion for involuntary nonsuit was properly denied as to both defendants.

6. Constitutional Law § 18—

The right of free assemblage and the right to bear arms does not sanction an assembly by a secret society for the unlawful purpose of intimidating or coercing the populace or any segment thereof and thus usurp the functions of the law enforcement officers of the community or the courts of the State.

7. Criminal Law § 37: Riot § 2—

In a prosecution of two defendants for inciting to riot, evidence of inflammatory statements made by one of them, which were not made in the presence of the other, is inadmissible as to such other, and the admission of such evidence over the objection of such other is prejudicial as to him.

8. Riot § 2—

In a prosecution for inciting to riot, the court is required to charge the elements of riot, since, unless the jury can find from the evidence that a riot occurred, defendants could not be guilty of inciting to riot.

9. Same—

In this prosecution for inciting to riot, the court correctly charged that the assemblage encouraged and attended by defendants must have been unlawful, calculated to result in a breach of the peace, and that

a riot must have ensued, in order to convict defendants of inciting to riot.

10. Riot § 1—

An unlawful assembly is an essential element of the offense of riot.

APPEAL by defendants from *Williams, J.*, March Term 1958 of ROBESON. These cases as Nos. 722 and 724 were argued at the Fall Term 1958 of this Court.

This is a criminal action. The defendants were indicted jointly and tried together in the court below. Separate appeals were brought to this Court, but they will be considered together and disposed of herein.

The defendants were tried upon a bill of indictment charging that James Cole and James Garland Martin, together with other persons to the State unknown, of a total number of more than ten, did on 18 January 1958, wilfully and unlawfully, while armed with firearms, concealed and unconcealed, to wit, pistols, rifles, and shotguns, assemble near the Town of Maxton in the County of Robeson, for the common purpose of conducting a meeting and rally of the so-called Knights of the Ku Klux Klan, with the common intent to preach racial dissention and coerce and intimidate the populace, and with the common intent to carry out said purpose in a violent manner to the terror of the people, with the common intent mutually to assist one another against all who should oppose them, although they had been warned that their prior conduct and pronouncements against the Indians of Robeson County had incensed and inflamed said Indians against them, and that a large number of said Indians intended to appear in armed force at said meeting, and that to hold said meeting would cause violence and a breach of the peace; that the said James Cole, James Garland Martin, and others to the State unknown, wilfully and unlawfully did incite a riot.

The State's evidence tends to show that the defendant James Cole of Marion, South Carolina, is the Grand Wizard of the Ku Klux Klan in North Carolina, and that headquarters of the Klan is in Charlotte, North Carolina; that James Garland Martin of Reidsville, North Carolina is known as the Titan of the Klan, and receives and examines applications for membership in the Klan, and places orders for Klan robes. There is evidence tending to show that Martin received a letter from the Charlotte headquarters prior to the Maxton rally, directing him to be armed at all Klan rallies in the future, and that he was invited to the Maxton rally by James Cole.

The State's evidence further tends to show that the meeting held or

attempted to be held on 18 January 1958 was the seventh or eighth meeting of the Klan in Robeson County. There is also evidence to the effect that James Cole had leased the field from the owners or occupants thereof where the Maxton rally was attempted to be held.

Paul Mason, a reporter for National Broadcasting, Radio Program Monitor, testified that he secured an interview with the defendant Cole on or about 21 December 1957 at a Klan meeting in Greensboro, North Carolina; that at that meeting Cole identified himself as the Grand Wizard of the Klan; that they were within a small circle of people and that all had guns. "I asked him why they had guns * * *. He said, 'We have a right to carry arms under the Constitution.' I said, 'You won't tell me any more why you are carrying guns?' He said, 'I think they speak for themselves.' Before I could say anything, he said, 'If they don't, they will.' * * * He said, 'I got five guns and I got money in the bank to buy five more, and as long as the Constitution gives me the right to bear arms, there ain't going to be no Negroes in school with my children. * * * I will tell you this: In North Carolina if the Pearsall Plan is not enough, then the Smith & Wesson Plan is.' I don't believe Cole was armed. Almost everyone else in the crowd was."

Bruce Roberts, the owner of the Scottish Chief and Lumberton Post, weekly newspapers, testified that on Friday or Saturday of the week before the Klan meeting on 18 January 1958, a man came to his office by the name of Guy—a white man; that as a result of the conversation with Guy "I went to a house on Fifth Street in Lumberton about 6:30 at night on Monday, the 13th of January 1958. I met James Cole at this time. James Cole and the person I know by the name of Guy said they had a couple of crosses to burn. * * * Apparently, they wanted me to write a story about it, a news story in my paper. * * * We left the house by car. James Cole and Howard Taylor were the other persons in the car in which I was riding. Howard Taylor is an employee of mine, who works with my paper in Maxton. * * * On the instructions of James Cole, we followed several cars to St. Pauls * * * we stopped in a sort of parking lot area. * * * There were several other cars. Some Klansmen in robes were there and some other cars began pulling in with Klansmen in them * * *. The defendant Cole said they were going to burn a cross in front of an Indian house near St. Pauls. Cole put on a Klan uniform and everybody had on or put on Klan robes. There were about fifteen hooded Klansmen there. The Klansmen got in cars and drove from there * * * for a mile or two, got out and burned a cross in front of a home. * * * James Cole was in uniform or regalia of the Ku Klux Klan. It was

different from the others, sort of purple * * * with two crosses on the front. * * * Cole said, regarding the cross-burning at St. Pauls, that an Indian woman lived in this house and she was having an affair with a white man; that this cross was burned as a warning to her. The cross was burned directly in front of the house * * * about 150 feet from the house. * * * James Cole and the Klansmen stayed at the house at St. Pauls where the cross was burned five or ten minutes. The Klansmen then got in cars and drove down 301 to East Lumberton. I followed along. James Cole and Howard Taylor were in my car. Over near the old mill in East Lumberton the car stopped at a vacant lot. James Cole was giving instructions. * * * They had another cross similar to the one they had near St. Pauls, six or seven feet high, and proceeded to set it up in the vacant lot. Cole said they were burning this particular cross in East Lumberton because the Klan had been informed that an Indian family had moved into East Lumberton; that the Klan had three investigators working on it, and that the burning of the cross was a warning."

This witness testified that he carried no story of this cross-burning in his paper but did make a report to the Fayetteville Observer and to the Charlotte News on Tuesday morning prior to the rally on the 18th; that he was a correspondent for those papers.

Malcolm G. McLeod testified that he was the Sheriff of Robeson County; that he knew the defendants James Cole and James Garland Martin; that on 15 January 1958 the witness had gone to Pembroke in Robeson County in response to a call from the Mayor of Pembroke. At the City Hall he found approximately thirty Indians assembled there. After talking with them, the witness, together with Captain C. R. Williams and Sergeant G. D. Dodson of the Highway Patrol, went to Marion, South Carolina, and had a talk with Cole at his residence. "I told Mr. Cole how the tension was growing in Robeson County among the Indian people with reference to the Ku Klux Klan having a rally in Maxton as advertised in the paper for the following Saturday night, January 18th * * * I told Mr. Cole that I had seen in the newspapers Tuesday afternoon and Wednesday morning about two cross-burnings as a warning to the Indian people of Robeson County."

According to this evidence and other evidence on behalf of the State, Cole was advised and urged not to hold the Klan rally at Maxton as advertised; he was told that it would be extremely dangerous to go ahead with the plans for the rally. Sheriff McLeod testified that he told Cole that he "thought his life would be in danger if he made the same speech he had been making."

Sheriff McLeod, continuing, testified that Cole did not give a definite answer as to whether he would have the meeting and rally on Saturday night; he said, "he would let us know."

Sergeant Dodson, who was present at the conference in Marion, South Carolina, testified that Cole said "he wasn't afraid; that he could call it off if he wanted to; never did say whether or not he would."

According to the State's evidence, Cole never communicated further with the officers about the meeting, but did call Bruce Roberts and inquired of him on Wednesday or Thursday before the rally on Saturday whether the Indians were mad at him and the Klan. Roberts inquired of Cole whether he was going to hold the rally, and he answered, "Yes, the Klan never backed down."

The witness McLeod further testified that he had seen Cole at other Klan meetings, "I believe that was the seventh or eighth since the opening meeting of the Klan held in Robeson County. I saw Cole in Shannon in October of 1956, one (meeting) up on 301 North of St. Pauls at Peter Frank Everett's place; saw him at Ivey's Crossroads, and one held in Wishart Township, near Allenton. The other Klan meetings I didn't go to."

This witness also testified that Cole would open the meetings with a hymn and prayer, and would then start his talk. "Practically every time he would say: 'Damn the Negro, damn the Jews * * * and the Catholics.' He would also give reference to the Pearsall Plan, said 'if the Pearsall Plan doesn't work the Smith & Wesson Plan will work.' "

This witness further testified that he had never seen the defendant Martin until the night of the rally on 18 January 1958; that he arrived at the place of the meeting between 8:00 and 8:30 with one of his deputies, Ralph Purcell; that as soon as Mr. Purcell and he stepped out of the car and started towards the field, eight or ten men with shotguns, rifles and pistols surrounded them. They identified themselves and told them they wanted to see James Cole. They were accompanied by the armed group to where the defendant Cole was working on a generator that made power for the electric lights. When they arrived there were about 200 people on the field. "I would say there were 25 or 30 members of the Ku Klux Klan there. Everybody had one or two guns—rifles—shotguns. One man had two pistols strapped to his side. * * * I didn't see any colored people, saw some white people and some Indians. * * * James Garland Martin came up to where Mr. Cole and I were standing and was talking about Mr. Cole's wife being in the car. * * * Mr. Cole said to take his wife and

children out of the car and told James Garland Martin to put them in a car out at the road. * * * I spoke to him (Cole) and I said, 'Jimmie, I told you how these people feel about this thing up here.' He said, 'Yes.' He said he wanted to talk to me in private. He said, 'I didn't want to come, but the rest wanted to come and I had to come with them, and that is the reason I am here.' * * * He then said, 'I am due some protection for a lawful assembly.' I said, 'I don't think you can call it a lawful assembly, you with men armed with guns and rifles * * *.' I told him, 'I believe if I had one hundred and fifty men, I couldn't keep the Indians of Robeson County from coming in on that field.' "

The evidence tends to show that Cole was not armed at the time he had his conversation with Sheriff McLeod, nor is there any evidence that he was ever armed. Later, members of the Indian race began arriving and lined up across the road from the field, many of them being armed.

The Sheriff left the scene, returned to his car and called by radio for additional deputies and for members of the Highway Patrol. Nine deputies and about fifteen members of the Highway Patrol responded to the call. Before the Sheriff and the additional officers returned to the scene of the rally the shooting had broken out. Several hundred shots were fired, and two people, a news reporter and a soldier bystander, were slightly injured by gunshot. The crowd was estimated to consist of from a few hundred to a thousand people. The shots fired were estimated to be anywhere from one hundred to several hundred. When the Highway Patrol and the additional police officers arrived, it took about thirty minutes to restore order; firearms in large numbers were taken from the Klansmen and from the Indians. It was about 10:30 p.m. before the field was cleared of people and automobiles. A number of cars had been damaged, the tires of one car had been slashed, and several cars had to be towed away by a wrecker.

The defendant Martin was disarmed during the riot and arrested for carrying a concealed weapon and for being drunk. He was convicted of both charges.

Sheriff McLeod had a conversation with the defendant Martin sometime during the week after the rally near Maxton, and Martin told the Sheriff he had attended the Klan rally in Randleman a week or two before the Maxton rally; that Cole was there and made a speech; that Cole said in Randleman "there were about 30,000 half-breeds down in Robeson County, and that he was going to have a

rally there and scare them up." This evidence was admitted only as against Martin.

Ralph Purcell, the Deputy Sheriff of Robeson County who accompanied the Sheriff to see Cole at the rally, testified that the community where the rally was held is made up of "colored, white, and Indian"; that ten Indian families lived in a radius of a mile of the place. This witness further testified that when Sheriff McLeod told Cole that he thought it inadvisable to hold the meeting, Cole told him he "couldn't see any reason why he should not hold it, but would tone it down some."

The jury returned a verdict of guilty as to both defendants as charged in the bill of indictment. From the sentences imposed, both defendants appeal, assigning error.

Attorney General Seawell, Assistant Attorney General Love, Bernard A. Harrell, Staff Attorney, for the State.

Charles B. Nye, Daniel M. Williams, Jr., attorneys for defendant Cole.

E. L. Alston, Jr., attorney for defendant Martin.

DENNY, J. We shall first consider certain assignments of error based on exceptions which both defendants have preserved and argued in their respective briefs.

The defendants insist that the trial court committed error in refusing to sustain their respective motions to quash the bill of indictment. They contend that while the indictment attempts to charge the defendants and their companions or associates with unlawful assembly, the indictment does not set forth any unlawful purpose or any unlawful acts which the defendants assembled to commit; that it does not charge the defendants with the necessary elements of an attempt to mutually assist each other against lawful authority. The arguments in the briefs are substantially as if the defendants were charged with engaging in a riot, when, as a matter of fact, the bill of indictment charges the defendants, and others to the State unknown, with inciting a riot.

The crimes of inciting a riot and participating in a riot are separate and distinct offenses against the public peace. Both crimes have their origin in the common law.

"Inciting to riot is not a constituent element of riot; they are separate and distinct offenses. * * * On may incite a riot and not be present or participate in it, or one may be present at a riot, and by giving support to riotious acts be guilty of riot, yet not be guilty of

inciting to riot." *Commonwealth v. Safis,* 122 Pa. Super. 333, 186. A. 177; 77 C.J.S., Riot, section 1(b), page 423.

In the case of *Commonwealth v. Egan,* 113 Pa. Super. 375, 173 A. 764, it was held that inciting to riot is a common law offense, the gist of which is its tendency to provoke a breach of the peace, though the parties first assembled for an innocent purpose. The Court said: "Giving the word 'incite' its plain and accepted meaning—to arouse, stir up, urge, provoke, encourage, spur on, goad—there can be no doubt of the offense charged * * *. Inciting to riot from the very sense of the language used, means such a course of conduct, by the use of words, signs or language, or any other means by which one can be urged on to action, as would naturally lead, or urge other men to engage in or enter upon conduct which, if completed, would make a riot. If any men or set of men should combine and arrange to so agitate the community to such a pitch, that the natural, and to be expected results of such agitation, would be a riot, that, would be inciting to riot, an offense at common law * * *." *Commonwealth v. Sciullo,* 169 Pa. Super. 318, 82 A. 2d 695.

In the instant case, the bill of indictment does charge that the defendants, while armed with certain weapons, did assemble near the Town of Maxton for the common purpose of conducting a meeting and rally of the so-called Knights of the Ku Klux Klan, with the common intent to preach racial dissension and to coerce and intimidate the populace. We hold that the indictment adequately charges an unlawful purpose and that the case of *S. v. Baldwin,* 18 N.C. 195, relied on by the defendants, is distinguishable and not controlling on the charge contained in the bill of indictment in this case.

The defendants were not convicted of unlawful assembly or riot, but of inciting to riot. Naturally, they could not have been convicted of inciting to riot unless the incitement resulted in a riot. "It must be shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, making threatening speeches, turbulent gestures, or the like, or being in disguise * * *. In any case, it is well settled that it is not necessary that personal violence be committed * * *." Wharton's Criminal Law and Procedure (1957 Ed.), Vol. 2, section 864, page 731; *S. v. Lustig,* 13 N.J. Super. 149, 80 A. 2d 309. This assignment of error is overruled.

The defendants assign as error the failure of the trial court to sustain their motions for judgment as of nonsuit at the close of the

State's evidence, which motions were renewed after the defendants announced they would offer no evidence.

The overwhelming weight of authority seems to be to the effect, in the absence of a statute to the contrary, that persons may assemble together for a lawful purpose, but if at any time during the meeting they act with a common intent, formed before or during the meeting, to attain a purpose which will interfere with the rights of others by committing disorderly acts in such manner as to cause sane, firm and courageous persons in the neighborhood to apprehend a breach of the peace, such meeting constitutes an unlawful assembly. See Anno: Unlawful Assembly, 58 A.L.R. 751, and 93 A.L.R. 737, where the authorities in support of this view, from many jurisdictions, are assembled.

In the case of *People v. Burman, et al*, 154 Mich. 150, 117 N.W. 589, 25 L.R.A. (NS) 251, the defendants were convicted of a breach of the peace in violation of a city ordinance. The defendants had marched through the streets of the City of Hancock, Michigan, displaying red flags. They had been warned that the display of such flags would cause a breach of the peace and riots. The Court, in upholding the convictions, said: "The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Had they such right, when they knew that the natural and inevitable consequence was to create riot and disorder? Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would excite fears and apprehension, and that by displaying it they would provoke violence and disorder. Their right to display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity. It is idle to say that the public peace and tranquillity was disturbed by the noise and violence, not of the defendants, but of those whose sentiments they offended. When defendants deliberately and knowingly offended that sentiment, they were responsible for the consequences which followed, and which they knew would follow. It is also idle to say that these others were wrongdoers in manifesting in the manner they did their resentment at defendants' conduct. This merely proves that they and defendants were joint wrongdoers; that they, as well as defendants, violated the ordinance in question. The object of this proceeding is not to redress the grievance of these other wrongdoers, but it is to redress the grievance of the public whose rights they and defendants jointly invaded. The guilt of their associate wrong-

doers does not lessen defendants' responsibility. It is sufficient to say that defendants by their conduct did 'aid, countenance, and assist in making a riot, noise, and disturbance, and therefore violated ordinance No. 10 of the City of Hancock.' "

In the case before us, the evidence supports the view that the so-called Knights of the Ku Klux Klan, under the leadership, control and direction of the defendant Cole, did by inflammatory speeches and cross-burnings, and reports thereof published in the newspapers, incense the Indians of Robeson County to such an extent that the proposed rally at Maxton would tend to provoke a breach of the peace and incite to riot. In fact, Cole was so advised before and after the rally was underway. Moreover, Cole and Martin knew that the purpose of the rally was to incense, intimidate, and scare the Indians. There is evidence to the effect that when Sheriff McLeod arrived at the scene of the planned rally on Saturday night, 18 January 1958, he advised Cole not to try to hold the rally; that Cole said "he couldn't see any reason why he should not hold it, but would tone it down some." This we think is tantamount to an admission by Cole that he originally intended to make statements that would be resented by the Indians and likely to cause them to riot. Otherwise, why "tone it down"? As to Martin, according to the evidence admitted against him, Cole had told him about a week or two before the Maxton rally that there were about 30,000 half-breeds in Robeson County and he was going to have a meeting and try to "scare them up." Therefore, it is evident that Martin knew the purpose of this particular meeting.

In light of the evidence disclosed on the record on this appeal, there can be no justification for the defendants and their associates to go to the rally at Maxton on 18 January 1958, armed with rifles, shotguns, pistols and other weapons, some concealed and others unconcealed, if their intent and purposes were legitimate and peaceful. Such show of armed defiance was incompatible with peaceful and lawful purposes. Moreover, such conduct within itself would be calculated to cause a breach of the peace in any community, particularly in a county where the defendant Cole had been preaching racial dissension and hatred and conducting cross-burnings for the purpose of frightening certain Indian families in the community. If any of the Indian residents of Robeson County are violating the law in any respect, it is the duty and responsibility of the duly constituted law enforcement officers of that county to prefer proper charges against them and to see that they are dealt with according to law (and this

we are confident they will do), but there is nothing in our Constitution or laws that authorizes the Ku Klux Klan or its officers to substitute themselves for the law enforcement officers of a community or the courts of the State.

In our opinion, when all the evidence adduced in the trial below is considered in the light most favorable to the State, as it must be on a motion for judgment as of nonsuit, it is sufficient to carry the case to the jury as to both defendants, and we so hold. *S. v. Block*, 245 N.C. 661, 97 S.E. 2d 243; *S. v. Burgess*, 245 N.C. 304, 96 S.E. 2d 54; *S. v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768.

The defendant Martin assigns as error the admission, over objection, and exceptions duly entered, of certain evidence against him with respect to the conversations between the defendant Cole at his residence in Marion, South Carolina, Sheriff McLeod of Robeson County, and certain members of the State Highway Patrol, although Martin was not present at the time. This defendant likewise assigns as error the evidence admitted against him of certain statements made by Cole, not in the presence of the defendant Martin, as to why he had the cross-burnings at St. Pauls and East Lumberton the latter part of the week before the Maxton rally. We think the evidence as to the contents of the conversations in Marion, South Carolina and as to why the crosses were being burned in Robeson County was inadmissible as to Martin and should have been excluded as to him, and the failure to do so entitles him to a new trial. *S. v. Franklin*, 248 N.C. 695, 104 S.E. 2d 837; *S. v. Kluttz*, 206 N.C. 726, 175 S.E. 81; *S. v. Simmons*, 198 N.C. 599, 152 S.E. 774; *S. v. Green*, 193 N.C. 302, 136 S.E. 729.

The defendant Cole's assignments of error Nos. 10 through 18 are based on his exceptions to the court's charge. Assignment of error No. 10 is directed to the court's definition as to what constitutes a riot. The court pointed out that there is no statutory definition of riot in this State, but that it has been defined by our Supreme Court to be, "a tumultuous disturbance of the peace by three persons or more assembled together of their own authority, with intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution, in terrific and violent manner, whether the object in question be lawful or otherwise. Indictment for riot always must charge the defendants with unlawful assembly, mutual intent to assist one another, and execution of the intent by overt acts, before they can be convicted." This definition was taken almost verbatim from the opinion of this Court in the case of *S. v. Stalcup, et al*, 23 N.C. 30, and approved in *S. v. Hoffman*, 199 N.C. 328, 154 S.E. 314.

It was not only proper but incumbent upon the court to define the crime of riot. It was not the crime for which this defendant was tried, but the crime which he was charged with inciting. Unless the jury could find from the evidence that a riot occurred, it would not have been justified in finding this defendant guilty of inciting a riot. This assignment of error is without merit.

The defendant Cole's exception No. 45, argued under assignment of error No. 12, is to the instruction given by the court with respect to the right to bear arms. The pertinent part of the instruction was as follows: " * * * the Constitution and laws of this State guarantee to a person the right to bear arms and right to assemble peaceably for the purpose of registering their grievances. I instruct you that does not give any individual, or any body of individuals, the right to bear arms for unlawful purposes in any respect anywhere."

This Court said in the case of *S. v. Huntley,* 25 N.C. 418: "The bill of rights in this State secures to every man, indeed, the right to 'bear arms for the defense of the State.' While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employs those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested. * * * A gun is an 'unusual weapon' wherewith to be armed and clad. No man amongst us carries it about with him, as one of his everyday accoutrements—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State as an appendage of manly equipment * * *. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people." This exception is without merit.

Exceptions Nos. 46 and 47, argued under this same assignment of error, are to the following portions of the court's charge: "If you find from the evidence beyond a reasonable doubt that on this occasion they went to this place for an unlawful purpose, armed with deadly weapons, pistols, rifles, guns, blackjacks, for the purpose of conducting a meeting, despite any opposition that might develop, and putting down by force any resistance to such meeting and to mutually assist each other in such conduct, that would constitute unlawful assembly; and if they took steps to carry it into execution in a violent manner, would constitute a riot. * * * (Exception No. 46)

"It makes no difference whether the original purpose of assembly

be lawful or unlawful. If it be for a lawful purpose and after having so assembled they change their plan or mind about it and adopt an unlawful purpose of assembly, that which has been a lawful assembly is converted into unlawful assembly, and if that be done by mutual consent in carrying out the design or putting the design into execution, with mutual intent to assist each other against any opposition, and violence and tumult result, that would constitute unlawful assembly, and if you so find beyond a reasonable doubt you will satisfy the law with respect to that element of the offense alleged." (Exception No. 47)

We do not construe these instructions as prejudicial to the defendant. They do not eliminate the necessity for an unlawful assembly, which must be charged and proven where one is tried on a bill of indictment for participating in a riot. *S. v. Hoffman, supra.*

In *S. v. Stalcup, supra,* an unlawful assembly was charged, but there was no charge that the parties assembled for the purpose of doing a lawful act in an unlawful manner or of doing an unlawful act. However, the authorities hold an unlawful assembly may be created deliberately or by chance. In any event, the unlawful assembly must precede the conduct which constitutes participation in a riot. In considering what constitutes a riot or civil commotion, this Court, in *Spruill v. Insurance Co.,* 46 N.C. 126, said: "A riot is where three or more persons actually do an unlawful act, either with or without a common cause. To this, Chitty, in his note, says, 'The intention with which the parties assemble, or, at least, act, must be unlawful,' and this qualification of Mr. Chitty is recognized by this Court in the case of *S. v. Stalcup,* 23 N.C. 30."

It is said in 77 C.J.S., Riot, section 1, page 422: "Inciting to riot. The gist of this offense is its tending to provoke a breach of the peace, even though the parties may have assembled in the first instance for an innocent purpose, and it is an offense at common law. It means such a course of conduct, by the use of words, signs, or language, or any other means by which one can be urged to action, as would naturally lead or urge other men to engage in, or enter on, conduct which, if completed, would make a riot."

In 46 Am. Jur., Riots and Unlawful Assembly, section 10, page 103, we find the following: "An unlawful assembly is a constituent and necessary part of the offense of riot at common law, and must precede the unlawful act which completes the offense. Very evidently therefore, presence of the essential elements of an unlawful assembly is essential to a conviction for riot, and should be considered in connection with prosecutions for riot. Neither the time nor the place of

the assemblage is material in determining whether or not the assemblage constitutes a mob * * * although the place of the riot may be material in determining liability as between the county and a municipality. Likewise, the fact that the group of persons do not voluntarily come together does not prevent their action from being that of a mob; nor is the primary purpose for which they assemble material, if they in fact form and execute an unlawful purpose after they are brought together." These exceptions are overruled.

We have carefully reviewed the remaining exceptions and assignments of error and, in our opinion, no error has been made to appear that would justify disturbing the verdict below as to the defendant Cole.

As to the defendant Cole—No Error.

As to the defendant Martin—New Trial.

L. W. WALL AND WIFE, LOUISE WALL, v. WENDELL TROGDON AND TROGDON FLYING SERVICE, INC.

(Filed 25 March, 1959.)

1. Aviation § 4: Trespass § 1f—

The flying of a plane over the land or pond of another does not constitute a trespass unless the flight is at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property below. G.S. 63-13.

2. Same—

The burden of proof is upon the party asserting a violation of G.S. 63-13, and evidence merely that the plane engaged in crop spraying operations seen flying over the land of plaintiff at an altitude of 100 feet or more, without evidence that such flight disturbed any person on the ground or was imminently dangerous to persons or property, is insufficient to make out a cause of action for trespass.

3. Negligence § 19b(1)—

Plaintiff must show a failure on the part of defendant to exercise proper care in the performance of some legal duty which he owed plaintiff under the circumstances, and that such negligent breach of duty was a proximate cause of the injury, which is that cause which produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the circumstances.

4. Same—

Plaintiff must establish every fact essential to constitute actionable negligence as a reasonable probability arising from a fair consideration of the evidence, and not as a mere guess or speculation, otherwise nonsuit is proper.

5. Aviation § 4: Negligence § 19b(1)— Evidence held insufficient to show that plaintiff's fish died as result of any negligence in operation of crop spraying plane.

Plaintiff based his action in negligence on the contention that the cut-off on the crop spraying apparatus on the plane was defective so that the plane in spraying crops on adjacent land emitted the poisonous spray while flying over plaintiff's land in banking and turning, and that fish in plaintiff's pond died shortly thereafter. Plaintiff offered no evidence that the spray actually touched his land, and his expert witness, who examined the dead fish, testified he ruled out several possible causes of death and concluded that the only possible cause of death he could think of would be poison. *Held:* The evidence is insufficient to show a causal connection between the negligence complained of and the death of plaintiff's fish, and therefore nonsuit was correctly entered.

6. Appeal and Error § 38—

Assignments of error not discussed in the brief or supported by any authority are deemed abandoned.

APPEAL by plaintiffs from *Olive, J.*, at February 1958 Civil Term of RANDOLPH. Docketed and argued at Fall Term 1958 as No. 524.

Civil action to recover property damage by alleged trespass and negligent acts of defendants in operation of airplane in dusting and spraying crops for hire.

The pleadings admit that the plaintiffs are the owners of a farm in Liberty Township, Randolph County, North Carolina, adjacent to the Guilford County line; that the corporate defendant is a North Carolina corporation, engaged in the business of dusting and spraying crops for hire, owning the airplane therein referred to; and that the individual defendant is an officer, and one of the principals of the corporate defendant, and pilot of the said airplane flown "on the times and occasions * * * complained of," that is, "on the date in question."

Plaintiffs further allege substantially the following:

1. That they have caused dams to be constructed on their premises, thereby creating two ponds or lakes of approximate area of one acre and 1.2 acres, respectively,—one known as the east lake and the other, the west lake, both of which were stocked with fish, principally bass and bream—one being available for commercial fishing.

2. That defendant Trogdon, flying an airplane belonging to corporate defendant, on or about August 8, 1956, was engaged in dispensing "rothane spray" over lands of Frank and Capp Brown, and on or

about August 10, 1956, was engaged in spraying the land belonging to Noah Hester, all adjacent to lands of plaintiffs; that on the former occasion the airplane was operated "extremely close to the ground," turning over and across the lands of plaintiffs and over the smaller of the two lakes; and on the latter occasion was likewise flown over lands of plaintiffs,—banking over the 1.2-acre lake; and on both occasions dispensing "the poisonous rothane insecticide spray," over the waters of plaintiffs' lakes, as a result of which the fish belonging to plaintiffs were killed and the waters rendered unsafe for use in any way, or for any purpose by either man or animal.

3. That on the occasions hereinabove referred to and complained of the spraying mechanism of the defendants' airplane was defective in that it would not shut off the poisonous and deadly gas being dispersed by it; and the defendants knew, or, by the exercise of reasonable care, should have known that said device was defective, and that a dispersal of said poisonous insecticide could endanger or be likely to endanger the life and property of persons on the ground.

4. That on the occasions hereinabove referred to and complained of defendants trespassed over the lands and waters of the plaintiffs and caused them great damage in the pollution of their waters and destruction of the marine life subsisting in them.

5. That in the conduct of their spraying operations on the occasions complained of defendants violated the provisions of G.S. 63-13, in that they flew at an extremely low altitude over the lands and waters of plaintiffs so as to interfere with the use of them.

6. That as a result (1) of the wrongful and unlawful acts of defendants in trespassing over the lands and waters of plaintiff, and (2) of the negligence of defendants in maintaining a defective apparatus on the airplane, plaintiffs have been damaged in large amount.

Defendants answering deny that they have trespassed on the land and waters of plaintiffs or that they have been negligent.

Upon the trial in Superior Court L. W. Wall, plaintiff, testified: "My wife and I are owners of a farm * * * I have done business with Trogdon. I had 2.2 acres of tobacco sprayed. I had occasion to use Trogdon Flying Service in the year 1956, when I had an acre and two-tenths on one farm and the adjoining farm had one acre,—2.2 acres in all. As to the location of my two lakes on this farm, one is located near the northeast boundary; the other just across the line east * * * The west lake is the older * * * constructed in 1952 and stocked with bream that Fall and with bass in the Spring of 1956. The east lake was constructed in 1954, and stocked with bream the following Fall 1954, and with bass the following Spring. We have fished the

west lake some. The east lake has never been fished * * * . On the occasion of August 8, the Trogdon Flying Service was spraying the Brown farm, which is located at the southeast corner of my farm * * * Mr. Elisha Stevenson farms the Brown land. On the occasion of the spraying of the Stevenson tobacco on the Brown land, I was at the northeast corner of my farm. Some spraying had been done on my land that same day. We stayed in the edge of the woods while he was spraying the Stevenson tobacco. I was working in tobacco on my farm. I had tobacco in the field east of my east lake. We had tobacco on the east side of that lake and also on the northeast corner of the farm * * *.

"On the occasion when the Stevenson tobacco was being sprayed, the woods were partially between me and my east lake, and the only time I could see the airplane which was spraying the Stevenson tobacco was when it came over the pines. There is a pine area that lays on the north side of the Brown field and on the south side of the lake.

"On that occasion, I saw the plane come up and make a circle and go back and spray again,— come back up two or three times. Plane made this circle to go back on my land. The plane came up here and around over this lake as it sprayed the Stevenson tobacco on the Brown land * * * I saw it come up and bank around three times * * * which was around 10 o'clock. This was on the east lake. I had occasion to go to my lake in the afternoon about 3:00 * * * When I went to the lake, the fish were jumping up; also tadpoles. The fish were jumping mostly around the edge of the water,— noticed this kind of oily substance on the water * * * I saw the fish jumping. Some of them had done turned over, floating on top of the water. They were dead. The day of the week was Wednesday. On that day I did not personally have contact with the defendants, but my wife did * * * .

"On the Friday following this particular Wednesday, I was working in this field, east lake, and I saw the Trogdon airplane on that occasion * * * he was spraying Noah Hester's land * * * (it) lies north of my farm and * * * the railroad and highway * * * . My west lake is located approximately 300 or 350 yards south of the highway and railroad. On this particular occasion * * * the airplane followed a course over the railroad and banked around somewhere at this lake and back north. The Trogdon airplane flew over another portion of my farm, coming south, and came along here and back over the railroad. I have not given Trogdon Flying Service or Wendell Trogdon any permission to fly over my land and lake. I had tobacco on both sides of the east lake. I did not have Trogdon spray that tobac-

co * * * the lake on the west side * * * there wasn't anything wrong with the fish in that lake prior to the time I saw the airplane bank over it August 10 * * * on Saturday afternoon * * * I found they were dead."

Then on cross-examination, plaintiff L. W. Wall testified: " * * * We had advised him not to fly over the lake"; that the plane was about 75 feet high; that the pines on his land run over 50 or 60 feet; that he didn't think the plane could have been as high as 150 feet or even 100 feet; that on August 10 it was flying around 100 feet; that he wouldn't say it passed over the (west) lake; that as to what killed the fish in the lake, all he knew was that they died after the plane flew over; that he couldn't say what killed the fish; and that he didn't know who was flying the plane.

And on recall plaintiff L. W. Wall testified that he took dead fish from the west lake to Dr. Lowry of State College, and was present when he examined them.

Mrs. L. W. Wall, plaintiff, testified that she "saw the airplane on the east lake"; that she "saw the plane come up over the pond"; that she saw her pond the next day and observed that the fish were jumping; and that some of the fish were already dead. And on recall she testified that she and Mr. Wall employed the Trogdon Flying Service for tobacco crop spraying— that she actually ordered the service by telephone.

Dr. E. M. Lowry, as witness for plaintiff, was qualified as an expert fishery biologist. He testified that he examined some fish brought to him by plaintiff (plaintiff had testified that the fish were from his pond) to determine why they had died; that as a result of his examination he had ruled out several possible causes; and that "the next possibility that we usually consider is a case of poisoning, and I concluded that the only possible cause of death that I could think of would be poison."

Edward Kime as witness for plaintiffs testified that on August 8, 1956, he was working at his farm across the railroad to the north of the Wall farm; that he saw the plane make a right turn, and bank over the woods towards the east pond; that he saw a stream of something coming out from under the wings; that at the time he saw the stream of solution coming out of the plane, it was flying over Mr. Wall's; that the east lake with respect to the patch of woods was to his left; that the lake was behind the patch of woods; that the plane banked over the woods and went down behind them; that on the next afternoon he had occasion to see the lake; that he saw several dead fish there; that a lot were jumping up out of the water; that he

did not know anything about the other (west) pond; and that when the plane sprayed Mr. Wall's tobacco, it did not spray in the vicinity of his pond.

Wesley Wall, son of and witness for plaintiffs, testified he was working with Mr. Edward Kime in his tobacco; that he saw the plane; that he saw a fluid coming from under the fuselage; that he saw the east lake that afternoon; and that he saw the fish jumping around the edge and on the top not doing anything. On cross-examination he testified that the plane just cleared the tree tops good at the east lake —about 75 or 100 feet high; that the trees were about 30 to 50 feet high; that he didn't know what was coming out of the plane; that it was a liquid; that the plane was not using dust; that "it was spreading out like liquid;" and that he did not examine the substance. On re-direct examination he testified that he did see a substance coming out of the plane and that he could see it was under the bottom of the plane, maybe a little to the left.

Plaintiffs rested their case.

Defendants' motion for judgment as of nonsuit was granted. Plaintiffs appeal therefrom to Supreme Court and assign error.

Miller & Beck, John Randolph Ingram for plaintiffs, appellants.
Walker & Melvin for defendants, appellees.

WINBORNE, C. J. It is seen that plaintiffs undertake to ground their alleged cause of action on (1) trespass and (2) actionable negligence. Even so, when the evidence shown in the record of case on appeal is taken in the light most favorable to plaintiffs, and giving to them the benefit of every reasonable inference therefrom, the case in both aspects is left in a state of uncertainty and rests upon possibility.

First, in respect to trespass, it is noted that the General Assembly of 1929 passed an act, Chapter 190, entitled "An Act Concerning Aeronautics and the Regulation of Aircraft, Pilots and Airports," Section 2 (G.S. 63-11) of which in pertinent part reads: "Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States"; and Section 3, G.S. 63-12, "The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4."

And in Section 4 of the 1929 Act, now G.S. 63-13, pertaining to lawfulness of flight, the General Assembly further declared: "Flight in

aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath * * * ."

This section has been amended in Chapter 1001 Session Laws 1947 by inserting after the word "be" and before the word "imminently" the following words: "Injurious to the health and happiness, or."

So that it is now lawful for aircraft to fly over the lands and waters of this State, "*unless* at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or *unless* so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath * * * ." (Emphasis supplied)

It is, therefore, clear that an aircraft can lawfully fly over the land and water of this State, unless done in violation of the provisions of G.S. 63-13, set forth above. The burden of proof is upon the one asserting such violation. And when testing the sufficiency of the proof the causal connection is deficient.

As to actionable negligence: In an action for recovery of damages for injury resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which he owed plaintiff under the circumstances in which they were placed; and, Second, that such negligent breach of duty was the proximate cause of the injury— a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. See *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406, and cases cited. Indeed there must be legal evidence of every material fact necessary to support a verdict, and the verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C.J. 51. *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730; *Denny v. Snow,* 199 N.C. 773, 155 S.E. 874; *Shuford v. Scruggs,* 201 N.C. 685, 161 S.E. 315; *Rountree v. Fountain,* 203 N.C. 381, 166 S.E. 329; *Allman v. R.R.,* 203 N.C. 660, 166 S.E. 891; *Cummings v. R.R.,* 217 N.C. 127, 6 S.E. 2d 837; *Mercer v. Powell,* 218 N.C. 642, 12 S.E. 2d 227; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661, and numerous other later cases.

If the evidence fails to establish either one of the essential ele-

ments of actionable negligence, the judgment of nonsuit must be affirmed.

In the light of these principles applied to the evidence in the case there is no causal connection between the death of the fish in the lakes and the operation of the aircraft.

In the first place there is no evidence as to elements constituting the spray used in spraying the crops. If there were poison in the spray there is no evidence that it was poisonous to fish. If it were poisonous to fish there is no evidence that the fish died from the poison. Whatever the oily substance seen on the waters of one of the lakes was, there is no evidence as to what it was, or the source from which it came. The testimony of the expert fishery biologist is purely speculative, and founded on possibilities. Indeed the element of proximate cause is missing.

Actionable trespass to land is not made out by merely showing that defendant's airplane crossed the air spaces above it at a low level. Plaintiff must show that such flight was "at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water is put by the owner," or that such flight was "so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath." Nor is actionable trespass to land made out by merely showing that in crossing the air space above the land a liquid streamed from the airplane, without showing that such liquid made an entry upon the lands or waters of the plaintiff, i.e., landed on plaintiffs' property rather than somewhere else.

Other assignments of error are not discussed, nor is there citation of authority in brief filed in this Court. Hence they are deemed abandoned. See Rule 28 of the Rules of Practice in Supreme Court.

The judgment as of nonsuit is

Affirmed.

JERRY O. WILSON v. JESS WILLARD CAMP AND BILLIE LEE CAMP.

(Filed 25 March, 1959.)

1. Appeal and Error § 1—

An affirmative finding on the issue of contributory negligence precludes recovery by plaintiff, and therefore if none of plaintiff's exceptions relating to that issue can be sustained, other exceptions of plaintiff need not be considered.

2. Negligence § 19c—

In determining the sufficiency of the evidence to require the submission of the issue of contributory negligence, the evidence must be considered in the light most favorable to defendant and the evidence favorable to plaintiff disregarded.

3. Same—

If diverse inferences may be drawn from the evidence on the issue of contributory negligence, the issue is for the determination of the jury.

4. Automobiles § 42g—

Evidence tending to show that plaintiff, traveling west, approached an intersection in the northern lane of a four-lane highway at a high and unlawful rate of speed, that he saw a car, headed in the opposite direction, waiting to make a left turn into the intersecting road, that the other car, after waiting for two other west-bound cars to clear the intersection, proceeded to make a left turn and had cleared the inside west-bound lane and was struck by plaintiff's car in the north lane, is sufficient to require the submission of the issue of contributory negligence to the jury.

5. Automobiles § 38—

Testimony of witnesses that plaintiff's car passed them traveling 70 miles per hour less than a quarter of a mile from the scene of the accident, with further testimony by the witnesses that the speed continued until the car passed out of sight some 400 feet from the accident, is competent as evidence tending to show plaintiff's excessive speed at the time of the accident.

6. Automobiles § 8—

Where plaintiff testifies that he saw defendant's car waiting at an intersection to make a left turn, plaintiff's testimony discloses that he had notice of the intended movement, and therefore defendant's failure to give the hand signal for such turn cannot be a proximate cause of the subsequent collision.

7. Negligence § 5—

The omission to perform a duty cannot constitute one of the proximate causes of an accident unless the doing of the omitted duty would have prevented the accident.

8. Automobiles § 46—

The charge in this case on the respective duties of motorists at intersections, proximate cause and contributory negligence, *held* free from error.

APPEAL by plaintiff from *Fountain, S. J.*, August, 1958 Term, GASTON Superior Court.

Civil action to recover for personal injury alleged to have been caused by the defendant, Billie Lee Camp, minor son of Jess Willard

Camp, by reason of the negligent manner in which the son operated his father's family purpose automobile. The defendants, by answer, denied negligence, pleaded contributory negligence, and set up a counterclaim for injuries to Billie Lee Camp and damage to the automobile.

The conflicting claims grew out of an automobile collision at the intersection of U. S. Highway No. 29 and the Cramerton-McAdenville Road west of Charlotte. No. 29 is an east and west arterial paved highway, 40 feet wide. Its two north lanes carry west-bound and its two south lanes carry east-bound traffic. The Cramerton-McAdenville Road crosses No. 29 approximately at right angles. At the time of the accident an electric traffic control light was in operation at the intersection. The evidence, in material part, tended to show the following: On July 12, 1957, at about 9:30 p. m., the plaintiff and the minor defendant had an automobile collision at the intersection resulting in injury to both drivers and damage to both vehicles. The accident occurred in the north traffic lane of No. 29 as the plaintiff attempted to pass through the intersection, driving west. From the intersection eastward, visibility was limited to about 400 feet by an elevation or hill.

The plaintiff testified that as he approached the intersection from the east at about 35 miles per hour, he saw the Camp car stopped in one of the south lanes at the intersection. It attempted to make a left turn across his lane of traffic but he saw the movement too late to apply his brakes and avoid the collision.

The defendant, Billie Lee Camp, testified he approached the intersection from the west on No. 29, intending to make a turn across the north lanes and enter the McAdenville Road. He waited until two west-bound cars had passed, looked east and failed to see any other approaching traffic, gave a proper hand signal for a left turn, but before he was able to complete his intended movement into the McAdenville Road, the plaintiff's car came in sight over the hill to the east and approached the intersection at such speed that he was unable completely to get out of the intersection before the plaintiff's car struck him.

Two defendants' witnesses, Talley and Johnston, testified they approached the intersection from the east on No. 29 at about 50 miles per hour. When they were about a quarter of a mile or less from the intersection, a dark Chevrolet, also going west, passed them at a speed of 70 or more miles per hour. They observed it until it was about 400 feet from the intersection and it did not reduce speed. They were the first to arrive at the scene of the accident. Talley testified: "To my knowledge that was the same car that was involved in the

accident. . . . I would say I last sighted him just about at the blinker lights, 400 feet from the intersection."

The plaintiff made a motion to strike the evidence of Johnston and Talley, and excepted to the court's refusal to grant the motion.

At the close of all the evidence, the plaintiff moved to dismiss the defendants' counterclaim, and excepted to the court's refusal to allow the motion. The court submitted issues of negligence, contributory negligence, and damages (as to each of the parties.) The plaintiff excepted to the submission of the issue of contributory negligence. The jury found the issue of negligence against the defendants and the issue of contributory negligence against the plaintiff, and left the other issues unanswered. From the judgment that neither party recover, the plaintiff excepted and appealed.

Childers & Fowler, By: Henry L. Fowler, Jr., for plaintiff, appellant.

Mullen, Holland & Cooke, By: James Mullen for defendants, appellees.

HIGGINS, J. The findings of negligence against the defendants and contributory negligence against the plaintiff settled the controversy. *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589; *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357; *Lyerly v. Griffin*, 237 N.C. 686, 75 S.E. 2d 730. Last clear chance not being involved, the plaintiff must remove the bar of contributory negligence in order to get back into court. He can do this only by showing prejudicial error on that issue. Errors, if committed on other issues, are nonprejudicial. We make this statement not suggesting other errors appear, but by way of explanation of our failure to discuss the assignments with respect to them.

By assignment of error No. 5, the plaintiff contends the court committed error in submitting the issue of contributory negligence because of the lack of evidence to support it. In passing on the question, we must take the evidence in the light most favorable to the defendant, disregarding that which is favorable to the plaintiff. "If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to plaintiff and others to the defendant, it is a case for the jury to determine." *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33; *Gilreath v. Silverman*, 245 N.C. 51, 95 S.E. 2d 107; *Battle v. Cleave*, 179 N.C. 112, 101 S.E. 555.

In this case, Camp testified he waited at the light for two cars to pass, saw no other traffic, and while he was in the act of crossing the two north traffic lanes to enter the McAdenville Road, the plain-

tiff's automobile crossed the hill at high speed and crashed into him before he was able to clear the intersection. His witnesses, Talley and Johnston, testified the dark Chevrolet did not reduce speed of 70 miles or more per hour. The plaintiff admitted he did not reduce speed for the intersection; that he saw the defendants' automobile stopped there, "getting ready to make a left-hand turn . . . I observed this car before the collision a couple of seconds. When I first saw the Camp car he was parked in the outside lane making a left turn."

The fact that defendant, from his stationary position in one of the south lanes, had time to cross over the inside lane and into the outside one in front of plaintiff, permits the inference the defendant was first in the intersection. It permits the inference that plaintiff's speed was so great that he could not stop. The physical evidence with respect to the position of the vehicles at the time of and after the collision, and the damage to them offer nothing to refute these inferences. We conclude, therefore, the evidence of contributory negligence was sufficient to go to the jury. Assignment of error No. 5 is not sustained.

By assignments of error Nos. 1 and 2, the plaintiff contends the court committed error in admitting the evidence of Talley and Johnston as to the speed of the automobile which passed them less than one-quarter of a mile from the scene of the accident He relies on *Barnes v Teer,* 218 N.C. 122, 10 S.E. 2d 614, as authority for his position. In that case, however, the evidence of speed was excluded because the observer saw the vehicle three or four miles from the scene of the accident. Here, the speed continued until the car passed out of sight at the blinker warning lights 400 feet from the accident. The evidence of Talley and Johnston was clearly admissible. *State v. Peterson,* 212 N.C. 758, 194 S.E. 498; *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394; *State v. Leonard,* 195 N.C. 242, 141 S.E. 736.

By his assignments Nos. 6, 7, and 8, the plaintiff challenges the charge relating to the respective duties of motorists at intersections. Particularly by assignment No. 6, he objects to the charge that if the plaintiff had notice of the defendant's intention to make a left turn at the intersection "and if he was given that notice at such distance from the intersection that he could, in the exercise of ordinary care, control his vehicle accordingly," the failure to give the hand signal would not be a proximate cause of the injuries. Under the facts in the case, the charge is free from error. The purpose of a hand signal is to give notice. If a complaining motorist has due notice otherwise, the purpose of the hand signal has been served. In this case the plaintiff testified: "The Camp car was in the second lane going tow-

ards Charlotte, getting ready to make a left turn." Of a similar situation, where notice was given by circumstances but not by hand signal, *Justice Ervin,* in the case of *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881, had this to say: " . . . this being so, the evidence warrants the inference there was no causal connection whatever between the failure of the plaintiff to give a hand signal and the subsequent collision. The omission to perform a duty cannot constitute one of the proximate causes of an accident unless the doing of the omitted duty would have prevented the accident." *Coach Co. v. Fultz,* 246 N.C. 523, 98 S.E. 2d 860; *Barker v. Engineering Co.,* 243 N.C. 103, 89 S.E. 2d 804; *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912. The charge as to the respective duties of motorists at intersections was in accord with, and much of it actually quoted from, the following cases: *Coach Co. v. Fultz, supra; Mallette v. Cleaners,* 245 N.C. 652, 97 S.E. 2d 245; *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1; *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Harrison v. Kapp,* 241 N.C. 408, 85 S.E. 2d 337; *Hamilton v. Henry,* 239 N.C. 664, 80 S.E. 2d 485; *Finch v. Ward,* 238 N.C. 290, 77 S.E. 2d 661; *Hawes v Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17; *Matheny v. Motor Co.,* 233 N.C. 673, 65 S.E. 2d 361; *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115.

Finally, by assignment No. 9, the plaintiff alleges error in the definition of proximate cause and reasonable foreseeability as a constituent element thereof. On this subject the court charged in accordance with the rules as approved in *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *White v. Lacey, supra; Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; and *Cooley v. Baker, supra.* The charge on the issue of contributory negligence was free from error.

The jury found the accident resulted from the negligence of both parties. Neither is responsible to the other for the resulting damage Both having been found at fault, the law leaves them where they left themselves

No Error.

STATE v. BILLY WAYNE DISHMAN.

(Filed 25 March, 1959.)

1. Appeal and Error § 19: Criminal Law § 154—

While the form and sufficiency of an assignment of error must de-

pend largely upon the special circumstances of the particular case, it is required that the assignment specifically point out the alleged error without requiring a voyage of discovery through the record, and it should, ordinarily, set out so much of the evidence or the charge or other matter or circumstance relied upon, as to clearly present the matter to be debated.

2. Criminal Law § 71—

Statement by investigating officers to the effect that they wanted to find out the truth and that it would be better if defendant told what happened, does not render a confession involuntary, and where the record discloses that no hope for lighter punishment was held out to defendant and that defendant did not act through fear, duress, intimidation or inducement, the record supports the court's findings that the admissions were voluntary and therefore competent.

PARKER, J., concurring in result.

APPEAL by defendant from *Burgwyn, E. J.*, September, 1958 Term, GASTON Superior Court.

At the time of arraignment the solicitor announced in open court: "The State would not seek conviction of the capital crime of rape, but of such lesser offense as the evidence in the case might justify." Upon the issues raised by the plea of not guilty, the court and jury heard numerous witnesses both for the State and the defendant. The latter testified in his own defense. The jury returned a verdict: "Guilty of an assault on a female, he being a male person over the age of 18 years." From the judgment imposing a jail sentence "for not less than nine nor more than 12 months," the defendant appealed.

Malcolm B. Seawell, Attorney General, Harry W. McGalliard, Assistant Attorney General, for the State.

Mullen, Holland & Cooke, By: F. P. Cooke for defendant, appellant.

HIGGINS, J. From time to time for more than 50 years, the Court has stated the minimum requirements for valid assignments of error. "Just what will constitute a sufficiently specific assignment must depend very largely upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary."

Thompson v. R.R., 147 N.C. 412, 61 S.E. 286. "What the Court desires, and, indeed, the least any appellate court requires, is that the exceptions which are *bona fide* presented to the court for decision, as the points determinative of the appeal, shall be stated clearly and intelligently by the assignment of errors, and not by referring to the record, and therewith shall be set out so much of the evidence, or of the charge, or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated." *Greene v. Dishman*, 202 N.C. 811, 164 S.E. 342; *Rogers v. Jones*, 172 N.C. 156, 90 S.E. 117; *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829; *Allen v. Allen*, 244 N.C. 446, 94 S.E. 2d 325; *Tillis v. Cotton Mills*, 244 N.C. 587, 94 S.E. 2d 600; *Armstrong v. Howard*, 244 N.C. 598, 94 S.E. 2d 594; *Lowie v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271; *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405; *Nichols v. McFarland*, 249 N.C. 125, 105 S.E. 2d 294; *Pamlico County v. Davis, ante*, 648.

The rule with respect to the assignments of error is not alone for the benefit of the Court. For obvious reasons, litigants are interested in having all members of the Court participate to the fullest extent in the decisions. Before argument, each Justice takes time off from other duties to examine the records and briefs (often voluminous) to the end that maximum benefit may be obtained from the argument. Immediately after argument, each case is considered in conference and a tentative decision reached on the basis of the previous study of the record and briefs, and the oral argument. The Justice selected to write the opinion has the benefit of the tentative decision and the discussion leading to it. Necessarily, he must review the record in detail. After the opinion is written and copies circulated, other members of the Court review it in the light of their original study. The assignments of error furnish the key to this study. If properly prepared, they reduce the possibility that a mistake or oversight will escape detection before the opinion is offered for final approval.

In this case, the assignments, with two exceptions (Nos. 4 and 5) do not conform to the rule. One and two are typical:

> "1. The action of the Court, as set out in defendant's EXCEPTION #1 (R pp 19-20), in admitting evidence of a confession over the objections and motion for a mistrial and motion to strike the evidence of the defendant.
> "2. The action of the Court, as set out in defendant's EXCEPTION #2 (R p 21), in expressing an opinion to the jury."

These assignments require a voyage of discovery through the record. Otherwise they are meaningless. Faulty assignments have occurred

with such frequency that we repeat here some of the urgent reasons for obeying the rules. This Court has no desire to deprive any litigant of his opportunity to have his case heard on the merits. But when more than the necessary time is spent on one case because of faulty presentation, the time lost by all members of the Court must be at the expense of other litigants. If other emphasis is needed, we call attention to the fact that records and briefs filed in cases set for one week of argument during the Fall Term totaled more than 3,000 pages.

The defendant's assignment No. 4 relates to the refusal of the court to grant his motion to strike all the evidence relating to the so-called confession upon the ground the statements made were involuntary. Realizing it would be cumbersome to recite in the assignment all the evidence asked to be stricken, we are giving the assignment due consideration. The evidence objected to arose out of the following circumstances: The investigating officers stated to the defendant they wanted to find out the truth. That " * * * it would be better if he would go ahead and tell us what had happened." The defendant then made incriminating statements. He was a married man, 24 years old, and a member of the Charlotte Auxiliary Police. Inquiry by the court disclosed nothing in the way of promises or duress. The defendant, who testified in his own behalf, did not claim he was offered any inducement or acted under any intimidation or threats in making the incriminating statements. The court held the statements were voluntary and, therefore, admissible.

The defendant cites, as authority for excluding the admissions, the case of *State v. Livingston,* 202 N.C. 809, 164 S.E. 337. In that case, two boys were arrested for store breaking and larceny. When their shoes were fitted into the tracks at the store, the officers told them that if they would admit it (the theft) the chances were it would be lighter on them. The admissions were excluded because of the hope for lighter punishment.

The record here discloses the officers asked for nothing except the truth. They held out no hope for lighter punishment. The defendant's own evidence did not indicate he acted through fear, duress, intimidation, or inducement. The facts support the court's findings the admissions were voluntary and, therefore, competent. *State v. Exum,* 213 N.C. 16, 195 S.E. 7; *State v. Caldwell,* 212 N.C. 484, 193 S.E. 716; *State v. Stefanoff,* 206 N.C. 443, 174 S.E. 411; *State v. Rodman,* 188 N.C. 720, 125 S.E. 486.

Assignment No. 5 cannot be sustained. The evidence was ample to repel the motion to dismiss.

The record fails to disclose any reason why the verdict and judgment should be disturbed.

No Error.

PARKER, J., concurring in result. In *S. v. Livingston,* 202 N.C. 809, 164 S.E. 337, the confession of the defendants was made after the statement to them that the chances were it would be lighter on them, if they would say they got the property. A new trial was awarded.

In *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620, the officers testified they told Covington: " 'It would be better to go on and tell us the truth than try to lie about it. . . .; it would be better to come on and tell the truth.' " The Court said it could not be held as a matter of law that the confession made after such a statement by the officers made the confession inadmissible.

In *S. v. Thompson,* 887 N.C. 19, 40 S.E.. 2d 620, the officers testithe officers to the defendant was: "if he told us anything to tell the truth, if he would not tell the truth, not to tell anything at all." The Court held the confession of the defendant made thereafter admissible.

In the instant case the officer told the defendant: "I thought it would be better if he would go ahead and tell us what had happened."

It is to be noted that in the *Livingston* case the suggestion was that the defendants confess their guilt, and in the *Thompson* and *Thomas* cases and in the instant case the suggestion was, in substance, to tell the truth, not to confess.

In *S. v. Thompson, supra,* the Court said: "The rule generally approved is, that 'where the prisoner is advised to tell nothing but the truth . . . , his confession . . . , is admissible.' "

The assignment of error challenging the admissibility of the confession does not come too late, because the question raised by the defendant as to the voluntariness of the confession appears from the State's evidence. *S. v. Anderson,* 208 N.C. 771, 783, 182 S.E. 643, 650; *S. v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717.

The Court said in *S. v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121: "It is conceded that if the evidence in respect of the voluntariness of the statements were merely in conflict, the court's determination would be conclusive on appeal. *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S v. Christy,* 170 N.C. 772, 87 S.E. 499; *S. v. Page,* 127 N.C. 512, 37 S.E. 66; *S. v. Burgwyn,* 87 N.C. 572. Equally

well established, however, is the rule that 'what facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court.' *S. v. Andrew,* 61 N.C. 205; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Crowson,* 98 N.C. 595, 4 S.E. 143."

Whether the statement of the officer to the defendant made the confession involuntary and inadmissible in evidence is a question of law, and the ruling of the court below is reviewable by this Court. In my opinion, it cannot be held as a matter of law that the statement of the officer to the defendant here, which was, in substance, to tell the truth, and nothing more, made his confession involuntary and inadmissible in evidence. I concur in the result.

HOLLINGSWORTH GMC TRUCKS, INC., A NORTH CAROLINA CORPORATION, v. RALPH LAMUEL SMITH.

(Filed 25 March, 1959.)

1. Appeal and Error § 3—

An appeal does not lie immediately from the denial of a motion to nonsuit, but movant may note an exception for consideration on appeal from final judgment. G.S. 1-183.

2. Trial § 21—

While motion to nonsuit presents a question of law to be decided by the judge before verdict, the court's ruling on the motion is *in fieri* during the trial, and the court may change his ruling thereon at any time before the verdict is in.

3. Appeal and Error § 46—

A mere recital in an order that it is entered in the exercise of the court's discretion does not make it a discretionary matter, and a ruling on a matter of law is, as a rule, not discretionary.

4. Appeal and Error § 3—

The court granted nonsuit on defendant's counterclaim, but after the jury's failure to reach a verdict on plaintiff's action, withdrew a juror, ordered a mistrial, and set aside the nonsuit on the counterclaim. *Held:* Although the striking out of the nonsuit involved a question of law, the court had the right to change his ruling on the motion any time before verdict, and therefore the exercise of such right could not affect a substantial right of plaintiff, and the action of the court is not appealable.

5. Appeal and Error §§ 2, 7—

Whether the Court will consider a demurrer *ore tenus* upon a fragmen-

tary appeal is a matter in its discretion, and the Court will ordinarily refuse to do so when a discussion of the merits would give a party a preview of the case before the trial.

APPEAL by plaintiff from *Froneberger, J.*, August, 1958, "A" Term of MECKLENBURG.

The action was instituted on 26 September, 1957, by issuance of summons and claim and delivery proceedings and filing of complaint.

The complaint alleges that defendant defaulted in payment of the balance of the purchase price of a motor tractor, of the type used in a tractor-trailer tandem for transportation of goods on the highways, that plaintiff is entitled to possession of the tractor under the terms of a conditional sales contract executed by defendant, and that plaintiff is entitled to recover damages for failure of defendant to procure casualty insurance on said tractor as per alleged agreement.

The defendant answered and denied the alleged indebtedness and claim for damages. For a further defense he alleged that plaintiff had warranted said tractor against defects for 30 days and had knowingly and falsely represented that the tractor had been "renewed" and all "worn and defective parts" had been replaced, that said tractor was unfit for use and there was a total failure of consideration. For a counterclaim he alleged that, because of the defective condition of the tractor, it wrecked while in use and injured defendant, that his personal injuries resulted proximately from the fraudulent representations of plaintiff and plaintiff's failure to put the tractor in good condition, as it had been represented to be, and that defendant is entitled to recover the sum paid by him at the time the tractor was purchased and for personal injuries received by him.

Plaintiff replied and denied the allegations of the further defense and counterclaim.

There was a jury trial. When all the evidence was in, plaintiff moved for a judgment as of nonsuit as to defendant's counterclaim for damages for personal injuries. The motion was allowed. Upon the remaining issues the jury was unable to agree on a verdict and the Judge withdrew a juror and declared a mistrial.

The Judge made an order, the pertinent portions of which follow: ". . . it appearing to the Court at the close of all of the defendant's evidence on the cross-action for personal injuries that a judgment as of nonsuit should be entered as to personal injuries alleged to have been caused by the plaintiff, as alleged in the defendant's cross-action, accordingly a judgment of nonsuit was entered as to the defendant's cross-action for personal injuries.

"That issues were submitted to the jury. . . .

"That the jury was unable to agree and the Court in its discretion withdrew a juror and declared a mistrial.

"Whereupon, on motion of the defendant, after hearing arguments of counsel for both parties, the court in its discretion hereby sets aside the aforesaid order of nonsuit entered at the close of the defendant's evidence.

"This case is retained and ordered placed again upon the civil docket for trial. . . ."

From the foregoing order setting aside the order of nonsuit as to defendant's counterclaim for personal injuries, plaintiff appealed.

Bell, Bradley, Gebhardt & DeLaney and Jones & Small for plaintiff, appellant.

Fred H. Hasty and Richard M. Welling for defendant, appellee.

MOORE, J. The defendant in apt time moved to dismiss the appeal on the ground that it is fragmentary and the record contains no final judgment from which an appeal will lie.

Plaintiff contends that on a motion to nonsuit the sufficiency of the evidence to carry the counterclaim to the jury is a question of law and not a matter of discretion, and, once the motion has been allowed, an order setting aside the ruling is a final judgment on a question of law from which an appeal will lie.

In the first place, the effect of the Judge's order is the same as if the motion to nonsuit the counterclaim had been denied in the first instance. With respect to the counterclaim the plaintiff is defendant. The statute makes no provision for an immediate appeal from a denial of a motion to nonsuit. "Defendant . . . may make such motion at the conclusion of the evidence of both parties. . . . If the motion is refused and after the jury has rendered its verdict the defendant may on appeal urge as ground for reversal the trial court's denial of his motion. . . ." G.S. 1-183. Since the allowance of a motion for judgment as of nonsuit is based on purely statutory grounds, the provisions of the statute will be strictly followed. *Avent v. Milland*, 225 N.C. 40, 33 S.E. 2d 123. No appeal lies from a refusal to dismiss an action. *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E. 2d 381. The movant may note an exception, allow the case to proceed, and then, if dissatisfied with the final result, the matter may be considered on the appeal from the final judgment. *Bradshaw v. Bank*, 172 N.C. 632, 90 S.E. 789.

"An appeal may be taken from every judicial order or determina-

tion of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." G.S. 1-277; *Veazey v. Durham,* 231 N.C. 354, 57 S.E. 2d 377.

It is insisted that if the order is permitted to stand in the instant case the plaintiff will lose a substantial legal right.

It is true that the question presentd by a motion to nonsuit is one of law. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463. The question of the sufficiency of the evidence to carry the case to the jury must be decided by the Judge before the verdict, and after the verdict the case may not be dismissed by way of nonsuit for insufficiency of the evidence. *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314. In the instant case there was no verdict. The jury could not agree and a mistrial was declared.

"A judgment or order rendered by a judge of the Superior Court in the exercise of a discretionary power is not subject to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part." *Veazey v. Durham, supra.* A mere recital in an order that it is entered in the exercise of the court's discretion does not necessarily make the subject of the order a discretionary matter. *Poovey v. Hickory,* 210 N.C. 630, 188 S.E. 78. Rulings of the court on matters of law are as a rule not discretionary. McIntosh, North Carolina Practice and Procedure (Second Edition), Vol. 2, Sec. 1782 (4), p. 209.

However, this Court has held that a motion for judgment as of nonsuit is *in fieri* until the rendition of a verdict. *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822. In the *Bruton* case the court denied motions to nonsuit made at the close of plaintiff's evidence and at the close of all the evidence. During arguments to the jury the court allowed the motion. On appeal plaintiff contended that the Judge had no power to grant the motion after having refused to do so at the close of the evidence. The decision of this Court was in effect that the Judge might change his ruling at any time before the verdict was in.

Conceding that the order of Judge Froneberger setting aside his former ruling involved a question of law, still it did not affect a substantial right. A litigant has no right to require the judge to refrain from doing that which he has a right to do.

"A judgment is *in fieri* during the term at which it is rendered and the judge, *non constat* notice of appeal, may modify, amend, or set

it aside at any time during the term. (citing authorities)." *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407. "Until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice, . . ." *S. v. Godwin*, 210 N.C. 447, 187 S.E. 560.

A superior court judge has little opportunity for prolonged deliberation upon many matters involving competency of evidence, legal principles and inferences of law which arise during a trial. He must, of necessity, make immediate rulings on the questions before him in order that trials may progress with reasonable celerity. To hold that he could not in the interest of justice change, modify or reverse a ruling during the progress of a trial and, in proper cases, during term, would be to require infallibility. As was said by one of the Justices when this case was argued in this Court, to hold a superior court judge to such a standard would be tantamount to placing him in a straightjacket.

The causes coming before the judge are in the bosom of the court during term time. So long as his orders, judgments and rulings do not fall within the classifications set out in G.S. 1-277, no appeal therefrom will lie. The order in the case at bar is not appealable.

The instant case will stand upon the civil issues docket as though it had not been tried before Judge Froneberger and as though he had made no orders or rulings therein, so far as the retrial is concerned.

In the Supreme Court, for the first time, the plaintiff interposed a demurrer *ore tenus* to the defendant's counterclaim for personal injuries.

The Court may, in its discretion, on a fragmentary appeal, express an opinion upon the merits. *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231. Or it may refuse to do so. *Thomas v. Carteret County*, 180 N.C. 109, 104 S.E. 75; *Chambers v. Railway Co.*, 172 N.C. 555, 90 S.E. 590. This Court will ordinarily refuse when a discussion of the merits would give a party a preview of the case before the trial. We have carefully read and considered the evidence and pleadings in this case and, in the exercise of the Court's discretion, we decline to pass upon the demurrer *ore tenus*. This, without prejudice.

Appeal dismissed.

VIVIAN EDNEY LETTERMAN AND HUSBAND, CHARLES LETTERMAN; C. R. EDNEY AND WIFE, DOLLEY WASHBURN EDNEY v. ENGLISH MICA COMPANY AND HARRIS CLAY COMPANY.

(Filed 25 March, 1959.)

1. Trespass § 1a—

Any entry on land in the peaceable possession of another is deemed a trespass entitling the possessor to nominal damages at least, regardless of force or the form of the instrumentality breaking the close, or the intent of the trespasser.

2. Trespass § 1e: Waters and Watercourses § 7—

The proprietor of a dam is not ordinarily an insurer, but is required only to exercise ordinary care in the maintenance and operation thereof.

3. Pleadings § 15—

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

4. Trespass § 1e: Waters and Watercourses § 7— Complaint held insufficient to state cause of action in trespass in operation of dam.

The complaint alleged in effect that the dam below plaintiff's property caused no damage while operated by demurring defendant's predecessor, that demurring defendant breached the provisions of its easement, knew that the other defendant was discharging excessive dirt in the river above plaintiff's property, and that the demurring defendant wrongfully and negligently maintained the dam so that it caused sediment to be deposited on plaintiff's land, resulting in rendering plaintiff's fords impassable and causing the river to overflow plaintiff's bottom lands to plaintiff's damage. *Held:* In the absence of allegation of specific acts of improper maintenance or operation of the dam by the demurring defendant or in what manner it breached the provisions of its easement, or of any violation of G.S. 77-7, the demurrer was properly sustained.

5. Same—

The doctrine of *res ipsa loquitur* does not apply to obviate the necessity of proving improper or negligent operation of a dam in an action by an upper proprietor to recover for alleged injuries to his lands therefrom.

APPEAL by plaintiffs from *Huskins, J.*, in Chambers, 20 December, 1958, in MITCHELL.

The action was instituted 16 June, 1958, by issuance of summons and filing of complaint.

In substance, the complaint alleges that plaintiffs own land fronting on North Toe River and cartways, appurtenant to said land, fording the river to the public highway, that Harris Clay Company owns and operates a mica mine about two miles upstream and English Mica

Company owns and maintains a dam about one-half mile downstream from the land, that Harris Clay Company in its mining operations puts an excessive amount of dirt in the stream, a large part of which is washed downstream to the backed water of the dam, that because of the deposit of dirt in the river and the manner in which the dam is maintained, the normal level of still water impounded by the dam has risen and backed upon plaintiffs' land and roadways, constituting a trespass and resulting in damage to plaintiffs for which they seek to recover.

The defendant, English Mica Company, in apt time demurred on the ground that the facts stated in the complaint do not constitute a cause of action against it. The court sustained the demurrer.

The allegations of the complaint with respect to English Mica Company, in addition to the facts summarized above, are:

"(6) About the year 1938, Ray Dent erected a dam across Toe River, about one-half mile down the stream below plaintiffs' land, and in the year 1941 conveyed the land whereon the dam is located to the English Mica Company.

"(7) That as long as Ray Dent owned and maintained the dam, he operated and maintained it in a manner that did not back the water above the 'Cow Ford' at normal times. That English Mica Company has wrongfully and negligently and in breach of the provision of its easement so maintained and operated the dam, knowing that its codefendant Harris Clay Company was putting an excessive amount of dirt in the river; wrongfully, negligently and in breach of and above and beyond the boundaries of its easement so maintained and operated the dam that it has caused sediment to fill up and back up raising both the floor of the bed of the stream and the water of the stream of North Toe River above the original level of the floor and the water of the stream at the 'Cow Ford,' at all times, and farther upstream than the easement of the defendants and has blocked plaintiffs' ford farther upstream known as the 'Lessenberry Ford' to such an extent that both fords have been rendered impassable by any means of conveyance for several years, destroying plaintiffs' only access to their lands and home from the public highway, and has caused the river to overflow several acres of plaintiffs' bottom lands and seriously damaging it for agriculture purposes.

"(8) That the defendant English Mica Company knew or, by reasonable care, would have known that while it was maintained, the dam, that its codefendant Harris Clay Company was carrying on hydraulic mining about two miles upstream and was wrongfully putting an excessive amount of dirt in the stream, polluting the water and filling

up the bed of the stream with sediment, much of which washed down to the backed water of plaintiffs' dam and was unusually backed up by the still and impounded water of defendant's dam onto the lands and fords of the plaintiffs, and knew that the combined result of its wrongful maintaining of its dam and the wrongfully polluting of the stream by Harris Clay Company was wrongfully blocking plaintiffs' only access to their lands and flooding their fields, to plaintiffs' great inconvenience and financial damage."

"(10) . . . English Mica Company knew or, by reasonable care, would have known it was maintaining its dam in such away as to cause the sediment of the stream, especially in connection with the excessive amount of sediment put in the stream by Harris Clay Company, to block plaintiffs' fords and flood plaintiffs' fields, and each of the defendants, with such knowledge, continued, negligently, to operate and maintain the dam and operate the mines from week to week and month to month up to the time of bringing this action, to the plaintiffs' substantial damage."

"(12) That by reason of the joint wrongs and torts of the defendants to plaintiffs' lands and easement the plaintiffs have been damaged in the sum of at least $8,000.00.

"(13) That the trespass wrongs and torts of the defendants, as hereinabove alleged, are a continuing trespass by the defendants on plaintiffs' lands and easements . . ."

From judgment sustaining the demurrer plaintiffs appealed.

R. W. Wilson for plaintiffs, appellants.

McBee and McBee, G. D. Bailey and W. E. Anglin for defendant, English Mica Company, appellee.

MOORE, J. Plaintiffs contend that they alleged sufficient facts to constitute a cause of action for a continuing trespass on the part of English Mica Company on their land and roadways.

"At common law, every man's land was deemed to be inclosed, so that every unwarrantable entry on such land necessarily carried with it some damage for which the trespasser was liable. Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used, and neither the form of the instrumentality by which the close is broken nor the extent of the damages is material. . . . whether the defendant acted intentionally is immaterial; trespass lies whether the injury to the plaintiff's possession is wilful or not, if the act which is injurious to the plaintiff is

the immediate result of the force originally applied by the defendant." 52 Am. Jur., Trespass, Sec. 12, pp. 844, 845.

In *Kinsland v. Kinsland,* 188 N.C. 810, 125 S.E. 625, it is alleged that the defendants entered upon plaintiff's land, built a dam and flooded a portion of the land. The court, holding that there was an issue for the jury, said: "The unauthorized entry upon the possession of another entitles him to nominal damages at least (*Lee v. Lee,* 180, N.C. 86) and it may be such as to evoke the equitable jurisdiction of the courts or it may result in the creation of a nuisance which the law will abate."

"As a general rule, the proprietor of a dam which has been lawfully constructed and maintained is not an insurer of the safety thereof, but is required to exercise ordinary care, in the maintenance and operation thereof, to avoid injury to others." 56 Am. Jur., Waters, Sec. 162, p. 629. "It may be that when a dam is first built that it will not injuriously affect land some distance from it, and for a long time there will be no cause for them to complain, but when the pond made by the dam fills with mud, sand, trash, and other things, causes overflows and injury to lands, then the parties injured have a cause of action, if the buildings and maintenance of the dam is the direct and proximate cause of their injury." *McDaniel v. Power Co.,* 95 S.C. 268, 78 S.E. 980, 6 A.L.R. 1321, 1323. But the owner of a dam is not responsible for injuries occasioned by causes which could not reasonably be anticipated or guarded against. 56 Am. Jur., Waters, Sec. 31, p. 560, *Cline v. Baker,* 118 N.C. 780, 24 S.E. 516.

It is our opinion that the plaintiffs have not alleged sufficient facts to show that the injuries suffered "is the immediate result of . . . force originally applied by the defendant" or that any act or omission of English Mica Company is a "direct and proximate cause of their injury."

A demurrer for the purpose of challenging the sufficiency of the pleading admits the truth of the facts alleged and the relevant inferences of fact deducible therefrom, but the demurrer does not admit inferences or conclusions of law. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

As against the demurring defendant, the plaintiffs allege that the dam was built by one Ray Dent in 1938, and as long as Ray Dent owned and maintained the dam it did not back water at normal times on plaintiffs' property, that Ray Dent sold it to English Mica Company in 1941; that English Mica Company breached the provisions of its easement, knew that Harris Clay Company was putting excessive dirt in the river which was coming downstream and settling

in the still water impounded by the dam, wrongfully and negligently maintained the dam and thereby caused the water to back upon the land and roadways of plaintiffs.

The complaint does not allege that the dirt was being deposited in the river at the time the dam was built. The inference is to the contrary. It alleges in substance that the dam was being properly maintained when Ray Dent owned it, but does not allege in what respect it has been maintained differently by English Mica Company. It does not allege in what manner defendant has breached the provisions of its easement, or of what its wrongful and negligent maintenance consists. It does not allege in what way defendant could have prevented the backing of the water or what its duty is with respect thereto. It is silent as to the construction and use of the dam. It alleges no violation of G.S. 77-7, if any there was.

The doctrine of *res ipsa loquitur* does not apply in this case. It does not come within the principles laid down in *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251.

One fact seems clear from the pleading. The Harris Clay Company has dumped dirt into the river. The dirt has flowed down to the still water of the dam, raised the bed of the stream and caused water to back onto the plaintiffs' land and roadways. This is insufficient allegation to place responsibility on English Mica Company.

Plaintiffs cite *Moses v. Morganton,* 192 N.C. 102, 133 S.E. 421, in support of their contention. It is clearly distinguishable. In that case the dam was built after the stream had already been polluted by the city sewer and by chemicals from the factory of the shoe company. The dam immediately upon construction backed the polluted water onto plaintiff's land.

The defendant English Mica Company properly demurred.

Affirmed.

J. D. LITTLE v. WILSON OIL CORPORATION AND S. W. WORTHINGTON, JR.

(Filed 25 March, 1959.)

1. Negligence § 4f(1)—

A person on the premises of a service station as a customer is an invitee.

*** egligence § 4f(2)—**

Proprietors owe the duty to an invitee to exercise ordinary care for

his safety, to keep the premises in a reasonably safe condition for use according to the the invitation, and to give warning of hidden dangers or unsafe conditions attendant on the contemplated use, which are known to the proprietors or should have been known by them in the exercise of reasonable inspection and supervision.

3. Same—

In an action by an invitee to recover for a fall, allegations that defendant proprietors were negligent in not providing a safe means of entering and leaving the premises, and that this dangerous situation had existed for a long time, are mere legal inferences or conclusions of law not admitted by demurrer.

4. Pleadings § 15—

A demurrer admits the truth of factual averments well stated, and such inferences as may be legitimately deduced therefrom.

5. Same—

Upon demurrer, a pleading must be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. G. S. 1-151.

6. Negligence § 4f(2)— Allegations held insufficient to allege negligence on part of filling station proprietors causing fall to invitee.

Plaintiff's allegations were to the effect that defendants' gasoline filling station was constructed with a concrete slab extending from the pumps to within a distance of about six feet from the door of the station, that the area around the concrete slab was paved with asphalt, that at certain points the asphalt had sunk or deteriorated, leaving a sharp edge of the concrete slab protruding above the asphalt some one and three quarters inches, that this condition was known to defendants or should have been known by them, that they gave no warning to plaintiff, and that plaintiff, in returning from the filling station building to his car, had to walk around an automobile parked near the entrance, which blocked his view, and tripped and fell over the edge of the concrete. *Held:* Defendants' demurrer was properly sustained, since the elevation of the concrete slab was plainly obvious and did not constitute a hidden danger of which defendants were under duty to give notice, and the fact that the concrete slab protruded such distance above the asphalt does not indicate negligence.

APPEAL by plaintiff from *Morris, J.*, December Civil Term 1958 of WILSON.

Civil action to recover damages resulting from a fall on defendants' premises, heard upon a demurrer to an amended complaint.

From a judgment sustaining the demurrer plaintiff appeals.

Robert A. Farris and Lamb, Lamb & Daughtridge for plaintiff, appellant.

Gardner, Connor & Lee for defendants, appellees.

PARKER, J. A demurrer was sustained to the original complaint. Whereupon, the plaintiff filed an amended complaint. Defendants again demurred upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action, and that it showed upon its face that plaintiff was guilty of contributory negligence as a matter of law. Judge Morris sustained the demurrer to the amended complaint, but his order does not state the ground upon which he based his decision.

This is a summary of the material allegations of the amended complaint: The defendant Worthington owns a service station in the City of Wilson, which he leased to defendant Wilson Oil Corporation. Both defendants were in charge of the service station, and had supervision and control of it.

At 9:30 a. m. on 6 December 1956 plaintiff as an invitee drove his automobile on the premises of the service station to purchase gasoline and other items sold there. There was situated upon the premises in the space between the gasoline pumps and the service station building a concrete slab extending from the gasoline pumps to within a distance of about six feet from the front door of the building. From this point the area was paved with asphalt to the service station building's entrance.

While an attendant was putting gasoline into plaintiff's automobile, plaintiff entered the service station to buy a Coca-Cola and a package of crackers. When plaintiff was in the service station, the attendant urgently called him to assist in the servicing of his automobile. In response to the call plaintiff started walking to his automobile. To reach it he was compelled to walk around another automobile parked near the entrance of the service station, which blocked his view of the concrete slab. Immediately after walking around this other parked automobile plaintiff was tripped up by the edge of the concrete slab, which unknown to him, protruded about one and three quarters inches above the asphalt at that point, and fell sustaining injuries.

The defendants were negligent in not providing a safe means of entering and leaving the premises; in allowing a dangerous situation to exist in that the concrete slab was surrounded by asphalt, which at certain points had sunk or deteriorated, leaving a sharp edge of the concrete slab above the asphalt, and this condition was known to the defendants, or should have been known to them by the exercise of due care; in giving no warning of such dangerous condition; and that this dangerous condition had existed for a long time in spite of injuries suffered by other people on the premises.

Plaintiff was on the premises of the service station as a customer. This made him an invitee. *Standard Oil Co. v. Gentry,* 241 Ala. 62, 1 So. 2d 29; *Standard Oil Co. v. Burleson,* 117 F. 2d 412; *Vanderdoes v. Rumore,* La. App., 2 So. 2d 284. See *Sledge v. Wagoner,* 248 N.C. 631, 104 S.E. 2d 195; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33.

Therefore, the defendants who were in charge of the service station and had supervision and control over it, while not insurers of his safety when using the premises, owed him the duty of exercising reasonable or ordinary care for his safety, and to keep the premises in a reasonably safe condition for use by him according to the invitation, and to give warning of hidden dangers or unsafe conditions attendant on his use, known to them, or which by reasonable inspection and supervision might have been known by them. *Standard Oil Co. v. Gentry, supra; Standard Oil Co. v. Burleson, supra; Flynn v. Cities Service Refining Co.,* 306 Mass. 302, 28 N.E. 2d 453; *Reynolds v. Skelly Oil Co.,* 227 Iowa 163, 287 N.W. 823; *Champlin Refining Co. v. Walker,* 113 F. 2d 844; 61 C.J.S., Motor Vehicles, p. 940; 65 C.J.S., Negligence, pp. 526-532; 24 Am. Jur., Gasoline Stations, Section 20; Annotation 116 A.L.R. pp. 1205-1206.

This Court in many cases involving other buildings than service stations has stated in language substantially similar to the above the duty owed by owners, occupants, or persons in charge of premises to invitees thereon. *Sledge v. Wagoner, supra; Lee v. Green & Co., supra; Fanelty v. Rogers Jewelers, Inc.,* 230 N.C. 694, 55 S.E. 2d 493; *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64; *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917; *Bohannon v. Stores Company, Inc.,* 197 N.C. 755, 150 S.E. 356.

The allegations in the amended complaint that the defendants were negligent in not providing a safe means of entering and leaving the premises, and that this dangerous situation had existed for a long time are merely legal inferences or conclusions of law asserted by the plaintiff, and are not admitted as true by the demurrer. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

On the demurrer we take the case as alleged by the amended complaint. The demurrer admits the truth of factual averments well stated, and such relevant inferences as may be legitimately deduced therefrom. And in passing on the demurrer we are required to construe the amended complaint liberally with a view to substantial justice between the parties and to make every reasonable intendment in favor of the pleader. G.S. 1-151; *Hedrick v. Graham, supra.* The ultimate facts asserted by the pleader as to the alleged negligence are

these: There was situated upon the premises in the space between the gasoline pumps and the service station building a concrete slab extending from the gasoline pumps to within a distance of about six feet from the front door of the building. The area from the concrete slab to the service station building was paved with asphalt. The edge of this concrete slab unknown to plaintiff protruded about one and three quarters inches above the asphalt at the point where he tripped over it, and fell. The concrete slab was surrounded by asphalt, which had sunk or deteriorated, leaving a sharp edge of the concrete slab above the asphalt, and this was known by the defendants, or should have been known to them by the exercise of due care. The defendants gave him no warning of such condition. A parked automobile near the entrance of the filling station blocked his view of the concrete slab when he left the service station building to assist an attendant in servicing his automobile. In walking to his automobile, he tripped over the concrete and fell.

The concrete slab at the gasoline pumps, standing whether due to the original construction or by sinking and deterioration of the surrounding asphalt about one and three quarters inches above the asphalt, was obvious to any ordinarily intelligent person using his eyes in an ordinary manner. If plaintiff had not seen this concrete slab before, when he walked around the automobile parked near the entrance of the service station building, the concrete slab was there at 9:30 a. m. in plain view and perfectly obvious to him. No unusual conditions existed. At the time and place the concrete slab did not constitute a hidden danger or an unsafe condition to plaintiff, an invitee, using the premises. The law imposes no duty upon the defendants to give notice of the concrete slab, which was plainly obvious to any ordinarily intelligent person using his eyes in an ordinary manner, to plaintiff who had eyes to see and an unobstructed view of the concrete slab when he walked around the parked automobile, but failed to take time to see the concrete slab. *Reese v. Piedmont, Inc.*, 240 N.C. 391, 82 S.E. 2d 365; *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491; *Flynn v. Cities Service Refining Co., supra; Sterns v. Highland Hotel Co.*, 307 Mass. 90, 29 N.E. 2d 721; *Mulkern v. Eastern S. S. Lines*, 307 Mass. 609, 29 N.E. 2d 919.

In *Murchison v. Apartments*, 245 N.C. 72, 95 S.E. 2d 133, plaintiff occupied an apartment in an area with over 200 apartments owned and operated by defendant. Plaintiff testified: "I attempted to turn on A Street to go up the sidewalk that leads to Apartments A-11 and A-12, and just as I entered the sidewalk, I stepped on the sidewalk with my left foot and my right foot tripped on a raised portion

of the sidewalk, and I fell." The Court said: "To elevate a sidewalk an inch or two above the street is almost universally done. Such method of construction does not indicate negligence. That plaintiff should, in stepping from the street to the sidewalk, stumble and fall because the sidewalk was an inch or two higher than the street does not indicate that defendant was in any wise negligent."

In *Benton v. Building Co., supra,* plaintiff's evidence showed that the store of one defendant was in the building of the other defendant, and opened off the lobby of the building through a plate glass door by a step down; that there was no lack of light, either in the lobby or store. Plaintiff fell and was injured as she went through the door from the lobby into the store, although she could have seen the step down had she taken time to look as she opened the door. A judgment of nonsuit below was affirmed. See also *Reese v. Piedmont, Inc., supra.*

Sledge v. Wagoner, supra, relied on by plaintiff, is distinguishable. The wire protruding some four inches from the floor and one-half inch from a wire rod magazine rack, which was standing against the wall not over four inches from the door facing, caught plaintiff's trousers and caused him to fall. The Court in its opinion speaks of this as "in the nature of a hidden peril."

Lee v. Green & Co., supra, and *Coston v. Hotel,* 231 N.C. 546, 57 S.E. 2d 793, also cited by plaintiff in his brief, are distinguishable. In the *Lee* case, plaintiff, a customer in a store, fell in an aisle of the store slick with excessive grease or oil, with greater accumulations of grease or oil at some places than at others. In the *Coston* case, plaintiff, a patron at the hotel, tripped over an electric wire or cord extended along the floor, and leading to a desk lamp. *Bemont v. Isenhour,* 249 N.C. 106, 105 S.E. 2d 431, is also distinguishable. In this case the Court said: "The defect cannot be said to have been readily visible and obvious."

The allegations of the amended complaint as to the construction, situation and circumstances of the concrete slab over which plaintiff tripped and fell, liberally construed, do not make out a case of actionable negligence against the defendants.

The judgment sustaining the demurrer is

Affirmed.

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Witnesses—Officers may not testify that whiskey had odor of nontax-paid whiskey, *S. v. Smith*, 212; testimony as to intoxication from blood tests, *Osborne v. Ice Co.*, 387; opinion testimony as to speed, *Wilson v. Camp*, 754; instruction that jury should scrutinize testimony of wife in defendant's behalf held insufficient, *S. v. Kimmer*, 290; defendant is entitled to cross-examine witness for bias, *S. v. Treadaway*, 657; cross-examination of wife testifying for husband, *S. v. Bell*, 379; where defendant does not testify, he may not be cross-examined as to unrelated offenses, *S. v. Bell*, 379; but when he does testify, he may be so cross-examined, *S. v. Troutman*, 395; competency of evidence for purpose of corroboration, *S. v. Brown*, 271; expert testimony in regard to lightning, *Pope v. Goodson*, 690; subscribing witnesses to will, *In re Will of Pridgen*, 509.

Workmen's Compensation Act—See Master and Servant.

Writ of Assistance—*In re Will of Smith*, 563.

Wrongful Death—See Death.

Zoning Ordinances—*Penny v. Durham*, 596.

ANALYTICAL INDEX.

ACTIONS.

§ 3. Moot Questions.

against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby and is thus the real party in interest. *Sanitary District v. Lenoir*, 96.

ADVERSE POSSESSION.

8. By Surviving Husband or Wife against Heirs.

Where the owner of land executes and records a deed to her son and thereafter the land is purchased by another son at foreclosure of a prior deed of trust executed by her, the fact that she continues to reside on the property until her death as a member of the household is insufficient to reestablish title in her, and only the grantee son is entitled to attack the foreclosure. *Corbett v. Corbett*, 585.

§ 14. Adverse Possession of Public Ways.

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. G. S. 1-45. *Salisbury v. Barnhardt*, 549.

§ 15. What Constitutes Color of Title.

Deed executed by the trustee to the purchaser at foreclosure sale, or by such purchaser to claimant, constitutes color of title even if the foreclosure is defective or void. *Corbett v. Corbett*, 585.

§ 16. Presumptive Possession to Outermost Boundaries of Deed.

Where both parties claim by adverse possession of the *locus in quo*, if the title of one of them had matured prior to any possession by the other, the title acquired by the first is the older title, and the law would presume that thereafter his possession was rightful, and the possession of the other under color, without physical possession of any of the land within the claim of the first, would not be constructively extended to cover any of the land within the actual possession of the first. *Sledge v. Miller*, 447.

§ 17. Period Necessary to Ripen Title by Adverse Possession.

Possession for the statutory period under color or possession for the statutory periods without color but under known and visible lines and boundaries, vests title in the possessor. *Sledge v. Miller*, 447.

§ 22. Competency and Relevancy of Evidence.

It is competent for a person claiming title by adverse possession to introduce evidence that he had listed and paid taxes on the land as a circumstance, with other circumstances, tending to show claim of title. *Corbett v. Corbett*, 589.

AGRICULTURE

§ 14. Validity of Milk Regulations.

The Milk Commission Act is constitutional and valid. *Milk Comm. v. Galloway*, 658.

§ 15. Powers and Functions of Milk Commission.

The Milk Commission is empowered to fix the transportation rates for hauling milk of producers to processing plants. *Milk Comm. v. Galloway*, 658.

ANIMALS.

§ 3. Liability of Owner for Permitting Domestic Animals to Run at Large.

In this action by a motorist to recover damages suffered when he collided with a mule when it suddenly jumped onto the highway immediately in front of his car at nighttime, evidence tending to show that defendant knew that the wire around his pasture was old and that the mule had escaped from the pasture earlier on the day of the collision and on the night before the collision, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to exercise reasonable care to keep the animal in restraint. *Shaw v. Joyce*, 415.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

A correct judgment of the lower court will not be disturbed regardless of whether the lower court assigned the correct reasons therefor. *Sanitary District v. Lenoir*, 96.

An affirmative finding on the issue of contributory negligence precludes recovery by plaintiff, and therefore if none of plaintiff's exceptions relating to that issue can be sustained, other exceptions of plaintiff need not be considered. *Wilson v. Camp*, 754.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court, in the exercise of its supervisory jurisdiction, has the power to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts, Constitution of North Carolina, Article IV, section 8, and in proper instances it will grant *certiorari* to review an order of the superior court involving a matter of public interest in order to promote the expeditious administration of justice. *Brice v. Salvage Co.*, 74.

The Supreme Court will take note *ex mero motu* of the failure of the complaint to state a cause of action. *Sanitary District v. Lenoir*, 96.

Even though the assignments of error have not been brought forward and discussed as required by the Rules of Court, the Supreme Court may nevertheless consider the questions discussed when title to realty is involved. *Coffey v. Greer*, 256.

The Supreme Court will take cognizance of a defect of parties *ex mero motu*

and remand the cause for necessary parties. *Britt v. Children's Homes*, 409.

Whether the court will consider a demurrer *ore tenus* upon a fragmentary appeal verbs in its discretion. *G M C Trucks v. Smith*, 764.

§ 3. Right to Appeal and Judgments Appealable.

When, pending hearing upon a demurrer for misjoinder of parties and causes, some of plaintiffs take a voluntary nonsuit obviating the grounds of that demurrer, the overruling of a demurrer thereafter filed for failure of the complaint to state a cause of action is not reviewable except by writ of *certiorari*. *Boles v. Graham*, 131.

While the better practice may be for a party to enter exception to the granting of appellant's petition for writ of *recordari*, and present the exception on appeal from final judgment, an appeal lies immediately from judgment entered in the Superior Court denying appellee's motion to dismiss a purported appeal from a justice of the peace on the ground that the record was not filed in the Superior Court in apt time, or from the granting of appellant's motion for a writ of *recordari*. Rule of Practice in the Superior Courts No. 14. *Freeman v. Bennett*, 180.

Rule 4 (a) of this Court has no application when the order striking a portion of the pleading is in effect the granting of a demurrer on the ground that the facts alleged are insufficient to constitute a cause of action, and an appeal will lie from such order under G. S. 1-277. *Etheridge v. Light Co.*, 367.

An order allowing plaintiff's motion to strike a further answer and defense in its entirety on the ground that it does not constitute a bar or defense to plaintiff's action, is, like an order which sustains a demurrer to a plea in bar, appealable as affecting a substantial right. Rule of Practice in the Supreme Court No. 4(a). *Mercer v. Hilliard*, 725.

The discretionary refusal to join a proper party is not appealable. *Corbett v. Corbett*, 585.

An appeal does not lie immediately from the denial of a motion to nonsuit, but movant may note an exception for consideration on appeal from final judgment. *GMC Trucks v. Smith*, 764.

The court granted nonsuit on defendant's counterclaim, but after the jury's failure to reach a verdict on plaintiff's action, withdrew a juror, ordered a mistrial, and set aside the nonsuit on the counterclaim. *Held*: Although the striking out of the nonsuit involved a question of law, the court had the right to change his ruling on the motion any time before verdict, and therefore the exercise of such right could not affect a substantial right of plaintiff, and the action of the court is not appealable. *Ibid.*

§ 7. Demurrers and Motions in Supreme Court.

Demurrer *ore tenus* on the ground that the complaint fails to state a cause of action may be filed in the Supreme Court on appeal. *Howze v. McCall*, 250. But not upon *certiorari* under Rule 4(a.) *Harrell v. Powell*, 244.

§ 12. Jurisdiction and Powers of Lower Court after Appeal.

The court has power to proceed to trial after appeal from the court's dis-

APPEAL AND ERROR —*Continued.*

cretionary refusal to join a proper party, since such appeal is premature and subject to dismissal. *Corbett v. Corbett*, 585.

Whether the Court will consider a demurrer *ore tenus* upon a fragmentary appeal is a matter in its discretion, and the Court will ordinarily refuse to do so when a discussion of the merits would give a party a preview of the case before the trial *GMC Trucks v. Smith*, 764.

§ 16. Certiorari as Method of Review.

Certiorari granted under Rule 4(a) brings to the Supreme Court for immediate review only the petitioner's exceptions to the rulings made by the court below and is insufficient basis for a demurrer *ore tenus* in the Supreme Court. *Harrell v. Powell*, 244.

Rule 4(a) of this Court has no application when the order striking a portion of the pleading is in effect the granting of a demurrer on the ground that the facts alleged are insufficient to constitute a cause of action; and an appeal will lie from such order under G. S. 1-277. *Etheridge v. Light Co.*, 367.

§ 19. Form of Exceptions and Assignments of Error in General.

An assignment of error that the court erred in permitting a witness "to testify as shown by exceptions" of designated number, with reference to the page of the record, is insufficient, it being required that an assignment of error definitely and clearly present the error relied on without compelling the Court to go beyond the assignment itself to learn what the question is. *Nichols v. McFarland*, 125.

The rules governing appeals are mandatory. *Ibid*; *Pamlico County v. Davis*, 648.

While the form and sufficiency of an assignment of error must depend largely upon the special circumstances of the particular case, it is required that the assignment specifically point out the alleged error without requiring a voyage of discovery through the record, and it should, ordinarily, set out so much of the evidence or the charge or other matter or circumstance relied upon, as to clearly present the matter to be debated. *S. v. Dishman*, 759.

§ 21. Exceptions and Assignments of Error to the Judgment or to Signing of Judgment.

An exception to the signing of the judgment presents the questions whether the facts found support the judgment and whether error of law appears upon the face of the record. *Salisbury v. Barnhardt*, 549.

An appeal itself will be treated as an exception to the judgment. *Columbus County v. Thompson*, 607.

An exception to the signing of the judgment presents for review the questions whether the facts found support the judgment and whether any error of law appears on the face of the record, but it does not present for review the evidence upon which the findings are based. *Ibid.*

§ 21a. Exceptions and Assignments of Error to Rulings on Motions to Nonsuit.

An assignment of error to the court's ruling on motion to nonsuit is sufficient

if it refers to the motion, the ruling thereon, the number of the exception, and the page of the record where found. *Nichols v. McFarland*, 125; *Pamlico County v. Davis*, 648.

§ 22. Objections, Exceptions and Assignments of Error to Findings of Fact.

An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion is a broadside exception and ineffectual because of noncompliance with the Rules of Court. Rules of Practice in the Supreme Court. *Columbus County v. Thompson*, 607.

§ 24. Exceptions and Assignments of Error to Charge.

An assignment of error to the statement of contentions cannot be sustained when no objection was lodged at the time and no request made for correction. *Hood v. Coach Co.*, 534.

§ 33. Necessary Parts of Record Proper.

Upon appeal from an order setting aside a default judgment upon the court's finding of surprise and a meritorious defense, the verified answer of defendant, attached to the motion to set aside, is a necessary part of the record proper, since in its absence it cannot be determined whether the finding of a meritorious defense was supported by evidence. *Mooneyham v. Mooneyham*, 642.

§ 34. Form and Requisites of Record.

Except when necessary to present particular exceptions, the evidence should be set out in the record in narrative and not in question and answer form. *Trucking Co. v. Dowless*, 346.

Responsibility for sending up the necessary parts of the record proper is upon the appellant, and his failure to send up necessary parts of the record proper necessitates dismissal of the appeal. *Mooneyham v. Mooneyham*, 642.

§ 35. Conclusiveness of Record.

Where the judgment recites that the parties waived a jury trial, such recital is conclusive on the Supreme Court, and an exception to trial by the court on the ground that appellants had not waived trial by jury cannot be sustained. *Hicks v. Koutro*, 61.

§ 38. Exceptions not Discussed in the Brief.

Assignments of error not brought forward or discussed in the brief will be deemed abandoned. *Coffey v. Greer*, 256; *Wall v. Trogdon*, 747.

§ 39. Presumptions and Burden of Showing Error.

Where there is nothing in the record to show that the judgment was entered out of term, the presumption of regularity prevails, and an exception on the ground that the judgment was entered out of term and in chambers cannot be sustained. *Hicks v. Koutro*, 61.

APPEAL AND ERROR —*Continued.*

§ 40. Harmless and Prejudicial Error in General.

Where both parties appeal, the exceptions of the successful party need not be considered when no prejudicial error is found on the appeal of the other party. *Light Co. v. Horton*, 300.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of testimony will not be held prejudicial when the same witness is thereafter permitted to give testimony of the same import. *In re will of Pridgen*, 509.

The exclusion of evidence cannot be prejudicial when the judgment of nonsuit would have to be affirmed even though the excluded evidence be considered. *Tyson v. Mfg. Co.*, 557; *Matheny v. Mills Co.*, 575.

§ 42. Harmless and Prejudicial Error in Instructions.

Ordinarily, when erroneous instructions are given in a charge, such error will not be cured although the court may have given correct instructions in other parts thereof, since it cannot be presumed that the jury was able to distinguish at which time the court was laying down the correct rule. *Primm v. King*, 228.

§ 45. Error Cured by Verdict.

Where the jury answers the issue as to breach of contract by defendant in the negative, the refusal of the court to submit issues as to special and punitive damages for the alleged breach cannot be prejudicial. *Perry v. Doub*, 322.

Where it is judicially determined that plaintiff was not the owner of the land in controversy, the refusal to submit an issue as to damages resulting from defendant's asserted trespass cannot be prejudicial. *Sledge v. Miller*, 447.

§ 46. Review of Discretionary Matters.

Findings held to show no abuse of discretion in denying motion for continuance. *Cleeland v. Cleeland*, 16.

A mere recital in an order that it is entered in the exercise of the court's discretion does not make it a discretionary matter, and a ruling on a matter of law is, as a rule, not discretionary. *GMC Trucks v. Smith*, 764.

§ 49. Review of Findings or Judgments on Findings.

While findings of the lower court are conclusive when supported by evidence, and in the absence of exception to the findings there is a presumption that the findings are supported by the evidence and thus are conclusive, where there is an exception to each material finding of fact, such findings cannot stand in the absence of evidence in the record tending to support them. *Freeman v. Bennett*, 180.

Where there are no exceptions to the admission of evidence or to the facts found, it will be presumed that the findings are supported by competent evidence and are binding. *Salisbury v. Barnhardt*, 549.

APPEAL AND ERROR —*Continued.*

On appeal to the Supreme Court from judgment of the Superior Court in reference proceedings, the sole questions presented are whether the facts found by the judge are supported by competent evidence and if such findings are sufficient to support the judgment. *Bradsher v. Morton*, 236.

The referee's findings of fact, approved by the trial court, are conclusive on appeal if supported by competent evidence even though incompetent evidence may also have been admitted, since it will be presumed that the findings were based on the competent evidence, and it is only when all of the evidence supporting a finding is based on incompetent evidence that such finding should be set aside on appeal. *Ibid.*

Findings of fact made by the trial court from conflicting evidence are binding on appeal. *Nowell v. Neal*, 516.

A finding of fact which is based upon incompetent testimony is not binding. *Smith v. Smith*, 669.

Findings of fact supported by evidence are conclusive on appeal. *Hartsell v. Thermoid Co.*, 527; *Milk Comm. v. Galloway*, 658.

The determinative question was the date summons was served in the action. The trial court found that the record offered by movant was erroneous on its face as to the dates of issuance and service of summons, and could not be relied upon as a true and correct copy of the proceedings. *Held*: The court should have found with particularity the controlling facts in order that it may be determined on appeal whether the facts found support the judgment. *Columbus County v. Thompson*, 607.

§ 50. Review of Injunctive Proceedings.

Where the findings of fact in injunction proceedings are supported by ample evidence, exceptions to the findings will not be sustained. *Studios v. Goldston*, 117.

While the court may review the findings of fact in injunction proceedings upon appeal from the granting or refusal of a temporary restraining order, where the court finds the facts by agreement of the parties upon the hearing upon the merits and issues a permanent restraining order on such findings, the findings are conclusive if supported by competent evidence, and the Supreme Court may review the evidence only to ascertain if there be any competent evidence to support the findings and whether the findings support the judgment. *Cauble v. Bell*, 722.

§ 51. Review of Judgments on Motions to Nonsuit.

Where defendant introduces evidence, only the motion for judgment as of nonsuit made at the close of all of the evidence is presented for review. *Tew v. Runnels*, 1; *Nichols v. McFarland*, 125; *Spaugh v. Winston-Salem*, 194.

Judgment of nonsuit cannot be sustained where the evidence is sufficient to make out a *prima facie* case even though, in the absence of objection to the evidence, all of the evidence tending to establish the affirmative of the issue is incompetent. *Skipper v. Yow*, 49.

§ 52. Petitions to Rehear.

Petition to rehear is the sole method of obtaining redress from error in a decision of the Supreme Court. *Nowell v. Neal*, 516.

APPEAL AND ERROR — *Continued.*

§ 55. Remand.

Where findings are insufficient to determine rights of parties, cause must be remanded. *Porter v. Bank*, 173; *Columbus County v. Thompson*, 607.

Where ruling is made under misapprehension of applicable law, the cause will be remanded. *S. v. Grundler*, 399.

The grantors in a deed are necessary parties in an action to construe the deed to determine whether it conveyed the fee simple title or contained a condition subsequent which would defeat the title, and when the grantors are not parties, the cause must be remanded. *Britt v. Children's Homes*, 409.

§ 59. Force and Effect of Decisions of Supreme Court in General.

An opinion of the Supreme Court must be read in the light of the factual situation then under consideration. *In re Will of Pridgen*, 509.

§ 60. Law of the Case.

A holding on a former appeal that the complaint as then drawn failed to state a cause of action becomes the law of the case. *Stamey v. Membership Corp*, 90.

§ 6. Resisting Arrest and Interference with Officer Making Arrest.

Evidence tending to show that both defendants were present when a police officer was attempting to make an arrest, that together they followed the officer with the prisoner to the patrol car, and that one of the defendants closed the car door to prevent the officer from placing his prisoner inside and then kicked the officer and forced him to release the prisoner, and that both defendants immediately thereafter joined in an assault on the officer, *is held* sufficient to be submitted to the jury as to the other defendant on a charge of interfering with the officer while he was engaged in the lawful discharge of his official duty in arresting the prisoner, since such evidence is sufficient to warrant the jury in finding that such other defendant was present for the purpose and with the intention of aiding, encouraging, and abetting the first defendant. *S. v. Troutman*, 395.

§ 7. Right of Person Arrested to Communicate with Friends or Counsel.

Persons confined to jail on criminal charges have the right to communicate with counsel and friends and reasonable opportunity to exercise such right. G. S. 15-47. *S. v. Wheeler*, 187.

ASSAULT AND BATTERY

§ 16. Necessity of Submitting Question of Guilt of Less Degrees of Offense Charged.

Where, in a prosecution for assault with deadly weapons with intent to kill, inflicting serious injury not resulting in death, defendants testify that they used no weapons but fought in their self-defense, and thus controvert the use of deadly weapons and the intent to kill, the court properly instructs the jury as to lesser degrees of the offense charged. *S. v. Troutman*, 395.

APPEAL AND ERROR —*Continued.*

§ 17. Verdict and Punishment.

A verdict of guilty of an assault where serious injury is inflicted is a sufficient finding of serious damage within the purview of G. S. 14-33(a) and removes the prosecutions from the limitations under (b) of that statute, so as to authorize fine, or imprisonment, or both, in the discretion of the court. *S. v. Troutman*, 395.

ASSIGNMENTS.

§ 4. Operation and Effect of Assignment.

An assignee of a chose in action may maintain an action thereon in his own name, G. S. 1-57, but the defendant is entitled to set up against him any offset or other defense existing at the time of the assignment. *Overton v. Tarkington*, 340.

In an action by the assignee of a chose in action, the defendant is entitled to set up as an offset for the reduction of the debt the penalty of twice the amount of interest paid to the assignor and the reduction of the debt by the forfeiture of the entire interest, and the striking of the allegations of the answer setting up such defense on the ground that the penalty for usurious interest collected by the assignor could not be asserted against the assignee, is error. *Ibid.*

ATTACHMENT

§ 6. Priorities.

In this special proceeding to determine the respective rights of the wife and an attaching creditor of the husband in funds deposited in the hands of the clerk as surplus after foreclosure sale of lands theretofore held by the husband and wife by the entireties, the wife claiming such funds under provisions of an order entered on motion in the cause in her suit for alimony making his share of the funds liable for the alimony therein decreed, it appeared of record that the wife had remarried and that therefore an absolute divorce had been decreed. *Held*: In the absence of findings sufficient to determine whether the decree of absolute divorce terminated the right to alimony under G. S. 50-11, as amended, judgment must be vacated and the cause remanded. *Porter v. Bank*, 173.

§ 7. Bonds in Attachment.

The filing of bond by the defendant to release his property from attachment does not bar defendant from challenging the validity of the attachment. *Armstrong v. Ins. Co.*, 352.

§ 11. Liabilities on Defendant's Bonds.

Where, in plaintiff's action *ex contractu* against a domestic corporation, attachment is ordered *ex parte* on plaintiff's allegation that defendant was secreting its property with intent to defraud, and defendant files answer denying all allegations upon which the right of attachment was based, a consent judgment thereafter entered that plaintiff recover the sum originally demanded, but which does not determine the validity of the attachment or direct that

ATTACHMENT — *Continued.*

defendant's bond should be liable for the payment of the judgment, constitutes a simple judgment for the amount specified and precludes recovery by plaintiff against the surety on defendant's bond. *Armstrong v. Ins. Co.*, 352.

AUTOMOBILES.

§ 1. Authority to Revolve or Suspend Drivers' Licenses.

G. S. 20-16 (a) (5) contains no fixed standard or guide for the Department of Motor Vehicles in determining whether or not a driver is an habitual violator of the traffic laws, but leaves it solely in the discretion of the Department to determine when a driver is an habitual violator, and therefore the statute is unconstitutional as a delegation of authority to th Deepartment to make law. *Harrell v. Scheidt*, 699.

§ 2. Grounds and Procedure for Suspension or Revocation of Drivers' Licenses.

A driver whose license is suspended, canceled or revoked by the Department of Motor Vehicles in the exercise of its discretion is entitled to judicial review: *Carmichael v. Scheidt*, 472.

It is mandatory for the Department of Motor Vehicles to suspend or revoke the license of any operator or chauffeur upon receiving a record of his conviction in a North Carolina court for operating a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, G. S. 20-17(2), and there is no right of judicial review when the revocation is mandatory. *Ibid.*

It is discretionary with the Department of Motor Vehicles whether to suspend or revoke the license of any operator or chauffeur upon receiving notice of the conviction of such person in another state for an offense which, if committed in this State, would be grounds for the revocation or suspension of the license. *Ibid.*

Licensee is entitled to judicial review of order permanently revoking license which is based in part on out-of-state conviction. *Ibid.*

The beginning date of the term of suspension of a driver's license, and likewise the effective date of the permanent revocation of such license for a conviction of a third offense, cannot be earlier than the dates of the respective convictions and cannot be computed as of the date the respective offenses were committed. *Ibid.*

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon conditions prescribed by a valid statute. *Harvell v. Scheidt*, 699.

The revocation or suspension of a driver's license is no part of the punishment for the violation of traffic laws, but is solely to protect the public and to impress the offender with the necessity for obedience to the traffic laws, not only for the safety of the public but also for his own safety as well. *Ibid.*

§ 3. Driving Without License or After Revocation of License.

A record of the Department of Motor Vehicles disclosing, under official Department action, that defendant's license was in a state of revocation during the period defendant was charged with driving on a highway of this State, is

AUTOMOBILES — *Continued.*

competent when the record is certified under seal of the Department. G. S. 8-35. *S. v. Mercer*, 371.

§ 7. Attention to Road and Due Care in General.

Even in the absence of statutory requirement, a motorist must exercise the care of an ordinarily prudent person under like circumstances to avoid injury, and in the exercise of such care, to keep a reasonably careful lookout and keep his vehicle under proper control. *Smith v. Kinston*, 160.

The driver of a motor vehicle is charged with the duty at all times of keeping such a lookout as an ordinarily prudent person would keep under the same or similar circumstances, and he is required not only to look but to see what ought to have been seen. *Carr v. Lee*, 712.

A motorist is required to drive his vehicle with due caution and circumspection at all times and at a speed and in a manner so as not to endanger or be likely to endanger any person or property. *Moore v. Plymouth*, 423.

Fog on a highway, even though temporary, increases the hazards and requires increased caution on the part of motorists. *Ibid.*

A red light is a recognized method of giving warning of danger, and a driver seeing a red light ahead of him on the highway is required, in the exercise of due care, to heed its warning. *Ibid.*

§ 8. Turning and Turning Signals.

Where plaintiff testifies that he saw defendant's car waiting at an intersection to make a left turn, plaintiff's testimony discloses that he had notice of the intended movement, and therefore defendant's failure to give the hand signal for such turn cannot be a proximate cause of the subsequent collision. *Wilson v. Camp*, 754.

§ 14. Following Vehicles Traveling in Same Direction.

Complaint held to disclose that sole proximate cause of accident was negligence of driver of car following plaintiff's car in hitting rear of plaintiff's car when plaintiff suddenly slowed to avoid striking car parked in plaintiff's lane of travel without lights, and that negligence of other defendant in parking on highway was not proximate cause of accident. *Howze v. McCall*, 250.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

The right of a motorist to assume that vehicles approaching from the opposite direction will remain on their right side of the highway is not absolute, and when a motorist approaches a machine emitting a chemical fog obscuring the entire highway, he may not rely on such assumption when a reasonably prudent man might reasonably anticipate that a motorist might be on the highway meeting him and unable to keep safely on his side of the highway on account of the fog. *Moore v. Plymouth*, 423.

§ 17. Right of Way at Intersections.

A motorist traveling along the dominant highway does not have the absolute right of way in the sense that he is not bound to exercise due care toward approaching traffic along the servient highway, but remains under duty to drive

at a speed no greater than is reasonable and prudent under the existing conditions, to keep his motor vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. *Primm v. King*, 228.

A motorist traveling on a servient highway on which a stop sign has been erected may not lawfully enter an intersection with a dominant highway until he has stopped and observed the traffic on the dominant highway and determined in the exercise of due care that he may enter such intersection with reasonable assurance of safety to himself and others, but his failure to do so is not negligence or contributory negligence *per se* but is to be considered with other facts in the case upon the issue. *Ibid.*

Where two vehicles approach an intersection at approximately the same time, or the vehicle on the right first enters the intersection, the vehicle on the right has the right of way. G. S. 20-155 (a) (b). *Carr v. Lee*, 712.

The right of way at an intersection means the right of a driver to continue his direction of travel in a lawful manner in preference to another vehicle approaching the intersection from a different direction. *Ibid.*

A driver having the right of way at an intersection is under no duty to anticipate disobedience of law or negligence on the part of others, but in the absence of anything which puts him on notice, or should put him on notice to the contrary, he is entitled to assume, and to act on the assumption, that others will obey the law, exercise reasonable care and yield to him the right of way. *Ibid.*

A driver who has the right of way at an intersection does not have the absolute right of way in the sense that he is not bound to use ordinary care in the exercise of his right, and he is nevertheless required to keep a reasonable lookout, keep his vehicle under control, and take reasonable precautions to avoid injury to persons and property, or when he sees, or by the exercise of due care should see, that an approaching driver cannot or will not observe the traffic laws, he must use such care as an ordinarily prudent person would use under the same or similar circumstances to avoid collision and injury. *Ibid.*

§ 27. Speed at Intersections.

Whether a speed within the statutory maximum is lawful on the part of a motorist traveling along a dominant highway approaching the intersection with a servient highway depends upon the circumstances, since under the provisions of G. S. 20-141(c) a motorist is required to decrease speed upon approaching a crossing or intersection when special hazards exist, and a motorist is required at all times to drive with due caution and circumspection and at a speed and in a manner so as not to endanger or be likely to endanger any person or property. *Primm v. King*, 228.

§ 34. Children.

It is the duty of a motorist in regard to a child on or near the traveled portion of a street to use proper care with respect to speed and control of

AUTOMOBILES — *Continued.*

his vehicle, maintain a vigilant lookout and give timely warning to avoid injury, G.S. 174(e), recognizing the likelihood of the child's running across the street in obedience to childish impulses, and the duty of the motorist in this respect applies not only to a child whom the motorist sees but also to a child whom a motorist should have seen in the exercise of reasonable vigilance, since he is charged with seeing what he could and should have seen. *Washington v. Davis*, 65.

The fact that a child attempts to cross a street elsewhere than at a recognized crosswalk does not relieve a motorist of his duty to exercise proper care under the circumstances to avoid injuring the child, and it is error for the court to charge the jury that the motorist would be under no affirmative duty to yield the right of way to the child if the child was crossing or attempting to cross at a place not a recognized crosswalk. *Ibid.*

It is the duty of the operator of a motor vehicle to use ordinary care to avoid injury to a child of tender years, even when the vehicle is being operated on private property away from a public highway or street. *McNeill v. Bullock*, 416.

§ 34a. Negligence in Emitting Smoke or Chemical Fog on Highway.

The emission from a vehicle of a chemical fog on a highway totally or materially obscuring the vision of the traveling public, without warning or signals except the noise of the machine and warning lights on the vehicle and fogging machine, which were completely obscured by the fog as to motorists approaching from its rear, is negligence, since injury to motorists on the highway may be reasonably foreseen. *Moore v. Plymouth*, 423.

§ 35. Pleadings and Parties in Auto Accident Cases.

Allegations held to show that negligence of one defendant was sole proximate cause, exonerating other defendant. *Howze v. McCall*, 250.

Allegations to the effect that one defendant slowed or stopped without giving the statutory signal, presumably to make a left turn at an intersection, that the driver of the car in which plaintiffs' intestate were riding applied his brakes and skidded to the left into the path of the car of the other defendant, approaching from the opposite direction, resulting in the collision, and evidence that when the driver of the car in which intestates were riding applied his brakes he skidded to his right and that the car approaching from the opposite direction turned to his left side of the highway to avoid the car of the other defendants in the intersection, and collided with the car in which intestates were riding, constitutes a fatal variance between allegation and proof, and nonsuit was properly entered. *Moore v. Singleton*, 287.

§ 38. Opinion Evidence as to Speed.

Testimony of witnesses that plaintiff's car passed them traveling 70 miles per hour less than a quarter of a mile from the scene of the accident, with further testimony by the witnesses that the speed continued until the car passed out of sight some 400 feet from the accident, is competent as evidence tending to show plaintiff's excessive speed at the time of the accident. *Wilson v. Camp*, 754.

§ 39. Physical Facts at Scene.

Physical facts at the scene of a collision may speak louder than the testimony of witnesses. *Carr v. Lee*, 712.

AUTOMOBILES — *Continued.*

§ 41b. Sufficiency of Evidence of Negligence In Failing to Exercise Due Care in General.

Evidence tending to show that defendant driver saw approaching him, when some 250 yards away, a truck with a red flashing light on its front and a fogging machine in the truck emitting chemical fog, which completely obscured the entire highway, that defendant driver slowed his vehicle but drove into the fog at a pretty good rate of speed and so continued on his right side of the highway until he was hit head-on by a truck traveling in the opposite direction, injuring plaintiff, a passenger in defendant's vehicle, *is held* sufficient to require the submission to the jury of the questions of such defendant's negligence and proximate cause. *Moore v. Plymouth*, 423.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Road in Passing Vehicle.

Plaintiff's evidence tending to show that the vehicle in which he was riding as a guest had been brought to a stop to avoid hitting another car in the driver's lane of travel opposite an intersection, that defendant's truck, traveling south in the western lane of the four-lane highway, approached from the opposite direction, and suddenly turned left and struck the car in which plaintiff was riding, requires the submission of the issue of negligence to the jury, notwithstanding other evidence inconsistent and in conflict therewith. *Lake v. Express*, 410.

§ 41g. Sufficiency of Evidence of Negligence in Failing to Yield Right of Way at Intersection.

Evidence tending to show that the operator of a motor vehicle on the servient highway failed to stop before entering the intersection with the dominant highway is sufficient to take the issue of his negligence to the jury in a suit involving a collision at the intersection with an automobile traveling along the dominant highway. *Primm v. King*, 228.

Evidence that a motorist along dominant highway failed to use due care to avoid collision with motorist on servient highway held sufficient. *Ibid.*

Evidence held insufficient to show negligence of driver of car entering intersection from the right as the proximate cause of collision at the intersection. *Carr v. Lee*, 712.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrians.

Plaintiff's evidence tending to show that plaintiff was intoxicated and was walking in a street near the edge of the pavement, facing traffic, that defendant's car was approaching from the opposite direction on the right side of the street at a lawful speed, that plaintiff saw the car but paid no attention to it, and that the car struck plaintiff and came to an immediate stop, together with testimony of a witness for plaintiff that plaintiff moved out into the street just before the accident *is held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Womble v. McGilvery*, 418.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

Plaintiff's evidence tended to show that his intestate, a twenty-months-old child, was playing in the yard near defendant as defendant was repairing his car, that the child was called into the house for his bath, that while his bath was being prepared the child must have gone outdoors, and that defendant, in backing his car thereafter to test the brakes, ran over and

AUTOMOBILES — *Continued.*

killed the child. *Held:* Nonsuit was proper in the absence of any evidence tending to show that defendant saw the child after the child was called into the house. *McNeill v. Bullock*, 416.

§ 41t. Sufficiency of Evidence of Negligence in Emitting Smoke or Chemical Fog on Highway.

Evidence held sufficient to be submitted to jury on question of operation of fogging machine without adequate warning signals. *Moore v. Plymouth*, 423.

§ 42h. Nonsuit for Contributory Negligence in Turning.

Plaintiff's allegations and evidence which are sufficient to support the inferences that plaintiff, at a time when the lights of motor vehicles were required to be shining, gave the proper signal for a left turn, looked for and did not see the lights of any other vehicles which could be affected by his movement, and that defendant, failing to give warning of his intention to pass, crashed into the left side of plaintiff's vehicle as it was making the turn, *is held* sufficient to be submitted to the jury on the issue of negligence. *McFalls v. Smith*, 123.

Evidence tending to show that plaintiff, driving a farm tractor, made a "U" turn on the highway without giving signal and without ascertaining, during the last ninety feet of travel, whether a vehicle was approaching from his rear, and was struck by a car driven by the femme defendant as is was attempting to pass, *is held* to disclose contributory negligence barring recovery as a matter of law, G.S. 20-149, notwithstanding plaintiff's evidence of defendant's failure to sound her horn before attempting to pass as required by G.S. 20-154. *Tallent v. Talbert*, 149.

§ 43. Sufficiency of Evidence of Concurring Negligence.

In this action by a passenger in an automobile, injured in a collision between the car in which she was riding, traveling along the dominant highway, and a car entering the intersection from a servient highway, the evidence *is held* sufficient to carry the case to the jury on the theory of concurrent negligence of both defendants. *Primm v. King*, 228.

Allegations to the effect that the first defendant had left his car parked at nighttime without lights in the southbound lane of traffic in violation of statute, that plaintiff, traveling south, when suddenly confronted with the parked car, applied his brakes and was struck from the rear by an automobile driven by the other defendant in a negligent manner in violation of statute, disclose that the collision was independently and proximately produced by the negligence of the second defendant, and the demurrer *ore tenus* of the first defendant is sustained in the Supreme Court, the allegations of the complaint that the collision was due to the joint and concurrent acts of negligence of both defendants being a mere conclusion of law. *Howze v. McCall*, 250.

In an action by a passenger on a truck to recover for personal injuries received in a collision, whether the negligence of a municipality and its employees in operating a fogging machine on the highway after sunset without sufficient warnings and signals, was insulated by the negligence of the driver of one of the vehicles involved in the collision in continuing to drive into the fog and in turning to his left side of the highway, thus causing the head-on collision, *held* a question for the jury on the basis of whether, upon

AUTOMOBILES — *Continued.*

the facts then and there existing, the subsequent act of the driver and resulting injury could have been reasonably foreseen. *Moore v. Plymouth*, 423.

§ 44. Sufficiency of Evidence of Contributory Negligence to Require Submission of Issue to the Jury.

Evidence tending to show that plaintiff, traveling west, approached an intersection in the northern lane of a four-lane highway at a high and unlawful rate of speed, that he saw a car, headed in the opposite direction, waiting to make a left turn into the intersecting road, that the other car, after waiting for two other west-bound cars to clear the intersection, proceeded to make a left turn and had cleared the inside west-bound lane and was struck by plaintiff's car in the north lane, is sufficient to require the submission of the issue of contributory negligence to the jury. *Wilson v. Camp*, 754.

§ 46. Instructions in Automobile Accident Cases.

Error in an instruction to the effect that a motorist would not be under affirmative duty to yield the right of way to a child if the place where the child was crossing or attemping to cross the street was not a recognized crosswalk, *held* not cured by a subsequent charge that, notwithstanding the law with regard to right of way, the motorist would be under duty to exercise proper precaution upon observing any child to avoid injuring him, since such duty obtains not only in regard to a child whom the motorist saw, but also to a child whom the motorist could and should have seen in the exercise of due care. *Washington v. Davis*, 65.

An instruction to the effect that a speed within the statutory maximum on the part of a motorist traveling along a dominant highway toward an intersection with a servient highway, would be lawful, is error, and such error is not cured by another portion of the charge which applies the common law rule of the prudent man without reference to the statute. *Primm v. King*, 228.

Where the evidence discloses that a motorist traveling along the servient highway, upon which stop signs had been erected, entered an intersection with a dominant highway, an instruction to the effect that where two vehicles approach an intersection at the same time, both of them observing the law, the motorist first in the intersection has the right of way notwithstanding that one of the highways is a dominant highway, is error. *Ibid.*

A charge predicating plaintiff's right to recover in part upon defendant's operation of his car at a reckless rate of speed must be held prejudicial to plaintiff when plaintiff relies exclusively on other grounds for recovery and there is neither allegation nor evidence that defendant operated his car at a reckless rate of speed, since it is error to charge on an abstract principle of law not supported by any view of the evidence. *Andrews v. Sprott*, 729.

It is error for the court to charge the jury conjunctively as to all the specific allegations of negligence upon which plaintiff relied in order to answer the issue of negligence in the affirmative, since such charge places the burden of proving all of the allegations of negligence as a proximate cause of the injury in order to obtain an affirmative answer to the issue, whereas proof of any one of them is sufficient for this purpose. The use of "and" instead of "or" is prejudicial in such instance. *Ibid.*

AUTOMOBILES — *Continued.*

The charge in this case on the respective duties of motorists at intersections, proximate cause and contributory negligence, *held* free from error. *Wilson v. Camp*, 754.

§ 50. Negligence of Driver Imputed to Guest or Passenger.

If the owner of an automobile is riding therein as a passenger and has the legal right to control the operation of the vehicle by the driver, the negligence of the driver will be imputed to the owner-passenger, and it is immaterial whether the right to control is exercised or not. Further, the right to exercise such control may be inferred from the fact of the owner's presence in the car. *Tew v. Runnels*, 1.

Evidence held to show contributory negligence as a matter of law on part of owner-passenger under the doctrine of imputed negligence. *Tew v. Runnels*, 1.

§ 74. Instructions in Prosecutions Under G.S. 20-138.

In prosecutions under G. S. 20-138 and G. S. 20-140, it is error for the court, in the face of defendants' pleas of not guilty, to assume in its charge that it had been established that one of the defendants was operating the motor vehicle at the time in question. *S. v. Swaringen*, 38.

AVIATION.

§ 4. Trespass and Injuries to Persons or Property on the Ground.

The flying of a plane over the land or pond of another does not constitute a trespass unless the flight is at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property below. *Wall v. Trogdon*, 747.

The burden of proof is upon the party asserting a violation of G.S. 66-13, and evidence merely that the plane engaged in crop spraying operations seen flying over the land of plaintiff at an altitude of 100 feet or more, without evidence that such flight disturbed any person on the ground or was imminently dangerous to persons or property, is insufficient to make out a cause of action for trespass. *Ibid.*

Evidence held insufficient to show that plaintiff's fish died as result of any negligence in operation of crop spraying plane. *Ibid.*

BAILMENT.

§ 3. Liabilities of Bailee to Bailor.

Evidence tending to show that deceased, over a period of years, was permitted to deposit and withdraw monies from plaintiff's safe, receiving receipts therefor, that upon withdrawals, the receipt corresponding to the sum withdrawn was removed and stuck on a filing wire, that the sum remaining after subtracting the total of the perforated receipts from the total receipts, was paid to the administrator of deceased, that such sum was substantially the same as shown to be due by an account book, kept by plaintiff's son in the course of the transactions, with other corroborative evidence, is *held* sufficient to support the referee's finding that nothing was due from plaintiff to the estate. *Bradsher v. Morton*, 236.

BETTERMENTS.

§ 1. Nature and Requisites of Claim for Betterments.

A party claiming betterments has the burden of establishing that he made permanent improvements on the land under *bona fide* belief of good title and had reasonable grounds for such belief. *Pamlico County v. Davis*, 648.

Evidence that the land in question was farm land which had been abandoned and had become a piece of waste-land, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, is sufficient to show "permanent improvements" within the purview of G. S. 1-340. *Ibid.*

Permanent improvements made by the purchaser in possession under an unenforceable contract to convey is sufficient claim of title to support a claim for betterments, and the statute of frauds may not be asserted to defeat such claim. *Ibid.*

§ 2. Proceedings to Enforce Claim.

Evidence that claimant went into possession of an abandoned farm, which had been permitted to become waste-land, under contract with the county to convey to him, the county having purchased at a tax foreclosure sale, that claimant expended a large sum of money in making permanent improvements over a period of three years, paid part of the purchase money, and that during the course of these improvements no one made an adverse claim, is sufficient to be submitted to the jury on the question whether the improvements were made under a *bona fide* belief of good title or right thereto. *Pamlico County v. Davis*, 648.

Evidence that claimant went into possession under a contract by the county to convey and that the county had purchased the land at a tax foreclosure sale, constitutes claimant in effect a purchaser at a judicial sale, and is sufficient evidence that he had reasonable grounds to believe he had good title or right thereto to support his claim for betterments *Ibid.*

BILLS AND NOTES.

§ 18. Presumptions and Burdens of Proof.

The burden is on the makers to show alleged want of consideration for their note. *Perry v. Doub*, 322.

BOUNDARIES.

§ 1. General Rules.

The fact that the descriptions in deeds forming the chain of title are not identical is not material if the differing language may in fact fit the same body of land, and if it is apparent from an examination of the descriptions in the several deeds that the respective grantors intended to convey the identical land, effect will be given to that intent. *Skipper v. Yow*, 49.

§ 2. Courses and Distances and Calls to Natural Monuments.

While course, distance and calls to fixed monuments will be harmonized if possible, if this cannot be done, a call to a natural monument will control course or distance. *Ibid.*

An established line of another tract is such a monument as controls course and distance. *Ibid.*

BOUNDARIES — *Continued.*

§ 3. Reversing Calls.

Ordinarily, the boundaries of a parcel of land should be determined by following the directions given in the deed in sequence, and a call may be reversed only to establish the location of a corner which cannot otherwise be located. *Batson v. Bell*, 718.

§ 5. Junior and Senior Deeds.

Where the beginning point in the description of one deed calls for the corner of the adjacent tract, such deed is a junior deed for the purpose of ascertaining the beginning corner, notwithstanding that the deeds to the respective tracts were executed at the same time, and the corner must be established, if possible, from the description contained in the deed to the adjacent tract, and may not be established by the calls in the junior deed, there being no question of adverse possession under color of title. *Coffey v. Greer*, 256.

It is not competent to use a junior deed from the common grantor for the purpose of locating the boundaries of the senior deed. *Caudill v. McNeill*, 376.

§ 7. Nature and Essentials of Processioning Proceeding; Nonsuit and Directed Verdict.

Where, in an action to establish a dividing line between the respective tracts of the parties, plaintiffs offer no competent evidence tending to support the boundary as contended by them, the court properly gives the jury peremptory instructions to find the boundary in accordance with defendants' contentions when supported by competent evidence. *Coffey v. Greer*, 256.

§ 8. Processioning Proceeding; Questions of Law and of Fact.

What are the boundaries of the tract of land is a matter of law to be determined by the court from the description set out in the conveyance; where those boundaries are located on the ground is a factual question for the jury. *Batson v. Bell*, 718.

§ 9. Sufficiency of Description and Admissibility of Evidence Aliunde.

A description in a deed to part of a tract of land which gives certain corners and lines and then directs "then east a sufficient distance to divide" the land equally, thence south to a road and thence along definite lines to the beginning, so as to include one half the tract, *is held* to require the division of the land by area rather than by value and is a sufficient description if the dividing line can be established by mathematical computation, and the exclusion of testimony of the court surveyor that he had ascertained the dividing line by computation and the running of the remaining calls in the description, was error. *Caudill v. McNeil*, 376.

Evidence tending to establish line of adjacent grant as natural monument is sufficient predicate for location of boundary by jury. *Batson v. Bell*, 718.

§ 11. Declarations Against Interest.

A sketch as to the timber conveyed by defendant's predecessor in title would not be competent as an admission against interest as to the boundaries of the land owned by such predecessor in fee even if the ancestor saw and approved the sketch and even though plaintiff establishes the identity of the description in the timber deed and the description set out in the answer, since the fact that a person conveys the timber on a designated tract, with-

BOUNDARIES — *Continued.*

out more, is no evidence that the land therein described is all the land owned by him. *A fortiorari*, a copy of the original sketch made by the draftsman after the death of the ancestor and the destruction of the original by fire, is incompetent. *Sledge v. Miller*, 447.

BROKERS.

§ 2. Revocation and Termination of Brokerage Contract.

An exclusive listing with a broker which stipulates that it should be in force for a period of three months and thereafter until revoked by the giving of notice, and stipulates further that if within three days after "this listing expires" the broker should furnish a list of the prospects actually shown the property, vendors would pay full commission if any of the prospects purchased the property within ninety days after expiration of the agreement, is not ambiguous and requires affirmative action on the part of vendors in order to effect its cancellation unless such requirement is waived by the broker. *Bonn v. Summers*, 357.

Whether a broker by conduct or otherwise waives the contractual notice of the termination of the brokerage contract is ordinarily for the jury. *Ibid.*

§ 3. Powers and Authority of Broker.

The owner of land may sell same through an agent, and such authorized agent may sign a contract to sell and convey in his own name or in the name of his pricipal or principals, and the authority of the agent to sell may be shown *aliunde* or by parol. *Lewis v. Allred*, 486.

§ 6. Right to Commissions.

Where a broker, within the time limited in the contract, obtains a purchaser ready, able and willing to purchase on the terms prescribed by vendors, the broker is entitled to his commission, notwithstanding vendors voluntarily fail to comply with their agreement to sell. *Bonn v. Summers*, 357.

BURGLARY.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to be submitted to the jury on the charge of burglary in the first degree, and there was no evidence that the offense was burglary in the second degree. *S. v. Smith*, 653.

§ 6. Verdict and Instructions as to Possible Verdicts.

G.S. 15-171, requiring the court in a prosecution for burglary in the first degree to submit the question of defendant's guilt of burglary in the second degree, notwithstanding the absence of any evidence of defendant's guilt of such degree of the crime, was repealed by Chapter 100, Session Laws of 1953. *S. v. Smith*, 653.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud or Mistake Induced by Fraud.

Allegations to the effect that an official of a housing authority which managed property under lease to the Federal Government had knowledge of proposed legislation which would materially affect the value of the property

CANCELLATION AND RESCISSION OF INSTRUMENTS— *Continued.*

(Federal Housing Act of 1950) and with such knowledge obtained an option from the owners of the fee, without disclosing the fact of the pendency of such legislation, *is held* insufficient to state a cause of action to set aside the option and deeds pursuant thereto on the ground of fraud in the absence of allegations sufficient to show any fiduciary relationship existing between the parties or any action by the purchaser diverting vendors from making full inquiry, or that vendors made any inquiry of the purchaser and that he denied the facts or remained silent in regard thereto in the face of such inquiry. *Harrell v. Powell*, 244.

While fraud is presumed in dealings between a fiduciary and the person to whom he stands in such relationship, in order for such presumption to obtain and be sufficient to take the case to the jury, it is first required that there be sufficient evidence to support a finding that such fiduciary relationship existed. *Biggs v. Trust Co.*, 435.

In this action to set aside the revocation of an agreement by employees to purchase the stock of a corporation, the evidence *is held* insufficient to be submitted to the jury on the issue of fraud or duress, the evidence failing to show want of adequate consideration or that the employees beginning the revocation agreement were not given opportunity to read and understand the instrument. *Ibid.*

§ 7. Parties Who May Institute Action.

Heirs cannot attack the deed of an ancestor except for fraud or undue influence in securing the execution thereof. *Corbett v. Corbett*, 585.

CARRIERS.

§ 2. State License and Franchise.

Where the owner of trucks leases them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right to use same exclusively for the transportation and delivery of lessee's goods, the lessor is not a contract carrier within the meaning of G.S. 20-38 (r) (1) and G.S. 20-38 (t), since the lessor merely leases its vehicles and is not a carrier of any kind, and lessee is solely a private carrier, and therefore lessor is not liable for additional assessment at the "for hire" rates under the statute. *Finance Corp. v. Scheidt*, 334.

§ 5. Rates and Tariffs.

In a proceeding to recover excessive freight charges collected because of an error in the tariff distance table filed with the Utilities Commission, the charges being in conformity with the tariff schedule for a greater distance than the correct distance between the termini, evidence offered by the carriers as to whether the higher rate was fair and reasonable for the shorter distance is properly excluded, since the carriers should not be permitted to change the rate by reason of a mistake in their tariff distance table, and petitioners are entitled to recover that part of the excess charged which is not barred by the statute of limitations. *Utilities Com. v. R. R.*, 477.

CEMETERIES.

§ 1. Control and Regulation.

A municipal corporation has no power to provide by ordinance that a fee be charged for the setting of a marker at a grave in the municipal cemetery when such marker is not purchased from nor set by the municipality, and no part of the charge for such setting is to be used in the perpetual care fund of the cemetery, and such charge is not an inspection fee. *S. v. McGraw*, 205.

COMPROMISE AND SETTLEMENT.

Compromise judgment with one party to transaction cannot bar action against another party. *Mercer v. Hilliard*, 725.

Where the evidence discloses that the corporate plaintiff and the driver of its tractor-trailer had paid to the administrator of the passenger-owner of a car, killed in a collision with the tractor-trailer, a sum of money in full settlement of any and all actions or causes of action arising out of the accident, the evidence justifies nonsuit in the corporation's subsequent action against the administrator of the owner-passenger to recover damages sustained by the tractor-trailer in the collision, there being no evidence to sustain the allegations of the corporate plaintiff in its reply that the settlement was obtained by an insurance adjuster without the knowledge or consent and in direct conflict with the instructions of the corporation. *Cannon v. Parker*, 279.

Compromise and settlement is an affirmative defense which ordinarily must be pleaded. *Koonce v. Motor Lines*, 390.

Plaintiff employee contended that it was agreed that his salary should not be reduced but that the amount paid him monthly should be reduced and the amount of the reduction should accrue and be paid him in a lump sum at a later time. Defendant employer contended that the employee's salary was merely reduced by the said sum without further agreement, and introduced salary checks endorsed and cashed by the employee stating that they were in full settlement of all amounts of every nature due the payee on the date specified. *Held:* The acceptance of the checks would not preclude the employee from claiming the accrued salary unless the checks were accepted in settlement of a disputed account, and an instruction to this effect is without error. *Ibid.*

CONSPIRACY.

§ 7. Instructions.

Where the indictment charges the defendants named and "other person or persons to the State unknown," with conspiracy to commit a criminal act, an instruction requiring the jury to find that at least two of the defendants named conspired together in order to convict any of them, cannot be held for error, the instruction being favorable to defendants on this point. *S. v. Caldwell*, 56.

CONSTITUTIONAL LAW.

§ 1. Supremacy of Federal Constitution and Statutes.

The Railroad Labor Act under the Commerce Clause controls the State "Right to Work" Act. *Allen v. R. R.*, 429.

CONSTITUTIONAL LAW — *Continued.*

§ 6. Legislative Powers in General.

Outside the power granted to the Federal Government, the power of the Legislature of North Carolina to enact statutes is without limit, except as restrained by the Constitution of North Carolina. *Milk Comm. v. Galloway*, 658.

§ 7. Delegation of Power by General Assembly.

The General Assembly may not delegate its authority to legislate. *Hartsell v. Thermoid Co.*, 527.

The statute conferring upon the N. C. Milk Commission power to fix prices in respect to milk and its products in intrastate business, prescribes the standards for the guidance of the Commission, leaving to the Commission only its proper administrative function, and therefore the Act is a constitutional delegation of power, G.S. 106-266.8 (j), with further protection against abuse of such power by provision for appeal and a hearing *de novo* in the Superior Court. *Milk Comm. v. Galloway*, 658.

While the General Assembly may delegate power to find facts or determine the existence or nonexistence of a factual situation on which the operation of a law is made to depend or an agency of government is to come into existence, the General Assembly may not delegate to an agency authority to apply or withhold the application of the law in its absolute or unguided discretion. *Harrell v. Scheidt*, 699.

Statute delegating authority to Department of Motor Vehicles to revoke license of habitual offenders held unconstitutional. *Ibid.*

§ 8. Legislative Control Over Municipal Corporations.

The Legislature has complete authority to create, control and dissolve cities, towns and other public corporations or other governmental agencies. *Sanitary District v. Lenoir*, 96.

§ 10. Judicial Powers—Determination of Constitutionality of Statute.

Doubt as to the constitutionality of a statute authorizing the imposition of a tax, approved by the voters, must be resolved in favor of the constitutionality of the statute and tax. *Thomasson v. Smith*, 84.

The presumption is in favor of the constitutionality of an act of the General Assembly, and a statute will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt. *Assurance Co. v. Gold*, 461, *Milk Comm. v. Galloway*, 658.

The enactment of law is the function of the General Assembly, and the courts must construe a statute as written. *S. v. Welborn*, 268, *Hartsell v. Thermoid Co.*, 527. *Fisher v. Motor Co.*, 617.

§ 17. Personal and Civil Rights in General.

The fact that a small portion of union dues may be used for political purposes contrary to the views of a nonoperating employee forced to join a railroad union does not violate his personal freedom. *Allen v. R. R.*, 492.

§ 18. Right of Free Press, Speech and Assembly.

The right of free assemblage and the right to bear arms does not sanction an assembly by a secret society for the unlawful purpose of intimidating or coercing the populace or any segment thereof and thus usurp the functions

of the law enforcement officers of the community or the courts of the State. *S. v. Cole*, 733.

§ 20. Equal Protection, Application and Enforcement of Laws and Discrimination.

The tax imposed by the Firemen's Pension Fund Act held unconstitutional in that the act discriminates in the imposition of the tax. *Assurance Co. v. Gold*, 461.

Order of Milk Commission in fixing uniform rates for transportation of milk from producers to a processor, regardless of the routes of the milk truck, does not deprive producer of equal protection and application of laws even though his individual rate is increased. *Milk Comm. v. Galloway*, 658.

§ 24. What Constitutes Due Process of Law.

Levy of tax within municipality to pay for extension of water and sewer facilities in an area to be annexed at a fixed future date does not deprive city taxpayers of property without due process of law. *Thomasson v. Smith*, 84.

An order of the N. C. Milk Commission prescribing a uniform hauling charge equal upon all producers delivering milk to a certain distributor, regardless of the distance or route, is not arbitrary nor discriminatory and is relevant to the legislative purpose of the Milk Commission Act, and such regulation, replacing a system of charges varying in accordance with the routes of the milk trucks, does not deny a producer the equal protection of the laws or deprive him of property without due process of law, even though he is subject under the regulation to a higher charge than he was under the old system. *Milk Comm. v. Galloway*, 658.

While public policy demands that every person have his day in court to assert his own rights or defend against their infringement, public policy equally requires that there be an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred. *Crosland-Cullen Co. v. Crosland*, 167.

The Constitutionality of a statute of this State authorizing service of process on foreign corporations involves a question of due process of law, Fourteenth Amendment to the United States Constitution, to be determined in accordance with the decisions of the Supreme Court of the United States. *Shepard v. Mfg. Co.*, 454.

The fact that a portion of the dues of a railroad union may be used for political purposes contrary to the views of a nonoperating employee forced to join the union does not deprive him of property without due process of law. *Allen v. R. R.*, 492.

§ 26. Full Faith and Credit to Foreign Judgments.

The full faith and credit clause of the Federal Constitution, Art. IV, sec. 1, does not require the courts of this State to treat as final and conclusive an order of a sister state which is interlocutory in nature and can be modified by the foreign court rendering the decree. *Cleeland v. Cleeland*, 16.

§ 29. Right to Trial by Jury.

Trial is by a jury of six in a municipal recorder's court under G.S. 7-204,

CONSTITUTIONAL LAW — *Continued.*

with right to trial by a common law jury on appeal to Superior Court. *Roebuck v. New Bern*, 41.

§ 31. Right of Confrontation and to Time and Opportunity to Prepare Defense.

Due process of law implies the right and opportunity to be heard and to prepare for the hearing. *S. v. Wheeler*, 187.

Where three defendants are jointly indicted for an offense, they are entitled to confer together as to their joint defense to the joint charge, and each is entitled to know what facts and circumstances the others can contribute to the defense, and the denial of opportunity to exercise such right is a denial of their constitutional right to prepare for the hearing. *Ibid.*

CONTEMPT OF COURT.

§ 3. Civil Contempt—Refusal to Obey Lawful Court Order.

A breach of contract, even though it be embodied in a consent judgment, is not punishable for contempt under G.S. 5-8. *In re Will of Smith*, 563.

CONTRACTS.

§ 5. Form and Requisites.

Whether the stipulations upon a page appearing after the page containing the signatures of the parties is a part of the contract depends upon the intention of the parties, and is ordinarily a question of fact to be decided by the jury. *Trucking Co. v. Dowless*, 346.

§ 12. Construction and Operation of Contracts in General.

When competent parties contract at arms length upon a lawful subject, the courts must construe the agreement as written by the parties. *Suits v. Ins. Co.*, 383.

A party will not be relieved from its contractual obligations in the absence of mistake, duress, illegality or fraud. *Hartsell v. Thomoid Co.*, 527.

Where the obligations of the parties to a contract are expressed in clear and unambiguous language, they are determinable as questions of law, but when the matter relates to defects and omissions on the part of plaintiff in furnishing the materials specified by the contract, and there is conflicting evidence as to whether the materials furnished actually met the specifications, the question is properly submitted to the jury. *Lumber Co. v. Construction Co.*, 680.

In plaintiff's action to recover the balance of the contract price for materials furnished, where the contract is clear that plaintiff, as a matter of law, was not required to furnish certain items under the terms of the agreement, defendant cannot be prejudiced by the submission of issues relating thereto and the finding by the jury thereon in favor of plaintiff. *Ibid.*

Conduct of the parties giving practical interpretation of their agreement will be considered by the courts when called upon to construe the contract. *Ibid.*

§ 25. Actions on Contracts—Pleadings, Issues and Burden of Proof.

In this action by a subcontractor against the main contractor to recover

CONTRACTS — *Continued.*

the balance due on contract for materials, defendant set up as a counterclaim six items based on omissions and defects in the materials furnished by plaintiff. *Held:* Regardless of the form of the issues the burden was upon defendant to prove the items constituting his counterclaim, and therefore the refusal of the court to submit the single issue tendered by defendant as to the amount due on the counterclaim, and the submission of separate issues as to the amount due plaintiff on the contract and the amounts due defendant on each of the items comprising the counterclaim, will not be held for error. *Lumber Co. v. Construction Co.*, 680.

§ 29. Damages.

In an action to recover the unpaid portion of the contract price for materials furnished, the defendant, under his denial of plaintiff's alleged performance, may show, in diminution of plaintiff's recovery, the reasonable cost of supplying omissions, if any, and of remedying defects, if any: and, if such costs exceed the unpaid portion of the contract price, the defendant may, by counterclaim, recover the amount of such excess. *Lumber Co. v. Construction Co.*, 680.

Where the evidence is susceptible to the construction that plaintiff, in furnishing glazed sash, was not under contractual duty to paint same for the protection of the putty, that the sash was rejected by the architect because the putty had dried out and cracked because of want of protective paint, but that the defect was the result of defendant contractor's failure to paint and cover up the putty within a reasonable time after the glazed sash was exposed to the elements, the question of whether the putty cracked because of faulty materials or workmanship provided by plaintiff or because of defendant's neglect, is for the determination of the jury. *Ibid.*

CORPORATIONS.

§ 12. Liability of Officers for Mismanagement.

A purchaser of stock in a corporation cannot complain of alleged mismanagement of the corporation occurring prior to his purchase. *Park Terrace v. Burge*, 308.

§ 12a. Liability of Officers and Directors for Corporate Debts.

Where the evidence discloses that the plaintiff sold goods to an individual on such individual's credit alone, and refused to extend credit to the corporation in which the individual was an officer, plaintiff may not contend that because the purported corporation was nonexistent at the time, the officers and directors thereof were personally liable, since such principle obtains in proper instances only when the stockholders, officers and directors continue to obtain credit for and on behalf of a purported but nonexistent corporation. *Supply Co. v. Reynolds*, 612.

§ 18. Purchase of Own Stock by Corporation.

Purchasers of all the stock of a corporation may not complain that prior to their purchase the former stockholders and directors had the corporation repurchase some of its stock, and therefore they cannot maintain a suit therefor in the name of corporation. *Park Terrace v. Burge*, 308.

CORPORATIONS — *Continued.*

§ 25. Actions by Corporation.

Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended less than a year prior to the institution of the action, do not disclose that the corporation did not have legal capacity to institute the action. *Mica Industries v. Penland*, 602.

§ 26. Liability of Corporation for Torts.

Evidence that defendant corporation's agent obtained the signatures of plaintiff's employees to invoices for products delivered and, by the use of carbons, to additional invoices, which the agent later filled in, and obtained payment for both the genuine and spurious invoices, is sufficient predicate for liability of defendant corporation under the general rule that the principal is liable for the fraud of its agent committed while acting within his authority. *Thrower v. Dairy Products*, 109.

COURTS.

§ 3. Original Jurisdiction of Superior Courts in General.

The Superior Court, in its general equitable jurisdiction has inherent power over property in *custodia legis* and may order the sale of such property when necessary for the proper protection of the interests involved. *Lambeth v. Lambeth*, 315.

§ 8. Appeals from Justice of the Peace.

Where appeal from a judgment of a justice of the peace is not filed in the Superior Court within ten days as required by G.S. 7-181, but is filed during the term at which the appeal would have stood regularly for trial had the record been timely filed, appellee's motion at the next succeeding term to dismiss the appeal presents, in like manner as a petition for *recordari*, the question of fact whether the failure of the justice of the peace to comply with the statute was caused by defendant's default, and when there is no evidence or finding in regard therto, judgment denying the motion is not supported by the record, and the cause must be remanded. *Freeman v. Bennett*, 180.

§ 9. Jurisdiction of Superior Court after Orders or Judgments of Another Superior Court Judge.

Where the court, upon findings of fact and conclusions of law, continues a temporary restraining order to the hearing on the merits, such findings and conclusions are not reviewable by another Superior Court judge upon motion to dissolve the temporary order prior to the final hearing. *Topping v. Board of Education*, 291.

§ 11. Establishment of Courts Inferior to Superior Court.

The County Recorder's Court of Pamlico Count is a duly constituted court. *S. v. Mercer*, 371.

§ 18. Conflict of Laws Between State and Federal Courts.

A municipality, in managing a housing project under contract with the Federal Government, is not an "employee of the government" within the meaning of USCA Title 28, 1346(b), and therefore in an action to recover for injuries sustained as a result of the negligence of a municipal employee in the discharge of its duty in the management of such project, nonsuit on

COURTS — *Continued.*

the ground that the municipality was an agent of the United States under the terms of the contract and that the action was in the exclusive jurisdiction of the Federal court, is properly denied. *Carter v. Greensboro*, 328.

Decision of the Supreme Court of the United States construing the Union Shop Amendment to the Railway Labor Act (45 USCA sec. 152, Eleventh) controls, and a union shop agreement authorized by the Union Shop Amendment is valid in instances governed by the Federal Act, notwithstanding that otherwise it would be void under our "Right to Work." *Allen v. R. R.*, 492.

CRIMINAL LAW.

§ 1. Nature and Elements of Crimes in General.

Notwithstanding the broad provisions of G.S. 14-4, the violation of a municipal ordinance cannot be a criminal offense if the ordinance is invalid. *S. v. McGraw*, 205.

§ 7. Entrapment.

While each case must be decided on its own facts, if a police officer or his agent, for the purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit except for the persuasion, encouragement, inducement and importunity of the officer or agent, the plea of entrapment is good; if the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense, such is not entrapment. *S. v. Caldwell*, 56.

Where the agent of the police testifies that the idea of committing the unlawful act originated with defendants and that they freely accepted his assistance, with evidence for defendants in conflict therewith, the issue of entrapment is for the jury, and its verdict is conclusive thereon. *Ibid.*

§ 9. Aiders and Abettors.

Evidence held sufficient to be submitted to the jury as to defendant's guilt as aider and abettor. *S. v. Troutman*, 395.

§ 16. Jurisdiction—Courts Inferior to Superior Court.

Where a statute declares that criminal offenses below the grade of felony committed within the corporate limits of a municipality or within five miles thereof are petty misdemeanors within the jurisdiction of the municipal recorder's court, G.S. 7-190 (1) and (3), the State Constitution, Article I, Section 13, authorizes the legislature to provide means of trial other than by common law jury. *Roebuck v. New Bern*, 41.

Statutory provisions for a jury of twelve, applicable solely to civil actions in a municipal recorder's court, G.S. 7-250, G.S. 7-252, cannot be invoked by a defendant in a criminal prosecution in such court as the basis for demand for a jury of twelve in the face of statutes establishing a jury of six in criminal prosecution in such court. *Ibid.*

The Recorder's Court of Pamlico County has jurisdiction to try a defendant on a charge of operating a motor vehicle on a public higway while defendant's license was revoked, and when the judge of that court testifies that he held a session of court on a Friday, such court is a court of competent jurisdiction to try the defendant for such offense on such day. *S. v. Mercer*, 371.

CRIMINAL LAW — *Continued.*

§ 26. Plea of Former Jeopardy.

A plea of former jeopardy cannot be predicated upon the fact that the grand jury had theretofore returned not a true bill another indictment of the same defendant for the identical offense. *S. v. Mercer*, 371.

§ 32. Burden of Proof and Presumptions.

Defendants' pleas of not guilty place the burden on the State of proving beyond a reasonable doubt each essential element of the offenses charged. *S. v. Swaringen*, 38.

The burden is on the State to offer evidence sufficient to establish the *corpus delicti* beyond a reasonable doubt. *S. v. Jones*, 134.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

Where defendant is charged with possession of nontaxpaid whiskey and with possession for the purpose of sale, evidence that defendant had nontaxpaid whiskey in his possession on a date some nine months after the offense for which defendant was being tried is irrelevant and incompetent, nor is such evidence admissible to prove *quo animo*, since mere proof of unlawful possession at one time is not relevant to whether his possession at another time was for the purpose of sale. *S. v. Bell*, 379.

§ 37. Res Inter Alios Acta.

In a prosecution of two defendants for inciting to riot, evidence of inflammatory statements made by one of them, which were not made in the presence of the other, is inadmissible as to such other, and the admission of such evidence over the objection of such other is prejudicial as to him. *S. v. Cole*, 733.

§ 42. Articles Connected with the Crime.

In a prosecution for rape, articles of clothing identified by the prosecutrix as wearing apparel removed from her person and later found in the building are competent. *S. v. Bass*, 209.

A knife used by defendant in cutting prosecutrix, properly identified, is competent in evidence. *Ibid.*

§ 43. Photographs.

Photographs, testified to be accurate representations of the areas surrounding the scene of the crime, are properly admitted for the limited purpose of explaining the testimony of the witnesses. *S. v. Bass*, 209.

§ 70. Hearsay Testimony in General.

Defendants admitted that on the afternoon in question they were riding in a particular car, but denied they were at the scene or committed the crime. The court admitted testimony of a witness that a boy, who was at the scene of the crime, told the witness that he saw a car of like make and color leave the scene immediately after the crime was committed. *Held:* The testimony was incompetent as hearsay, and since it related to a controverted and material fact, its admission was prejudicial. *S. v. Smith*, 653.

§ 71. Confessions.

Statement by investigating officers to the effect that they wanted to find out the truth and that it would be better if defendant told what happened, does not render a confession involuntary, and where the record discloses that

CRIMINAL LAW — *Continued.*

no hope for lighter punishment was held out to defendant and that defendant did not act through fear, duress, intimidation or inducement, the record supports the court's findings that the admissions were voluntary and therefore competent. *S. v. Dishman*, 759.

§ 75. Books, Records and Private Writings.

A record of the Department of Motor Vehicles disclosing, under official Department action, that defendant's license was in a state of revocation during the period defendant was charged with driving on a highway of this State, is competent when the record is certified under seal of the Department. *S. v. Mercer*, 372.

§ 78. Competency of Wife to Testify.

Where defendant's wife testifies in his behalf, she is subject to be cross-examined to the same extent as if unrelated to him. *S. v. Bell*, 379.

§ 80. Character Evidence of Defendant.

Even when defendant puts his character in evidence, the State may not, by cross-examination or otherwise, show his bad character by evidence that defendant had committed an unrelated, separate and distinct criminal offense, and certainly may not do so when defendant does not put his character in evidence. *S. v. Bell*, 376.

Where a defendant testifies at the trial, it is competent to cross-examine him in reference to convictions in other criminal cases for the purpose of impeaching his credibility as a witness, the questions not being based on mere assumptions or implications. *S. v. Troutman*, 395.

§ 83. Cross-Examination of Witnesses.

In a prosecution for operating a motor vehicle on a public street while under the influence of intoxicating liquor, the exclusion of testimony that the prosecuting witness was biased because interested adversely to defendant in a civil action arising out of the operation of the vehicle by defendant at the time in question, *held* erroneous on authority of *S. v. Hart*, 239 N.C. 709. *S. v. Treadaway*, 657.

§ 84. Credibility of Witnesses, Corroboration and Impeachment.

A witness for defendant may be cross-examined as to unrelated criminal offenses committed by her for the purpose of impeaching her credibility. *S. v. Bell*, 379.

Where articles of clothing worn by prosecutrix and a knife used by defendant are properly identified and admitted in evidence, corroborative testimony of others witnesses in regard thereto is competent. *S. v. Bass*, 209.

That witness had made like statements prior to trial is competent for purpose of corroboration. *S. v. Brown*, 271.

§ 90. Admission of Evidence Competent for Restricted Purpose.

The general admission of evidence competent against defendant for a restrictive purpose will not be held for error in the absence of request by defendant at the time that its admission be restricted. Rule of Practice in the Supreme Court No. 21. *S. v. Jones*, 134.

CRIMINAL LAW — *Continued.*

§ 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 the benefit of every reasonable intendment thereon, and every reasonable inference therefrom. *S. v. Brown*, 271.

And only the evidence favorable to the State need be considered. *S. v. Troutman*, 395.

§ 107. Instructions—Statement of Law and Application of Evidence Thereto.

It is the duty of the court to charge the jury on a material aspect of the case presented by the evidence, even in the absence of prayers for special instructions. *S. v. Wagoner*, 637.

Equivocation in defendant's testimony and evidence of contradictory statements made by him go to the weight of the testimony and do not relieve the court of the duty to submit to the jury a defense presented by defendant's evidence. *Ibid.*

§ 108. Expression of Opinion by Court on the Evidence.

In the absence of a judicial admission, the assumption by the court that any fact controverted by defendant's plea of not guilty has been established, is error, notwithstanding that the expression of opinion may have been unintentional or inadvertent, and notwithstanding the manner in which counsel examined the witnesses or argued the case to the jury. *S. v. Swaringen*, 38.

Where the court makes a plain and accurate statement of the testimony of each witness and states the contentions of the State and defendant respectively in regard thereto, the fact that the court does not state any contentions as to why the jury should or should not believe and accept the testimony of any of the State's witnesses, is not ground for objection, since the court may appropriately leave to the respective counsels the making of contentions relating to the credibility of the witnesses and the probative value of the testimony. *S. v. Jones*, 134.

Where the court, in stating the State's contentions, makes a separate statement to the effect that there could be no other explanation of defendant's conduct than that he was guilty of the offense charged, without any words indicating that such statement was a further contention of the State, the charge must be held for prejudicial error, notwithstanding that the court may have intended to make such statement a part of the statement of contentions. *S. v. Newton*, 145.

A statement of the court to the jury, upon the jury's request for further instructions, that the verdict need not be in writing but that the court had instructed the jury to return a verdict of guilty as charged in the indictment, otherwise to specify the verdict, must be held for prejudicial error as an expression of opinion by the court on the evidence. *Ibid.*

An expression of opinion by the court upon the evidence, directly or indirectly, must be held prejudicial. *Ibid.*

The court's statement that it would give the jury peremptory instructions in the case, together with the court's interrogation of witnesses, and recall of the jurors after they had deliberated only fifteen minutes, with instructions to them to go back and take a vote, *is held* to constitute prejudicial error, notwithstanding that the court did not give peremptory instructions,

the probable effect on the jury and not the motive of the judge being determinative. *S. v. Bertrand*, 413.

§ 109. Instructions on Less Degrees of the Crime.

Where, in a prosecution for rape, there is testimony that defendant also cut the prosecutrix with a knife, the court properly instructs the jury upon the question of defendant's guilt of assault with a deadly weapon as an offense included within the offense charged. *S. v. Bass*, 209.

§ 111. Charge on Character Evidence and Credibility of Witnesses.

A charge that the jury should scrutinize the testimony of defendant's wife in his behalf, without giving the qualifying instruction that if the jury, after scrutiny, should believe her testimony to give it the same weight as the testimony of a disinterested witness, is error. *S. v. Kimmer*, 290.

§ 114. Instructions on Right to Recommend Life Imprisonment.

It is error for the court to instruct the jury that the State contended it should not recommend life imprisonment. *S. v. Oakes*, 282.

It is error for the court to instruct the jury to the effect that conviction of a capital felony with recommendation of life imprisonment constituted a separate degree of the crime. *S. v. Denny*, 113.

§ 121. Motions in Arrest of Judgment.

Insufficiency of an indictment to charge the commission of any criminal offense is properly presented by motion to quash, but may also be raised by motion in arrest of judgment, or the Supreme Court may take cognizance of such defect *ex mero motu*. *S. v. Walker*, 35.

§ 131. Severity of Sentence.

Where bills of indictment for offenses each carrying a maximum imprisonment of ten years are consolidated for judgment, G.S. 14-70, G.S. 14-54, and only one judgment is entered thereon, sentence in excess of ten years is unwarranted, but is not void, and when defendant has not served that part of the sentence which is within lawful limits, he is not entitled to his discharge. *S. v. Clendon*, 44.

§ 133. Concurrent and Cumulative Sentences.

Where a sentence is made to begin at the expiration of a previous sentence, and the previous sentence is in excess of that allowed by law, the cause must be remanded for proper sentences. *S. v. Clendon*, 44.

Where sentences against defendants are not ordered to begin at the expiration of prior sentences imposed upon them, the subsequent sentences run concurrently. *S. v. Troutman*, 398.

§ 136. Revocation of Suspension of Judgment or Sentence.

Where it is held that defendant's motion for nonsuit should have been allowed, the provision of the judgment invoking a prior suspended sentence must also be reversed. *S. v. Smith*, 212.

§ 139. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases.

On appeal in a capital case the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu*. *S. v. Oakes*, 282.

CRIMINAL LAW — *Continued.*

§ 143. Right of Defendant to Appeal.

A judge of the Superior Court has authority under G.S. 1-220 to hear a motion made within the time allowed to serve case on appeal to set aside an order theretofore entered in the action vacating the appeal entries and the abandonment of the appeal. *S. v. Gundler*, 399.

§ 154. Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error not supported by an exception is ineffectual. *S. v. Garner*, 127.

Assignments of error which fail to specify in particular the subject matter of the assignment is ineffectual. *S. v. Mercer*, 371.

While the form and sufficiency of an assignment of error must depend largely upon the special circumstances of the particular case, it is required that the assignment specifically point out the alleged error without requiring a voyage of discovery through the record, and it should, ordinarily, set out so much of the evidence or the charge or other matter or circumstance relied upon, as to clearly present the matter to be debated. *S. v. Dishman*, 759.

§ 156. Exceptions and Assignments of Error to the Charge.

Exceptions and assignments of error to the charge on the ground that it failed to declare and explain the law arising on the evidence given in the case, without pointing out any particular matter arising on the evidence concerning which the court failed to declare and explain the law, are ineffectual, and further, in this case, the charge of the court was clear, full and explicit. *S. v. Jones*, 134.

§ 159. The Brief.

Assignments of error not brought forward and discussed in the brief are deemed abandoned. *S. v. Jones*, 134; *S. v. Smith*, 653.

§ 161. Harmless and Prejudicial Error in Instructions.

When the charge read contexually clearly presents the applicable principles of law in such manner as to leave no reasonable ground to believe that the jury was misinformed or misled, an assignment of error thereto cannot be sustained. *S. v. Gardner*, 127.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where the record does not show what the witness would have answered to questions asked on cross-examination, an exception to the exclusion of the testimony presents nothing for review. *S. v. Jones*, 134.

§ 164. Error Rendered Harmless by Verdict.

Where sentences entered against defendants in certain prosecutions run concurrently with other sentences theretofore imposed, and will have expired before the expiration of the other sentences, defendants cannot be prejudiced. *S. v. Troutman*, 398.

§ 169. Determination and Disposition of Cause—Remand.

Where sentence having a maximum in excess of that allowed by law is entered and thereafter sentence for another offense is imposed to begin at the expiration of the previous sentence, the cause will be remanded for

CRIMINAL LAW — *Continued.*

proper sentence in the first prosecution, giving defendant the benefit of the time already served, and then remanded to the superior court of the county in which the second sentence was entered for the imposition of sentence to begin at the expiration of the first. *S. v. Clendon*, 44.

Where it appears that the judge below has ruled upon a matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light. *S. v. Grundler*, 399.

§ 173. Post Conviction Hearing Act.

The Post Conviction Hearing Act is not a substitute for appeal, but provides procedure to determine as questions of law whether petitioners were denied the right to be represented by counsel, to obtain witnesses and to have a fair opportunity to prepare and present their defense. *S. v. Wheeler*, 187.

While the Supreme Court is bound by the findings of fact made by the court below in proceedings under the Post Conviction Hearing Act, it is not bound by the court's conclusions of law based on the facts found. *Ibid.*

Findings in a proceeding under the Post Conviction Hearing Act disclosing that petitioners, although jointly tried, were not allowed to communicate with one another prior to trial, and that their attemtps to contact witnesses and friends were unsuccessful, held not to support the court's conclusion of law that petitioners had not been denied any rights guaranteed to them by the Constitution of North Carolina, Art. I, secs. 11 and 17, and the 14th Amendment to the Constitution of the United States. *Ibid.*

Where all of the affirmative evidence tends to show that after petitioners' arrest, their respective attempts to contact relatives and a material witness were thwarted by failure of an SBI agent to fulfil his promises to deliver the messages or find the witness, and the only evidence that any of petitioners actually got a message beyond the confines of the jail was that one of them was permitted to talk to her sister by phone, with testimony of the jailer that he did not know whether the phone call was permitted before or after the trial, *is held* insufficient to support the court's finding that petitioners were not denied the right to communicate with counsel or friends. *Ibid.*

Where it appears that three defendants indicted for a joint offense were not allowed to communicate with each other prior to trial, but were led into court, each without attorney, relative or friend, and confronted by the State's prosecutor, ready for trial with his investigators and witnesses, it cannot be held that petitioners waived their rights to prepare for their defense by failing to complain to the court at the time of their arraignment, notwithstanding that they were mature persons not altogether strangers to court proceedings. *Ibid.*

CUSTOMS AND USUAGES.

Plaintiff employee contended that his salary, under agreement of the parties, was to be paid partly in cash and the balance to accrue and be paid in a lump sum at a later date, and offered evidence that on a prior occasion a raise in his salary was permitted to accrue and was paid in a lump sum at a later date. *Held:* The prior course of dealing tended to corroborate the plaintiff in his claim and was competent for that limited purpose. *Koonce v. Motor Lines*, 390.

DAMAGES.

§ 14. Sufficiency of Evidence of Damages.

While the damages must be established with reasonable certainty, it is not required that they be established with absolute certainty, and where plaintiff has paid both genuine and spurious invoices, the ascertainment of the amount of the spurious invoices by taking the invoices for the less amount for those days during which both a genuine and a spurious invoice were paid, establishes the amount of damages with reasonable certainty, and is sufficient. *Thrower v. Dairy Products*, 109.

DEATH.

§ 3 Nature and Grounds of Action for Wrongful Death.

Right of action for wrongful death is solely statutory, and the statute gives but one cause of action for damages for the death of a person, and ordinarily the administrator may not sue successively different parties upon allegations that their wrongful acts, respectively, produced the death of his intestate. *Bell v. Hankins*, 199.

Nonsuit is properly entered in an action for wrongful death when plaintiff's allegation that she was duly qualified and acting administratrix of the deceased is denied in the answer and plaintiff offers no evidence in support of her allegation. *Carr v. Lee*, 712.

§ 4. Time within Which Action for Wrongful Death Must Be Instituted.

Under the 1951 amendment to G.S. 28-173 the two year statute of limitations is applicable to actions for wrongful death, G.S. 1-53(4), and such limitation is no longer a condition annexed to the cause of action but an ordinary statute of limitations. *Stamey v. Membership Corp.*, 90.

Where the complaint in an action for wrongful death fails to state a cause of action, an amendment thereafter filed, supplying the deficiencies, constitutes a new cause of action, and the two year statute of limitations must be computed from the date of death until the filing of the amendment. *Ibid.*

§ 6. Expectancy of Life and Damages.

A personal representative has the right to negotiate and compromise on action for wrongful death. *Bill v. Hankins*, 199.

A consent judgment between the personal representative and the original wrongdoer bars a subsequent action by the personal representative against the physician or surgeon for malpractice alleged to be a contributing cause of death. *Ibid.*

DEDICATION.

§ 2. Acceptance of Dedication.

The use of a portion of the width of a dedicated street constitutes an acceptance of the dedication of the entire width of the street, and the nonuser of a portion thereof does not constitute an abandonment, but the municipality has the right at anytime thereafter to use the full width of the street as the growing necessities of the public may require. *Salisbury v. Barnhardt*, 549.

DEEDS.

§ 6. Execution and Acknowledgment.

The certificate of acknowledgment appearing in due form in the grant of an easement cannot be collaterally attacked, and therefore evidence that one of the grantors did not know that the officer was acting as a notary public but thought he was a mere witness, is properly excluded in an action to restrain interference with the easement, there being no attack on the certificate of the officer on the ground of fraud. *Gas Co. v. Day*, 482.

§ 7. Delivery.

The registration of a deed by grantor is effective delivery to the grantee even though the grantee knows nothing of its execution or recording, since it will be presumed that the grantee will accept the deed made for his benefit in the absence of evidence to the contrary. *Corbett v. Corbett*, 585.

§ 11. Construction and Operation of Deeds in General.

When the terms of a deed are ambiguous, the intention of the parties must, ordinarily, be gathered from the language of the instrument itself, but in proper instances consideration may be given to other instruments executed contemporaneously therewith, the attending circumstances and the situation of the parties at the time. *Smith v. Smith*, 669.

The practical construction placed upon a deed by the parties thereto before a controversy arises will ordinarily be given weight by the courts in arriving at the true meaning and intent of the language. *Ibid.*

The parol evidence rule applies to the construction of deeds, and a conveyance cannot be contradicted by a parol agreement, nor, in the absence of fraud, mistake or undue influence, can the provisions of a deed be set aside by parol testimony. *Ibid.*

§ 14. Reservations and Exceptions.

A deed to land excepting all mineral interest and reserving same to grantors severs the mineral and mining rights from the surface rights. *Light Co. v. Horton*, 300.

The reservation of the water power rights by grantors vests in grantors and their successors at most such water rights as are susceptible of development within the boundaries of the tract conveyed, and cannot entitle them to any part of the compensation paid for the condemnation of a part of the tract of land for the ponding of water incident to the development of a power site some distance downstream from the tract. *Ibid.*

§ 19. Restrictive Covenants.

Where the court, under agreement of the parties, finds upon the hearing on the merits that the subdivision in question had been developed under a uniform plan for residential purposes, conformed to within the area, and that the business development in the neighborhood was outside the restricted area, the findings support the issuance of order enjoining a land owner and his prospective purchaser from effecting a threatened violation of the restrictive covenants. *Cauble v. Bell*, 722.

DESCENT AND DISTRIBUTION.

§ 1. Nature of Titles by Descent in General.

Real property passes to collateral relations only in the absence of lineal

DESCENT AND DISTRIBUTION.

descendants. *Skipper v. Yow*, 49.

Upon proof of death there is a presumption that deceased died intestate, but there is no presumption that he died without lineal descendants. *Ibid.*

A deed more than thirty years old reciting that the common source of title died intestate and unmarried is competent to show descent through collateral heirs. *Ibid.*

DIVORCE AND ALIMONY.

§ 20. Decree of Divorce as Affecting Right to Alimony.

A decree of divorce on the ground of two years separation in an action instituted by the wife terminates the wife's right to alimony without divorce under a prior decree. G.S. 50-11, as amended by Ch. 872, Session Laws of 1955. *Porter v. Bank*, 173.

§ 21. Enforcing Payment of Alimony.

In the wife's action for alimony without divorce, a receiver appointed therein to take possession of the husband's property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. G.S. 50-16. *Lambeth v. Lambeth*, 315.

Therefore a court of equity can authorize the receiver to sell the lands of the husband for reinvestment so as to bring in sufficient funds to pay the alimony decreed. *Ibid.* The proceeds of sale retain the character of realty. *Ibid.*

§ 22. Jurisdiction to Award Custody of Children.

Under the 1957 amendment to G.S. 17-39, *habeas corpus* will be to determine the right to custody of a minor irrespective of the marital *status* of the parties. *Cleeland v. Cleeland*, 16. And a foreign decree does not deprive over courts of jurisdiction to hear petition for custody for change of conditions. *Ibid.*

DOWER.

§ 3. Lands to Which Dower Attaches.

The wife of a devisee of the remainder interest in lands is not entitled to dower so long as the prior life estate created by testator remains in existence, and therefore the devisee may convey his remainder, or it may be conveyed by operation of law, during the existence of the life estate without the joinder of the devisee's wife, and such conveyance divests the wife of the devisee of all claim to dower in the lands. *In re Will of Smith*, 563.

DURESS.

An unjust payment loses its voluntary character if it is brought about by fraud, duress or undue influence, and the health, age and mental condition of the person making the payment are properly considered in determining whether the payment was made under duress. *Bradsher v. Morton*, 236.

EASEMENTS.

§ 2. Creation of Easement by Deed or by Reservation in Deed.

Where the grant of an easement across a described tract of land provides in the instrument that the grantee of the easement should have the right to select the route, and the grantee thereafter selects the route with the acquiescence of the grantor, the location of the easement will be deemed that which was intended by the grant, and the grant will not be held void for uncertainty of description. *Gas Co. v. Day*, 482.

§ 7. Location of Easement.

Where the grant of an easement specifically stipulates that the grantee should have the right to select the route across the lands described, which the grantee does with the acquiescence of the grantors, evidence of a parol agreement contemporaneous with the execution of the instrument that the route should be selected within the bounds of another prior easement to a third party, is properly excluded as tending to vary or contradict the terms of the written instrument. *Gas Co. v. Day*, 482.

§ 9. Easements Running with the Land.

The grantees in a deed which specifically exempts from its provisions an easement theretofore granted across the land by grantors, take title subject to the easement, and therefore whether the easement grant was properly acknowledged is immaterial as to them, since their deed gives them notice. *Gas Co. v. Day*, 482.

EJECTMENT.

§ 7. Presumptions and Burden of Proof.

Upon defendant's denial of plaintiff's title and defendant's trespass in an action for the recovery of land, the burden is on plaintiff to prove his title and the trespass of defendant. *Seawell v. Fishing Club*, 402; *Sledge v. Miller*, 447.

In an action involving title to realty in which plaintiff seeks to establish title by a connected chain of title from the sovereign, the burden is on plaintiff to show that the descriptions in each of the deeds constituting a link in his chain of title cover and include the land claimed. *Sledge v. Miller*, 447.

§ 9. Competency and Relevancy of Evidence.

Recitation in deed more than thirty years old that the common source of title was unmarried and died intestate held competent under the ancient document rule. *Skipper v. Yow*, 49.

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where a proceeding for a partition is converted into an action to try title by respondents' denial that petitioners own any interest in the land, petitioners cannot be nonsuited if their evidence is sufficient to warrant a jury in finding that they own some interest in the land entitling them to the present right of possession, and it is not required that they establish the exact interest claimed in their pleading. *Skipper v. Yow*, 49.

Plaintiffs seeking to establish title by showing a common source of title and a better title from that source, must not only show that the parties trace their title to the same person, but must also show title to the same land from that source. *Ibid.*

EJECTMENT — *Continued.*

Where plaintiffs in an action to try title introduce evidence that the land descended to the collateral heirs of the common ancestor, together with evidence of their inheritance from such collateral heirs and evidence of defendants' title from the same source, the evidence is sufficient to be submitted to the jury on the question of inheritance and precludes nonsuit if plaintiffs' evidence is sufficient to identify the land as the land in controversy. *Ibid.*

Evidence that the differing descriptions in the deeds in petitioners' chain of title did in fact convey the land in dispute, together with testimony of a surveyor that the lands described in the respective descriptions convered substantially the tracts as described in the petitions, is sufficient to overrule respondents' motion to nonsuit in an action to try title to the land. *Ibid.*

Where plaintiff, in an action for the recovery of land, introduces deeds establishing a common source of title but fails to offer evidence fitting the descriptions in the deeds to the land claimed, nonsuit is proper, since rarely does a deed prove itself as to the identity of the land conveyed, but such proof must be effected by evidence *dehors* the instrument. *Seawell v. Fishing Club*, 402.

It would seem that the testimony of plaintiff's witness to the effect that the land described in the complaint was generally reputed to be within the area covered by the description in a deed in plaintiff's chain of title, is insufficient to require the submission of that question to the jury when on cross-examination the witness testifies that a survey in accordance with the description in the deed would not include the land in controversy. *Sledge v. Miller*, 447.

Where plaintiff, in seeking to establish his chain of title, introduces in evidence a deed executed by receivers, but fails to offer in evidence the judgment roll to establish that the persons named as receivers were in fact receivers and had authority to convey, there is a break in the chain of title, and nonsuit is proper, since the recitals in the deed do not establish as against strangers the facts therein recited. The same rule applies as to a deed executed by commissioners without proof of authority in the commissioners to execute the instrument. *Ibid.*

ELECTIONS.

§ 2. Qualification of Electors and Registration.

It is the duty of a registrar to administer the oath prescribed by law to electors before registering them, but his failure to perform his duty in this respect will not deprive the elector of his right to vote or render his vote void after it has been cast. *McPherson v. Burlington*, 569.

The fact that neither the registrar nor the person appointed for one day in his stead are residents of the area in which the annexation election is held, does not prevent them from being at least *de facto* registrars, and in the absence of any evidence that the result of the election was affected by such irregularities, it is insufficient ground to void the election or any votes cast by persons registered by them. *Ibid.*

§ 8. Contested Elections—Pleadings and Burden of Proof.

The certificate of the County Board of Elections is *prima facie* evidence of the correctness of the count and stands unless rebutted by proper and competent evidence. *McPherson v. Burlington*, 569.

ELECTIONS — *Continued.*

§ 12. Criminal Liabilities.

An indictment charging that defendant unlawfully and willfully by his own boisterous and violent conduct disturbed a named registrar while in the performance of her duties in examining a named applicant for registration, is insufficient, it being necessary that the language of the statute, G.S. 163-196, be supplemented by averments particularizing the crime with sufficient certainty to protect the accused from subsequent prosecutions for the same offense. *S. v. Walker*, 35.

EMINENT DOMAIN.

§ 5. Amount of Compensation.

Where a part of a tract of land is taken for highway purposes, the measure of damages is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left after the taking. *Robinson v. Highway Com.*, 120.

In ascertaining the difference between the fair market value of land immediately before and immediately after a partial taking, the value of the land taken and the value of the remaining land after giving consideration to general and special benefits, if any, are elements to be considered and it is error for the court to instruct the jury that it should ascertain the difference between the value of the land immediately before and immediately after the taking and then subtract from this difference any general and special benefits. *Ibid.*

Where petitioner deposits into court the sum fixed by the commissioners as just compensation and enters into possession, respondents may not accept such sum except as full payment, and therefore upon the later adjudication of the amount of compensation in a larger sum, respondents are entitled to interest on the full sum so adjudicated from the time petitioner took possession until payment of compensation is made. *Winston-Salem v. Wells*, 148.

§ 6. Evidence of Value.

While uses to which the remaining lands are reasonably susceptible as a direct result of the location of the highway may be considered in proper instances in determining general and special benefits, testimony of a witness as to his observations of sales made of unidentified properties on similar highways under unidentified circumstances would seem impertinent. *Robinson v. Highway Com.*, 120.

§ 7b. Proceedings to Condemn Land for School Site.

Chapter 683, Session Laws of 1957, rewrote Art. 15, Sec. 1, Chapter 1372, Session Laws of 1955 (G.S. 115-125), and condemnation proceedings for a school site are controlled by G.S. 40, Art. 2. *Topping v. Board of Education*, 291.

§ 11. Actions by Owner for Compensation or Damages.

In an action by the owner of an interest in lands against the State Highway Commission to recover compensation for the taking of a portion of the land, the joinder, as a respondent, of the owner of the other interest in the land cannot result in a misjoinder of parties and causes, since the action is to enforce a single right to recover compensation, and the joinder of all

EMINENT DOMAIN — *Continued.*

parties having an interest in the land is required by G.S. 40-12. *Tyson v. Highway Comm.*, 732.

§ 13. Time of Passage of Title.

In proceedings to condemn land for a school site, the payment into court by the county board of education of the amount of damages assessed by the commissioners and the taking of possession by it under order of the clerk while the cause remains pending for trial on exceptions directed both to petitioner's right to condemn and to the adequacy of the damages warded by the commissioners, G.S. 40-19, does not vest title in the board, since title is not divested from the landowner unless and until the condemnor obtains a final judgment in his favor and pays the landowner the amout of damages fixed by such final judgment. *Topping v. Board of Education*, 291.

§ 14. Persons Entitled to Compensation Paid.

Condemnor paid the amount of damages assessed by the jury into court, and the conflicting claims of respondents in the fund was referred to a referee. One group of respondents claimed as successors to the grantee in the deed from the common source of title; and the other group claimed under the reservations of the mineral and water power rights set forth in that deed. *Held:* It was incumbent upon the contestants to establish their respective interests in the fund, and upon failure of the claimants under the reservations and exceptions in the deed to offer any evidence as to the value of the mineral rights or the water power rights lost by reason of the condemnation or evidence upon which the jury based its verdict in the condemnation proceeding, judgment that they should recover only nominal damages and that the balance of the recovery should be paid to the owners of the land is without error. *Light Co. v. Horton*, 300.

ESTOPPEL.

§ 6. Necessity for Pleading an Estoppel.

A contradictory allegation in a pleading filed in a prior action cannot form the basis of an estoppel unless pleaded with certainty and particularity. *Smith v. Smith*, 669.

EVIDENCE.

§ 1. Judicial Notice of Legislative and Judicial Acts of this State.

The courts will take judicial notice of the date of the commencement of a term of the Superior Court and who is the presiding judge at such term. *Freeman v. Bennett*, 180.

§ 2. Judicial Notice of Legislative, Executive and Judicial Acts of the U. S. and Other States.

Federal regulations having general application and legal effect and published in the Federal Register must be given judicial notice. *Wright v. McMullan*, 591.

§ 3. Judicial Notice of Facts within Common Knowledge.

The courts will take judicial notice, as facts within common knowledge, of the characteristics of a hurricane and that a particular hurricane pass-

ing through the State was of great intensity, wreaking destruction in the area through which it passed. *Smith v. Kinston*, 160.

It is a matter of common knowledge that the breeding and presence of anopheles mosquitoes constitute a menace to the health and comfort of persons exposed to them. *Moore v. Plymouth*, 423.

§ 9. Burden of Proof on Defenses and Counterclaims.

The burden of proving a counterclaim alleged in the answer is upon defendant. *Lumber Co. v. Construction Co.*, 680.

§ 11. Transactions or Communications with Decedent.

Where the personal representative introduces evidence as to a personal transaction with decedent, he opens the door for the admission of evidence relating to the transaction by the adverse party. *Bradsher v. Morton*, 236.

§ 25½. Ancient Documents.

Recitals in a deed more than thirty years old that the common source of title died intestate and unmarried *held* competent under the ancient document rule, it appearing that at lease some who spoke through the recitals are dead. *Skipper v. Yow*, 49.

§ 26. Best and Secondary Evidence Relating to Writings.

Where plaintiff demands that defendant produce the original invoices for the purpose of ascertaining which carbon copies in plaintiff's possession are genuine and which spurious, and defendant states that the originals are not available, defendant cannot complain of the introduction of the carbons in evidence, since it is apparent that defendant had within its power the means of establishing the matter if plaintiff were in error as to which of the invoices are genuine and which spurious. *Thrower v. Dairy Products Co.*, 109.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

In determining whether a deed executed by a mother to her son and the son's wife created an estate by the entireties or merely partitioned the land between the mother and the son, who were tenants in common, parol testimony of the parties after controversy arose as to their intentions may not be considered insofar as such testimony tends to contradict the plain provisions of the deed. *Smith v. Smith*, 669.

§ 43. Competency and Qualification of Experts.

Where the hearing commissioner inquires into the qualification and competency of a witness presented as an expert in regard to lightning, his ruling that the witness is qualified as an expert will not be disturbed, there being nothing to show abuse of discretion. *Pope v. Goodson*, 690.

§ 45. Expert Testimony—Blood Tests.

A witness who has been duly qualified as an expert and who has made a chemical analysis of a sample of blood taken from the person in question shortly after the time in question, is competent to testify as to the alcoholic content of the blood and that such percentage of alcohol would render such person intoxicated. *Osborne v. Ice Co.*, 387.

EVIDENCE — *Continued.*

§ 51. Examination of Experts.

Where there is evidence that deceased was standing near a window and also that he was leaning with his left shoulder against the window casing, wearing wet clothing, when lightning came down the post or stud, the fact that hypothetical questions asked a lightning expert were predicated upon deceased's standing near the window, rather than against the casing, will not be held prejudicial. *Pope v. Goodson*, 690.

§ 55. Evidence Competent for Purpose of Corroboration.

Plaintiff employee contended that his salary, under agreement of the parties, was to be paid partly in cash and the balance to accrue and be paid in a lump sum at a later date, and offered evidence that on a prior occasion a raise in his salary was permitted to accrue and was paid in a lump sum at a later date. *Held:* The prior course of dealing tended to corroborate the plaintiff in his claim and was competent for that limited purpose. *Koonce v. Motor Lines*, 390.

EXECUTION.

§ 1. Property Subject to Execution.

Only the property of the judgment debtor may be levied on and sold under execution, and a levy on property of a person other than the judgment debtor constitutes a trespass. *Mica Industries v. Penland*, 602.

§ 7. Claims and Rights of Third Person.

The owner of property seized by an officer under execution against another may maintain an action against the officer seizing the property to recover possession, and may recover in such action damages, if any, sustained on account of the wrongful seizure and detention of its property. *Mica Industries v. Penland*, 602.

The judgment creditor, nothing else appearing, is not liable on account of the sheriff's wrongful seizure and detention of property not belonging to the judgment debtor, but if he induces the sheriff to wrongfully seize the property of a stranger, he is equally liable with the sheriff for damages sustained by the owner of the property on account thereof. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

§ 8. Collection of Assets.

A personal representative has the right to negotiate and compromise a statutory cause of action for wrongful death. *Bell v. Hankins*, 199.

§ 16. Validity of Sale of Land to Make Assets.

The regularity of a proceeding by an executor or administrator to sell lands to make assets to pay debts of the estate will be presumed in the absence of evidence to the contrary. *Nunn v. Gibbons*, 362.

§ 24a. Action for Personal Services Rendered Decedent.

Evidence held sufficient to make out cause of action to recover on *quantum meruit* for personal services. *Gales v. Smith*, 263.

EXECUTORS AND ADMINISTRATORS — *Continued.*

In an action to recover on *quantum meruit* for personal services rendered in reliance on a contract to convey or devise, allegations and evidence as to the alleged contract are relevant, not as a basis for recovery on the contract, but to rebut any presumption that the services were gratuitous. *Ibid.*

Evidence held sufficient to support claim on *quantum meruit* for personal services rendered decedent. *Nunn v. Gibbons*, 362.

In an action to recover the reasonable value of personal services rendered decedent in reliance on decedent's verbal contract to devise certain lands to plaintiff, allegations in the answer that decedent did in fact devise a part of the lands to plaintiff, that plaintiff knew of the provisions of the will, and by her acts and conduct accepted the provision in full satisfaction, or, at least, that the value of the property actually devised should be treated as *pro tanto* payment for any amount found due for the services, *held* erroneously stricken on motion, since it cannot be determined prior to the introduction of evidence that they are irrelevant, redundant, or that their retention would unjustly prejudice plaintiff's cause. *Briggs v. Dickey*, 640.

§ 24c. Presumption That Services Were Gratuitous.

Any presumption arising from the family relationship that personal services rendered were grautitous is rebuttable by proof that the services were performed in consideration of the agreement to pay therefor by conveyance or devise. *Gales v. Smith*, 263; *Nunn v. Gibbons*, 362.

FIDUCIARIES.

While a public official occupies a fiduciary relationship to the governmental agency or unit which he serves, it does not follow that he occupies a fiduciary relationship to a private citizen from whom he, as an individual, purchases property, and therefore he is not under duty to disclose to the vendor the pendency or passage of legislation affecting the value of the property when the facts in regard thereto are of public record. *Harrell v. Powell*, 244.

An agreement under which the employees of a corporation contract with the principal stockholders to purchase the entire capital stock of the corporation, partly for cash and partly upon deferred payments, merely defines the contractual rights and obligations of the respective parties, and does not establish a fiduciary or confidential relationship between them. *Briggs v. Trust Co.*, 435.

FIREMEN'S PENSION FUND ACT.

The tax imposed by the Firemen's Pension Fund Act *held* unconstitutional as discriminatory. *Assurance Co. v. Gold*, 461.

FRAUD.

§ 2. Constructive or Legal Fraud.

In order for the doctrine of constructive fraud to apply, it must be proven by sufficient evidence that a fiduciary relation existed between the parties. *Biggs v. Trust Co.*, 435.

FRAUDS, STATUTE OF

§ 1. Nature and Operation in General.

Our statute of frauds must be liberally construed, but contracts coming within its perview are voidable and not void. *Herring v. Merchandise, Inc.*, 221.

The statute of frauds acts to prevent the enforcement of executory contracts but does not affect contracts which have been consumated. *Ibid.*

The Connor Act supplements the statute of frauds, and both were designed to accomplish the same purpose. *Ibid.*

§ 2. Sufficiency of Memorandum.

A receipt for the cash payment on an identified tract of land belonging to an estate, signed by the executor, who is also an heir and authorized to act in the matter by the other heirs, is a sufficient memorandum of the contract to convey, signed by the party to be charged within the requirement of the statute of frauds. *Lewis v. Allred*, 486.

§ 3. Pleading The Statute.

The statute of frauds must be pleaded and cannot be taken advantage of by demurrer. *Herring v. Merchandise, Inc.*, 221.

§ 6b. Contracts To Convey or Devise.

An oval agreement to devise realty comes within the statute of frauds. *Gales v. Smith*, 263.

The authority of an agent to contract to convey lands need not be in writing under the statute of frauds. *Lewis v. Allred*, 486.

A memorandum of a contract to sell realty will not be held insufficient because of its failure to stipulate the time for performance, but in the absence of such stitpulation the law implies an obligation to perform within a reasonable time. *Ibid.*

Where memorandum of a contract to convey lands of an estate is executed by the executor, who is also an heir and authorized to act for the other heirs, but the memorandum fails to stipulate the time for performance and the evidence is conflicting as to whether a definite time was agreed upon by the executor and the purchaser, the question is for the jury, and an instruction to the effect that the closing date might be controlled by stipulation of the other devisees is erroneous. *Ibid.*

§ 6c. Leases.

While G.S. 22-2 makes no declaration with respect to the assignment or surrender of leases when the unexpired term exceeds three years, an assignment or surrender of such lease must be in writing G.S. 22-2, and in order to protect against creditors or subsequent purchasers must be recorded. G.S. 47-18. *Herring v. Merchandise*, 221.

§ 6f. Abandonment, Cancellation and Estoppel.

While an executory parol offer to surrender a leasehold estate having more than three years to run is within the statute of frauds and cannot be specifically enforced, such parol surrender, when consummated, is not invalid, and further a lessee may by his conduct be estopped to deny the termination of his lease. *Herring v. Merchandise, Inc.*, 221.

Where, in lessor's action for possession of the premises, the allegations of the complaint are sufficient, liberally construed, to allege a consummated

FRAUDS, STATUTE OF — *Continued.*

parol agreement by lessee to surrender the premises or equitable matters *in pais* sufficient to raise the question of estoppel of lessee and those claiming under him from denying the termination of the lease, lessor is entitled to show facts establishing such allegations, and judgment dismissing the action on the ground that the parol agreement to surrender the lease came within the statute of frauds and was void as a matter of law, is error. *Ibid.*

GIFTS.

§ 1. Gifts Inter Vivos.

The ownership of U. S. Savings Bonds, Series E, is fixed by the U. S. Treasury regulations in effect when the bonds are issued, irrespective of state laws relating to gifts *inter vivos* or *causa mortis*. *Wright v. McMullan*, 591.

Where the purchaser of U. S. Savings Bonds has them issued and registered in the name of his son and retains them in his possession, the son, or upon the son's death, his personal representative, is entitled to the proceeds of the bonds under Federal regulations, irrespective of the purchasers' mistake as to the legal consequences flowing from his intentional and deliberate act in having the bonds so issued and registered, there being no mistake of fact in regard thereto. *Ibid.*

GRAND JURY.

§ 2. Nature and Functions of Grand Jury.

The grand jury is not a trial court but an investigatory body, and it is competent to send to the grand jury as many bills of indictment as may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial. *S. v. Mercer*, 371.

HABEAS CORPUS.

§ 2. To Obtain Freedom from Unlawful Restraint.

Where bills of indictment for offenses each carrying a maximum imprisonment of ten years are consolidated for judgment, G.S. 14-70, G.S. 14-54, and only one judgment is entered thereon, sentence in excess of ten years is unwarranted, but is not void, and when defendant has not served that part of the sentence which is within lawful limits, he is not entitled to his discharge. *S. v. Clendon*, 44.

§ 3. To Determine Right to Custody of Infants.

Under Ch. 545, Session Laws of 1957, (G.S. 17-39.1) *habeas corpus* will lie to determine the right to custody of minor children irrespective of the marital status of the parties. *Cleeland v. Cleeland*, 16.

A decree of another state approving a prior separation agreement between the parties and awarding the custody of the children of the marriage in accordance therewith does not preclude our court from hearing and determining the right to custody of such children and awarding their custody in accordance with the conditions then existing some three years after the foreign decree, the court rendering the decree having authority to modify it for change of condition. *Ibid.*

HOMICIDE.

§ 4. Murder in the First Degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *S. v. Brown*, 271.

§ 9. Self Defense.

A person has the right to kill in self-defense if he believes and has reasonable grounds for the belief, that he is about to be assaulted with a shotgun, even though no actual assault has been made, and that it is necessary for him to kill to save himself from death or great bodily harm, it being for the jury to determine the reasonableness of the belief upon the facts and circumstances as they appeared to defendant at the time of the killing. *S. v. Goode*, 632.

§ 13. Presumptions and Burden of Proof.

The intentional killing of a human being with a deadly weapon raises the presumption of malice, constituting the offense murder in the second degree, nothing else appearing, with the burden upon the State to establish premeditation and deliberation beyond a reasonable doubt in order to establish a case of murder in the first degree. *S. v. Brown*, 271.

The burden is upon defendant to prove to the satisfaction of the jury that he acted in his self-defense and that in the exercise of his right to self-defense he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. *S. v. McDonald*, 419.

§ 16. Evidence of Threats, Motive and Malice.

The introduction in evidence of a peace warrant together with affidavit made by the deceased two days prior to her death, is error, and such error *held* not cured in this case by an instruction undertaking to limit the purpose of the introduction of the peace warrant, since the whole was before the jury. *S. v. Oakes*, 282.

Under the facts of the instant case, testimony of uncommunicated threats *held* competent under authority of *S. v. Minton*, 228 N.C. 15. *S. v. Goode*, 632.

§ 18. Evidence Competent on Question of Self-Defense.

Defendant, in substantiation of his evidence on his plea of self-defense, introduced testimony of a witness as to a conversation between the witness and deceased on the day of the homicide in which deceased stated he was going to kill defendant or defendant was going to kill him. The witness further testified that he had repeated the substance of the conversation to others. *Held:* The exclusion of testimony of another witness that he had heard the first witness on the day of the crime relate his conversation with deceased, must be held for prejudicial error, it not being necessary to the competency of such corroborating evidence that the witness should have identified persons to whom he had made the statements. *S. v. Brown*, 271.

§ 20. Sufficiency of Evidence and Nonsuit.

The evidence in this case *is held* sufficient to be submitted to the jury in support of the charge of murder in the first degree. *S. v. Brown*, 271.

Testimony of State's witnesses as to declarations made by defendant tending to establish that defendant killed his wife in self-defense, does not justi-

fy nonsuit when the other evidence in the case tends to show the facts to be other than as set forth in defendant's declarations. *S. v. McDonald*, 419.

The State's evidence tending to show that defendant intentionally shot his antagonist with a pistol, inflicting fatal injury, is sufficient to take the case to the jury on a charge of murder in the second degree. *S. v. Wagoner*, 637.

§ 27. Instructions on Defenses.

An instruction on the defense of drunkenness rendering defendant incapable of premeditation and deliberation that the defense of drunkenness is one which is dangerous in its application, is erroneous as an expression of opinion by the court on the evidence. *S. v. Oakes*, 282.

Defendant's evidence was to the effect that he shot and felled one person and that another person, who was in the company of the felled person, ran to the felled person and reached for the felled person's gun, and that defendant then shot the second person, inflicting fatal injury. *Held:* An instruction basing defendant's right of self-defense upon whether the second person was making an unlawful and felonious assault upon defendant is prejudicial, since defendant's evidence, at most, tends to show that he had ground to believe that the second person was about to commit a felonious assault upon him. *S. v. Goode*, 632.

Where defendant testifies that he did not know whether he pulled the trigger or whether his antagonist pulled the trigger in the scuffle, but that the pistol was fired in the scuffle, and that defendant did not intend to shoot his antagonist, but merely had the weapon to ward his antagonist off, his antagonist having on previous occasions assaulted defendant, the evidence is sufficient to require an instruction to the jury on the defense of an accidental killing. *S. v. Wagoner*, 637.

§ 29. Instructions on Right to Recommend Life Imprisonment.

The 1949 amendment to G.S. 14-17 does not create a separate crime of "murder in the first degree with recommendation of mercy," but merely gives the jury, in the event it convicts defendant of murder in the first degree, the unbridled discretion to recommend that the punishment should be life imprisonment rather than death, and therefore a charge, pursuant to statement of the solicitor, to the effect that the charge of murder in the first degree was no longer in the case, but that the charge of murder in the first degree with recommendation of mercy was in the case, is prejudicial. *S. v. Denny*, 113.

It is error for the court, after giving correct instructions as to the right of the jury to recommend life imprisonment if they should find defendant guilty of murder in the first degree, to instruct the jury that the State contended that the jury should not recommend that the punishment should be imprisonment for life. *S. v. Oakes*, 282.

HOSPITALS.

§ 2. Support and Control of Public Hospitals.

Where a bond order, approved by the voters of the county, authorizes the issuance of bonds in an aggregate amount to finance a new building or buildings to be used as a public hospital and the acquisition of a suitable

HOSPITALS — *Continued.*

site therefor, the use of the proceeds of the bonds is limited by the bond order, and the county may not use the surplus left after completing the project contemplated in the bond order toward the construction of a clinic in another municipality of the county. *Lewis v. Beaufort County*, 628.

HUSBAND AND WIFE.

§ 5. Contracts and Conveyances Between Husband and Wife.

A conveyance by the wife to the husband without complying with the statutory requirements of G.S. 52-12, is null and void. *Perkins v. Perkins*, 152.

Where the husband has a third party convey land to his wife, the conveyance will be presumed to be a gift, and in order for the husband to establish that she was to hold title in trust for him, he must establish the parol trust by clear, strong and convincing proof. *Ibid.*

§ 14. Creation and Existence of Estates by Entireties.

A conveyance of land to husband and wife, nothing else appearing, creates an estate by the entireties. *Smith v. Smith*, 669.

Where tenants in common exchange deeds for the purpose of alloting to each his or her share of the land, the deeds employed merely sever the unity of possession and create no new title, and therefore if any one of such deeds names the tenant and his spouse as grantees, no estate by the entireties is thereby created, even though the grantee consents thereto, since the grantees must be jointly named and jointly entitled in order to create an estate by the entireties. *Ibid.*

Mother and son were tenants in common. The son and his wife conveyed to the mother the son's entire interest in the lands, and the mother executed deed for a portion of the land to the son and his wife, "creating an estate by the entirety." There was no evidence that the portion conveyed to the son amounted to one-half the lands. *Held:* The deed executed by the mother to the son and his wife created an estate by the entireties, even though both deeds were executed contemporaneously, this being consonant with the intention of the parties as disclosed by the evidence and the facts and circumstances surrounding the parties at the time. *Ibid.*

§ 17. Termination of Estates by Entireties.

An estate by the entireties is converted to a tenancy in common by decree of absolute divorce, and the wife may thereafter maintain proceedings for partition. *Smith v. Smith*, 669.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

An indictment must charge each element of the offense of which defendant is accused with such certainty as to identify the offense and protect the accused from being twice put in jeopardy for the same offense, enable the accused to prepare for trial, and enable the court to proceed to judgment. *S. v. Walker*, 35.

While an indictment for a statutory offense is ordinarily sufficient if it follows the language of the statute, if the statute characterizes the offense in mere general or generic terms or does not sufficiently define the crime

INDICTMENT AND WARRANT — *Continued.*

or set forth all its essential elements, the language of the statute must be supplemented by other allegations so as to set forth intelligently and explicitly every essential element of the offense. *Ibid.*

§ 14. Time of Making Motions to Quash and Waiver of Defects.

The insufficiency of an indictment to charge the commission of any offense may be raised at any time by motion to quash, or the court may take cognizance thereof *ex mero motu*. *S. v. Walker*, 35.

INFANTS.

§ 2. Liability of Infants on Contracts.

Where an infant buys a car and wrecks it, he may disaffirm the contract and recover that part of the purchase price furnished by him, less the value of the car in its wrecked condition, notwithstanding that the father of the infant, prior to the wreck, in stating that he had paid a part of the purchase price, made no complaint or suggestion of nonage or other disability of his son. *Fisher v. Motor Co.*, 617.

Where defendant, in a suit by an infant to recover the purchase price of an article upon disaffirmance of the contract of sale, controverts the amount of the purchase price furnished by the infant, an issue of fact is raised for the determination of the jury, and plaintiff is not entitled to judgment on the pleadings, notwithstanding the question of minority is not controverted. *Ibid.*

Whether the law as to the liability of an infant on a contract of sale of an automobile should be changed is not a question for the Court, since the Court interprets and does not make the law. *Ibid.*

§ 8. Jurisdiction to Award Custody of Minor.

A decree of another state awarding the custody of a minor does not deprive our courts from modifying and changing the decree in accordance with change in conditions subsequent to the decree, the court rendering the decree having authority to modify it for change of condition. *Cleeland v. Cleeland*, 16.

INJUNCTION.

§ 7. Enjoining Occupancy or Use of Land.

Where the court, under agreement of the parties, finds upon the hearing on the merits that the subdivision in question had been developed under a uniform plan for residential purposes, conformed to within the area, and that the business development in the neighborhood was outside the restricted area, the findings support the issuance of order enjoining a land owner and his prospective purchaser from effecting a threatened violation of the restrictive covenants. *Cauble v. Bell*, 722.

§ 11. Enjoining Institution or Prosecution of Civil Action.

Finding that plaintiff had repeatedly instituted actions on the same cause of action against the same defendants for the purpose of harassment supports an order enjoining plaintiff from thereafter instituting additional actions on the same causes, the order relating only to actions subsequently instituted and to causes which had been determined by final judgment. *Nowell v. Neal*, 516.

INJUNCTION — *Continued.*

The remedy of a bill of peace to prevent vexatious litigation may be invoked in pending litigation. *Ibid.*

§ 13. Continuance and Dissolution of Temporary Orders.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the final hearing, the merits of the action are not involved, and where the complaint alleges that defendants are threatening to sell realty of the church in question and divert its building fund pursuant to an election of the congregation improperly called, the result of which was brought about by undue influence, coercive, or fraudulent means, the temporary order restraining defendants from transferring the real estate or expending any portion of the church's building fund is properly continued until the final hearing, although such restraining order would not preclude the church from thereafter holding an election bearing on the question or from approving or disapproving the action taken at the election. *McDaniel v. Quakenbush*, 31.

Where the sole purpose of the suit is to obtain injunctive relief, plaintiff is entitled as a matter of law to the continuance of the temporary restraining order to the hearing, notwithstanding the denial of the primary equity in the answer, when the complaint sufficiency alleges the primary equity and the evidence and findings make it appear that continuance of the temporary order is necessary to protect plaintiff's right until the controversy can be determined upon its merits, since in such instance the dissolution of the temporary order would virtually decide the case upon the merits upon the hearing of the order to show cause. *Studios v. Goldston*, 117.

If an order continuing a temporary restraining order to the hearing is erroneous, it can be corrected only by appeal, and in the absence of appeal it determines the status of the cause until the hearing. *Topping v. Board of Education*, 291.

Where the court, upon findings of fact and conclusions of law, continues a temporary restraining order to the hearing on the merits, such findings and conclusions are not reviewable by another Superior Court judge upon motion to dissolve the temporary order prior to the final hearing. *Ibid.*

Holding that defendants had complied with conditions for dissolution of temporary restraining order, held error. *Ibid.*

INSANE PERSONS.

§ 6. Support of Incompetent's Dependants.

Findings to the effect that an incompetent was incurably insane, that his estate was greatly in excess of any needs for his support, hospitalization and maintenance, that his adult children were in dire financial need, and that advancements to them from their father's estate would operate for the better promotion and advancement in life of the children, support an order directing advancements to be made to the children out of the surplus estate of the incompetent, G.S. 35-20, G.S. 35-21, and such order will not be held erroneous for want of direction in the order securing the advancements from being wasted, G.S. 35-26, the finding that the advancements would operate for the better promotion in life of the children, supported by evidence, being conclusive even though it should later turn out that the advancements were wasted, and it being a permissible inference from the evidence

INSANE PERSONS — *Continued.*

and findings that the advancements would be used to aid the children, respectively, in the purchase of homes. *Ford v. Bank*, 141.

INSURANCE.

§ 1. Control and Regulation of Insurance Companies.

The tax imposed by Chapter 1420, Session Laws of 1957, (G.S. 118-20) is not a tax imposed on insurance companies as a condition to writing insurance and is not a part of the premium but is an addition to the premium and a tax to be paid by the purchasers of insurance and collected by insurers for the Firemen's Pension Fund. *Assurance Co. v. Gold*, 461.

§ 3. Construction and Operation of Policies in General.

While a policy of insurance will be liberally construed in favor of insured, the courts cannot revise the contract of the parties or strike out any of its provisions. *Suits v. Ins. Co.*, 383.

An insurance premium is a consideration paid, whether in money or otherwise, for a contract of insurance. *Assurance Co. v. Gold*, 461.

If the language of an insurance contract is ambiguous and susceptible to two interpretations, the courts will give it that interpretation which is most favorable to insured. *Peirson v. Ins. Co.*, 580.

If the language of an insurance contract is plain and unambiguous, the courts must give effect to the language, since the courts interpret but do not make contracts. *Ibid.*

The words of an insurance contract must be given their ordinary and accepted meaning unless it is apparent another meaning is intended. *Ibid.*

Each clause of an insurance contract must be given effect if this can be done by any reasonable construction, and differing clauses must harmonize if possible. *Ibid.*

§ 29. Disability Insurance—Confining Illness.

Where the policy in one part provides benefits for nonconfining total disability and total loss of time, and in another part provides additional benefits if such disability confines insured continuously within doors insured, in order to qualify for the additional benefits, must show that his total disability and total loss of time, during the period claimed, confined him "continuously withindoors" within the language of the policy construed liberally in favor of insured. *Suits v. Ins. Co.*, 383.

Where, in a suit to recover additional benefits provided by the policy if insured's total disability should continuously confine insured withindoors, insured's evidence discloses that during the period in question he enrolled as a graduate student at a university 35 miles distant, drove to and from the university and attended classes three times a week unaided, drove his car on personal errands and on pleasure trips, etc., nonsuit should be entered, notwithstanding insured's evidence that he was paralyzed from the lower abdomen down and suffered total disability and loss of time. *Ibid.*

§ 42. War Risk Exclusion.

Death of a soldier in action during the "Korean Conflict" occurs while he is in the military service in time of war, "whether such war be declared or undeclared" within the exclusion of a double indemnity provision in a life insurance policy. *Lamar v. Ins. Co.*, 643.

INSURANCE — *Continued.*

§ 54. Vehicles Insured under Liability Policy.

A policy covering liability for medical expenses arising out of the use of any vehicle owned by insured and used principally in insured's automobile dealer or garage business, or operations necessary or incidental thereto, does not cover medical expenses for insured's wife for injuries sustained while she was riding to a social function in an automobile owned and used by insured principally in his separate retail hardware mercantile business, notwithstanding that the vehicle was occasionally used in connection with the automobile dealer and garage business, since the vehicle was not used principally in the garage business or for a use incidental to such business. The word "incidental" defined. *Peirson v. Ins. Co.*, 580.

§ 92. Action on Lightning, Windstorm and Hail Insurance.

Testimony to the effect that in raising insured's house in constructing a basement, the house was underpinned so that it was even more solidly on its foundations than before, and that winds of a hurricane shook the house and then lifted it up and caused it to crash to the ground, *is held* sufficient to sustain the jury's verdict that the damage was the direct and proximate result of windstorm and that insured had not increased the hazard, and to justify recovery on the windstorm policy sued on. *Moore v. Ins. Co.*, 625.

INTOXICATING LIQUOR.

§ 12. Competency and Relevancy of Evidence.

Testimony that the liquor in question "smelled" like nontaxpaid liquor has no probative force. *S. v. Smith*, 212.

Where defendant is charged with possession of nontaxpaid whiskey and with possession for the purpose of sale, evidence that defendant had nontaxpaid whiskey in his possession on a date some nine months after the offense for which defendant was being tried is irrelevant and incompetent, nor is such evidence admissible to prove *quo animo*, since mere proof of unlawful possession at one time is not relevant to whether his possession at another time was for the purpose of sale. *S. v. Bell*, 379.

§ 13c. Sufficiency of Evidence on Charge of Illegal Possession.

Where there is no evidence tending to show that the container of less than one gallon of liquor found in defendant's possession did not bear revenue stamps of the Federal Government or any county board, and the only testimony tending to show that the whiskey was nontaxpaid is testimony of the officer that it had the odor of nontaxpaid whiskey, defendant's motion to nonsuit in a prosecution for illegal possession of intoxicating liquor should have been allowed. *S. v. Smith*, 212.

The evidence disclosed that defendant was in possession of five pints of taxpaid whiskey in a building used by him as a combination store and dwelling, and that the whiskey was found in the room used as a bedroom, with the seal of one of the bottles broken, but it was stipulated by defendant's counsel that defendant had the whiskey in his store. *Held*: The evidence is sufficient to support the charge of unlawful possession, and defendant's motion to nonsuit was properly denied. *S. v. Welborn*, 268.

JUDGMENTS.

§ 1. Consent Judgments.

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and in order to vacate such judgment an independent action must be instituted. *Armstrong v. Ins. Co.*, 352.

§ 10. Time and Place of Rendition.

Order for the sale of realty to produce income for the payment of alimony decreed by the court should be entered at term and not in chambers if the defendant husband is not given notice thereof. *Lambeth v. Lambeth*, 315.

§ 11. Judgments by Default and Inquiry.

A judgment by default and inquiry establishes a right of action of the kind properly pleaded in the complaint, determines the right of plaintiff to recover at least nominal damages and costs, and precludes defendant from offering any evidence, in the execution of the inquiry, to show that plaintiff has no right of action. *Howze v. McCall*, 250.

While a judgment by default and inquiry precludes defendant from showing that plaintiff has no right of action, the default admits only the averments of the complaint, and if the allegations of the complaint are insufficient to state facts constituting a cause of action, judgment on the inquiry is erroneous and may be set aside upon demurrer *ore tenus* while the action is pending. *Ibid.*

§ 17b. Conformity to Verdict, Proof and Pleadings.

Where defendant tenders judgment placing plaintiffs in the same position as if the jury had answered the issue in plaintiffs' favor, the matters in controversy are settled by concession and the court properly enters judgment thereon, and plaintiffs may not object thereto, plaintiffs being entitled to an adjudication of their rights, but not being entitled to insist on how their rights should be ascertained. *Perry v. Doub*, 322.

The court may not, even with the consent of the parties, adjudicate a cause in part and leave one of the causes of action undisposed of, but should enter a single judgment completely and finally determining all of the rights of the parties arising on the pleadings and evidence. *Trucking Co. v. Dowless*, 346; *Hicks v. Koutro*, 61.

§ 17d. Construction, Operation and Effect of Judgment.

A consent judgment that propounders should execute and deliver to caveator a deed to certain lands upon payment by the caveator of the sum stipulated, does not constitute a transfer of title within the contemplation of G.S. 1-227 and G.S. 1-228, even though such judgment may be sufficient to support an order for specific performance in an action brought for that purpose, and the judgment does not in itself entitle caveator to an order for possession. *In re Will of Smith*, 563.

§ 18. Process, Notice and Service.

Valid service on nonresident by service on the Secretary of State supports judgment *in personam*. *Shepard v. Mfg. Co.*, 454.

JUDGMENTS — *Continued.*

§ 27a. Attack of and Setting Aside Default Judgments.

A judge of the Superior Court has original as well as appellate jurisdiction to set aside a default judgment. *Columbus County v. Thompson*, 607.

Findings, supported by evidence, to the effect that in an action against husband and wife arising out of business dealings between plaintiffs and the husband, the wife relied upon the husband's assurance that he would handle the matter, and that the wife has a meritorious defense to the action against her, *are held* sufficient to support the court's order setting aside the judgment against her for suprise and excusable neglect under G.S. 1-220 upon her motion made within one year of the rendition of judgment. *Abernethy v. Nichols*, 70.

The finding of a meritorious defense is essential to the validity of an order setting aside a judgment for surprise under *Moneyham v. Moneyham*, 641.

§ 27b. Attack of Judgment for Want of Jurisdiction.

A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter. *Nunn v. Gibbons*, 362.

Where there is no valid service, the judgment is void. *Columbus County v. Thompson*, 607.

A void judgment is a nullity and neither the lapse of time nor a general appearance can give it validity. *Ibid.*

§ 27c. Attack and Setting Aside Erroneous Judgments.

An erroneous judgment can be corrected only by appeal. *Topping v. Board of Education*, 291; *Nowell v. Neal*, 516. An expression of opinion by the trial court on the evidence is error of law within this rule. *Nowell v. Neal*, 516.

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

In order for a party to be barred by the doctrine of *res judciata*, it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him. *Crosland-Cullen Co. v. Crosland*, 167.

Plaintiff, after unsuccessful litigation against one party, may not seek to litigate identical question in action against another. *Ibid.*

A personal representative, after entering a consent judgment for damages for the wrongful death of intestate, may not sue the surgeon for malpractice alleged to be a contributing cause of the death. *Bell v. Hankins*, 199.

§ 33a. Operation of Judgments of Nonsuit as Bar to Subsequent Action.

Where plaintiff fails to pay the costs awarded against her in a prior action nonsuited, the judgment of nonsuit bars a subsequent action instituted on the same cause even though it be instituted within one year of the nonsuit, since compliance with the conditions of the statute is prerequisite to the right to claim its protection. *Nowell v. Hamilton*, 523.

§ 33b. Operation of Consent Judgments and Judgments in Retraxit as Bar to Subsequent Action.

Consent judgment or judgment in retraxit pursuant to compromise with

JUDGMENTS — *Continued.*

owner of parked car does not bar action by owner of car directly involved in the collision against the driver of the other car. *Mercer v. Hilliard*, 725.

§ 35. Plea of Bar, Hearings and Determination.

Ordinarily, only the documents constituting the record proper are before the court at pretrial conference, and where the record on appeal fails to indicate that either party offered evidence or waived a jury trial, judgment of nonsuit on the ground of estoppel by a prior judgment, predicated upon findings of fact by the court, must be vacated and the cause remanded. *S. v. Goode*, 634.

JUDICIAL SALES.

§ 4. Deposits and Resales.

An advance bid entered by the owners of a minority interest in the land and not supported by a cash deposit or bond but only by the interest of the advance bidders in the land, which interests are subject to deeds of trust, judgments and tax liens in an undisclosed amount, does not meet, at least technically, the statutory requirements for an advance bid. *Galloway v. Hester*, 275.

Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion, and where it appears that one advance bid after another had caused the property to be resold a number of times until all bidders had retired from the competition, the confirmation of the last sale to the last and highest bidder in the amount of the bidder's upset bid, the cash deposit having been made, and the refusal to order another sale upon an upset bid of the owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land which was subject to liens in an undisclosed amount, will be affirmed as a proper exercise of judicial discretion by the court. *Ibid.*

§ 7. Title and Rights of Purchaser.

The purchaser at a judicial sale is not under duty to employ counsel to examine the proceeding. *Pamlico County v. Davis*, 648.

LIBEL AND SLANDER.

§ 7b. Qualified Privilege.

An official report by an investigator of a church, published in the official organ of the church, is qualifiedly privileged, and in the absence of evidence of express or actual malice, nonsuit is proper. *Herndon v. Melton*, 217.

LIMITATION OF ACTIONS.

§ 5b. Fraud or Ignorance of Cause of Action.

Where it appears from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of the alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged the cause of action for fraud, the action is barred by G.S. 1-52(9). *Nowell v. Hamilton*, 523.

LIMITATION OF ACTIONS — *Continued.*

§ 11. Institution of Action.

An amendment introducing a new cause of action does not relate back, and the bar of the statute of limitations must be computed as of the time of filing the amended pleading rather than the time the action was instituted, irrespective of whether the limitation is a condition annexed to the cause of action or an ordinary statute of limitations. *Stamey v. Membership Corp.*, 90.

Where the original complaint fails to state facts sufficient to constitute a cause of action, an amendment supplying the deficiency constitutes a new cause of action for the purpose of computing the bar of the statute of limitations. *Ibid.*

§ 15. Pleading.

The contention that an amendment constituting a new cause of action was filed after the bar of the statute of limitations was complete cannot be raised by demurrer or motion to strike, but can be presented only by answer. *Stamey v. Membership Corp.*, 90.

MASTER AND SERVANT.

§ 2b. Construction and Operation of Contracts of Employment.

Where the employer contends and offers evidence to the effect that it reduced the salary of an employee by a certain sum and that the contract thereafter continued without change for the reduced salary, and the employee contends and offers evidence to the effect that the parties agreed that his salary should not be reduced, but that it should be paid part in cash, and the amount of the reduction should accrue and be paid him at a later date in a lump sum, and that this agreement continued without change, the conflicting evidence raises an issue for the determination of the jury, and further, the employee could not be limited in his recovery to the last six months of the employment. *Koonce v. Motor Lines*, 390.

A like prior course of dealing between the parties is competent in corroboration of the employee's contention. *Ibid.*

§ 2e. Collective Bargaining.

Union shop agreement held not unconstitutional in requiring involuntary payment of dues used partly for political purposes. *Allen v. R. R.*, 491.

§ 4a. Distinction Between Employee and Independent Contractor.

The distinction between an independent contractor and an employee or agent is the right of the employer to exercise control over the manner in which the work is performed. *Pressley v. Turner*, 102.

That the person doing the work determines the hours of work and is paid on a commission basis rather than a fixed salary, are not determinative of whether such person is an employee or an independent contractor but are merely indicia to be considered with the other factors in determining the status of the parties under the contract. *Ibid.*

§ 15. Duty to Provide Safe Place to Work.

An employer owes the duty to an employee to exercise ordinary care to provide a reasonably safe place to work and reasonably safe ingress and egress. *Bemont v. Isenhour*, 106.

MASTER AND SERVANT — *Continued.*

§ 40c. Compensation Act—Whether Accident "Arises Out of Employment."

Findings, supported by evidence, to the effect that the employee was intoxicated at the time of the accident, that in overtaking a truck preceding him on the highway, his car left skid marks for 75 feet straight in a line forward and then skid marks sideways across the center of the highway to his left, and that his car was struck by a car approaching from the opposite direction, *are held* sufficient to show that the accident resulted from the employee's violation of a safety statute and to support the finding of the Industrial Commission that the employee's injury and death was occasioned by his intoxication, and judgment denying compensation is affirmed. *Osborne v. Ice Co.*, 387.

Where the employer provides a parking lot on its premises next to its factory and permits its employees to park their cars in the lot, an injury received by an employee in a fall while she was walking from her parked car on her way to the other part of the employer's premises where she actually worked, is an injury arising out of and in the course of her employment within the purview of G.S. 97-2(f). *Davis v. Mfg. Co.*, 543.

Injury or death caused by lightning may be compensable as arising out of the employment when the circumstances incident to the employment subject the employee to a greater hazard or risk than that to which he would otherwise have been exposed or to which the public in general is exposed. *Pope v. Goodson*, 690.

Only those injuries by accident which arise out of and in the course of the employment are compensable under our Workmen's Compensation Act, and it is required that the injury be traceable to the employment as a contributing proximate cause. *Ibid.*

Whether an injury by accident arises out of the employment is a mixed question of law and of fact. *Ibid.*

Evidence held sufficient to support conclusion that the incidents of employment exposed the employee to the risk of lightning greater than that of persons in general. *Ibid.*

§ 40f. Compensation Act—Deseases.

Upon disability from asbestosis, it must be assumed that even the last five days the employee was exposed to asbestos dust contributed to the injury, and such presumption supports a finding to that effect. *Hartsell v. Thermoid Co.*, 527.

§ 40g. Compensation Act—Hernia.

Judgment awarding compensation for hernia without evidence that at the time the employee suffered the injury he was performing the work in any other than the usual manner, reversed on authority of *Hensley v. Cooperative*, 246 N.C. 274. *Holt v. Mills Co.*, 215.

§ 40j. Compensation Act—Compensation for Facial Disfigurement.

Evidence *held* sufficient to support the finding of Industrial Commission that claimant had suffered a facial disfigurement sufficient to adversely affect claimant's appearance to such extent that it may be reasonably presumed to lessen his opportunity for remunerative employment, and award of compensation therefor is upheld. *Davis v. Construction Co.*, 129.

MASTER AND SERVANT — *Continued.*

§ 45. Compensation Act—Nature and Functions of Industrial Commission.

The General Assembly may not delegate its authority to legislate to a court or commission, and a decision or rule of the Industrial Commission does not have the force of law. *Hartsell v. Thermoid Co.*, 527.

§ 51. Proceedings before Commission.

Where the hearing commissioner inquires into the qualification and competency of a witness presented as an expert in regard to lightning, his ruling that the witness is qualified as an expert will not be disturbed, there being nothing to show abuse of discretion. *Pope v. Goodson*, 690.

§ 53b(1) Amount of Compensation for Injury.

Compensation for permanent partial disability in the loss of the use of the employee's hand resulting from an accident occurring prior to the effective date of the amendment to G.S. 97-31(t) is the minimum of $10 per week prescribed by G.S. 97-29, for 170 weeks, notwithstanding that the employee had returned to work after the termination of his total temporary disability. *Oaks v. Mills Co.*, 285.

§ 53b(4). Compensation Act—Costs and Attorneys' Fees.

The provisions of G.S. 97-90 that the Industrial Commission approve fees for attorneys implies the exercise of discretion and judgment by the Commission, and the superior court on appeal is without power to hear evidence upon the question and strike out the fee allowed by the Commission and approve a fee in a different amount. *Brice v. Salvage Co.*, 74.

§ 53e. Parties Liable for Payment of Award.

The 1957 amendment to G.S. 97-57 became effective 1 July, 1957, and where an employee ceases work because of disability from asbestosis prior to that date, the amendment is not applicable in determining liability for such disability. *Hartsell v. Thermoid Co.*, 527.

G.S. 97-57 is clear as to which employer is liable for disability from asbestosis, the statute providing that the employer in whose service the employee was last exposed to the hazards of the disease for as much as thirty working days, or parts thereof, within seven consecutive calendar months, should be liable, but in those instances in which different insurance carriers are on the risk during such thirty-day period, the statute, prior to the 1957 amendment, makes no provision as to the respective liabilities of the insurers, and therefore their liabilities must be determined in accordance with the policy contracts. *Ibid.*

Where an employee becomes disabled from asbestosis while working for a single employer, but different insurers are on the risk during the employee's last thirty days exposure to the hazards of the disease, the carrier last on the risk, even though it was on the risk for only the last five days the employee worked, is solely liable for the award under the provision of the policy contracts that each policy should apply only to injury by disease of which the last day of the last exposure occurs during the policy period, there being no statutory provision governing the respective liabilities of the insurers in such instance prior to the 1957 amendment to G.S. 97-57. *Ibid.*

Under the Workmen's Compensation Act, an employee has the right to enforce against the insurer the contract of insurance made for his benefit. G.S. 97-98. *Ibid.*

MASTER AND SERVANT — *Continued.*

§ 55d. Compensation Act—Appeal and Review in Superior Court.

The Industrial Commission is constituted the fact finding body in proceedings coming within its jurisdiction, G.S. 97-77, and review on appeal from its judgment is limited to the legal questions of whether there is competent evidence to support its findings and whether such findings support its legal conclusions, and the superior court cannot in any event consider evidence on appeal for the purpose of finding the facts for itself, its power being limited to remand of the cause for proper findings if the findings of the Commission are insufficient to enable the court to determine the rights of the parties. *Brice v. Salvage Co.*, 74.

If a finding of the Industrial Commission is supported by competent evidence, the admission of evidence that is without probative value upon the question is immaterial. *Osborne v. Ice Co.*, 387.

The findings of fact of the Industrial Commission are conclusive if supported by competent evidence, notwithstanding that the evidence would support a contrary finding. *Ibid.*

An exception to the failure of the Industrial Commission to make a pertinent finding supported by evidence must be sustained. *Hartsell v. Thermoid Co.*, 527.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

Evidence tending to show that plaintiff paid the total balance he acknowledged to be due intestate to intestate's personal representatives, that the beneficiaries of the estate claimed a large additional amount to be due, and made repeated demands upon plaintiff and threatened to "take further steps" if the additional amount were not paid, that plaintiff, who was unlettered, old and ill, was greatly worried by the demands, and paid the additional sum to maintain peace in the family, stating that he did not owe the money but for defendants to take it and bring it back after they had found out it wasn't their money, *is held* sufficient to support the referee's finding that the payment of the additional sum was not voluntary. *Bradsher v. Morton*, 236.

MORTGAGES.

§ 39b. Waiver of Right to Attack Foreclosure and Estoppel.

Where the grantee of the mortgagor acquiesces in the foreclosure of a prior deed of trust executed by his grantor and accepts from the purchaser in payment of a lien on the property monies borrowed by the purchaser on a subsequent deed of trust, he is estopped from attacking the title of the purchaser. *Corbett v. Corbett*, 585.

MUNICIPAL CORPORATIONS.

§ 3. Territorial Extent and Annexation.

Municipality may issue bonds and levy taxes to extend municipal services to territory to be annexed prior to date annexation is effective. *Thomasson v. Smith*, 84.

MUNICIPAL CORPORATIONS — *Continued.*

Sanitary District held not entitled to complain that limits of municipality were extended to embrace part of district. *Sanitary District v. Lenoir*, 96.

A public corporation formed by the merger or consolidation of two or more public corporations succeeds to all the duties, obligations and assets of its previous parts; where the boundaries of one public corporation are extended to take in part of the territory of another and each corporation continues its services and exercises the function authorized by the Legislature, there is no merger, and each continues to own and hold its property necessary for its corporate purposes, certainly in the absence of clear legislative mandate to the contrary. *Ibid.*

A sanitary district is not a "municipality" within the meaning of G.S. 160-1, so as to preclude a municipality from annexing territory within a sanitary district. *Ibid.*

The territory of governmental agencies or municipal corporations may overlap even when both have the same general purpose. *Ibid.*

§ 5. Powers and Functions in General and Legislative Control.

Municipal corporations are creatures of the General Assembly and can have only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given. *S. v. McGraw*, 205.

§ 6. Distinction between Governmental and Private Powers.

Activity of a municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State rather than for itself, is a governmental function; activity of a municipality which is commercial or chiefly for the private advantage if the compact community, is private or proprietary. *Carter v. Greensboro*, 328.

Activity of a city in managing a temporary, low-cost housing project for a special and limited class of tenants under contract with the Federal Government, under which the city receives substantial ground rental and other benefits and is entitled to salvage upon removal of the structures, is a proprietary activity, and the city may not escape liability for the negligent acts of its employee in the discharge of such function on the ground of governmental immunity. *Ibid.*

§ 7. Governmental Powers.

A municipal corporation has power to operate chemical fogging machines to destroy anopheles mosquitoes in the interest of health. *Moore v. Plymouth*, 423.

§ 8a. Private Powers in General.

While the General Assembly may authorize a municipal corporation to engage in a business for public benefit and to extend such power beyond its corporate limits, such authority does not confer upon the municipality the right to exclude competition in the territory served. *S. v. McGraw*, 205.

§ 8b. Public Utitlities.

Section 6, Chapter 802, Session Laws of 1957, authorizes the City of Charlotte to extend its water and sewer lines into the area to be annexed, upon the approval of the voters of annexation, prior to the time fixed by the statute as the effective date of the annexation. *Thomasson v. Smith*, 84.

MUNICIPAL CORPORATIONS — *Continued.*

§ 8g. Cemeteries.

A municipal corporation has no power to provide by ordinance that a fee be charged for the setting of a marker at a grave in the municipal cemetery when such marker is not purchased from nor set by the municipality, and no part of the charge for such setting is to be used in the perpetual care fund of the cemetery, and such charge is not an inspection fee. *S. v. McGraw*, 205.

§ 12. Governmental Immunity to Tort Liability.

Where a municipal corporation procures liability insurance on a vehicle used by it in the performance of a governmental function, it waives its governmental immunity for the negligent operation of such vehicle to the extent of the amount of liability insurance. *Moore v. Plymouth*, 423.

§ 14a. Defects or Obstructions in Streets.

Evidence held to disclose contributory negligence as matter of law on part of motorist hitting tree lying in the street. *Smith v. Kinston*, 160.

§ 14b. Defects in or Injuries from Sewers and Drains.

Where plaintiffs sue for permanent damages to their lands resulting from the discharge of sewage into a stream by defendant municipality, and offer evidence that their land was being damaged therefrom, there is no variance between plaintiff's allegation and proof so as to justify nonsuit, notwithstanding that the court, upon defendant's evidence that the nuisance would be abated by a definite date, submits the issue as to temporary rather than permanent damage. *Spaugh v. Winston-Salem*, 194.

§ 25b. Control over and Management of Streets.

Nonuser of a portion of the width of a dedicated street does not constitute an abandonment of the unused portion by the municipality even though such portion is left unused upon the construction of a new street from the used portion of the dedicated street, nor does such circumstance constitute a relocation of the street so as to constitute an abandonment of any portion of the dedicated street. *Salisbury v. Barnhardt*, 549.

The fact that a municipality has permitted an owner of land adjacent to a street, dedicated to and accepted by the public, to erect and maintain for a number of years a granite wall on a portion of the width of the street and has assessed the property for improvements for curbing and guttering a new street bordering the unused portion of the dedicated street, does not estop the municipality, upon the later improvement of the dedicated street for its full width, from asserting title for the entire width of the dedicated street. *Ibid.*

§ 30. Power to Make Improvements and Levy Assessments Therefor.

It is not required that land abut directly on a part of a street that has been improved in order to subject it to liability for assessments, as where a lot abuts one street opposite a "y" intersection with a new street. *Salisbury v. Barnhardt*, 549.

§ 37. Zoning Ordinances.

It is not required that zoning district lines coincide with property lines, regardless of the area involved. G.S. 160-173. *Penny v. Durham*, 596.

MUNICIPAL CORPORATIONS — *Continued.*

As a general rule, the words of a zoning ordinance will be given their ordinary meaning and significance. *Ibid.*

Zoning ordinances are in derogation of the right of private property, and exemptions must be liberally construed in favor of the property owner. *Ibid.*

The zoning ordinance in question, passed by a majority vote, rezoned applicant's property lying more than 150 feet from the street, but left the zoning regulations unchanged as to applicant's property abutting the street to a depth of 150 feet therefrom. The owners of more than 20 per cent of the footage on the opposite side of the street from applicant's property had protested the change. *Held:* Protestants' property does not lie "directly opposite" the property rezoned within the purview of G.S. 160-176, and therefore it was not required that the zoning ordinance be passed by three-fourths of the members of the city council. The term "directly opposite" defined. *Ibid.*

§ 40. Violation and Enforcement of Ordinances.

Notwithstanding the broad provisions of G.S. 14-4, the violation of a municipal ordinance cannot be a criminal offense if the ordinance is invalid. *S. v. McGraw*, 205.

§ 46. Notice and Filing of Claim against Municipality.

Where plaintiff fails to allege and prove the giving of notice of a claim in tort against a municipality within the time prescribed by its charter, ordinarily nonsuit is proper, but if plaintiff alleges and proves that his failure to give such notice was due to such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice and that he actually gave notice within a reasonable time after the disability was removed, the failure to give such notice does not bar his action. *Carter v. Greensboro*, 328.

Plaintiff's evidence that when he was three years old he was seriously injured, requiring more than six months hospital treatment, that he was without guardian, that his mother was of limited education, was separated from his father and later divorced, and that notice of his claim against the municipality was given immediately after he was advised of his legal rights, requires the submission to the jury of an issue of whether the giving of timely notice was impossible because of plaintiff's physical and mental incapacity, and the jury's affirmative answer to the issue is conclusive. *Ibid.*

NEGLIGENCE.

§ 4a. Condition and Use of Land and Buildings in General.

It is not negligence *per se* for the owner of land to maintain a pond, pool, lake or reservoir thereon. *Matheny v. Mills Co.*, 575.

§ 4b. Injuries to Children.

Where the owner of land has knowledge, actual or constructive, that children of tender years are in the habit of playing on his premises, it becomes his duty to exercise ordinary care to provide reasonably adequate protection against their injury, the standard of care being that care which a man of ordinary prudence would exercise under such circumstances. *Matheny v. Mills Co.*, 575.

The owner of land, even though he has knowledge that children of tender years are in the habit of playing thereon, is not under duty to render trespass by them impossible, but is required to take only such precautions, by

way of erecting guards, fences or other means, as are reasonably sufficient to prevent trespassing by them, and he may not be held liable as an insurer of their safety. *Ibid.*

Evidence held insufficient to show negligent failure of owner of land to exercise due care to prevent injury to trespassing children. *Ibid.*

§ 4f(1). Distinction between Trespassers, Licensees and Invitees.

One who enters the premises of another without permission or other right is a trespasser; one who enters with permission but solely for his own purposes is a licensee; one who enters by invitation, express or implied, is an invitee. *Hood v. Coach Co.*, 534.

A person on the premises of a service station as a customer is an invitee. *Little v. Oil Co.*, 773.

§ 4f(2). Injury to Invitees Using Land or Buildings.

The owner of land owes the duty to invitees to keep his premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions so far as they can be ascertained by reasonable inspection and supervision. *Hood v. Coach Co.*, 534; *Skipper v. Cheatham*, 706; *Little v. Oil Co.* 773.

An employee, in using the entrance designated by the employer and the employer's contractor for use while the building was being enlarged is not a licensee but an envitee, and the contractor is under duty to exercise due care not to render the entrance dangerous to those properly using it. *Bemont v. Isenhour*, 106.

The proprietors of a store are not insurers of the safety of their customers. *Skipper v. Cheatham*, 706.

There is no inference of negligence, nor does the doctrine of *res ipsa loquitur* apply to a fall by a patron on the premises of a store. *Ibid.*

Evidence held sufficient to be submitted to the jury on the issue of the contractors negligence in leaving an end of a scaffolding brace protruding into the entrance designated for use by the owner's employers while the building was being enlarged, and not to show contributory negligence as a matter of law on the part of the employee in hitting his head on the protruding board. *Ibid.*

Complaint held insufficient to state cause of action to recover for fall of customer on store premises. *Skipper v. Cheatham*, 706.

A pedestrian, while walking to the rear of a bus station along the paved portion of the property of a bus company, customarily used by pedestrians and patrons, lying between a paved alley and the bus company's office and shops, and in returning to his car along the same route, in making a trip to the bus station for the purpose of buying a ticket, is an invitee. *Hood v. Coach Co.*, 534.

Evidence held sufficient to be submitted to jury in action by invitee injured in fall into entrance well of bus office and not to show contributory negligence as matter of law. *Ibid.*

Allegations held insufficient to state cause of action for negligence on part of calling station proprietors in causing fall of customer over concrete slab. *Little v. Oil Co.*, 773.

NEGLIGENCE — *Continued.*

§ 4f(3). Duty to Licensees.

The owner of land owes the duty to licensees not to wilfully or wantonly injure them and also not to increase the danger by affirmative and active negligence in the management of the property. *Hood v. Coach Co.*, 534.

4f(4). Duty to Trespassers.

The owner of land owes the duty to trespassers not to wilfully or wantonly injure them. *Hood v. Coach Co.*, 534.

§ 5. Proximate Cause in General.

There can be more than one proximate cause of an injury, and negligence which continues to the moment of impact is a proximate cause thereof. *Moore v. Plymouth*, 423.

The omission to perform a duty cannot constitute one of the proximate causes of an accident unless the doing of the omitted duty would have prevented the accident. *Wilson v. Camp*, 754.

§ 6. Concurrent Negligence.

Concurrent negligence consists of negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single, indivisible injury. *Moore v. Plymouth*, 423.

§ 7. Intervening Negligence.

The test of whether an intervening act of another insulates the primary negligence is whether such intervening act could have reasonably been foreseen and expected. *Moore v. Plymouth*, 423.

§ 11. Contributory Negligence of Persons Injured in General.

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, but it is sufficient if it contributes thereto as a proximate cause or one of them. *Tew v. Runnels*, 1; *Smith v. Kinston*, 160.

A pedestrian is required to exercise the care of a reasonably prudent man to avoid being injured, the rule being constant while the degree of care varies with the exigencies of the occasion. Whether the pedestrian's attention was distracted is a factor in determining the question. *Bemont v. Isenhour*, 106.

§ 15½. Limitations.

The three year statute of limitations applies to a cause of action to recover for personal injuries negligently inflicted. G.S. 1-52(5). *Stamey v. Membership Corp.*, 90.

§ 16. Pleadings.

Negligence and proximate cause are legal conclusions from the facts, and therefore the complaint in an action to recover for negligent injury must allege particular facts sufficient to support these conclusions, and mere averments that the conditions constituted a "dangerous trap," or were hazardous, are ineffectual as mere legal conclusions. *Skipper v. Cheatham*, 706.

In an action to recover for negligent injury, demurrer on the ground of contributory negligence may be allowed only if the facts alleged in the complaint affirmatively show contributory negligence as a matter of law, and it is not required that the pleading allege facts sufficient to negative contributory negligence. *Ibid.*

NEGLIGENCE — *Continued.*

§ 18. Competency and Relevancy of Evidence.

Change in design of manufacture after the accident is not competent to show that article was dangerous as manufactured at time of accident. *Tyson v. Mfg. Co.*, 557.

§ 19a(1). Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence.

In determining the sufficiency of the evidence to require the submission of the issue of contributory negligence, the evidence must be considered in the light most favorable to defendant and the evidence favorable to plaintiff disregarded. *Wilson v. Camp*, 754.

If diverse inferences may be drawn from the evidence on the issue of contributory negligence, the issue is for the determination of the jury. *Ibid.*

§ 19b(1). Sufficiency of Evidence of Negligence to Overrule Nonsuit in General.

If the evidence in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive motion to nonsuit, or demurrer to the evidence. *McFalls v. Smith*, 123; *Lake v. Express, Inc.*, 410.

Plaintiff is entitled to have the issue of negligence submitted to the jury if plaintiff's evidence and legitimate inferences therefrom tend to show that defendant breached a legal duty which it owed plaintiff and that such breach of duty, or failure to perform, proximately caused plaintiff's injury. *Hood v. Coach Co.*, 534.

Plaintiff must show a failure on the part of defendant to exercise proper care in the performance of some legal duty which he owed plaintiff under the circumstances, and that such negligent breach of duty was a proximate cause of the injury, which is that cause which produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the circumstances. *Wall v. Trogdon*, 747.

Plaintiff must establish every fact essential to constitute actionable negligence as a reasonable probability arising from a fair consideration of the evidence, and not as a mere guess or speculation, otherwise nonsuit is proper. *ibid.*

§ 19c. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence should not be granted unless the evidence, taken in the light most favorable to plaintiff establishes contributory negligence so clearly that no other reasonable inference can be drawn therefrom. *Tew v. Runnels*, 1; *Hood v. Coach Co.*, 534.

Whether nonsuit should be granted on the ground of contributory negligence must be determined in the light of the facts in each particular case. *Tew v. Runnels*, 1.

§ 20. Instructions in Actions for Negligence.

Where photographs of the scene are admitted as substantive evidence without objection, and such photographs tend to show that the wall around a depression on defendant's property had been shattered at both ends and iron upright pipes broken off, and there is further evidence that a municipal

NEGLIGENCE — *Continued.*

ordinance required a railing or fence around depressions, there is sufficient evidence of a change of condition in the premises to support an instruction on this aspect of the case. *Hood v. Coach Co.*, 534.

It is error for the court to charge the jury conjunctively as to all the specific allegations of negligence upon which plaintiff relied in order to answer the issue of negligence in the affirmative, since such charge places the burden of proving all of the allegations of negligence as a proximate cause of the injury in order to obtain an affirmative answer to the issue, whereas proof of any one of them is sufficient for this purpose. The use of "and" instead of "or" is prejudicial in such instance. *Andrews v. Sprott*, 729.

PARENT AND CHILD.

§ 5. Liability for Support of Child.

A parent is under legal and moral obligation to support his minor children, which obligation is applicable to both sane and insane parents, but this obligation normally terminates when the child reaches his majority and ceases to be dependent. *Ford v. Bank*, 141.

PARTIES.

§ 1. Necessary Parties.

When a complete determination of the controversy cannot be made without the presence of other parties, they are necessary parties and must be joined. G.S. 1-73. *Overton v. Tarkington*, 340.

§ 4. Proper Parties.

The only statutory exception giving a party a legal right to the joinder of another party who is not necessary to the determination of the controversy is the right to bring in a party for contribution as a joint obligor under G.S. 1-240. *Overton v. Tarkington*, 340.

The joinder of a proper but not a necessary party is addressed to the discretion of the trial court in the absence of statutory provision to the contrary. *Ibid.*

In an action by the assignee on a debt in which defendant sets up as an offset the penalty for usury, whether the assignor should be joined for the purpose of permitting defendant to seek to recover from him double the amount of usurious interest paid to the assignor rests in the discretion of the court, the assignor being a proper but not a necessary party to the determination of the assignee's cause of action. *Ibid.*

Upon plea of sole seizin in partition proceedings the mortgagee of the party pleading sole seizin is a proper, but not a necessary party, and whether such party should be joined rests in the discretion of the trial court. *Corbett v. Corbett*, 585.

§ 10. Joinder of Additional Parties.

Where an additional party is joined on motion of defendant, without notice to plaintiff or such additional party, on the ground that such additional party is a necessary party, plaintiff and such additional party are entitled to a hearing on that question, and where the holding of the court that the additional party was not a necessary party is legally correct, the discretionary refusal of the court to join such additional party as a proper party is not reviewable. *Overton v. Tarkington*, 340.

PARTITION.

§ 1a. Right to Partition.

Petitioners, owning undivided interests in fee in several tracts of land and also owning life estates in the balance of the undivided interests in the same tracts of land, with contingent limitation over to persons not presently determinable, have the right, as against the contingent remaindermen, to partition the several tracts so that petitioners may hold some of the tracts in fee and in common, and thus know the boundaries of the real estate owned by them in fee distinct from the boundaries of that in which they own life estates with contingent remainder over. *Davis v. Griffin*, 26.

A tenant in common is entitled as a matter of right to partition real estate held in common to the end that he may have and enjoy his share therein in severalty, G.S. 46-3, and a person owning an estate for life may join in the proceeding. *Ibid.*

After absolute divorce, wife may maintain partition proceedings for land formerly held by entireties. *Smith v. Smith*, 669.

§ 4a. Proceedings for Partition—Parties and Pleadings.

Petition for partition should accurately describe the specific lands sought to be partitioned and should affirmatively make it appear that all parties who claim an interest in the property are before the court. *Skipper v. Yow*, 49.

Upon plea of sole seizin in partition proceedings, the mortgagee of the party pleading sole seizin is a proper, but not a necessary party, and whether such party should be joined rests in the discretion of the trial court. *Corbett v. Corbett*, 585.

§ 5a. Plea of Sole Seizin.

Where respondents in a proceeding for partition deny that petitioners own any interest in the land, the proceeding is converted into a civil action to try title. *Skipper v. Yow*, 49.

§ 7. Partition by Exchange of Deeds.

Deed by one tenant to another of entire interest in property and reconveyance to him of a part of the tract held not exchange of deeds for partition in this case. *Smith v. Smith*, 669.

PARTNERSHIP.

§ 1a. Nature and Essentials.

Evidence that the husband was in the building and land development business, that his wife owned certain realty, and that she executed deeds for her land as directed by her husband, but that she never received payment for property transferred by her and that the only money received by her from her husband over the period in question was for her support, is sufficient to justify a holding that she is liable as a partner or otherwise for building materials purchased by her husband. *Supply Co. v. Reynolds*, 612.

§ 5. Representation of Firm by Partner and Liability of Partners.

Where there is a general partnership of two persons, without restrictions on the authority of either partner to act within the scope of the partnership business, one of the partners cannot, by notice to a third person that he would not be personally liable for goods thereafter sold the partnership in the ordinary course of the partnership business, relieve himself of liability

PARTNERSHIP — *Continued.*

for such goods thereafter ordered by the other partner while the partnership is a going concern. *Biscuit Co. v. Stroud*, 467.

§ 12. Accounting and Settlement.

Upon the dissolution of a partnership, either by the partners or by the court, the partners are responsible to each other for an accounting. *Pentecost v. Ray*, 406.

Where a receiver has been appointed for the partnership assets. the accounting is by the receiver, and a partner may not be held to an accounting for transactions thereafter occuring. *Ibid.*

PAYMENT.

§ 9. Burden of Proving Payment.

Plaintiff sued on a note and conditional sales contract for a car. Defendant offered in evidence title to the car marked paid and accompanying letter from plaintiff stating that the contract of purchase has been paid, but the note and contract remained in plaintiff's hands and were introduced in evidence by it, *Held:* The burden of proving payment was upon defendant, and the action being upon the note and contract and not the title, defendant's possession of the title marked paid did not place the burden of going forward with the evidence upon plaintiff. *Finance Co. v. McDonald*, 72.

PHYSICIANS AND SURGEONS.

§ 14. Actions for Malpractice in General.

Where the administrator institutes action for wrongful death against persons alleged to be solely responsible therefor and compromises the action by a consent judgment for a substantial sum, such judgment is a bar to the administrator's right to institute a subsequent action for wrongful death against a physician or surgeon for negligent treatment of the original injuries, the administrator having knowledge, actual or constructive, regarding the action for malpractice at the time of the institution of the action against the original tort-feasors. *Bell v. Hankins*, 199.

PLEADINGS.

§ 3a. Complaint—Statement of Cause in General.

A cause of action consists of the facts alleged in the complaint. *Stamey v. Membership Corp.*, 90; *Spaugh v. Winston-Salem*, 194.

§ 7. Form and Contents of Answer.

The answer must state in a plain and concise manner the facts constituting an affirmative defense, and language merely indicating in a general way the character of the defense is insufficient. *Etheridge v. Light Co.*, 367.

New matter constituting an affirmative defense must be alleged with the same clearness and conciseness as is required of allegations in the complaint. *Smith v. Smith*, 669.

§ 10. Counterclaims.

A counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it must set forth the facts constituting such cause with the same precision as if the cause were alleged in a complaint. *Perkins v. Perkins*, 152.

PLEADINGS — *Continued.*

§ 15. Office and Effect of Demurrer.

A demurrer admits the truth of all allegations of fact contained in the complaint and all inferences of fact which may be reasonably drawn therefrom. *Little v. Oil Co.*, 773, *McDaniel v. Quakenbush*, 31. But such facts are admitted solely for the purposes of the demurrer. *Mica Industries v. Penland*, 602.

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, giving the pleader every reasonable intendment, and admitting for the purpose of the demurrer the truth of the allegations contained in the complaint, but the demurrer does not admit conclusions of law. *Howze v. McCall*, 250; *Penny v. Durham*, 596; *Skipper v. Cheatham*, 706; *Letterman v. Mica Co.*, 249; *Little v. Oil Co.*, 773.

A demurrer to the complaint and a demurrer to the evidence are different in purpose and effect. *Cannon v. Parker*, 279.

§ 17. Statement of Grounds, Form and Requisites of Demurrer.

A demurrer for failure of the complaint to state a cause of action is properly overruled when the demurrer does not point out any defect in the complaint which would entitle defendants to a dismissal of the action. *McPherson v. Burlington*, 569.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

If any portion of a complaint alleges facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be reasonably and fairly gathered from it, the pleading is good as against demurrer. *McDaniel v. Quakenbush*, 31.

Where all the defendants join in a demurrer to the complaint upon the ground that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to any one of the defendants. *Paul v. Dixon*, 621.

§ 20½. Form and Effect of Judgments Upon Demurrers.

Where a complaint, in an action to recover for negligent injury, is defective in failing to allege sufficient facts to support the legal conclusion of negligence, the cause should not be dismissed upon demurrer but plaintiff should be allowed to move for leave to amend, G.S. 1-131, since it is only when the allegations affirmatively disclose a defective cause of action that the action should be dismissed upon demurrer. *Skipper v. Cheatham*, 706.

§ 22. Amendment of Pleadings.

Even though the complaint in an action to recover for negligent injury fails to state facts sufficient to constitute a cause of action, an amendment, supplying the deficiency by alleging relevant facts connected with the transactions forming the subject of the original complaint, may be permitted under G.S. 1-163, no statute of limitations being involved. *Stamey v. Membership Corp.*, 90.

But such amendment constitutes a new cause of action and the limitation must be computed with reference thereto when a statute of limitations is involved. *Ibid.*

The court properly refuses to allow an amendment after verdict when the evidence fails to support the requested amendment. *Perkins v. Perkins*, 152.

PLEADINGS — *Continued.*

Where no statute of limitations is involved, it is permissible to allow a plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. *Mica Industries v. Penland*, 602.

§ 24c. Proof Without Allegation.

The admission of evidence upon an aspect of the case not supported by allegation is error. *Perkins v. Perkins*, 152.

§ 25. Questions and Issues Raised by Pleadings.

In determining whether an issue of fact is raised by the pleadings, the pleadings must be liberally construed to effect substantial justice between the parties. *Herring v. Merchandise, Inc.*, 221.

Where defendant admits the execution of the contract but consistently denies that a page appearing after the page containing the signatures of the parties was a part of the agreement, an issue of fact is raised for the determination of the jury, and it is error for the court to answer such issue as a matter of law. *Trucking Co. v. Dowless*, 346.

§ 28. Motions for Judgment on the Pleadings.

A motion for judgment on the pleadings is in the nature of a demurrer and may be allowed only when the pleading of the opposite party fails to present any material issue of fact. *Fisher v. Motor Co.*, 617.

§ 30. Motions to Strike.

An additional defendant, joined for contribution, has no standing to move to strike from the answer defenses asserted by the original defendant to plaintiff's claim. *Etheridge v. Light Co.*, 367.

After pleading contributory negligence, defendant alleged further that plaintiff's intestate knew or should have known of the danger and with such knowledge voluntarily worked in such dangerous place, and that therefore plaintiff was barred of recovery by assumption of risk and *volenti non fit injuria*, but alleged no facts upon which such further defenses were predicated. *Held:* Plaintiff's motion to strike such further defenses was properly allowed, since a defense may not be predicated upon general allegations as to the character of the defense, but must allege the basic facts upon which the defense is predicated. *Ibid.*

Allegations presenting matter which may become material on the trial held erroneously stricken. *Briggs v. Dickey*, 640.

A motion by plaintiff to strike the entire further answer and defense of defendant on the ground that the facts alleged therein do not constitute a legal defense, is, in effect, a demurrer to such further answer and defense. *Mercer v. Hilliard*, 725.

PRINCIPAL AND AGENT.

§ 10. Liability of Principal for Torts of Agent.

Evidence that defendant corporation's agent obtained the signatures of plaintiff's employees to invoices for products delivered and, by the use of carbons, to additional invoices, which the agent later filed in, and obtained payment for both the genuine and spurious invoices, is sufficient predicate

PRINCIPAL AND AGENT — *Continued.*

for liability of defendant corporation under the general rule that the principal is liable for the fraud of its agent committed while acting within his authority. *Thrower v. Dairy Products*, 109.

The purchaser of products, in permitting the seller's agent to deposit invoices, over the course of years, in a receptacle in the purchaser's office, is not guilty of negligence barring recovery for the fraud of the seller's agent in thus presenting both genuine and spurious invoices, since the seller selected the agent, and it is necessary to trade and commerce that a party may rely on the integrity of men. *Ibid.*

PROCESS.

§ 2. Issuance and Time of Service.

Under G.S. 1-89, prior to the 1939 amendment, the service of summons more than ten days after its issuance in tax foreclosure proceedings, without any *alias* or *pluries* summons, is tantamount to nonservice, since the summons has lost its validity at the time of service. *Columbus County v. Thompson*, 607.

§ 8d. Service on Nonresident Corporations by Service on the Secretary of State.

Foreign corporation engaged in selling appliances in this State may be served under G.S. 55-145(a)(3) for injury from defective appliance. *Shepard v. Mfg. Co.*, 454.

G.S. 55-145(a) (3), authorizing the service of process on a foreign corporation by service on the Secretary of State in causes of action to recover for injuries resulting from the production, manufacture or distribution of goods of such corporation consumed or used in this State, is constitutional and valid. *Ibid.*

§ 10. Service on Nonresident Auto Owners or Employers.

A nonresident who has the legal right to exercise control over the operation of a motor vehicle at the time of the collision in this State is subject to service of process under G.S. 1-105, neither ownership nor physical presence being necessary for valid service under the statutes. *Pressley v. Turner*, 102.

Evidence held sufficient to support finding that resident driver was employee and not independent contractor and therefore service on nonresident employer under G.S. 1-105 was valid. *Ibid.*

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

Allegations to the effect that prior to the deed executed to plaintiff by husband and wife, the husband and wife had conveyed by registered deed other lands to the wife and others, but that the description included a portion of the lands conveyed to plaintiff, and praying that if the deed to the defendants conveyed a part of the land thereafter conveyed to plaintiff by design, the interest of the *femme* grantor-grantee be reduced under the equity of marshalling, in order to exonerate that part conveyed by her to plaintiff, or that if the description was erroneous in including a part of the lands conveyed to plaintiff, the cloud on plaintiff's title should be removed,

QUIETING TITLE — *Continued.*

held sufficient to state a cause of action against the *femme* grantor-grantee, at least. *Paul v. Dixon*, 621.

RAPE.

§ 8. Carnal Knowledge of Female under Twelve.

The act of carnally knowing and abusing any female child under the age of twelve years is rape; neither force nor intent are elements of the offense. *S. v. Jones*, 134.

The terms "carnal knowledge" and "sexual intercourse" are synonymous and are effected in law if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. G.S. 14-23. *Ibid.*

§ 10. Competency and Relevancy of Evidence in Prosecution for Carnal Knowledge of Female under Twelve.

Where the prosecuting witness, a female child under the age of twelve, testifies that defendant had sexual intercourse with her, testimony of physicians that the child was suffering from gonorrhea some six days after the alleged rape is competent in corroboration of the child's testimony that a male person had carnally known and abused her, notwithstanding the absence of evidence that defendant had gonorrhea. *S. v. Jones*, 134.

§ 26. Necessity of Submitting Question of Guilt of Less Degree of Crime.

G.S. 15-169 and G.S. 15-170 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense included in the crime charged, and where the State's evidence is positive as to each and every element of the crime of rape and there is no conflict in the evidence relating to any element thereof or evidence that would warrant or support a finding that defendant was guilty of a lesser offense, it is not error for the court to limit the jury to a verdict of guilty of rape, guilty of rape with recommendation that the punishment be imprisonment for life, or not guilty. *S. v. Jones*, 134.

Where, in a prosecution for rape, there is testimony that defendant also cut the prosecutrix with a knife, the court properly instructs the jury upon the question of defendant's guilt of assault with a deadly weapon as an offense included within the offense charged. *S. v. Bass*, 209.

RECEIVERS.

§ 4. Powers and Duties of Receiver and Supervision of Courts.

Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require. *Lambeth v. Lambeth*, 315.

A court of equity has the power to order the receiver of the husband's realty, appointed to enforce the payment of alimony decreed, to sell certain non-income producing realty for the purpose of investing the proceeds in accordance with G.S. Chapter 53, Article 6, so as to produce an income sufficient to enable the receiver to pay the expenses of the receivership and the alimony awarded. *Ibid.*

§ 9. Title to and Possession of Property.

Where, pursuant to the referee's report, in an action for the dissolution

of a partnership, receivers are appointed to take inventory and to sell assets of the partnership, the property of the partnership is in the hands of the court and the partnership is terminated, and another reference may not be ordered on the ground that thereafter one of the partners had commenced a business of a similar nature and had used partnership assets therein and should account therefor, since, if the receivers did not take over all of the partnership property, the remedy is to send them back for it or to have its loss accounted for. *Pentecost v. Ray*, 406.

REFERENCE.

§ 1. Nature and Grounds of Remedy.

The reference statutes are to be liberally construed to effectuate their purpose of facilitating the work of the court and simplifying the issues to be submitted to a jury when right to trial by jury is preserved. *Perry v. Doub*, 322.

§ 3. Compulsory Reference.

When the pleadings show that a long and complicated accounting is necessary in order to answer the ultimate issue, the trial judge, after the filing of both the complaint and the answer, is vested with authority to order a compulsory reference. *Perry v. Doub*, 322.

Where the pleadings and escrow agreement between the parties disclose a controversy in regard to numerous items making up an account, the trial court is authorized to order a compulsory reference, and it is immaterial to the validity of the order of compulsory reference that the items relate to the consideration for only two notes or that the controversy later is narrowed to only a few of the items controverted in the pleadings. *Ibid.*

The fact that both parties except to the order of compulsory reference and demand a jury trial does not demonstrate that a compulsory reference was improvidently ordered. *Ibid.*

§ 4. Pleas in Bar.

In order for a plea in bar to preclude an order of reference, it is necessary that the plea, if established, should finally determine the entire controversy. *Sledge v. Miller*, 447.

In an action for trespass to try title, defendant's plea of the three-year statute as a bar to the recovery of damages for trespass and his plea of title by adverse possession under the seven, twenty, twenty-one and thirty year statutes, does not constitute a plea in bar precluding reference since the three-year statute would not determine the question of title and the pleas of the other statues raise the very questions as to the boundaries justifying a reference under the statute. *Ibid.*

§ 10. Duties and Powers of Court upon Review.

In reviewing exception to the referee's findings of fact and conclusions of law, it is the duty of the judge of the Superior Court to consider the evidence and make his own findings and conclusions, which he may do by affirming or modifying the findings and conclusion of the referee. *Bradsher v. Morton*, 236.

§ 11. Re-Reference.

Where a receiver has been appointed for partnership assets in reference

REFERENCE — *Continued.*

proceedings, another reference in regard to the use of the partnership property after the appointment of the receiver should not be ordered. *Pentecost v. Ray*, 406.

§ 14a. Right to Jury Trial upon Exceptions.

Even though a party to a compulsory reference by proper exceptions and tender of issues preserves his right to jury trial upon the written evidence taken before the referee, if such evidence is insufficient to raise issues of fact, exception to the refusal of a jury trial is untenable. *Light Co. v. Horton*, 300.

REFORMATION OF INSTRUMENTS.

§ 1. Nature and Grounds of Remedy in General.

Where the purchaser of U. S. Bonds has them issued in the name of his son and retains possession thereof, he may not, upon the subsequent death of the son, assert ownership of the funds upon his contention that he intended merely to set aside the funds which could be made a gift at some future time should he so desire, since a party may not avoid the legal effect of his acts because of ignorance of law unless there be some fraud or circumvention. *Wright v. McMullan*, 591.

Allegation that the wife's name was inserted in a deed to the husband "through error" is insufficient to support a reformation of the deed, since reformation will not be granted for mistake of one party, but only for mutual mistake resulting in the failure of the instrument to express the true intent of the parties, or mistake of one party induced by the fraud of the other. *Smith v. Smith*, 669.

§ 6. Proceedings and Relief—Parties.

In order to maintain an action to reform a deed absolute on its face into a mortgage, the party asserting the right must be the grantor in the deed or in privity with him. However, if the grantor has conveyed his entire interest, he is not a necessary party and the person succeeding to his equity may maintain the action without his joinder. *Perkins v. Perkins*, 152.

§ 7. Pleadings.

A deed absolute on its face cannot be converted into a mortgage without allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. *Perkins v. Perkins*, 152.

Where the party seeking to reform a deed absolute on its face into a mortgage, offers evidence that the deed was executed to the grantee in fee simple at his request, the court properly refuses to permit him to amend his pleading after verdict so as to allege that the redemption clause was omitted from the deed by reason of ignorance or mutual mistake, since the evidence does not support such allegation. *Ibid.*

§ 8. Burden of Proof.

In order to correct a deed absolute on its face into a mortgage, plaintiff must establish his case by clear, strong and convincing proof. *Perkins v. Perkins*, 152.

RELIGIOUS SOCIETIES.

§ 2. Property and Conveyance.

Where a church has no written constitution or bylaws, the manner of calling meetings for the purpose of ascertaining the will of the members of the church should be governed by the established customs and practices of the church, and a majority of its membership, ordinarily, controls the right to the use and title to the property. *McDaniel v. Quakenbush*, 31.

RIOT.

§ 1. Nature and Elements of the Offense.

The crimes of inciting a riot and participating in a riot are separate and distinct offenses against the public peace. *S. v. Cole*, 733.

Defendants may not be convicted of inciting to riot unless the incitement results in a riot, and therefore in a prosecution for inciting a riot the State must show, in addition to incitement by defendants, that an unlawful assembly took place and that it was accompanied by actual force or violence, or that it had at least an apparent tendency thereto. *Ibid.*

An unlawful assembly is an essential element of the offense of riot. *Ibid.*

§ 2. Prosecutions.

Indictment held sufficient to charge defendants with inciting to riot. *S. v. Cole*, 733.

The evidence in this case *is held* sufficient to be submitted to the jury that defendants, armed with deadly weapons, encouraged and attended a meeting of the Ku Klux Klan in a neighborhood having a large number of Indian residents after inflammatory speeches, cross-burnings and newspaper reports thereof had incensed the Indians of the community to such an extent that the proposed meeting would tend to invoke a breach of the peace and incite to riot, and motion for involuntary nonsuit was properly denied as to both defendants. *Ibid.*

In a prosecution of two defendants for inciting to riot, evidence of inflammatory statements made by one of them, which were not made in the presence of the other, is inadmissible as to such other, and the admission of such evidence over the objection of such other is prejudicial as to him. *Ibid.*

In a prosecution for inciting to riot, the court is required to charge the elements of riot, since, unless the jury can find from the evidence that a riot occurred, defendants could not be guilty of inciting to riot. *Ibid.*

In this prosecution for inciting to riot, the court correctly charged that the assemblage encouraged and attended by defendants must have been unlawful, calculated to result in a breach of the peace, and that a riot must have ensued, in order to convict defendants of inciting to riot. *Ibid.*

SALES.

§ 24. Remedies of Buyer in General.

Upon breach of material warranty, the purchaser may either rescind and recover the purchase price, or affirm the contract and recover the damages caused by the breach of warranty, but these remedies are alternative and inconsistent, and are mutually exclusive. *Hajoica Corp. v. Brooks*, 10.

SALES — *Continued.*

§ 25. Rescission and Recovery of Price Paid.

Ordinarily, the buyer waives and loses the right to rescind if, after he discovers or has reasonable opportunity to discover the defect, he continues to use the chattel for his own purposes. *Hajoica Corp. v. Brooks*, 10.

Evidence held to show that purchaser waived his right to rescind sale for breach of warranty. *Ibid.*

Allegations in the complaint as amended to the effect that plaintiff traded motor vehicles with defendants, that the vehicle traded to plaintiff was thereafter seized and confiscated by the Federal Government, resulting in a total failure of consideration for the vehicle traded to defendants, and seeking to recover the value of the vehicle traded to defendants, *are held* sufficient to allege a cause of action for damages for breach of implied warranty of title of the vehicle traded to plaintiff. *Vann Co. v. Barefoot*, 22.

Where vehicle sold is seized and confiscated by Federal Government, purchaser is not required to prove ground for seizure in order to recover. *Ibid.*

§ 27. Actions and Counterclaims for Breach of Warranty.

Defendant's allegations and evidence to the effect that the tractor sold him was represented as manufactured in a certain year and to be in good condition and serviceable, whereas it was manufactured more than five years previously and was not serviceable, but was worn out and useless for practical purposes, *held* to support defendant's counterclaim for fraudulent representations in the seller's action on the note for the purchase price. *Hinshaw v. Joyce*, 218.

§ 30. Actions for Damages for Injuries Caused by Alleged Defects in Article Sold.

A manufacturer owes to the ultimate user the duty not to construct the article with hidden defects which might result in injury, and to give notice of any concealed dangers, but ordinarily the manufacturer is not liable for injuries from patent dangers. *Tyson v. Mfg. Co.*, 557.

The seller can have no greater liability for injury to the user of the article manufactured, resulting from alleged defect in its manufacturing, than the manufacturer itself. *Ibid.*

Plaintiff's evidence tended to show that she was injured while working on a tobacco harvester when, by reason of the sudden lurching of the machine, she was thrown off balance and her thumb caught in a sprocket which was only partially protected by a guard. Plaintiff testified to the effect that she understood the operation of the harvester, that it was simple, and that there was nothing to keep her from seeing the open sprocket. *Held:* Nonsuit in her action against the manufacturer and seller was properly entered, since there is no evidence of a latent defect or concealed danger or that the harvester was inherently dangerous when used for its intended purpose. *Ibid.*

Evidence that after plaintiff was injured when her thumb was caught in an open sprocket wheel, the manufacturer in later models substituted a solid disc sprocket wheel, is incompetent for the purpose of showing negligence of the manufacturer and seller on the occasion in controversy. *Ibid.*

SANITARY DISTRICTS.

§ 1. Creation and Territorial Extent.

A sanitary district is not a "municipality" within the meaning of G.S. 160-1, so as to preclude a municipality from annexing territory within a sanitary district. *Sanitary District v. Lenoir*, 96.

The territory of governmental agencies or municipal corporations may overlap even when both have the same general purpose. *Ibid.*

§ 2. Nature and Functions in General.

A sanitary district exercises a governmental function in operating its water system to provide fire protection and kindred services; it acts in a proprietary capacity in providing water to its inhabitants for their convenience. *Sanitary District v. Lenoir*, 96.

A sanitary district has no right to challenge the enlargement of the boundaries of a municipal corporation to include part of the territory of the sanitary district, since the mere enlargement of the city's boundaries does not appropriate the property of the district or deprive the district of its function of selling water transported through its mains to all its customers living in the district. *Ibid.*

STATUTES.

§ 5a. Construction and Operation in General.

Whenever the meaning of a statute is in doubt, reference may be had to the title and context as to legislative declarations of the purpose of the Act. *Finance Corp. v. Scheidt*, 334.

Where the caption of a statute declares as its purpose the clarification of a prior statute, the fact that the later statute for the first time sets forth an exemption in specific terms does not perforce negate the existence of such exemption under the prior statute, since to clarify does not mean to add to or take from, but to make clear. *Ibid.*

TAXATION.

§ 1. Uniform Rule and Discrimination.

The provisions of sec. 1½, Chapter 1420, Session Laws of 1957, (G.S. 118-37) exempting those who purchase policies from insurance companies which are members of the Farmers Mutual Fire Insurance Association from the tax imposed by the statute on those who purchase insurance from other companies, results in unconstitutional discrimination in the imposition of the tax, it being established by a finding of fact that the exempted companies sell insurance of the kind taxed by the statute. *Assurance Co. v. Gold*, 461.

§ 5. Public Purpose.

A municipal corporation may issue bonds and levy taxes to pay principal and interest thereon and use the proceeds to finance the extension of water and sewer facilities into an area to be annexed at a fixed future date after the residents of the area to be annexed have approved the annexation and the citizens of the municipality have approved both the annexation and the issuance of bonds, and such bonds are for a public purpose, and the tax imposed within the municipality prior to annexation does not deprive the

TAXATION — *Continued.*

taxpayers of the city of property without due process of law. *Thomasson v. Smith*, 84.

§ 9. Tax on One Community for Benefit of Another.

Upon extension of the corporate limits of a municipality under legislative authority, the municipality acquires jurisdiction over the territory annexed and may levy and collect taxes on property embraced within the annexation, notwithstanding that a part of the taxes so collected may be used to pay municipal indebtedness incurred prior to the time of annexation, and in like manner the municipality may, under legislative authority and upon approval of its voters, issue bonds to finance extension of municipal facilities to the territory to be annexed and levy taxes to pay same prior to the fixed date of annexation. *Thomasson v. Smith*, 84.

§ 10½. Application of Proceeds of Tax or Bond Issue.

Where a bond order, approved by the voters of the county, authorizes the issuance of bonds in an aggregate amount to finance a new building or buildings to be used as a public hospital and the acquisition of a suitable site therefor, the use of the proceeds of the bonds is limited by the bond order, and the county may not use the surplus left after completing the project contemplated in the bond order toward the construction of a clinic in another municipality of the county. *Lewis v. Beaufort County*, 628.

§ 30. Levy and Assessment of License and Franchise Taxes.

Where the owner of trucks leases them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right to use same exclusively for the transportation and delivery of lessee's goods, the lessor is not a contract carrier within the meaning of G.S. 20-38 (r) (1) and G.S. 20-38 (t), since the lessor merely leases its vehicles and is not a carrier of any kind, and lessee is solely a private carrier, and therefore lessor is not liable for additional assessment at the "for hire" rates under the statute. *Finance Corp. v. Scheidt*, 334.

TENANTS IN COMMON.

§ 2. Creation and Existance of Tenancy in Common.

An absolute divorce renders the parties tenants in common of land formerly held by the entireties. *Smith v. Smith*, 669.

§ 10. Conveyance, Lease or Mortgage by One Tenant.

A lease executed by only some of the owners is not binding on the owners not parties thereto. *Herring v. Merchandise, Inc.*, 221.

TORTS.

§ 6. Right to Contribution.

When an injured party elects to sue some but not all of the tort-feasors responsible for his injuries, those sued have a right to bring the other wrongdoers in for contribution, and the original defendant then becomes a plaintiff on the cross-action in relation to such additional defendants. *Etheridge v. Light Co.*, 367.

TORTS — *Continued.*

In order for the original defendant to be entitled to the joinder of an additional defendant for contribution, the original defendant must allege facts sufficient to establish the right to contribution, and motion of the additional defendant to strike such cross-action for contribution is in effect a demurrer thereto. *Ibid.*

Allegations of answer held sufficient predicate for joinder of additional party for contribution. *Ibid.*

§ 9a. Effect of Release or Covenant not to Sue.

A negligent injury gives rise to but a single cause of action for all damages, past and prospective, suffered in consequence of the wrongful or negligent acts, including damages for negligent treatment by a physician or surgeon if the injured person exercises due care in selecting his physician or surgeon and in procuring treatment, and therefore a release of the original tortfeasor bars an action for malpractice. *Bell v. Hankins*, 199.

TRESPASS.

§ 1a. Acts Constituting Trespass in General.

Any entry on land in the peaceable possession of another is deemed a trespass entitling the possessor to nominal damages at least, regardless of force or the form of the instrumentality breaking the close, or the intent of the trespasser. *Letterman v. Mica Co.*, 769.

§ 1e. Trespass by Water.

An action for damages from the discharge of sediment upon plaintiff's land and the flooding of the land incident to the operation of defendant's dam cannot be maintained in the absence of allegation and evidence of specific acts of improper maintenance and operation of the dam. *Letterman v. Mica Co.*, 769.

TRESPASS TO TRY TITLE.

§ 3. Actions.

In an action in trespass to try title, defendant's denial of plaintiff's title places the burden of proof on plaintiff to establish his title by one of the approved methods. *Sledge v. Miller*, 447; *Seawell v. Fishing Club*, 402.

Plaintiff must show that the descriptions in the deeds in his chain of title covered the land in controversy, and that commissioners and receivers in his chain of title had authority to convey. *Sledge v. Miller*, 447.

TRIAL.

§ 4. Time of Trial and Continuances.

Where a cause comes on to be heard at a time agreed upon, an applicant for a continuance should show that he has used due diligence and that a fair trial cannot be had because of circumstances beyond his control. G.S. 1-176. *Cleeland v. Cleeland*, 16.

Continuances are not favored, and the act of the trial judge in granting or denying a motion for continuance will not be disturbed in the absence of a showing of abuse of discretion. *Ibid.*

TRIAL — *Continued.*

Where the trial court denies a motion for continuance made when the cause came on to be heard at the time agreed upon, upon findings supported by evidence that respondent was unable to attend the hearing because of being hysterical and intoxicated, no abuse of discretion is shown. *Ibid.*

§ 5½ Pretrial Proceedings.

Ordinarily, only the documents constituting the record proper are before the court at pretrial conference, and where the record on appeal fails to indicate that either party offered evidence or waived a jury trial, judgment of nonsuit on the ground of estoppel by a prior judgment, predicated upon findings of fact by the court, must be vacated and the cause remanded. *Ransom v. Robinson*, 634.

§ 19. Province of Court and Jury in Regard to Evidence.

Whether the evidence is sufficient to be submitted to the jury is a question of law for the court. *McFalls v. Smith*, 123; *Suits v. Ins. Co.*, 383.

§ 20. Questions of Law and of Fact.

Where the pleadings raise an issue of fact for the jury it is error for the court to determine such issue as a matter of law. *Trucking Co. v. Dowless*, 346.

Issues of law raised by the pleadings are to be decided by the court; issues of fact must be determined by a jury in the absence of waiver of jury trial. *Herring v. Merchandise, Inc.*, 221.

§ 21. Office and Effect of Motion to Nonsuit.

A demurrer to the complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are different in purpose and result; the one challenges the sufficiency of the pleading, the other the sufficiency of the evidence, and the words *ore tenus* have no significance in relation to a demurrer to the evidence or motion to nonsuit. *Cannon v. Parker*, 279.

While motion to nonsuit presents a question of law to be decided by the judge before verdict, the court's ruling on the motion is *in fieri* during the trial, and the court may change his ruling thereon at any time before the verdict is in. *GMC Trucks v. Smith*, 764.

§ 21½. Necessity for Motion to Nonsuit and Renewal of Motion.

Where plaintiff offers evidence for the purpose of defeating defendant's counterclaim, plaintiff waives his motion to nonsuit the counterclaim made at the close of defendant's evidence. *Hinshaw v. Joyce*, 218.

§ 22a. Consideration of Evidence on Motion to Nonsuit in General.

Plaintiff is entitled to have the evidence on the entire record considered in the light most favorable to her, and she is entitled to the benefit of every reasonable inference to be drawn therefrom. *Primm v. King*, 228.

On motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to her and to have the benefit of every reasonable inference to be drawn therefrom. *Carr v. Lee*, 712.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

On motion to nonsuit, evidence offered by defendant which is favorable to plaintiff or not in conflict therewith, or which clarifies or explains plaintiff's evidence, will be considered. *Tew v. Runnels*, 1.

TRIAL — *Continued.*

§ 22c. Contradictions and Discrepancies in Evidence as Affecting Nonsuit.

Equivocation in the evidence goes to its weight only and does not warrant nonsuit. *McFalls v. Smith*, 123; *Lake v. Express, Inc.*, 410.

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit. *Gales v. Smith*, 263; *Moore v. Ins. Co.*, 625.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Where plaintiffs' allegations and evidence are sufficient to make out a cause of action entitling them to nominal damages at least on the basis of *quantum meruit*, involuntary nonsuit may not be properly entered, notwithstanding the absence of evidence as to the reasonable value of the services. *Gales v. Smith*, 263.

§ 23f. Nonsuit for Variance.

Nonsuit is properly allowed when there is a material variance between plaintiff's allegation and proof, and whether there is such fatal variance must be resolved in the light of the facts of each case. *Spaugh v. Winston-Salem*, 194; *Moore v. Singleton*, 287.

§ 28. Form of Peremptory Instructions.

A peremptory instruction to answer the issue in a designated way will not be held for error when the court immediately thereafter charges the jury to so answer the issue if the jury should find from the greater weight of the evidence the facts to be as all the evidence tended to show. *Coffey v. Greer*, 256.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

It is the duty of the court to charge upon a substantive and essential feature of the case arising on the evidence, even in the absence of request for special instructions. G.S. 1-180. *Washington v. Davis*, 65.

Instruction on law not presented by evidence is error. *Andrews v. Sprott*, 729.

§ 31e. Instructions—Expression of Opinion on Evidence.

The expression of an opinion by the trial court on an issue of fact to be submitted to a jury is prohibited by statute and is legal error. *Nowell v. Neal*, 516.

§ 36. Form and Sufficiency of Issues.

Even though the facts relating to a particular matter are controverted in the pleadings, unless the controverted facts raise an issue "material to be tried," i.e., determinative of the rights of the parties, it is error for the court to submit an issue relating thereto. *Vann Co. v. Barefoot*, 22. But when an issue of fact is controverted in the pleadings, it is error for the court to answer such issue as a matter of law. *Trucking Co. v. Dowless*, 346.

The court should not determine part of the issues and leave part of the issues to be settled at a latter date or in another action, but should dispose of all of the issues raised by the pleadings in the one action. *Hicks v. Koutro*, 61; *Trucking Co. v. Dowless*, 346.

TRIAL — *Continued.*

Issues should be formulated so as to present separately the determinative issues of fact arising on the pleadings and evidence. *Trucking Co. v. Dowless*, 346.

The court is required to submit such issues as are necessary to settle the material controversies arising on the pleadings, including new matter alleged in the answer, so that the verdict will support a final judgment, but within this rule the form and number of the issues are within the sound discretion of the trial court. *Lumber Co. v. Construction Co.*, 680.

§ 49. Motions to Set Aside Verdict as Contrary to Weight of Evidence.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and its refusal to exercise the discretion is not appealable. *Hinshaw v. Joyce*, 218; *Perry v. Doub*, 322.

§ 53. Waiver of Jury Trial and Trial by Court.

When Ch. 1337, Session Laws of 1955, is made applicable to a particular county by proper resolution of its board of county commissioners, the provision of the statute relating to waiver of trial by jury, G.S. 1-539.5, supplements G.S. 1-184 and is to be construed in *pari materia* therewith so that G.S. 1-185, G.S. 1-186, and G.S. 1-187 apply equally to a "small claims action" under the 1955 statute. *Hajoca Corp. v. Brooks*, 10.

The court should not enter a fragmentary judgment settling part of the case and leave part of the issues to be settled at a later date or in another action, even though the parties consent thereto, since it is the duty of the court to dispose of all issues raised by the pleadings in the one action, the courts and the public having an interest in the finality of litigation *Hicks v. Koutro*, 61.

§ 55. Trial by Court—Findings and Judgment.

Where a jury trial is waived and the facts are found by the court under agreement of the parties, the court's findings have the force and effect of a verdict by a jury. *Cauble v. Bell*, 722.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Right of Action.

The owner of personalty may maintain an action to recover its possession against a person wrongfully seizing it, and may also, even by amendment, assert a cause of action to recover damages sustained on account of the wrongful seizure and detention of the property. *Mica Industries v. Penland*, 602.

TRUSTS.

§ 2. Parol Trusts.

Where the husband conveys, or has a third party convey, to his wife a tract of land without consideration, the transaction will be presumed a gift to the wife, and in order to establish a resulting trust in his favor, he must rebut the presumption by clear, strong and convincing proof, and allegation merely that the wife paid no consideration and had no financial interest in the property is insufficient. *Perkins v. Perkins*, 152.

TRUSTS — *Continued.*

The party seeking to establish a resulting trust upon a fee simple deed must allege that the deed was executed by a third party to the grantee with the understanding that the grantee would hold the property in trust for him and would convey same to him upon payment of a stipulated sum or the performance of some specified act, and that he had complied with the conditions upon which the agreement was based, and mere allegation that the grantee had agreed to hold the property in trust for him without setting forth the conditions of the asserted trust or the facts and circumsances that led up to and created the trust relationship, is insufficient. *Ibid.*

UNLAWFUL ASSEMBLY.

An assembly for a lawful purpose may be converted into an unlawful assembly if at any time during the meeting the persons assembled act with a common intent, formed before or during the meeting, to obtain a purpose which will interfere with the rights of others by committing disorderly acts in such manner as to cause same, firm and courageous persons in the neighborhood to apprehend a breach of the peace. *S. v. Cole*, 733.

USURY.

§ 8. Penalties.

The statutory penalty for usury is imposed only when a corrupt intent exists to take more than the legal rate of interest. *Perry v. Doub*, 322.

The penalty for usury may be asserted affirmatively in an action to recover twice the amount of usurious interest paid, and defensively, in an action on the indebtedness, to have the debt reduced by twice the amount of interest paid, and also for forfeiture of the entire interest charged. *Overton v. Tarkington*, 340.

The penalty for usury may be asserted against the assignee of the chose for usurious interest paid the assignor. *Ibid.*

UTILITIES COMMISSION.

§ 2. Jurisdiction.

Where carriers charge rates in accordance with the published tariffs on file, but because of error in the tariff distance table the charges are excessive, the shippers may recover the excess charged by petition before the Utilities Commission, the remedy by civil action to recover overcharges and penalties being the proper remedy only when the charges are collected in excess of the published tariffs. *Utilities Com. v. R. R.*, 477.

Where the tariffs charged are in accordance with the approved tariff schedules but are excessive because of error in the tariff distance table filed with the Utilities Commission, the Utilities Commission has power to enter a retroactive order awarding reparations, since the order does not purport to change, retroactively, the authorized tariffs. *Ibid.*

§ 5. Appeal and Review.

The rates approved by the Utilities Commission are to be deemed just and reasonable and any different rate is to be deemed unjust and unreasonable. *Utilities Com. v. R. R.*, 477.

VENDOR AND PURCHASER.

§ 1. Nature and Requisites of Contract to Convey in General.

The owner of land may sell same through an agent, and such authorized agent may sign a contract to sell and convey in his own name or in the name of his principal or principals, and the authority of the agent to sell may be shown *aliunde* or by parol. *Lewis v. Allred*, 486.

§ 4. Fraud or Duress.

Ordinarily, in the absence of inquiry by the vendors, the purchaser is not under duty to disclose facts materially affecting the value of the property when no fiduciary relationship exists between them, certainly when such facts are a matter of public record, and the purchaser does not, by word or deed, divert full investigation by vendors. *Harrell v. Powell*, 244.

§ 6. Time of Performance.

A memorandum of a contract to sell realty will not be held insufficient because of its failure to stipulate the time for performance, but in the absence of such stipulation the law implies an obligation to perform within a reasonable time. *Lewis v. Allred*, 486.

Where memorandum of a contract to convey lands of an estate is executed by the executor, who is also an heir and authorized to act for the other heirs, but the memorandum fails to stipulate the time for performance and the evidence is conflicting as to whether a definite time was agreed upon by the executor and the purchaser, the question is for the jury, and an instruction to the effect that the closing date might be controlled by stipulation of the other devisees is erroneous. *Ibid.*

§ 19. Tender of Deed.

Where a consent judgment obligates the life tenant and remainderman under a will to convey lands to the caveator upon the payment of a sum stipulated, it is the duty of the life tenant and remainderman to prepare, execute and tender a proper deed for delivery upon the payment of the sum stipulated, and since the wife of the remainderman has no dower interest in the lands, the fact that she did not sign the consent judgment constitutes neither a justifiable nor a legal excuse for their failure to do so. But even if the wife of the remainderman had a right of dower, the caveator would be entitled to demand conveyance and have the agreed purchase price abated to the extent of the value of her dower. *In re Will of Smith*, 563.

VENUE.

§ 1a. Residence of Parties.

Allegations to the effect that plaintiff leased a store building and purchased a stock of merchandise situate therein, that thereafter defendant lessor made improper proposals as a condition to her right to remain in possession of the premises, that his demands put her in fear of bodily harm so that she was forced for her safety to abandon her leasehold rights and sell her stock of merchandise at a loss, state a transitory cause of action for assault, and plaintiff is entitled to institute the action in the county of her residence. *Fulcher v. Smith*, 645.

WATERS AND WATER COURSES.

§ 7. Maintenance and Operation of Dams.

The proprietor of a dam is not ordinarily an insurer, but is required only to exercise ordinary care in the maintenance and operation thereof. *Letterman v. Mica Co.*, 769.

The complaint alleged in effect that the dam below plaintiff's property caused no damage while operated by demurring defendant's predecessor, that demurring defendant breached the provisions of its easement, knew that the other defendant was discharging excessive dirt in the river above plaintiff's property, and that the demurring defendant wrongfully and negligently maintained the dam so that it caused sediment to be deposited on plaintiff's land, resulting in rendering plaintiff's fords impassable and causing the river to overflow plaintiff's bottom lands to plaintiff's damage. *Held:* In the absence of allegation of specific acts of improper maintenance or operation of the dam by the demurring defendant or in what manner it breached the provisions of its easement, or of any violation of G.S. 77-7, the demurrer was properly sustained. *Ibid.*

The doctrine of *res ipsa loquitur* does not apply to obviate the necessity of proving improper or negligent operation of a dam in an action by an upper proprietor to recover for alleged injuries to his lands therefrom. *Ibid.*

WILLS.

§ 4. Contracts to Bequeath or Devise.

An oral agreement to devise realty is within the statute of frauds and unenforceable. *Gales v. Smith*, 263.

§ 7. Attestation and Subscribing Witnesses.

If the subscribing witnesses sign a will in a room adjacent to the room in which testator is lying in bed, but the testator is in a position where he did see or could have seen them subscribe their names, the attestation is in compliance with law, and an instruction to this effect is not error. *In re Will of Pridgen*, 509.

§ 21b. Mental Capacity.

An instruction to the effect that mental capacity to execute a will is the capacity of testator to know his relatives and to know and realize that the instrument devised and bequeathed his property to the person therein named, to the exclusion of his relatives, in accordance with his free will and desire, *held* not prejudicial. *In re Will of Pridgen*, 509.

§ 22. Burden of Proof in Caveat Proceedings.

The burden of establishing mental incapacity to execute a will is on caveators. *In re Will of Pridgen*, 509.

§ 44. Doctrine of Election.

Whether a beneficiary is put to an election under the will is controlled by the intent of the testator, and while this intent must be gathered from the will, the value of the respective properties devised or bequeathed to the beneficiary and the value of the properties of the beneficiary and the value of the properties of the beneficiary disposed of by the will, are attendant circumstances which well may be material on the question of intent. *Hicks v. Koutro*, 61.

WILLS — *Continued.*

A holding by the court that the doctrine of election is not applicable to the will in question without any findings as to the value of the respective properties and without attempting to determine the testator's intent, is error, and on appeal the cause must be remanded for another hearing. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-15. Plea of statute of limitations cannot be raised by demurrer or motion to strike. *Stamey v. Membership Corp.*, 90.

1-25. Failure to pay costs precludes institution of another action within year of nonsuit. *Nowell v. Hamilton*, 523.

1-45. No title by adverse use of public way. *Salisbury v. Barnhardt*, 549.

1-52(5). Three year statute applies to actions for negligence. *Stamey v. Membership Corp.*, 90.

1-52(9). Where complaint discloses knowledge of fraud more than three years prior to institution of action, the action is barred. *Nowell v. Hamilton*, 523.

1-57. Party must be in some manner adversely affected before he can maintain action. *Sanitary District v. Lenoir*, 96.
Defendant is entitled to set up an off-set existing against assignor at time of assignment. *Overton v. Tarkington*, 340.

1-73. Parties who are necessary to complete determination of controversy must be joined. *Overton v. Tarkington*, 340.

1-89. Prior to 1939 amendment service of summons more than ten days after its issuance is ineffective. *Columbus County v. Thompson*, 607.

1-105. Nonresident who has legal right to control operation of motor vehicle in this State may be served under this statute. *Pressley v. Turner*, 102.

1-122. Cause of action consists of allegations of the complaint. *Stamey v. Membership Corp.*, 90. *Spaugh v. Winston-Salem*, 194.

1-127; 1-183. Demurrer to complaint and demurrer to evidence are different in purpose and result. *Cannon v. Parker*, 279.

1-131. Where complaint contains defective statement of good cause of action, cause should not be dismissed upon demurrer. *Skipper v. Cheatham*, 706.

1-134. Demurrer *ore tenus* may be filed in Supreme Court. *Howze v. McCall*, 250.

1-135. New matter constituting defense must be alleged with same clearness as is required of allegation of complaint. *Smith v. Smith*, 669.
Answer must state in plain manner facts constituting affirmative defense without unnecessary repetition. *Etheridge v. Light Co.*, 367.

1-151. Complaint liberally construed held insufficient to state cause of action for negligence in causing fall of customer at filling station. *Little v. Oil Corp.*, 773.

1-163. New cause of action may be introduced by amendment when no statute of limitations is involved and new cause arises out of transactions upon which original complaint is based. *Mica Industries v. Penland*, 602.
Amendment supplying deficiency in statement of cause of action may be allowed, no statute of limitations being involved. *Stamey v. Membership Corp.*, 90.

1-168. Nonsuit is proper when there is fatal variance. *Spaugh v. Winston-Salem*, 194.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

1-176. When cause comes on to be heard at time agreed, movant for continuance must show that he had used due diligence and that fair trial cannot then be had because of circumstances beyond his control. *Cleeland v. Cleeland*, 16.

1-180. Court is required to charge on substantive features of case without request. *Washington v. Davis*, 65.
Instruction that defense of drunkenness was dangerous in its application held error. *S. v. Oakes*, 282.

1-183. Appeal does not lie immediately from denial of motion to nonsuit, and court may change its ruling on the motion at any time before verdict. *GMC Trucks v. Smith*, 764.
Where defendant introduces evidence, correctness of denial of second motion to nonsuit only is presented. *Spaugh v. Winston-Salem*, 194.

1-184; 1-185; 1-186; 1-187; 1-539.5. Waiver of jury trial in small claims action. *Hajoca Corp. v. Brooks*, 10.

1-189. In action for trespass to try title, plea of adverse possession is not plea in bar precluding compulsory reference. *Sledge v. Miller*, 447.

1-200. Unless controverted facts raise an issue "material to be tried" it is error to submit such issue. *Vann Co. v. Barefoot*, 22.

1-220. Finding of meritorious defense is essential to validity of order setting aside judgment for surprise. *Mooneyham v. Mooneyham*, 641.
Judgment against wife properly set aside upon finding that she relied on husband to defend suit. *Abernethy v. Nichols*, 70.

1-227; 1-228. Consent judgment that propounders execute and deliver to caveator a deed to certain land upon payment by caveator of stipulated sum does not in itself constitute transfer of title. *In re Will of Smith*, 563.

1-230. Owner may sue to recover property and for damages for its wrongful detention. *Mica Industries v. Penland*, 602.

1-277. Appeal lies from order striking whole section of pleading on ground that its allegations are insufficient to state cause of action. *Etheridge v. Light Co.*, 367.
Expression of opinion by court on evidence is error of law which may be corrected solely by appeal. *Nowell v. Neal*, 516.

1-315. Levy on property not belonging to judgment debtor constitutes trespass. *Mica Industries v. Penland*, 602.

1-339.25(a). Advance bid entered by owners of minority interest in lands, not supported by bond or deposit does not meet requirements of statute. *Galloway v. Hester*, 275.

1-340. Ditching and clearing farm lands is making permanent improvements. *Pamlico County v. Davis*, 648.

1-440.39(d). Filing of bond by defendant does not bar defendant from challenging the validity of the attachment. *Armstrong v. Ins. Co.*, 352.

5-8. Breach of contract, even though embodied in consent judgment, is not punishable as contempt. *In re Will of Smith*, 563.

7-181. Where appeal from justice of peace is not filed within ten days but is filed during term at which it would have stood for trial, motion to dismiss the appeal presents question of whether appellant was at fault. *Freeman v. Bennett*, 180.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

7-204. Statute provides jury of six in prosecutions in municipal recorder's court. *Roebuck v. New Bern*, 41.

7-218. Pamlico County Recorder's Court is duly constituted. *S. v. Mercer*, 371.

7-220. Recorder's Court has jurisdiction to try defendant on charge of operating motor vehicle after revocation of license. *S. v. Mercer*, 371.

8-35. Certified record of Department of Motor Vehicles is competent in evidence. *S. v. Mercer*, 371.

8-57. Where defendant's wife testified in his behalf she is subject to cross-examination. *S. v. Bell*, 379.

14-4. Violation of void ordinance cannot be an offense. *S. v. McGraw*, 205.

14-17. Court may not instruct jury that State contended it should not recommend life imprisonment. *S. v. Oakes*, 282.

14-21. Neither force nor intent are elements of offense of carnally knowing female under 12. *S. v. Jones*, 134.

14-23. Slightest penetration of sexual organ of female by sexual organ of male constitutes carnal knowledge. *S. v. Jones*, 134.

14-33(a). A verdict of guilty of assault where serious injury is inflicted is a sufficient finding of serious damage within purview of statute. *S. v. Troutman*, 395.

14-70; 14-54. Where bills of indictment for offenses are consolidated for judgment, and only one judgment is entered, sentence may not exceed maximum for one offense. *S. v. Clendon*, 44.

15-47. Persons confined to jail have right to communicate with friends and counsel. *S. v. Wheeler*, 187.

15-169; 15-170. Court is not required to submit question of guilt of less degrees of crime of rape when there is no evidence of guilt of less degrees. *S. v. Jones*, 134.

15-171. Repealed so that court need not submit question of burglary in second degree when there is no evidence of this degree of the offense. *S. v. Smith*, 653.

16-1. Sanitary district is "municipality" within meaning of statute so as to preclude municipality from annexing territory within sanitary district, but mere enlargement of city's boundaries to include part of district, without disturbing functions of district, is valid. *Sanitary District v. Lenoir*, 96.

17-39.1 Under this statute habeas corpus will lie to determine right to custody of children of marriage regardless of marital status of parties. *Cleeland v. Cleeland*, 16.

18-11. Evidence of guilt of unlawful possession of whiskey held sufficient to be submitted to jury. *S. v. Welborn*, 268.

20-16(a) (5). Held unconstitutional delegation of power. *Harvell v. Scheidt*, 699.

20-38(r) (1); 20-38(t). Lessor of trucks is not contract carrier and is not required to pay "for hire" rates. *Finance Corp. v. Scheidt*, 334.

20-19(b). Licensee is entitled to judicial review of order permanently revoking license which is based in part on out-of-state conviction. *Carmichael v. Scheidt*, 472.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

20-138; 20-140. In prosecution for drunken driving, it is error for the court to assume that one of defendants was operating the vehicle at the time. *S. v. Swaringen*, 38.

20-140. Motorist is required to drive with due caution and circumspection at all times. *Moore v. Plymouth*, 423.

20-141(c). Whether speed within statutory maximum is lawful in approaching intersection depends on circumstances. *Primm v. King*, 228.

20-149; 20-154. Evidence held to disclose contributory negligence as matter of law in making "U" turn without signal or lookout. *Tallent v. Talbert*, 149.

20-155(a)(b). Right of way at intersection. *Carr v. Lee*, 712.

20-158(a). Motorist may not enter intersection with dominant highway unless he exercises reasonable care to ascertain he can do so in safety, and rule that motorist on right has right of way is not applicable. *Primm v. King*, 228.

20-174(e). Motorist is under duty to exercise increased vigilance when he sees, or should see, children on or near the highway. *Washington v. Davis*, 65.

22-2. Receipt for cash payment on identified tract of land belonging to estate, signed by executor who is also heir and representative of other heirs, is sufficient memorandum. *Lewis v. Allred*, 486.

22-2; 47-18. Surrender of unexpired portion of term in excess of three years must be registered to be effective as against creditors and purchasers for value. *Herring v. Merchandise*, 221.

24-2. Penalty for usury is imposed only when corrupt intent exists to take more than legal rate of interest. *Perry v. Doub*, 322.

28-173. Where plaintiff in action for wrongful death fails to prove she is duly qualified personal representative, nonsuit is proper. *Carr v. Lee*, 712.

After recovery of person negligently injuring intestate for intestate's wrongful death, administrator may not sue physician for malpractice. *Bell v. Hankins*, 199.

28-173; 1-53(4). Two year statute applies to action for wrongful death, and limitation is no longer condition annexed to cause of action. *Stamey v. Membership Corp.*, 90.

31-3.3. Subscribing witnesses may sign in room adjoining that of testator if he is in position to see them sign. *In re Will of Pridgen*, 509.

35-20; 35-21; 35-26. Findings held to support order for advancement to adult children out of estate of incompetent father. *Ford v. Bank*, 141.

40-12. Petitioner properly joins as defendants others having interest in land in his proceedings against Highway Commission to recover compensation. *Tyson v. Highway Com.*, 732.

40-19. Payment into court of damages awarded by commissioners does not transfer title to school site while cause is pending on exceptions both as to right to condemn and adequacy of damages. *Topping v. Board of Education*, 291.

46-3; 46-24. Tenant in common is entitled to partition and life tenant may join in the proceeding. *Davis v. Griffin*, 26.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

50-11. Under amendment decree of divorce on ground of two years separation in action instituted by wife terminates wife's right to alimony without divorce under prior decree. *Porter v. Bank*, 173.

50-16. Receiver may sell husband's real estate if necessary to pay alimony decreed. *Lambeth v. Lambeth*, 315.

52-12. Conveyance by wife to husband without complying with provisions of statute is void. *Perkins v. Perkins*, 152.

55-145(a). Foreign corporation engaged in selling appliances in this State may be served under this statute in action for injury from defective appliance. *Shepard v. Mfg. Co.*, 454.

59-45; 59-48; 50-39. One partner cannot by notice to third person, relieve himself of liability for goods purchased by partnership in ordinary course of business while partnership is going concern. *Biscuit Co. v. Stroud*, 467.

62-110; 62-138; 62-139. Where tariff is excessive because of error in tariff distance table, shipper may recover excess by petition before Utilities Commission. *Utilities Com. v. R. R.*, 477.

62-123. Rates approved by Utilities Commission are to be deemed just and reasonable. *Utilities Com. v. R. R.*, 477.

63-13. Evidence held insufficient to show trespass or negligence in operation of crop dusting plane over lands of plaintiff. *Wall v. Trogdon*, 747.

77-7. Complaint held insufficient to state cause of action in trespass in operation of dam. *Letterman v. Mica Co.*, 769.

95-78. "Right to Work" Act is superseded by Railroad Labor Act in instances within purview of the Federal statute. *Allen v. R. R.*, 492.

97-2(f). Fall of employee while walking from parking lot furnished by employer to her place of work at another part of premises arises out of employment. *Davis v. Mfg. Co.*, 543.

97-31(t); 97-29. Compensation for permanent partial disability prior to amendment could not be less than $10. per week. *Oaks v. Mills Corp.*, 285.

97-31(v). Evidence held sufficient to support finding that claimant had suffered facial disfigurement sufficient to affect adversely earning capacity. *Davis v. Construction Co.*, 129.

97-57. Prior to 1957 amendment, carrier last on risk, even if only for few days, is liable for award for silicosis. *Hartsell v. Thermoid Co.*, 527.

97-77. On appeal from Industrial Commission, Superior Court may not hear evidence and find facts. *Brice v. Salvage Co.*, 74.

97-90. Commission and not Superior Court is empowered to fix attorneys' fees in proceeding under Compensation Act. *Brice v. Salvage Co.*, 74.

97-98. Employee has right to enforce against insurer the contract of insurance made for his benefit. *Hartsell v. Thermoid Co.*, 527.

105-230; 55-114(4). Allegations that plaintiff corporation's charter had been suspended less than year do not disclose that corporation did not have capacity to sue. *Mica Industries v. Penland*, 602.

106-266.8. Statute is constitutional and Milk Commission is given authority to fix transportation rates for hauling milk of producers to processing plants. *Milk Com. v. Galloway*, 658.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

115-125. Condemnation for school site is controlled by G.S. 40, Art. 2. *Topping v. Board of Education*, 291.

118-37; 118-20. Statute held unconstitutional as imposing discriminatory tax. *Assurance Co. v. Gold*, 461.

160-2(3); 160-200(22); 160-200(23). City may not charge fee for setting of grave marker not purchased from or set by the city. *S. v. McGraw*, 205.

160-15A. Municipality waives its governmental immunity by procuring liability insurance. *Moore v. Plymouth*, 423.

160-173. It is not required that zoning district lines coincide with property lines. *Penny v. Durham*, 596.

160-176. Strip of 150 feet between street and zoning line prevents property zoned from being opposite property on other side of street. *Penny v. Durham*, 596.

160-200(6). Municipality has authority to operate chemical fogging machine to destroy mosquitoes. *Moore v. Plymouth*, 423.

160-239; 160-255; 160-238. Bonds for extension of municipal services, except fire alarm system, do not deprive city taxpayers of property without due process of law. *Thomasson v. Smith*, 84.

163-196. Indictment following language of this statute is insufficient to charge the offense. *S. v. Walker*, 35.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. 7. Order of Milk Commission fixing transportation rates for hauling milk to processing plant held constitutional. *Milk Com. v. Galloway*, 658.

I, secs. 11, 17. Denial of right of prisoner to communicate with friends and counsel deprives him of due process of law. *S. v. Wheeler*, 187.

I, sec. 13. Statute providing for jury of six in prosecutions in municipal recorder's court is valid. *Roebuck v. New Bern*, 41.

I, 17. Order of Milk Commission fixing transportation rates for hauling milk to processing plant held constitutional. *Milk Com. v. Galloway*, 658.

Bonds for extension of municipal services to territory to be annexed do not deprive taxpayers of city of property without due process. *Thomasson v. Smith*, 84.

IV, sec. 8. Supreme Court, in exercise of supervisory jurisdiction, will grant *certiorari* to review order involving matter of public interest. *Brice v. Salvage Co.*, 74.

IV, sec. 27. Statute providing for jury of six in prosecutions in municipal recorder's court is valid. *Roebuck v. New Bern*, 41.

V, sec. 3. Constitutional requirement of uniformity in taxation applies to taxes on trades, professions, franchises and incomes. *Assurance Co. v. Gold*, 461.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Article IV, sec. 1. Does not require courts of this State to treat as final an order of a sister state which is interlocutory. *Cleeland v. Cleeland*, 16.

1st Amendment. Union shop agreement held not unconstitutional in requiring involuntary payment of dues used partly for political purposes. *Allen v. R. R.*, 492.

5th Amendment. Union shop agreement held not unconstitutional in requiring involuntary payment of dues used partly for political purposes, *Allen v. R. R.*, 492.

14th Amendment. Denial of right of prisoner to communicate with friends and counsel deprives him of due process. *S. v. Wheeler*, 187.

Order of Milk Commission fixing transportation rates for hauling milk to processing plant held constitutional. *Milk Com. v. Galloway*, 658.

Bonds for extension of municipal services to territory to be annexed do not deprive taxpayers of city of property without due process. *Thomasson v. Smith*, 84.