NORTH CAROLINA REPORTS

Vol. 250

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1959

FALL TERM, 1959

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1 9 5 9

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1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
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1 " Eq.	"	36	"
2 " "	"	37	"
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7 " "	"	42	"
8 " "	"	48	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1959—FALL TERM, 1959

CHIEF JUSTICE:

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ASSOCIATE JUSTICES:

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ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

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OF THE

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FIRST DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Coinjock.
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WALTER J. BONE	Seventh	Nashville
J. PAUL FRIZZELLE	Eighth	Snow Hill.

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CLAWSON L. WILLIAMS	Eleventh	Sanford.
HEMAN R. CLARK	Twelfth	Fayetteville.
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C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
HENRY A. MCKINNON	Sixteenth	Lumberton.

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L. RICHARD PREYER	Eighteenth	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
F. DONALD PHILLIPS	Twentieth	Rockingham.
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HUBERT E. OLIVE	Twenty-Second	Lexington.
ROBERT M. GAMBILL	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

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JAMES C. FARTHING	Twenty-Fifth	Lenoir.
FRANCIS O. CLARKSON	Twenty-Sixth	Charlotte.
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W. K. MCLEAN	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.

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H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.
Q. K. NIMOCKS, JR.	Fayetteville.
ZEBULON V. NETTLES, 1 January, 1959	Asheville.

SOLICITORS

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Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City
HUBERT E. MAY	Second	Nashville.
W. H. S. BURGWYN, JR.	Third	Woodland.
ARCHIE TAYLOR	Fourth	Lillington.
ROBERT D. ROUSE, JR.	Fifth	Farmville.
WALTER T. BRITT	Sixth	Clinton.
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JOHN J. BURNEY, JR.	Eighth	Wilmington.
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MAURICE E. BRASWELL	Ninth-B	Fayetteville
WILLIAM H. MURDOCK	Tenth	Durham.

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ROBERT S. SWAIN	Nineteenth	Asheville.
GLENN W. BROWN	Twentieth	Bryson City.
CHARLES M. NEAVES	Twenty-first	Elkin.

[1] Appointed July 1, 1959.

SUPERIOR COURTS, FALL TERM, 1959

FIRST DIVISION

FIRST DISTRICT
Judge Morris

Camden—Sept. 14; Sept. 28.
Chowan—Nov. 30.
Currituck—Sept. 7; Oct. 12†.
Dare—Oct. 26.
Gates—Oct. 19(a).
Pasquotank—Sept. 21†; Oct. 19†; Nov. 16*; Dec. 7†.
Perquimans—Nov. 2.

SECOND DISTRICT
Judge Paul

Beaufort—Sept. 7†; Sept. 21*; Oct. 19†; Nov. 9*; Dec 7†(2).
Hyde—Oct. 12; Nov. 2†.
Martin—Aug. 10†; Sept. 28*; Nov. 23† (2); Dec. 14.
Tyrrell—Aug. 31†; Oct. 5.
Washington—Sept. 14*; Nov. 16†.

THIRD DISTRICT
Judge Bundy

Carteret—Oct. 19†; Nov. 9.
Craven—Sept. 7(2); Oct. 5†(2); Nov. 2† (A); Nov. 16; Nov. 30†(2).
Pamlico—Aug. 10(2).
Pitt—Aug. 24(2); Sept. 21†(2); Oct. 12 (A); Oct. 26†; Nov. 2; Nov. 23; Dec. 14.

FOURTH DISTRICT
Judge Stevens

Duplin—Aug. 31; Sept. 7†; Oct. 12*; Nov. 9*; Dec. 7†(2).
Jones—Sept. 28; Nov. 2†; Nov. 30.
Onslow—July 20‡(A); Oct. 5; Nov. 16† (2).
Sampson—Aug. 10(2); Sept. 14†(2); Oct. 19*; Oct. 26†; Nov. 23*(A).

FIFTH DISTRICT
Judge Mintz

New Hanover—Aug. 3*; Aug. 10†; Aug. 24*; Sept. 14†(2); Oct. 5*; Oct. 12†(2). Nov. 2*(2); Nov. 23†(2); Dec. 7*(2).
Pender—Sept. 7†; Sept. 28; Oct. 26†; Nov. 16.

SIXTH DISTRICT
Judge Parker

Bertie—Aug. 31; Sept. 7†; Nov. 23(2).
Halifax—Aug. 17(2); Oct. 5†(2); Oct. 26*; Dec. 7(2).
Hertford—July 27(A); Sept. 14; Sept. 21†; Oct. 19.
Northampton—Aug. 10; Nov. 2(2).

SEVENTH DISTRICT
Judge Bone

Edgecombe—Sept. 21*; Oct. 12*(2); Nov. 9†(2).
Nash—Aug. 24*; Sept 14†; Oct. 5*; Oct. 26†(2); Nov. 23*(2); Dec. 7†(A).
Wilson—July 20*; Aug. 31*(2); Sept. 28†(A)(2); Oct. 26*(A)(2); Dec. 7†(2).

EIGHTH DISTRICT
Judge Frizzelle

Greene—Oct. 12†(A); Oct. 19*(A); Dec. 7.
Lenoir—Aug. 24*; Sept. 14†(2); Oct. 12† (2); Oct. 26*(2); Nov. 23†; Dec. 14.
Wayne—Aug. 17*; Aug. 31†(2); Sept. 28†(2); Nov. 9(2); Dec. 7†(A).

SECOND DIVISION

NINTH DISTRICT
Judge Hobgood

Franklin—Sept. 21†; Oct. 19*; Oct. 26* (A); Nov. 30†.
Granville—July 27; Oct. 12†; Nov. 16.
Person—Sept. 14; Oct. 5†(A); Nov. 2.
Vance—Oct. 5*; Nov. 9†.
Warren—Sept. 7*; Oct. 26†.

TENTH DISTRICT
Judge Bickett

Wake—July 13*(A)(2); July 27†(A); Aug. 10†; Aug. 17*(2); Aug. 31†; Sept. 7† (A)(2); Sept. 7*(2); Sept. 21†(2); Oct. 5* (A)(2); Oct. 12†(2); Oct. 26†(2); Nov. 2* (A)(2); Nov. 9†(2); Nov. 23*(2); Nov. 23† (A)(2); Dec. 14*.

ELEVENTH DISTRICT
Judge Williams

Harnett—Aug. 17†; Aug. 31*(A); Sept. 14†(A)(2); Oct. 12†(2); Nov. 16*(A)(2).
Johnston—Aug. 24; Sept. 28†(2); Oct. 26; Nov. 9†(2); Dec. 7(2).
Lee—Aug. 3*; Aug. 10†; Sept. 14*; Sept. 21†; Nov. 2*; Nov. 23†.

TWELFTH DISTRICT
Judge Clark

Cumberland—Aug. 10†; Aug. 17*; Aug. 31*(2); Sept. 14†; Sept. 28*(2); Oct. 12† (2); Oct. 26†(2); Nov. 9*(2); Nov. 30†(2); Dec. 14*.
Hoke—Aug. 24; Nov. 23.

THIRTEENTH DISTRICT
Judge Mallard

Bladen—Oct. 26*; Nov. 16†.
Brunswick—Sept. 21; Oct. 19†.
Columbus—Sept. 7*(2); Sept. 28†(2); Oct. 12*; Nov. 2†(2); Nov. 23*(2).

FOURTEENTH DISTRICT
Judge Hall

Durham—July 13*(A)(2); Aug. 3(2); Aug. 31*; Sept. 7†; Sept. 14*(2); Oct. 5* (2); Oct. 19†(2); Nov. 2*(2); Nov. 16†(2); Nov. 30(2); Dec. 14*.

FIFTEENTH DISTRICT
Judge Carr

Alamance—July 20†(A); Aug. 3†; Aug. 17*(2); Sept. 14†(2); Oct. 19*(2); Nov. 16†(2); Dec. 7*.
Chatham—Aug. 31†; Oct. 12; Nov. 2†; Nov. 9†; Nov. 30.
Orange—Aug. 10*; Sept. 28†(2); Dec. 14.

SIXTEENTH DISTRICT
Judge McKinnon

Robeson—July 13†(A); Aug. 17*; Aug. 31†; Sept. 7*(2); Sept. 21†(2); Oct. 12† (2); Oct. 26*(2); Nov. 16†(2); Nov. 30*.
Scotland—July 27†; Aug. 24; Oct. 5†; Nov. 9†; Dec. 7(2).

THIRD DIVISION

SEVENTEENTH DISTRICT
Judge Gwyn

Caswell—Nov. 16*(A); Dec. 7†.
Rockingham—Sept. 7*(2); Sept. 28†(A) (2); Oct. 19†; Oct. 26*(2); Nov. 23† (2); Dec. 14*.
Stokes—Oct. 5*; Oct. 12†.
Surry—July 13†(2); Sept. 21*(2); Nov. 9†(2); Dec. 7(A).

EIGHTEENTH DISTRICT
Schedule A—Judge Preyer

Guil. Gr.—July 13*; July 27*; Aug. 31*; Sept. 7†; Sept. 14†(2); Oct. 5*; Oct. 12† (2); Oct. 26*; Nov. 9*; Nov. 16†(2); Nov. 30*; Dec. 7*.
Guil. H. P.—July 20*; Sept. 28*; Nov. 2*; Dec. 14*.

Schedule B—Judge Crissman

Guil. Gr.—Sept. 14*(2); Sept. 28†(2); Oct. 12*(2); Oct. 26†(2); Nov. 23†(2).
Guil. H. P.—Sept. 14†(A); Oct. 19†(A); Nov. 9†(2).

NINETEENTH DISTRICT
Judge Armstrong

Cabarrus—Aug. 24*; Aug. 31†; Oct. 12 (2); Nov. 9†(A)(2).
Montgomery—July 13(A); Sept. 28†; Oct. 5; Nov. 2(A).
Randolph—July 20†(A)(2); Sept. 7*; Nov. 9†(2); Nov. 30†; Dec. 7*(2).
Rowan—Sept. 14(2); Oct. 26†(2); Nov. 23*; Dec. 7†(A).

TWENTIETH DISTRICT
Judge Phillips

Anson—Sept. 21*; Sept. 28†; Nov. 23† Moore—Aug. 17*(A); Sept. 7†(2); Nov. 16.
Richmond—July 20*; July 27†; Oct. 5*; Oct. 12†; Dec. 7†(2).
Stanley—July 13; Oct. 19†(2); Nov. 30.
Union—Aug. 24†(A); Aug. 31; Nov. 2 (2).

TWENTY-FIRST DISTRICT
Judge Johnston

Forsyth—July 13†(2); July 27(2); Aug. 31†§; Sept. 7(2); Sept. 14†(A)(2); Sept 28† (2); Oct. 12(2); Oct. 26†(2); Nov. 9(2); Nov. 23†(2); Dec. 7†(A); Dec. 7.

TWENTY-SECOND DISTRICT
Judge Olive

Alexander—Sept. 28.
Davidson—July 20†(A); Aug. 24; Sept. 14†(2); Oct. 12†; Oct. 19†(A); Nov. 16(2); Dec. 14†.
Davie—Aug. 3; Oct. 5†; Nov. 9.
Iredell—Aug. 31; Sept. 7†; Oct. 19†; Oct. 26(2); Nov. 30†(2).

TWENTY-THIRD DISTRICT
Judge Gambill

Alleghany—Aug. 31; Oct. 5.
Ashe—July 20*; Sept. 14†; Oct. 26*.
Wilkes—July 27; Aug. 17(2); Sept. 21† (2); Oct. 12; Nov. 2†(2); Nov. 16(A); Dec. 7.
Yadkin—Sept. 7*; Nov. 16†(2); Nov. 30.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge Huskins

Avery—July 13(A)(2); Oct. 19(2).
Madison—July 27*; Aug. 31†(2); Oct. 5*; Nov. 2†; Dec. 7*; Dec. 14†.
Mitchell—Aug. 3†(A); Sept. 14(2).
Watauga—Sept 28*; Nov. 9†(2).
Yancey—Aug. 10; Aug. 17†(2); Nov. 23 (2).

TWENTY-FIFTH DISTRICT
Judge Farthing

Burke—Aug. 17; Oct. 5(2); Nov. 23.
Caldwell—Aug. 31; Sept. 21†(2); Dec. 7(2).
Catawba—Aug. 3(2); Sept. 7†(2); Nov. 9(2); Nov. 30†.

TWENTY-SIXTH DISTRICT
Schedule A—Judge Campbell

Mecklenburg—July 13*(A)(2); Aug. 3* (2); Aug. 17†(A)(2); Aug. 31†(2); Sept. 14†; Sept. 21†(2); Oct. 5†(2); Oct. 19; Oct. 26†(2); Nov. 9†; Nov. 16†(2); Nov. 30†; Dec. 7(2).

Schedule B—Judge Clarkson

Mecklenburg—Aug. 17†(3); Sept. 7*(2); Sept. 21†(2); Oct. 5†(2); Oct. 19†(2); Nov. 2*(2); Nov. 16†(2); Nov. 30†; Dec. 7†(2).

TWENTY-SEVENTH DISTRICT
Judge Froneberger

Cleveland—July 13(2); Sept. 28†(2); Oct. 26*; Nov. 30†(A)(2).
Gaston—July 27; Aug. 10†(A)(2); Sept. 21*; Oct. 12†(2); Nov. 16*(2); Dec. 7†.
Lincoln—Sept. 7(2).

TWENTY-EIGHTH DISTRICT
Judge McLean

Buncombe—July 13*(A)(2); July 27† (A); Aug. 3†(3); Aug. 24*(2); Sept. 7† (3); Sept. 21*(A)(2); Sept. 28†(3); Oct. 19*(2); Nov. 2†(3); Nov. 23*(A)(2); Nov. 23†; Nov. 30†(2).

TWENTY-NINTH DISTRICT
Judge Pless

Henderson—Aug. 17†(2); Oct. 19.
McDowell—Sept. 7(2); Oct. 5†(2).
Polk—Aug. 31.
Rutherford—Aug. 17*†(A); Sept. 21 †* (2); Nov. 9*†(2).
Transylvania—July 13(2); Oct. 26(2).

THIRTIETH DISTRICT
Judge Patton

Cherokee—July 27; Nov. 9(2).
Clay—Oct. 5.
Graham—Aug. 31.
Haywood—July 13; Sept. 21†(2); Nov. 23(2).
Jackson—Oct. 12(2).
Macon—Aug. 3; Dec. 7(2).
Swain—July 20; Oct. 26.

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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.
No number indicates one week term.
§ Indicates non-jury term.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—ALGENON L. BUTLER, *Judge*, Clinton.
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.

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.
ROBERT WILLIS, Assistant U. S. District Attorney, Greensboro.
H. VERNON HART, Assistant U. S. District Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant U. S. District Attorney, Greensboro.
JAMES H. 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.
JOHN E. MCDONALD, Ass't. U. S. Attorney, Charlotte, N. C.
HUGH E. MONTEITH, Ass't. U. S. Attorney, Asheville, N. C.
ROY A. HARMON, United States Marshal, Asheville, N. C.
THOS. E. RHODES, Clerk, Asheville, N. C.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 8th day of August, 1959, and said persons have, as of this date, been issued certificates of this Board.

ALALA, JOSEPH BASIL, JR. ..... Greensboro
ALEXIOU, ADAMANDIO STANLEY ..... Greensboro
ALLRED, JOHN THOMPSON ..... Dunn
BADGETT, RICHARD GORDON ..... Pilot Mountain
BAXTER, ROBERT CLIFTON, JR. ..... Burlington
BECKHAM, ARTHUR SETTLE, JR. ..... Statesville
BENFIELD, MARION WILSON, JR. ..... Casar
BLOSSOM, WILLIAM CHRISTOLPH, III ..... Rocky Point
BLUM, ROBERT JOEL ..... Greensboro
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BOURNE, JOEL KING ..... Tarboro
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BURT, MOSES CEMUEL, JR. ..... Hillsboro
CAMPBELL, JOHN MANLEY ..... Burlington
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COLLIER, ROBERT ALVIS, JR. ..... Statesville
CONE, SYDNEY M., III ..... Greensboro
CROOM, JACQUES HOWARD ..... Fayetteville
DAWKINS, KOY ELLIS ..... Rockingham
EDWARDS, HAROLD MILLS ..... Charlotte
FARRIS, JAMES MAYNARD ..... Mayodan
FISH, KONRAD KARL ..... Durham
FITZSIMMONS, GEORGE ALOYSIUS ..... Charlotte
FLEISHMAN, JOEL LAWRENCE ..... Fayetteville
FRYE, HENRY ELL ..... Greensboro
FRYE, LESLIE GRAY ..... Clemmons
GAINEY, ALONZO HILL, JR. ..... Leland
GARDNER, ROSSIE GARNET ..... High Point
GOLDFARB, CARL ..... Charlotte
GOODALE, RALPH EVERETT ..... Winston-Salem
GOODMAN, ARTHUR, JR. ..... Durham

GOODWYN, GEORGE ALMON ..... Tarboro
GREGG, JAMES MURPHY, JR. ..... Winston-Salem
GRIM, HARRY JOHNSTON ..... Greensboro
HALL, FRANCES HUNT ..... Zebulon
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Given over my hand and the seal of the Board of Law Examiners this 9th day of November, 1959.

EDWARD L. CANNON, *Secretary*
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State of North Carolina

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1959

TEXTILE INSURANCE COMPANY v. CALLIE R. LAMBETH AND CARLEE W. MELTON, EXECUTRICES OF THE ESTATE OF CASPER A. WARNER, D/B/A WARNER'S TRANSFER AND STORAGE COMPANY; RUTH M. WARNER, ADMINISTRATRIX OF THE ESTATE OF WINFRED ALAN WARNER, DECEASED; JESSE MISENHEIMER, ADMINISTRATOR OF THE ESTATE OF GARY WAYNE MISENHEIMER, DECEASED; L. G. DEWITT, INC.; NANCY IRENE JETT, ADMINISTRATRIX OF THE ESTATE OF THOMAS CLIFTON JETT, DECEASED.

(Filed 8 April, 1959.)

1. **Trial § 55—**

Where the parties waive trial by jury, the court's findings of fact have the force and effect of a verdict by jury.

2. **Insurance § 55—**

As between insured and insurer, a policy can afford no protection to insured for liability to third persons injured in a collision more than fifty miles from where the vehicle is principally garaged when the policy expressly stipulates that the vehicles covered by the policy should be used exclusively within a radius of fifty miles.

3. **Same—**

The issuance of an endorsement and the filing of a certificate of insurance with the Utilities Commission stipulating that the liability of insurer extended to all losses occurring on the route or in the territory authorized to be served by the insured, cannot enlarge the liability of insurer to third persons injured in a collision occurring while the vehicle of insured was being driven on a trip in interstate commerce, since the Utilities Commission did not purport, or have authority, to

authorize the operation in interstate commerce. G.S. 62-121.23.

4. Carriers § 1—

Evidence tending to show that the truck in question at the time of the collision was engaged in hauling the household goods of a customer from a municipality in this State to a municipality in another state, supports a finding that the truck was engaged in interstate commerce and under the authority of the I. C. C., notwithstanding the testimony of one witness that some automobile accessories were included in the load.

5. Insurance § 54—

An endorsement certifying that insurer had issued to insured a policy of liability insurance amended to provide coverage to third persons for injuries sustained when the vehicles of insured were being used under his franchise, regardless of whether such vehicles were specifically described in the policy or not, imposes liability on insurer for a trip under the franchise, notwithstanding the vehicle is not described in the policy.

6. Reformation of Instruments § 8—

In order to correct an instrument on the ground of mutual mistake of the parties, the evidence must be clear, strong and convincing, and whether a party has offered the requisite intensity of proof is for the determination of the jury, or for the court when a trial by jury is waived.

7. Insurance §§ 3, 54—

Where a policy of liability insurance does not describe a particular vehicle or extend its coverage to such vehicle, there can be no recovery by insured for liability to third persons for injuries sustained in the collision of such vehicle, unless the policy is reformed.

8. Insurance § 7— Evidence held sufficient to reform policy for mutual mistake.

Evidence to the effect that insured maintained a vehicle for trips in interstate commerce and also a vehicle to substitute therefor in the event the first vehicle was at the time engaged in local hauling or needed repairs, that both vehicles had insured's I. C. C. permit number painted on the side and carried license plates of the several states covered by insured's franchise, that only one of the two vehicles was used in interstate commerce at a time, that insurer's writing and policy agent was advised of the situation and that insured desired the policy to cover each vehicle when used on an interstate trip, that the writing and policy agent took the matter up with insurer's chief underwriter, who was empowered to authorize the substitution of one vehicle for another and had authority to issue an endorsement authorizing such substitution, and that he agreed to the arrangement for the substitution of one truck for the other within the limitations contemplated, *is held* sufficient to support the findings of fact by the court, and judgment reforming the policy to cover liabilities resulting from the use of the substitute truck, as well as the truck described in the policy, while the substitute truck was being used in place of the first on an interstate trip.

9. Appeal and Error § 49—

Findings of fact of the lower court are conclusive on appeal when

supported by competent evidence, but a finding which is not supported by sufficient competent evidence will be ordered stricken from the findings.

10. Insurance § 7—

A policy of insurance, in the same manner as other contracts, may be reformed by parol evidence for mutual mistake, inadvertence or mistake induced by fraud or inequitable conduct.

APPEAL by plaintiff from *Phillips, J.*, March 17 Civil Term, 1958, of GUILFORD, High Point Division, docketed and argued as No. 608 at Fall Term, 1958.

Civil action under Declaratory Judgment Act. G.S. 1-253 *et seq.*

Plaintiff, upon facts alleged, seeks a judgment declaring that neither of two policies of liability insurance issued by it to CASPER A. WARNER, d/b/a WARNER'S TRANSFER AND STORAGE COMPANY, hereafter called WARNER, covers the insured's liabilities to third parties arising out of a collision on April 10, 1957, between WARNER'S 1950 Chevrolet two-ton truck, Motor No. 9TYI-1080, Serial No. 1016679, hereafter called the collision truck, and a tractor-trailer owned by L. G. DeWitt, Inc., hereafter called DeWitt, and, in any event, a judgment declaring the rights and liabilities of plaintiff and WARNER *inter se*.

The collision occurred on Highway No. 220, near Ellerbe, Richmond County, North Carolina. Three persons were killed: (1) Thomas Clifton Jett, the driver of the tractor-trailer; (2) Gary Wayne Misenheimer; (3) Winfred Alan Warner, the driver of WARNER'S truck. The tractor-trailer and its cargo and the WARNER truck were damaged.

Casper A. Warner died June 23, 1957.

The persons named in the caption are, respectively, the duly appointed and qualified personal representatives of said deceased persons.

Prior to the commencement of this action, the personal representatives of Misenheimer and of Jett asserted claims for the alleged wrongful deaths of their respective intestates, and DeWitt asserted a claim for damage to the tractor-trailer and its cargo, against the estate of Casper A. Warner, deceased. These claimants contended, and now contend, that the collision was proximately caused by the negligence of the late Winfred Alan Warner while operating the collision truck in the course and within the scope of his employment by WARNER. Plaintiff was notified of said claims.

Policy No. AP 62156 describes the collision truck (listed as Item 5), four other trucks and a sedan. Plaintiff denies liability under this policy because the collision occurred more than fifty miles beyond the city limits of High Point, North Carolina.

Policy No. AP 61135 describes one truck, to wit, a 1950 Chevrolet two-ton truck, Motor No. HEA 753118, Serial No. 14TWG4179. Plaintiff denies liability under this policy because the collision truck was not described therein.

Both policies were in full force on April 10, 1957.

A joint answer was filed by the Executrices of the Estate of Casper A. Warner and the Administrator of the Estate of Winfred Alan Warner, hereafter called the Warner defendants. They admitted the issuance by plaintiff of the two policies but alleged that Policy No. AP 61135 did not set forth the complete insurance agreement between plaintiff and WARNER with reference to the collision truck.

Further answering, and as a cross complaint against plaintiff, the Warner defendants, in detail and at length, alleged facts relating to the issuance of Policy No. AP 61135. In brief, they alleged that prior to and at the time of the issuance thereof it was agreed by and between plaintiff and WARNER that Policy No. AP 61135 was to cover the collision truck when in use for long-haul operations under WARNER'S Interstate Commerce Commission franchise as a temporary substitute for the truck described therein. They alleged, *inter alia*, that, by mutual mistake, the policy as issued failed to set forth said agreement, and that they were entitled to have the policy reformed so as to express the true and complete agreement of the parties.

Separate answers were filed by defendants Misenheimer, Jett and DeWitt. In substance, they asserted their claims against the Warner defendants and denied plaintiff's allegations that its policies did not cover or afford protection for claims arising out of the collision.

By stipulation entered in the minutes, all parties waived trial by jury and agreed that the presiding judge hear the evidence, find the facts, make the necessary conclusions of law and render judgment thereon.

Evidence was offered by both plaintiff and defendants.

The judgment, comprising 21 pages (single-spaced) of the record, contains the court's findings of fact and conclusions of law. Pertinent portions thereof will be discussed in the opinion.

The judgment proper provides:

> "Upon the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff is not entitled to the relief prayed for in the complaint; and it is further ORDERED, ADJUDGED AND DECREED that Item 5 of the policy number AP 61135 be, and the same is hereby reformed and corrected so as to include the substitute agreement of the plaintiff and the insured, said insuring agree-

ment to be corrected by the issuance of an endorsement to be attached to and made a part of said policy reading as follows: For and in consideration of the premium set forth in the policy, it is understood and agreed that Item 5 shall be amended to read '1950 Chevrolet, two-ton truck, motor number HEA 753118, serial number 14TWG4179, or the 1950 Chevrolet, two-ton truck, motor number 9TYI-1080, serial number 1016679, when used as a substitute for the described vehicle when the described vehicle is temporarily withdrawn from use in long-haul or interstate commerce operations, only one vehicle to be beyond a radius of 50 miles from the limits of the City of High Point, North Carolina, at any given time.' AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is liable upon its policy number AP 61135, within the limits of liability therein provided, for the payment of any and all damages sustained in the accident of April 10, 1957, by Jesse Misenheimer, Administrator of the Estate of Gary Wayne Misenheimer, L. G. DeWitt, Inc., and Nancy Irene Jett, Administratrix of the Estate of Thomas Clifton Jett, which may be recovered by them, or any of them against Callie R. Lambeth and Carlee W. Melton, Executrices of the Estate of Casper A. Warner, d/b/a Warner's Transfer and Storage Company, and Ruth M. Warner, Administratrix of the Estate of Winfred Alan Warner, or either of them; AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Callie R. Lambeth and Carlee W. Melton, Executrices of the Estate of Casper A. Warner, d/b/a Warner's Transfer and Storage Company, and Ruth M. Warner, Administratrix of the Estate of Winfred Alan Warner, shall have and recover of the plaintiff all reasonable and necessary expenses, including attorneys' fees, court costs and investigative expense, incurred or to to be incurred by them in the investigation of the accident of April 10, 1957, and the defense of the actions which have been or may hereafter be instituted against them by persons claiming to have been damaged in said accident as the proximate result of the alleged negligence of Winfred Alan Warner; and IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is legally obligated to defend on behalf of Callie R. Lambeth and Carlee W. Melton, Executrices of the Estate of Casper A. Warner, d/b/a Warner's Transfer and Storage Company, and Ruth M. Warner, Administratrix of the Estate of Winfred Alan Warner, any action or actions which have been or which may be hereafter filed against them by persons who claim to have been

damaged as the result of the alleged negligence of Winfred Alan Warner in the operation of said Chevrolet truck at the time of said accident; and IT IS FURTHER ORDERED that the costs of this action to be taxed by the Clerk shall be paid by the plaintiff."

Plaintiff excepted and appealed, assigning errors.

Sapp & Sapp for plaintiff, appellant.

Jordan, Wright & Henson and Martin & Whitley for Callie R. Lambeth and Carlee W. Melton, Executrices of the Estate of Casper A. Warner, d/b/a Warner's Transfer and Storage Company; Ruth M. Warner, Administratrix of the Estate of Winfred Alan Warner, Deceased, defendants, appellees.

Morgan, Byerly & Post for Jesse Misenheimer, Administrator of the Estate of Gary Wayne Misenheimer, Deceased, defendant, appellee.

Webb & Lee for L. G. DeWitt, Inc.; Nancy Irene Jett, Administratrix of the Estate of Thomas Clifton Jett, Deceased, defendants, appellees.

BOBBITT, J. Upon waiver of jury trial as provided in G.S. 1-184, the court's findings of fact have the force and effect of a verdict by jury. *Cauble v. Bell*, 249 N.C. 722, and cases cited.

Was the evidence sufficient to support the court's findings of fact? If so, are the findings of fact sufficient to support the court's conclusions of law and judgment?

Re: Policy No. AP 62156.

An endorsement attached to this policy provides: "In consideration of the premiums charged it is understood and agreed that the vans and trucks covered hereunder are used exclusively within a radius of fifty (50) miles of the limits of the City or Town where such vans or trucks are principally garaged."

The court found as a fact that the collision occurred 57.08 miles from the city limits of High Point, North Carolina, where, according to the policy, the collision truck was to be "principally garaged."

This policy afforded no protection to WARNER in respect of the collision truck when operated more than fifty miles from the city limits of High Point, North Carolina. *Wright v. Insurance Co.*, 244 N.C. 361, 368, 93 S.E. 2d 438, and cases cited. Indeed, the Warner defendants make no contention that this policy protects them in respect of claims arising out of the April 10, 1957, collision.

Whether plaintiff is entitled to a judgment of nonliability under

this policy as to defendants Misenheimer, Jett and DeWitt depends upon the legal significance of another endorsement whereby plaintiff certified that it had issued to WARNER "the policy of Automobile Bodily Injury Liability and Property Damage Liability Insurance herein described which, by the attachment of endorsement, form No. N. C. M. C. 20, revised, approved by the North Carolina Utilities Commission, has been amended to provide the coverage or security for the protection of the public required with respect to the operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity, permit, or other lawful authority, issued to the Insured by the North Carolina Utilities Commission under the North Carolina Bus Act of 1949, with respect to motor carriers of passengers, or under the North Carolina Truck Act of 1947, with respect to motor carriers of property, and the pertinent rules and regulations of the North Carolina Utilities Commission, regardless of whether such motor vehicles are specifically described in the policy or not. *The liability of the Company extends to all losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the Insured or elsewhere within the borders of the State of North Carolina.*" (Our italics) A certificate of insurance, setting forth said endorsement, was filed by plaintiff with the North Carolina Utilities Commission.

Section 19 of the North Carolina Truck Act of 1947, now codified as G.S. 62-121.23, provides: "No certificate or permit shall be issued to any motor carrier, or remain in force until such carrier shall have procured and filed with the Commission such security for the protection of the public as the Commission shall by regulation determine and require."

As to this policy, the court, based on the italicized sentence, concluded as a matter of law that plaintiff was not entitled to a judgment of nonliability as to defendants Misenheimer, Jett and DeWitt. The judgment proper contains no provision relating to this policy except the (first) sentence wherein it was adjudged "that the plaintiff is not entitled to the relief prayed for in the complaint." Thus, the court refused to adjudge plaintiff's nonliability under this policy; and the judgment implies that *both* policies afford protection to defendants Misenheimer, Jett and DeWitt.

In *Flythe v. Coach Co.*, 195 N.C. 777, 783, 143 S.E. 865, where no such endorsement was involved, this Court held that the insurer was not liable for claims arising out of a collision that occurred when the insured bus was being operated on a special trip (from Raleigh to Davidson College) when the policy provided that the bus was to be

used in carrying passengers between Wilmington and Charlotte, on a fixed schedule, over North Carolina highways.

Here, the North Carolina Utilities Commission had issued to WARNER a certificate of public convenience and necessity whereby WARNER was authorized as an irregular route common carrier to transport household goods "between all points and places throughout the State of North Carolina." Unquestionably, if the collision had occurred when the collision truck was engaged in the intrastate transportation of household goods as authorized by WARNER'S certificate of public convenience and necessity, Policy No. AP 62156, *endorsed as aforesaid,* would have afforded protection to defendants Misenheimer, Jett and DeWitt irrespective of the rights and liabilities of plaintiff and WARNER *inter se.*

However, the court found as a fact that, when the collision occurred, the collision truck was engaged in the transportation of household goods from High Point, North Carolina, to Miami, Florida, an interstate operation. WARNER'S authority to operate the collision truck for the transportation of household goods in interstate commerce was conferred solely by its I. C. C. franchise, not by the certificate of public convenience and necessity issued to WARNER by the North Carolina Utilities Commission. The North Carolina Utilities Commission did not purport to authorize, nor did it have legal power to authorize, interstate truck operations. As to such operations, the Interstate Commerce Commission had full and exclusive authority.

In *Putts v. Commercial Standard Insurance Co.*, Tenth Circuit, 173 F. 2d 153, the coverage of the policy was limited to operations within fifty miles of Deming, New Mexico. The collision occurred more than fifty miles from Deming while the truck was en route to Dallas, Texas. The insured held permits from the Corporation Commission to operate as a contract motor carrier of goods for hire. Endorsements extending coverage to protect the public while operating under such permits were required and issued. However, when the collision occurred the truck was engaged in transporting the insured's own merchandise for use in the insured's own business. Since the truck was not being operated under either permit at the time of the accident, it was held that insured's liability to third parties was not within the coverage of the policy.

It is generally held that a policy endorsement, issued to comply with the requirement of a state agency such as the North Carolina Utilities Commission, will provide coverage to the public only in respect of operations authorized by the insured's permit or certificate of public convenience and necessity. *Foster v. Commercial Standard*

Ins. Co., Tenth Circuit, 121 F. 2d 117; *Simon v. American Casualty Co. of Reading, Pa.*, Fourth Circuit, 146 F. 2d 208; *Sordelett v. Mercer (Va.)*, 40 S.E. 2d 289; *Hawkeye Casualty Co. v. Halferty*, Eighth Circuit, 131 F. 2d 294; *Travelers Ins. Co. v. Caldwell*, Eighth Circuit, 133 F. 2d 649; *Frohoff v. Casualty Reciprocal Exchange (Mo.)*, 113 S.W. 2d 1026; *Drake v. Pennsylvania Thresher & F. Mut. Cas. Ins. Co. (Ala.)*, 92 So. 2d 11; *Smith v. Massachusetts Bonding and Insurance Co. (Ohio)*, 142 N.E. 2d 307. Compare *Kietlinski v. Interstate Transportation Lines (Wis.)*, 88 N.W. 2d 739.

The underlying idea is expressed by Circuit Judge Northcott in *Simon v. American Casualty Co. of Reading, Pa., supra*, as follows: "The purpose of the provision of the Public Service Commission requiring the attachment, to any accident policy issued in the State of West Virginia, of (M. C. Form 13) was to assure the existence of coverage *whenever a vehicle was being used in the business for which a permit was required*, irrespective of any violations by the insured, which otherwise would cause the coverage to be non-existent." (Our italics)

In our opinion, the endorsement issued by plaintiff to comply with the requirements made by the North Carolina Utilities Commission in respect of operations under its certificate of convenience and necessity does not extend the policy coverage so as to provide protection to third persons in respect of operations which the North Carolina Utilities Commission neither authorized nor was empowered to authorize.

For the reasons stated, we reach the conclusion that, with reference to Policy No. AP 62156, plaintiff was entitled to a judgment of nonliability as to all defendants. Plaintiff's assignment of error, based on the court's failure to so adjudge, is sustained. Accordingly, the judgment should be modified so as to contain an express adjudication to this effect. It is so ordered.

Re: Policy No. AP 61135.

The Interstate Commerce Commission had authorized WARNER to operate as a common carrier by motor vehicle, over irregular routes, in the transportation of "HOUSEHOLD GOODS as defined in PRACTICES OF MOTOR COMMON CARRIERS OF HOUSEHOLD GOODS, 17 M. C. C. 467, Between High Point, N. C., and points and places within 10 miles thereof, on the one hand, and on the other, points and places in Georgia, Florida, Tennessee, West Virginia, Ohio, New Jersey, New York, Pennsylvania, Maryland, and District of Columbia, traversing South Carolina, Virginia, Kentucky, and Delaware for operating convenience only."

Plaintiff's assignment of error, based on its exception to the court's finding that the collision truck was transporting Mr. Sirrul's *household goods* from High Point to Miami, is overruled. The sole basis therefor is that one witness testified that some (unidentified) automobile accessories were included in the load. According to this witness, Mr. Sirrul was a salesman for an "accessory company." We think the evidence fully supports the court's finding.

Attached to Policy No. AP 61135 is an endorsement whereby plaintiff certified that it had issued to WARNER "a policy or policies of Automobile Bodily Injury Liability and Property Damage Liability Insurance which, by the attachment of endorsement, form number B.M.C. 90, approved by the Interstate Commerce Commission, has or have been amended to provide the coverage or security for the protection of the public required with respect to the operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the Insured by the Interstate Commerce Commission or otherwise in transportation subject to part II of the Interstate Commerce Act and the pertinent rules and regulations of the Interstate Commerce Commission, *regardless of whether such motor vehicles are specifically described in the policy or policies or not.* The liability of the Company extends to all losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the Insured or elsewhere." (Our italics) A certificate of insurance, setting forth said endorsement, was filed by plaintiff with the Interstate Commerce Commission.

An I. C. C. franchise confers operating rights. What motor vehicles are used in exercising his franchise rights is solely a matter for the licensee. The obvious purpose of the endorsement is to provide protection of the public when the licensee is exercising his I. C. C. franchise rights irrespective of the particular vehicle the licensee may be using while so engaged.

Under the italicized provision of said endorsement, it is quite clear that this policy afforded protection to defendants Misenheimer, Jett and DeWitt irrespective of the rights and liabilities of plaintiff and WARNER *inter se.*

The judgment reforms Policy No. AP 61135 by amending Item 5 to read "1950 Chevrolet, two-ton truck, motor number HEA 753118, serial number 14TWG4179, or the 1950 Chevrolet, two-ton truck, motor number 9TYI-1080, serial number 1016679, when used as a substitute for the described vehicle when the described vehicle is temporarily withdrawn from use in long-haul or interstate commerce operations, only one vehicle to be beyond a radius of 50 miles from

the limits of the City of High Point, North Carolina, at any given time."

Based on evidence it considered clear, strong, cogent and convincing, the court found that the agreement of the parties with reference to coverage on the collision truck was as stated in said amendment but that a provision to that effect had been omitted from the policy by mutual mistake.

It is well settled: (1) To reform, i.e., to *correct*, a written instrument on the ground of mutual mistake of the parties, the evidence must be clear, strong and convincing. *Johnson v. Johnson*, 172 N.C. 530, 90 S.E. 516. (2) "Whether or not the evidence is clear, strong and convincing in a particular case is for the jury to determine." Stansbury, North Carolina Evidence, § 213, and cases cited.

In addition to facts stated above, the court's extensive findings of fact include many evidential findings as distinguished from ultimate findings. We limit our review to those factual findings which we regard sufficient to support the right of the Warner defendants to a reformation of Policy No. AP 61135 on the ground of mutual mistake as provided in the judgment.

The findings of fact, in part summarized and in part quoted, set out in the following ten paragraphs (our numbering), are not challenged by plaintiff's exceptions.

1. The late Casper A. Warner, on account of ill health, had not been actively engaged in the operation of his transfer business since about July, 1955. From July, 1955, the business was operated mainly by Winfred Alan Warner, his son, who was in charge of all of the outside affairs of the business, including the handling of liability insurance for the trucks, and Callie R. Lambeth, his daughter, who was in charge of the office affairs of the business.

2. WARNER operated a total of six pieces (trucks) of revenue equipment. WARNER'S business consisted principally of the local transfer and hauling of household goods in and around High Point. From time to time all six of these revenue trucks were used in such local hauling.

3. Only two of WARNER'S trucks were used in long-haul and interstate operations, viz.: (1) The truck, which had a 22-foot body, described in Policy No. AP 61135, which "was used most regularly in the interstate or long-haul operations." (2) The collision truck, which had a 16-foot body, which "was only occasionally used as a substitute or replacement for the truck with the 22-foot body." WARNER'S I. C. C. permit number was painted on the side of each of these

trucks and each carried the license plates of the several states through which interstate hauling was conducted by WARNER.

4. When the collision truck was used in interstate or long-haul operations, the truck described in Policy No. AP 61135 "was removed from such long-haul or interstate operations and was not again used in long-haul or interstate operations until the other truck (the collision truck) had returned to the warehouse."

5. Under date of February 1, 1950, plaintiff, designated therein as "Company," and Flythe Insurance Agency, designated therein as "Agent," both of High Point, North Carolina, made and executed an Agency Agreement, which was still in force when this action was tried. It contained, *inter alia,* the following provisions:

"(1) Agent has full power and authority to receive and accept proposals for insurance covering such classes or risks as the Company may, from time to time, authorize to be insured, . . .

"(2) The Company authorizes the Agent to countersign and deliver policies of insurance signed by the authorized officials of the company, and to request or prepare customary endorsements, changes, assignments, transfers and modifications of policies from time to time where loss has not occurred."

6. Flythe Insurance Agency, owned by Lloyd W. Flythe, Sr., had been an established insurance agency for some thirty-five years. Lloyd W. Flythe, Jr., had been in the Agency since about 1953; and prior to July, 1956, he became, and since then has been, the principal operator of the business. "Flythe, Jr. was both a writing agent and policy agent; he solicited and placed the insurance and issued policies."

7. "When Lloyd Flythe, Jr. came with the Agency about five years ago Warner's Transfer and Storage Company was one of the clients that the Agency serviced. Lloyd Flythe, Jr. was acquainted with Casper A. Warner and his son Winfred Alan Warner and his daughter Mrs. Callie Lambeth. The Flythe Agency handled all of the liability insurance coverage and the cargo liability insurance coverage upon the Warner trucks. He was familiar with the operations that Warner's Transfer and Storage Company was conducting and was acquainted with the equipment that they used in their operations."

8. Each of the two (renewal) policies involved herein bear facsimile signatures of plaintiff's president and treasurer. Policy No. AP 61135 was "Countersigned at High Point, N. C. this 7 day of July 1956. L. W. Flythe, Flythe Insurance Agency, Authorized Agent." Policy No. AP 62156 was "Countersigned at High Point, N. C., 10-17-56, this 8th day of November 1956. L. W. Flythe, Flythe Insurance Agency, Authorized Agent."

9. "When the long-haul policy came up for renewal in July of 1956, Lloyd W. Flythe, Jr. was advised by the insured that, even though the Chevrolet truck listed in the long-haul policy was primarily the long-haul unit, for convenience Warner had had another vehicle licensed for long haul, so that if the long-haul truck had a load of furniture being delivered locally or when due to repairs or load capacity of the vehicles involved he needed a substitute or replacement, the insured wanted to be able to substitute the other 1950 truck which was licensed for long-haul operations to expedite operations, and have insurance coverage for the substitute vehicle. The agent then went to the home office of Textile Insurance Company and conferred with John Fletcher who was at that time the chief underwriter for the plaintiff. Flythe and Fletcher had a number of conferences in regard to the issuance of the renewal of the long-haul policy."

10. "The duties of the chief underwriter of Textile Insurance Company consisted of, among other things, the determination of the classification of the risk and the premium to be charged for the risk; the issuing of policies and endorsements and the review of the operations of the insured and determining the type of policy or policies and the endorsements which should be issued to cover such operation; and the review of reports and the loss experience of the insured and the issuance of renewal policies if the risk proved satisfactory. Fletcher, as chief underwriter, was empowered to authorize the substitution of one vehicle for another and had power and authority to issue an endorsement authorizing such substitution and had authority to issue an endorsement embodying the agreement between Textile Insurance Company and the insured for the substitution of another vehicle for the vehicle described in the long-haul policy."

The court also found as facts: "Prior to the time the renewal policy was issued, Flythe explained to Fletcher that, although the 1950 Chevrolet truck which was described in the long-haul policy was primarily used in long-haul and interstate commerce operations, for convenience the insured had another 1950 truck licensed for long-haul and interstate commerce operations and when the truck primarily used in long-haul and interstate commerce operations was being used locally or when because of weight capacity or while out for repairs the described vehicle was not being used, the insured wanted to substitute a 1950 truck in lieu of the described truck so that he would have coverage for the substituted truck. Fletcher agreed to this arrangement and it was understood that only one truck at a time could be used for long-haul operations and never at any time was there to be but one long-haul unit operated beyond the 50-mile radius.

Under these circumstances, no question was raised by Fletcher about increasing the premium for the use of the substitute truck in interstate commerce and long-haul operations. After the conferences of the agent with the chief underwriter of Textile Insurance Company, Textile Insurance Company issued the policy and forwarded it to Flythe to be countersigned and delivered by him to the insured. Upon inquiry by the insured, Flythe advised the insured of the agreement for the substitution of the other 1950 Chevrolet for the Chevrolet truck described in the policy and told him as long as the vehicles were all insured by the same company and the Company was aware of how they were used, the substitution could be made."

Plaintiff's exception to these crucial findings of fact is overruled. The testimony of Lloyd W. Flythe, Jr., fully supports these findings of fact; and there is much corroborative evidence to support his testimony. John F. Fletcher, a witness for plaintiff, testified that he had several conversations with Flythe relating to the WARNER coverage prior to the issuance of Policy No. AP 61135. He did not deny, but simply did not recall, that he had made the agreement to which Mr. Flythe testified explicitly and in detail.

The court also found as facts that on April 10, 1957, when the collision occurred, WARNER was using the collision truck to haul Sirrul's household goods from High Point, N. C., to Miami, Florida, as a substitute or replacement for the truck described in Policy No. AP 61135 because that truck was in poor mechanical condition, in need of repairs, and was in the warehouse where WARNER'S trucks were kept when not in use. These findings of fact are fully supported by competent evidence. Hence, plaintiff's exception thereto is overruled.

The court also found as a fact that ". . . Gary Wayne Misenheimer was a passenger in the 1950 model Chevrolet truck being operated by Winfred Alan Warner . . ." We find no evidence deemed sufficient to support this finding of fact. Plaintiff's assignment of error, based on its exception to this finding of fact, is sustained. The judgment should be modified by striking therefrom this finding of fact. It is so ordered.

Unquestionably, as plaintiff contends, Policy No. AP 61135 as written does not describe the collision truck nor do any of its provisions extend coverage to the collision truck; and, in this jurisdiction, unless and until a policy is reformed there can be no recovery on the ground that it does not express the real agreement between the parties. *Floars v. Insurance Co.*, 144 N.C. 232, 56 S.E. 915; *Graham v. Insurance Co.*, 176 N.C. 313, 97 S.E. 6; *Burton v. Insurance Company*, 198 N.C. 498, 152 S.E. 396; Annotation: 66 A.L.R. 763, 771.

The cross action of the Warner defendants is not on the policy

as written. Compare *Peirson v. Insurance Co.*, 248 N.C. 215, 219, 102 S.E. 2d 800. Based on appropriate allegations, the Warner defendants have established by evidence clear, strong and convincing, the real agreement between the parties and that the policy failed to express the real agreement because of mistake common to both parties; and the judgment reforms the policy so as to express the real agreement and then determines the rights of the parties on the basis of the policy as reformed.

"It is well settled that in equity a written instrument, including insurance policies, can be reformed by parol evidence, for mutual mistake, inadvertence, or the mistake of one superinduced by the fraud of the other or inequitable conduct of the other." *Williams v. Insurance Co.*, 209 N.C. 765, 769, 185 S.E. 21; 29 Am. Jur., Insurance § 241; 44 C.J.S., Insurance §§ 278, 279; 7 Appleman, Insurance Law and Practice, § 4256.

It is noted that while Lloyd W. Flythe, Jr., advised WARNER that plaintiff agreed that the collision truck was covered under the conditions alleged by the Warner defendants, Flythe was authorized to do so by plaintiff's then chief underwriter.

Our conclusion is that, except as noted above, the court's findings of fact are supported by the evidence; and that the judgment is supported by the court's findings of fact.

Each of plaintiff's thirty-six assignments of error has been carefully considered. As indicated above, two of plaintiff's assignments of error are sustained. In all other instances, plaintiff's assignments of error are overruled.

As modified in accordance with this opinion, the judgment of the court below is affirmed.

Modified and affirmed.

HAZEL M. LANE v. JESSIE L. DORNEY, EXECUTRIX OF THE ESTATE OF HERBERT G. DORNEY, DECEASED, AND V. WILTON LANE, ADMINISTRATOR C.T.A. OF THE ESTATE OF HERBERT S. LANE, DECEASED, v. JESSIE L. DORNEY, EXECUTRIX OF THE ESTATE OF HERBERT G. DORNEY, DECEASED.

(Filed 8 April, 1959.)

1. Trial § 23a—

Nonsuit is properly entered when the evidence, considered in the light most favorable to the plaintiff and giving him the benefit of every reasonable intendment thereon and every reasonable inference there-

from, raises only a conjecture or speculation as to the determinative issue. G.S. 1-183.

2. Death § 3—

In an action for wrongful death, plaintiff has the burden of showing negligence on the part of defendant and that such negligence was the proximate cause of the fatal injury.

3. Automobiles § 36: Negligence § 17—

Negligence is not presumed from the mere fact of injury, but plaintiff has the burden of proving negligence and proximate cause, and when he relies upon circumstantial evidence, he must establish negligence and proximate cause as a reasonable inference from the facts proved and not circumstances which raise a mere conjecture or surmise.

4. Negligence § 19a: Trial § 19—

Whether there is enough evidence to support a material issue is a matter of law.

5. Automobiles § 41a—

Evidence tending to show merely that a person driving an automobile at a lawful speed along a dry, paved highway, ran off the highway to his right just beyond a bridge, after a curve, causing the car to go over an embankment and overturn, killing two passengers therein, without any evidence of any obstruction or defect in the road, prior swerving of the car, traffic, or any unusual happening prior to the accident, *is held* insufficient to be submitted to the jury on the issue of the negligence of the driver as the proximate cause of the accident.

6. Negligence § 3½— Applicability of doctrine of res ipsa loquitur.

While the doctrine of *res ipsa loquitur* applies in proper cases when an instrumentality is shown to be under the control of defendant and the accident is such as does not occur in the ordinary course of things if the person having control of the instrumentality uses proper care, the doctrine does not apply when all the facts are known and testified to, where more than one inference can be drawn from the evidence as to the cause of the injury, where the existence of negligence is not the more reasonable probability or the matter is left in conjecture, where it appears that the accident was due to an act of God or the tortious act of a stranger, where the instrumentality is not under the exclusive control or management of defendant, or where the injury results from an accident as defined by law.

7. Appeal and Error § 59—

An opinion of the Supreme Court must be considered within the framework of the facts of the particular case in which it is rendered.

8. Automobiles §§ 36, 41a—

The doctrine of *res ipsa loquitur* does not apply to evidence showing merely that an automobile suddenly and for some unexplained reason ran off the highway and overturned, there being no evidence of excessive

speed, reckless driving or failure to exercise reasonable control and lookout. *Etheridge v. Etheridge*, 222 N.C. 616, modified.

HIGGINS, J., dissenting.
BOBBITT, J., concurs in dissent.

APPEAL by plaintiffs from *Armstrong, J.*, at September 1958 Civil Term of GUILFORD (Greensboro Division), being No. 605 at Fall Term 1958, and brought forward to present No. 595.

Two civil actions to recover of Jessie L. Dorney, Executrix of Herbert G. Dorney, (1) for personal injuries to plaintiff Hazel M. Lane, and (2) for wrongful death of plaintiff's testate Herbert S. Lane, allegedly proximately caused by negligence of defendant's testate Herbert G. Dorney, deceased, by consent consolidated for trial.

The allegations bearing upon the negligence of testate of defendant are substantially the same in both complaints, i.e., that "at about 8:20 P.M. on October 18, 1954," plaintiff Hazel M. Lane and her husband, Herbert S. Lane, testate of plaintiff V. Wilton Lane, were riding as passengers and guests "in an automobile which was owned and being operated at the time by defendant's testator, Herbert G. Dorney, en route from Greensboro, North Carolina, to High Point, North Carolina, on the highway between Pomona, North Carolina, and High Point, North Carolina."

That "while operating said automobile, as set out" (above) * * * "as said automobile approached the curve in said highway which is immediately to the northeast of said highway's bridge over Deep River, defendant's testator Herbert G. Dorney caused said automobile to run off the paved portion of said highway and over the embankment of said highway at said point and to crash below," as a result of which plaintiff Hazel M. Lane suffered injury, and testator Herbert S. Lane was killed.

And that the injuries and damages and death were "caused solely by the carelessness and negligence of defendant's testator, Herbert G. Dorney, in that, in driving said automobile, as set out * * * defendant's testator, Herbert G. Dorney, failed to keep a proper lookout for the course and condition of said highway and particularly for the curve on said highway" and failed to keep said automobile under proper control and on the paved portion of said highway and caused said automobile to run off the paved portion of said highway and over said embankment and to crash below.

Defendant answered, denying the allegations of negligence.

The case on appeal shows that a pre-trial hearing was had. In the Pre-Trial Order the following appears:

"2. It is judicially stipulated by all of the parties to this action as follows:

"(c) That at about 8:20 P.M., on October 18, 1954, the late Herbert G. Dorney was operating a 1950 Tudor Oldsmobile '54 N.C. License 70-474; owned by him, along N. C. Highway No. 68 between Pomona and High Point, Guilford County, North Carolina, at a point about six miles northeast of High Point and that the late Herbert S. Lane was riding in the front seat of the car; Hazel M. Lane and Jessie L. Dorney were riding in the back seat."

And upon the trial plaintiff offered evidence.

Jessie L. Dorney, defendant, as Executrix in both cases, was called as an adverse witness by the plaintiffs, and testified substantially as follows:

"After we got out of Greensboro in the county, I do not know how many miles per hour Mr. Dorney was driving the car. From the time we left my home as we went down the road, there was no change in the position of any of the parties in the car * * * . From the time we left until the wreck, Mrs. Lane and I were engaged in conversation with each other in the back seat. I was not noticing particularly what was going on as far as the driving was concerned. Mr. Dorney was 62 years old at that time, nearly 63. He was perfectly well and had no impairment in his health of any kind at that time.

"I do not know whether the car ran off the road and over an embankment at the point of the Deep River Bridge about 6 miles northeast of High Point. I know now that this car was involved in a wreck on the way to High Point. I was not conscious of anything unusual happening on the road before this car was involved in this crash. I do not know whether there was any skidding of the car before the crash. I was conscious of none. I was not conscious of any swerving of the car while it was on the paved portion of the road. I was not conscious of the car hitting anything in the road or anything of that sort. * * * Mr. Dorney and Mr. Lane were killed in the wreck. I do not know the condition of the road at or near the point of the wreck that night with reference to it being wet or dry. I have no recollection of the surface itself. I am not aware of any unusual traffic conditions at that particular point that night. On that road, I was not aware of any unusual traffic conditions. I was not conscious of any unusual happening on the road as long as the car was on the road itself. * * * I do not know whether the car struck the concrete steps that led down into the river bottom and I do not know whether it struck the ap-

proach to the bridge or just what it struck. * * * I was told that the car was completely demolished * * * ."

On cross-examination Mrs. Dorney testified as follows:

"Mrs. Lane and I were engaged in conversation as my husband was driving the automobile along the highway. I presume that the lights on the car were burning. I don't know the mileage from my house to the point of the accident, but it was quite some distance. As the car was being driven along the highway by my husband there was nothing unusual about the way he was driving that attracted my attention. I did not realize that there was an accident or that there was going to be an accident until the moment of a great impact."

And on redirect examination, she testified as follows:

" * * * Just before the accident occurred, I was engaged in conversation with Mrs. Lane. I was not paying any attention to the road or to Mr. Dorney, or to Mr. Lane."

C. T. Pierce testified substantially as follows:

"I am a sergeant with the North Carolina State Highway Patrol * * * In that capacity, I investigated an automobile crash on the night of October 18, 1954. The investigation was at approximately 8:45 P. M., on the "Red Road" running from Pomona to High Point * * * . The accident occurred six miles north of High Point on this Pomona Road. When I arrived at the scene of the accident about 8:55 P. M., I found a 1950 model Oldsmobile, two-door, overturned on the south end of the bridge over Deep River. The license number of the car was NC 70-474, 1954 license. * * * I examined the condition of the road around the point of this accident. Approaching this bridge from Greensboro, traveling in the direction of High Point, there is a long, rather sweeping curve to the left and at the bottom— this is down grade— and at the bottom of this hill is a bridge over Deep River with cement abutments on each side of the bridge. The road at the point of the bridge is approximately 18 feet wide. The paved portion of the road is about the same, 18 feet wide, standard road. It is 18-foot standard leading up to the point and in both directions from the bridge. That condition existed on the night of October 18, 1954. The weather condition on that night was cloudy. The road was dry. In my investigation, I found no obstruction in the road of any kind * * * I found no defects of any kind in the road. This highway was and is a part of the North Carolina Public Highway System. The highway composition was tar and gravel * * * I examined the condition of the car, but I do not recall the details. In my examination of the road at the point, I did not find any skid marks of any kind on the

pavement. I did not find anything of any nature about the condition of the highway at that point that was unusual in any respect."

On cross-examination, the witness added substantially the following:

"The road runs northeast towards Greensboro and southwest towards High Point * * * At the point where the road crosses the bridge, the bridge itself is straight. As I recall, the road was straight to the southwest and northeast of the bridge for some distance. * * * With reference to defendant's exhibit 1, marked for identification, my recollection now is that the top of the bridge abutment was actually below the surface of the pavement. Unlike most bridges, there was no rail or anything along the sides. I found the 1950 Olds overturned at the south end of the bridge. I don't recall whether it was partly in the river, but it was down below the surface of the road, some distance beyond the bridge. That was at the end of the bridge toward High Point. The bridge ran north and south with the south end toward High Point and the north end toward Greensboro. The vehicle was off the west side of the bridge near the south end of the bridge.

"When I arrived there * * * my recollection is that * * * the car was upside down resting on the top * * * ."

And on redirect examination the witness testified as follows:

"The shoulders of this road were roughly 3 feet wide on each side of the pavement. Just before you get to the bridge coming from Greensboro, I observed at a point 22 feet north of the little abutment enclosing the steps that went down the hill at the bridge * * * a tire mark leading over to the steps. By a tire mark, I mean an indenture in the shoulder of the road. The nature of the tire mark was an indenture in the shoulder of the road leading off from the edge of the pavement over to the steps. I don't recall whether it was exactly straight or not."

Plaintiffs offered in evidence photograph marked for identification "Defendant's Exhibit 1."

Plaintiffs offered evidence on the issue of damages, and then rested their cases. Defendant's motion for judgment as of nonsuit in both cases consolidated for trial was allowed. Plaintiffs except thereto and from judgment in accordance therewith appeal to Supreme Court, and assign error.

McLendon, Brim, Holderness & Brooks for plaintiffs, appellants.

Jordan, Wright & Henson, Wharton & Wharton for defendant, appellee.

WINBORNE, C. J. This is the question involved on this appeal, as

stated in brief of plaintiffs: Did the Superior Court commit error in granting defendants' motion for judgment of nonsuit at the close of the plaintiffs' evidence?

Taking the evidence offered by plaintiffs, as shown in the record of case on appeal, in the light most favorable to the plaintiffs, giving to them the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is done in considering demurrer to the evidence, G.S. 1-183, a negative answer to this question is deemed proper.

In an action for recovery of damages for personal injury or for wrongful death from actionable negligence of defendant, plaintiffs must show: (1) That there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiffs under the circumstances in which they were placed; and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849; *Wall v. Trogdon,* 249 N.C. 747, and cases cited.

Negligence is not presumed from the mere fact of injury or that testator was killed. *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661, and numerous later decisions in approval.

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. *Wall v. Trogdon, supra.* If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law. *Mills v. Moore, supra.*

Moreover, in *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670, in opinion by *Ervin, J.,* it is appropriately stated: "In an action for death by wrongful act based on negligence, the burden rests on the plaintiff to produce evidence, either direct or circumstantial, sufficient to establish the two essential elements of actionable negligence, (deleting citations), namely: (1) That the defendant was guilty of a negligent act or omission; and (2) that such act or omission proximately caused the death of the decedent * * * To carry this burden by circumstantial evidence, the plaintiff must present facts which reasonably warrant the inference that the decedent was killed by the

actionable negligence of the defendant * * * An inference of negligence cannot rest on conjecture or surmise * * * This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proofs * * * ."

Indeed, an accepted and sound rule of law and logic is that the facts from which an inference of negligence may be drawn must be proved, and cannot themselves be inferred or presumed from other facts which merely raise a conjecture or possibility of their existence. See 20 Am. Jur. Evidence, Sec. 165,— recognized with approval in the *Sowers* case.

And in *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258, opinion by *Parker, J.,* this principle is applied in this manner: "When in a case like this the plaintiff must rely on the physical facts, and other evidence, which is circumstantial in nature, to show that Donald Wilson was driving the automobile at the time of the wreck, he must establish attendant facts and circumstances which reasonably warrant this inference (citing cases). Such inference cannot rest on conjecture or surmise * * * 'The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff' * * * 'A cause of action must be something more than a guess' * * * A resort to a choice of possibilities is guesswork, not decision * * * To carry his case to the jury the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts."

Testing plaintiffs' evidence by these principles in determining its sufficiency to show negligence of testate of defendant in the operation of the automobile, the question is left in the realm of conjecture and surmise. Just what happened to bring about the "great impact," as characterized by Mrs. Dorney, is pure guesswork. And the rule of *res ipsa loquitur* upon which plaintiffs rely is inapplicable.

Under decisions of this Court in actions based on actionable negligence, and there is no definite evidence as to what caused the accident and no evidence of negligence except the bare fact that the accident occurred, and plaintiff therefore seeks to maintain her action by applying the rule *res ipsa loquitur,* the rule is as stated in *Scott v. London Docks Co.,* 159 Eng. Rep. 665, that "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, or affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose

from want of care." See among others *Saunders v. R.R.*, 185 N.C. 289, 117 S.E. 4; *Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9.

But decisions of this Court uniformly hold that the principle of *res ipsa loquitur* "does not apply (1) when all the facts causing the accident are known and testified to by the witnesses at the trial * * * ; (2) where more than one inference can be drawn from the evidence as to the cause of the injury * * * ; (3) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture * * *; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger * * *; (5) when the instrumentality causing the injury is not under the exclusive control or management of defendant * * *; (6) where the injury results from accident as defined and contemplated by law." *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251.

Nevertheless plaintiffs, appellants, relying principally upon *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477, contend that the doctrine of *res ipsa loquitur* is recognized in North Carolina as applicable to unexplained automobile accidents.

In this connection it must be noted, however, that "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered,"— so declared Chief Justice Marshall, writing in 1807 in *U. S. v. Burr*, 4 *Cranch*, 469, at 481. And this rule has been expressed in many opinions before this Court. See cases listed in Strong's N. C. Index, Vol. 1, Appeal and Error, Sec. 59, including *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956), where in opinion by *Bobbitt, J.*, after speaking of statements in our decisions "which, when considered apart from the factual situations under consideration, tend to support plaintiff's contention," added "But we are mindful of the apt expression of *Barnhill, J. (later C.J.)*: 'The law discussed in any opinion is set within the framework of the facts of that particular case * * * .'" *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10.

With this rule in mind, it is seen that the factual situation in the *Etheridge* case, as stated in the opinion of the Court, is this: "On Sunday 27 April, 1941, plaintiff and defendant, brothers, were returning to Whitakers, N. C., from Bellamy's Mill in an automobile owned and operated by defendant. Defendant was driving about 35 miles per hour on a dirt road. As they approached an intersection or fork in the road defendant passed another vehicle going about 20 miles per hour. 'He swerved around that car and ran into that intersection

and lost control of the car and ran in the ditch (on the right) and the car turned over. He crossed the intersection and was making the bend to the left and the speed he couldn't make it and hit the bank on the right side. After you crossed the intersection the road curves to the left.' The car ran into the ditch and turned over. Defendant passed the car before reaching the intersection and the car turned over 100 to 150 feet beyond the intersection. It was dusty at the time. Defendant offered evidence tending to show that as he crossed the intersection his car hit a 'kinder' bump, went to the right and stayed on the right-hand side until the accident occurred. He tried to turn back to the middle of the road but could not. He does not know why. He applied his brakes 'but they did not seem to take hold.' "

And it will be noted in the opinion, after first discussing the related facts, it is said: "This evidence, except as one of several circumstances, does not tend to show negligence. Is there, then, any sufficient evidence of want of due care, requiring the submission of the cause to a jury? The statute prohibits the operation of a motor vehicle without due caution and circumspection or at a speed or in a manner so as to endanger or be likely to endanger any person or property, Sec. 102, Chap. 407, Public Laws 1937, or at a speed greater than is reasonable and prudent under the conditions then existing * * * Plaintiff's complaint, liberally construed, alleges a violation of these provisions of our Motor Vehicle Laws. We are constrained to hold that he has offered evidence tending to support the allegation."

The reason for the decision is merely that this evidence of the violation of the statute prohibiting reckless driving was sufficient to require submission of the case to a jury. (The opinion might have stopped here.) Appellee contends, and rightly so, that this limitation of the effect of the *Etheridge* case is recognized in *Riggs v. Motor Lines*, 233 N.C. 160, 63 S.E. 2d 197, and *Stegall v. Sledge*, 247 N.C. 718, 102 S.E. 2d 115, in which cases the *Etheridge* case is cited for the proposition that the evidence tended to show excessive speed or reckless driving.

Moreover, appellees contend, and we hold properly so, that much of what was said in *Etheridge* case was *obiter dicta*, and that what the case actually holds is: "When a motorist drives an automobile around a curve at such a speed that he cannot make the curve and runs into a ditch bank, causing his car to overturn, all of which the evidence offered tends to show, a jury may find that he is guilty of actionable negligence in the violation of G.S. 20-140"; and that "the case also stands for the proposition that under these circumstances the jury may decline to believe defendant's explanation that he lost control be-

cause of striking a bump in the road or was unable to retain control because of sudden failure of his brakes." Thus when the *Etheridge* case is closely scrutinized it is found that it does not hold that the doctrine of *res ipsa loquitur* has been adopted in this State in automobile accident cases. Manifestly it does not support the proposition that a case is made for the jury by merely showing that an automobile apparently suddenly and for some unexplained reason leaves the highway and overturns in a creek bed,— there being no evidence of excessive speed, reckless driving, or failure to exercise reasonable control and lookout.

Indeed the opinion in the *Etheridge* case quoting from *Springs v. Doll, supra,* states that it, the doctrine of *res ipsa loquitur,* does not apply * * * (2) where more than one inference can be drawn from the evidence as to the cause of the injury; (3) where the existence of negligent default is not the most reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture * * * (6) where the injury results from accident as defined and contemplated by law. In this aspect compare *Lea v. Light Co., supra.*

It may be also noted and appellee calls attention to the fact that in the North Carolina cases cited by appellant there is testimony in the record comprising evidence of facts and circumstances, other than the mere occurrence of the accident from which an inference of negligence might be drawn. And it would seem that this is true of cases cited from other jurisdictions.

Further it is noted that in the case in hand the evidence discloses nothing except that there was an unexplained and mysterious upset of the car being driven by testator of defendant. He died in the accident. Thus the record leaves the case wholly in the area of speculation and conjecture.

Hence, for reasons stated, the judgment as of nonsuit is

Affirmed.

HIGGINS, J., dissenting. From the evidence, which is fully and fairly stated in the opinion, I draw inferences different from those expressed by the Chief Justice.

The evidence at the trial disclosed that Mr. Dorney, the driver, and Mr. Lane were in the front seat of the Oldsmobile, engaged in conversation. Their wives were in the back seat, similarly occupied. The hard surface highway over which they were traveling was 18 feet wide, dry, and free of obstruction. If nothing appeared in this case except the physical evidence of the wreck, I should be inclined

to go along with the opinion on the ground that the cause of the wreck might have resulted from mechanical defects, a sudden seizure of the driver, or the vehicle might have been forced off the road by the negligence of some other traveler on the highway. But Mrs. Dorney's evidence tends to remove these contingencies.

The evidence is plenary that Mr. Dorney, driving downhill on an unobstructed highway, failed to make a curve to the left, ran off the road to the right, wrecked the vehicle, with the fatal result. The tire marks for 22 feet on the shoulder of the road, the imprint on the concrete abutment enclosing the steps, the position of the vehicle resting on its top on the other side of the river, indicate the driver lost control. The evidence permits the inference that the loss of control did not result from defects in the vehicle, incapacity of the driver, or intervening negligence of another traveler. According to Mrs. Dorney, "He (Mr. Dorney) was perfectly well and had no impairment in his health—I was not conscious of anything unusual happening before this car was involved in this wreck—I was not conscious of any swerve of the car while it was on the paved portion of the road."

In the absence of any plausible explanation as to what caused the wreck, we are left with the permissible inference that it resulted from the driver's failure to use due care to keep his automobile under proper control, to keep a proper lookout for and observe the course and condition of the highway. Failure to use due care is negligence.

"In the absence of obstructions, defects in the road or car or other supervening cause, the wreck of a car under the circumstances disclosed (overturned on curve) readily warrants an inference of negligence in operation." *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477; *Tatem v. Tatem,* 245 N.C. 587, 96 S.E. 2d 725; *Hensley v. Harris,* 242 N.C. 599, 89 S.E. 2d 155; *Boone v. Matheny,* 224 N.C. 250, 29 S.E. 2d 687.

The evidence, in my opinion, was sufficient to require its submission to the jury. I vote to reverse.

BOBBITT, J., concurs in dissent.

MANLY H. BYERLY, ADMINISTRATOR OF THE ESTATE OF IVISON JEROME TOLBERT v. RUBY ROSALIE SHIRLEY TOLBERT, WIDOW; MILDRED VIOLA TOLBERT; JOSEPHINE ANNETTE TOLBERT, GLENDA SUE TOLBERT; JERRY MICHAEL TOLBERT; SANDRA LOUISE TOLBERT AND RUBY ROSALIE SHIRLEY TOLBERT (THE PERSON WITH WHOM MILDRED VIOLA TOLBERT, GLENDA SUE TOLBERT, JERRY MICHAEL TOLBERT, JOSEPHINE ANNETTE TOLBERT AND SANDRA LOUISE TOLBERT LIVE.)

(Filed 8 April, 1959.)

1. Death § 8—

While recoveries for wrongful death are not assets of the estate in the usual meaning of that term, they are to be distributed as provided for the distribution of personal property in case of intestacy. G.S. 28-173.

2. Descent and Distribution § 4—

G.S. 35-45 and G.S. 28-154 contemplate that an after-born child of an intestate is entitled to share in his estate, both real and personal.

3. Same—

G.S. 29-1(7) applies to the descent of realty and not to the distribution of personalty to an after-born child. Whether the statute relates solely to the descent of realty to collateral heirs, *quaere?*

4. Statutes § 5a—

The primary rule in the construction of a statute is to ascertain the intention of the General Assembly.

5. Descent and Distribution § 4—

A child born to intestate's widow more than 280 days after intestate's death is presumed not to have been *en ventre sa mere* at the time of intestate's death, but this presumption may be rebutted by evidence tending to show that intestate was in fact the father of the child, although in the absence of such evidence the presumption is determinative.

6. Same: Evidence § 44—

Whether the term of pregnancy may extend 322 days or more from the moment of conception is a proper subject of testimony by qualified medical experts, and in a particular case, all relevant facts concerning the particular pregnancy may be considered by such experts as a basis for their opinions.

7. Descent and Distribution § 4—

Where the wife testifies that her husband was the father of her child, born more than 280 days after the husband's death, her testimony is sufficient evidence to require the submission to the jury of the question of whether the intestate was the child's father for the purpose of determining whether such child is entitled to a distributive share in the personalty of intestate, the burden of proof being upon such child to establish the affirmative of the issue by the greater weight of the evidence.

APPEAL by guardian *ad litem* for Sandra Louise Tolbert from *Olive, J.*, January 19, 1959, Term, of FORSYTH.

The administrator of the Estate of Ivison Jerome Tolbert brought this action for a judicial determination of this question: Is Sandra Louise Tolbert entitled to a child's share in the distribution of a fund of $10,666.67 recovered by plaintiff through compromise settlement of an action for the wrongful death of his intestate?

At the time of his death on May 10, 1957, as the result of a truck collision, Ivison Jerome Tolbert, plaintiff's intestate, was married to and living with defendant Ruby Rosalie Shirley Tolbert. He was survived by his widow, who was then thirty years of age, and by four children of their marriage, to wit, Mildred Viola Tolbert, born August 24, 1945, Josephine Annette Tolbert, born February 28, 1948, Glenda Sue Tolbert, born January 8, 1950, and Jerry Michael Tolbert, born October 7, 1952. These four children are represented herein by Weston P. Hatfield, Esq., their guardian *ad litem*.

On March 29, 1958, Ruby Rosalie Shirley Tolbert, the intestate's widow, gave birth to a daughter, whom she named Sandra Louise Tolbert. At birth, this child weighed seven pounds and two ounces. She is represented herein by Clyde C. Randolph, Jr., Esq., her guardian *ad litem*.

Upon these facts plaintiff alleged: ". . . it is necessary to have a judicial determination as to whether or not the child born more than ten lunar months from the death of Ivison Jerome Tolbert could be his child."

Ruby Rosalie Shirley Tolbert, the intestate's widow, filed no answer.

The guardian *ad litem* for the four children born prior to the intestate's death admitted plaintiff's factual allegations and then averred "that Sandra Louise Tolbert having been born more than ten lunar months from the death of Ivison Jerome Tolbert is not the child of Ivison Jerome Tolbert and thus is not entitled to take in distribution assets of his estate."

The guardian *ad litem* for Sandra Louise Tolbert admitted plaintiff's factual allegations; and, for a further answer, alleged "that the defendant, Sandra Louise Tolbert, who was born to the defendant, Ruby Rosalie Shirley Tolbert, on March 29, 1958, is the daughter of Ivison Jerome Tolbert, deceased, and as such is entitled to share in his estate."

At trial, the intestate's widow testified, without objection, that she was the mother of Sandra Louise Tolbert, who was born March 29, 1958, and that Ivison Jerome Tolbert, her husband, was the father of Sandra Louise Tolbert. There was no cross-examination.

The guardian *ad litem* for Sandra Louise Tolbert proffered, but the court excluded, testimony of Dr. Edward R. White, Jr., whom the court found to be a medical expert, specializing in internal medicine, tending to show that, under the admitted facts, Ivison Jerome Tolbert *could have been* the father of Sandra Louise Tolbert.

The guardian *ad litem* for Sandra Louise Tolbert tendered, but the court refused to submit, this issue: "Is Ivison Jerome Tolbert, deceased, the father of Sandra Louise Tolbert?"

The issue submitted, and answered "No" in accordance with the court's peremptory instruction, was as follows: "Was Sandra Louise Tolbert born within ten lunar months after the death of Ivison Jerome Tolbert?"

Thereupon, the court adjudged that Sandra Louise Tolbert was not entitled to a distributive share in the personal property of Ivison Jerome Tolbert, deceased, but that his distributees were his said widow and his said four children born prior to his death.

The guardian *ad litem* for Sandra Louise Tolbert excepted and appealed.

Walser & Brinkley and Elledge & Mast for plaintiff, appellee.

Clyde C. Randolph, Jr., for defendant Sandra Louise Tolbert, appellant.

Weston P. Hatfield for defendants Mildred Viola Tolbert, Josephine Annette Tolbert, Glenda Sue Tolbert and Jerry Michael Tolbert, appellees.

BOBBITT, J. The jury's answer to the issue submitted simply declares a fact that is admitted by all parties.

The basic question is whether the fact that Sandra Louise Tolbert was born more than ten lunar months after the intestate's death establishes conclusively as a matter of law that she is not entitled to a child's share in the distribution of the intestate's estate. If not, appellant, upon offering evidence sufficient to warrant an affirmative answer, was entitled to have the issue he tendered submitted to the jury.

We need not consider whether the court erred in excluding the proffered testimony of Dr. White. If the issue tendered by appellant was appropriate, the widow's testimony was sufficient to warrant its submission to the jury.

Plaintiff's recovery for the wrongful death of his intestate, while not assets "in the usual acceptation of the term," *Lamm v. Lorbacher,*

235 N.C. 728, 71 S.E. 2d 49, is to be distributed as provided by G.S. Ch. 28 "for the distribution of personal property in case of intestacy." G.S. 28-173.

G.S. 31-45, in pertinent part, provides: "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, . . ."

G.S. 28-154 *et seq.*, relate to the payment or satisfaction of the share of such after-born child.

It is noteworthy that G.S. 31-45 and G.S. 28-154 were originally enacted as §§ 62 and 109, respectively, of Ch. 113, Public Laws of 1868-69. Their provisions disclose their interrelation.

These statutory provisions clearly assume and contemplate that an after-born child of an intestate shares in the estate, both real and personal, of such intestate.

No provision of G.S. Ch. 28 purports to restrict the distribution of the intestate's personal estate to an after-born child whose birth occurs within ten lunar months from the death of the intestate.

In *Hill v. Moore*, 5 N.C. 233, it was held that an infant *en ventre sa mere* when the father dies is entitled to a child's distributive share of the father's personal estate.

In *Grant v. Bustin*, 21 N.C. 77, *Gaston, J.*, said: ". . . . the rule . . . is that the *right* to the distributive share vests at the death of the intestate. (Citation) It is said the rule is liable to an exception in the case of a child in *ventre sa mere*. In truth, however, a child in *ventre sa mere* is held capable of taking a distributive share, because for all beneficial purposes it is in *rerum natura*, is regarded as actually *in esse*."

The question in *Grant v. Bustin, supra*, was whether a half brother of the intestate, born ten months and a half after her death, was entitled, under the statute of distribution, to a share of *her personal estate* in common with her brothers and sisters living at her death. After stating that "one not in being, and not considered as in being at the death of an intestate, can, under the statute of distributions, prefer no claim to a share of that intestate's estate," the opinion concludes: "It is not stated in this case, nor can we infer from the facts set forth, that Benjamin Bustin was in *ventre sa mere* at the death of Patience Pitts, and we *therefore* hold that he was not entitled to the distributive share claimed for him in her personal estate." (Our italics) This decision was not based on, nor does the opinion refer to, the 1823 statute discussed below.

In *Grant v. Bustin, supra*, admittedly the intestate was the *half*

sister of the child (Bustin) born ten months and a half after the intestate's death. This child was entitled to share in the intestate's personal estate only if *en ventre sa mere* when she died. The decision is authority for this proposition: In the absence of evidence that he was *en ventre sa mere* when his half-sister died intestate, a child born ten and a half months after her death is not entitled to share in the distribution of her personal estate.

G.S. Ch. 29, entitled "Descents," prescribes the rules of descent "When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same."

Appellees rely on the portion of G.S. 29-1 reading as follows: "Rule 7, Unborn infant may be heir. No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized."

Prior to the enactment of this statute, this Court, in *Cutlar v. Cutlar,* 9 N.C. 324, decided at June Term, 1823, held: "So in this State, if the son purchases land and dies without issue, it descends for the present upon the brothers and sisters then being, but if any are subsequently born they become equally entitled; and the same law must prevail relative to half-blood where they are entitled to inherit." To like effect: *Seville v. Whedbee,* 12 N.C. 160; *Caldwell v. Black,* 27 N.C. 463, 467. Under this rule when an intestate died without issue, brothers and sisters of the intestate whether of the whole blood or of the half blood, born after the death of the intestate, irrespective of any time limitation, came in and shared with those in whom the inheritance vested temporarily at his death. 1 Mordecai's Law Lectures 646.

The common law rule as stated in *Cutlar v. Cutlar, supra,* was changed by the 1823 statute now codified as G.S. 29-1, Rule 7. In *Rutherford v. Green,* 37 N.C. 121, 125, this Court held that the provisions of the 1823 statute "are altogether prospective and do not embrace the case of a descent from a person before that time dead."

Although referred to in *Rutherford v. Green, supra,* and elsewhere, as "ch. 1210," we find this 1823 statute set forth as Ch. XXXII, Laws of North Carolina, enacted by the General Assembly at its session commencing November 17, 1823, in a volume containing the Laws of North Carolina from 1817 to 1825. The wording of the 1823 statute is identical with G.S. 29-1, Rule 7, with two exceptions: (1) The original does not contain the caption, "Unborn infant may be heir." (2) The original contains the words "ten months," not "ten lunar

months." The 1823 statute was entitled, "An Act to amend an Act, entitled 'An Act regulating descents,' passed in the year 1808."

It is noted that Ch. IV, Laws of 1808, entitled "An Act to Regulate Descents," established six rules "regulating the descent of inheritance," the first three relating to lineal descents and the last three relating to collateral descents. We are not now concerned with amendments from time to time in these six prior rules of descent. Since the Revised Code of North Carolina, 1854, the Act of 1823 has been codified as Rule 7, i.e., it follows immediately the three rules relating to descents of inheritances "on failure of lineal descendants." (Note: "Ten lunar months," in lieu of "ten months," appears in this and subsequent codifications.)

As stated by *Stacy, C. J.*, in *Trust Co. v. Hood, Comr. of Banks,* 206 N.C. 268, 173 S.E. 601: "The heart of the statute is the intention of the law-making body."

It appears probable that the purpose of the Act of 1823 was to change the common law rule so that the final vesting *of inheritances* would not be in suspense under the circumstances considered in *Cutlar v. Cutlar, supra.* When an intestate dies without issue the subsequent birth of brothers and sisters, either of the whole blood or of the half blood, might be reasonably expected to occur from time to time over a period of many years. While this is true as to collateral relationships, it is not true as to a child of the intestate. Birth of such child, *rerum natura,* will occur, if at all, within a comparatively short time after the intestate's death.

We need not decide whether G.S. 29-1, Rule 7, relates solely to the descent of *inheritances,* real property, *to collateral relations* "on failure of lineal descendants." It is sufficient for present purposes to hold that it does not relate to the distribution of an intestate's personal estate to an after-born child.

Appellees cite *Shinn v. Motley,* 56 N.C. 490, *Britton v. Miller,* 63 N.C. 268, *Deal v. Sexton,* 144 N.C. 157, 56 S.E. 691, and *Severt v. Lyall,* 222 N.C. 533, 23 S.E. 2d 829, in support of their contention.

In *Shinn v. Motley, supra,* the opinion of *Battle, J.,* contains this sentence: "The child of Nancy Furr, which was born within ten months after the death of the testator, is to be considered as having been then *in ventre sa mere,* and of course entitled as a child born at that time." However, the basis of decision was that the testator had expressly provided that after-born children (testator's grandchildren) should share.

In *Britton v. Miller, supra,* the facts and decision pertinent here were as follows: Upon the death of Margaret S. Britton in 1864, the

share of her real and personal property devised and bequeathed by her to the children of her brother Stephen W. Britton vested in Rosa Mary Britton, the only child of Stephen W. Britton born prior to the death of Margaret S. Britton. In September, 1864, after the death of Margaret S. Britton, Rosa Mary Britton, an infant, died; and upon her death her estate vested in Stephen W. Britton, her father. In 1866 or 1867, Margaret Britton, a daughter of Stephen W. Britton by a second marriage, was born. This Court held that Stephen W. Britton's estate, derived from Rosa Mary Britton, was not "divested out of the father by the birth of his daughter Margaret more than ten lunar months *after the death of Rosa Mary.* Rev. Code, ch. 38, Rule 7." (Our italics) Since no contention was made that Margaret was born or *en ventre sa mere* when Rosa Mary died, the reference to the statute, now G.S. 29-1, Rule 7, may not be regarded as the basis of decision.

In *Deal v. Sexton, supra,* the rule of descent was stated in these words: ". . . posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child *en ventre sa mere* is considered absolutely born." In the cited case, the child was born within four months of the father's death. The fact that the child was *en ventre sa mere* when the intestate died was not questioned. *Brown, J.,* referring to the statute now codified as G.S. 29-1, Rule 7, said: "The statute law of this State treats the unborn child in its mother's womb with the same consideration as if born." The cited case may not be considered authority for the proposition that a child born more than ten lunar months after the intestate's death is excluded as a matter of law from inheriting, that is, that such child is precluded from asserting and offering evidence tending to show that he was in fact *en ventre sa mere* when his father died.

In *Severt v. Lyall, supra,* the owner of land, subject to a life estate, died intestate, predeceasing the life tenant. After holding that his heirs were to be determined as of the date of *his* death, not the death of the life tenant, a further question was posed by these facts: When the intestate died, August 23, 1914, he was survived by two sisters of the whole blood. Thereafter, there were born to the intestate's father and his father's second wife four children, the plaintiffs, the eldest of whom was born in December, 1919. The opinion of *Barnhill, J. (later C. J.),* concludes: "It follows that the *feme* defendants, the nearest blood kin of Clarence Odell Severt, living at the time he died, acquired title by inheritance at his death. Plaintiffs cannot take as his heirs. They were not 'in life' at the time of the death of the re-

mainderman and were not born within ten lunar months thereafter. C.S. 1654, Rule 7." It seems clear that the Act of 1823, now G.S. 29-1, Rule 7, was enacted primarily, if not solely, to apply to a factual situation such as that presented in this case.

G.S. 41-5 provides: "An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born."

G.S. 41-5 was considered in *Mackie v. Mackie,* 230 N.C. 152, 52 S.E. 2d 352, in relation to these facts: By deed dated July 16, 1894, John Mackie, Sr., conveyed certain land to his son, John Mackie, Jr., "for life and then to his children and their heirs and assigns." John Mackie, Jr., had no children when this voluntary conveyance was executed. A deed dated January 15, 1898, executed by John Mackie, Jr., et al., purported to revoke under G.S. 39-6 the future interests conveyed by his father's deed. The first child of John Mackie, Jr., was born June 9, 1898. This Court held that the purported deed of revocation was void. *Denny, J.,* for the Court, said: "Applying the law to the facts in this case, it is presumed that the child of John W. Mackie, Jr., who was born on 9 June, 1898, was conceived 280 days, or ten lunar months, prior to the date of his birth, *in the absence of evidence to the contrary,* and was therefore in being at the time the purported deed of revocation was executed on 15 January, 1898. *S. v. Forte, supra; S. v. Bryant,* 228 N.C. 641, 46 S.E. 2d 847; 16 Amer. Jur. 852." (Our italics)

In 16 Am. Jur., Descent and Distribution § 80, pp. 851-852, this statement appears: "Posthumous children, if born alive . . . inherit as they would have if they had been born in the lifetime of the intestate and had survived him, and they are in esse for the purpose of taking under the rule from the time of conception, the conception, for the purpose of the rule being presumed to be nine months before birth, but evidence to rebut the presumption is admissible."

In *S. v. Forte,* 222 N.C. 537, 23 S.E. 2d 842, and in *S. v. Bryant,* 228 N.C. 641, 46 S.E. 2d 847, what constituted in law or in fact the term of pregnancy was at most a subordinate circumstance bearing upon the primary issue. The sentence in *S. v. Forte, supra,* quoted in *S. v. Bryant, supra,* to wit, "And it is a matter of common knowledge that the term of pregnancy is ten lunar months, or 280 days," is to be understood as a general statement that, in the absence of evidence to the contrary, the term of pregnancy is presumed to be ten lunar months or 280 days.

It is noted that we are concerned here with a child born of the woman to whom the intestate was married and with whom he was

living at the time of his death. The question for decision is: When it is asserted on behalf of such child that the intestate was her father, does the fact that such child was born more than ten lunar months or 280 days after the intestate's death, standing alone, preclude the child *as a matter of law* from receiving a child's share in the distribution of the intestate's personal estate? Absent a statute so providing, the answer is, "No." Whether such child is the child of intestate is determinable as an issue of fact.

Whether, according to the laws of nature, the term of pregnancy may extend 322 days or more from the moment of conception, is a proper subject of testimony by qualified medical experts. In determining whether such prolonged term of pregnancy occurred in a particular case, all relevant facts concerning the particular pregnancy would seem an essential basis for opinion evidence by qualified medical experts.

The applicable rule is this: If, under such circumstances, a child is born more than ten lunar months or 280 days after the death of the intestate, the presumption is that the child was not *en ventre sa mere* when the intestate died. In the absence of evidence to the contrary, this presumption is determinative; but this presumption may be rebutted by evidence tending to show that intestate was in fact the father of the child. Thus, when the issue is raised, the burden of proof rests upon such child to establish by the greater weight of the evidence that the intestate was the father.

The rule stated requires that a new trial be awarded. Sandra Louise Tolbert was entitled, upon the testimony of her mother, to have submitted the issue tendered in her behalf, to wit, "Is Ivison Jerome Tolbert, deceased, the father of Sandra Louise Tolbert?"

New trial.

S. T. GLOVER, JR. v. BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES.

(Filed 8 April, 1959.)

1. Pleadings § 15—

A demurrer admits, for the purpose of testing the sufficiency of the pleading, all facts well pleaded in the complaint.

2. Pleadings § 19c—

If the facts alleged in the complaint, taken as true and liberally con-

strued in favor of the pleader, are sufficient to state a cause of action, demurrer should be overruled.

3. **Master and Servant §§ 2e, 6f: Associations § 5—**

Where a member of a union alleges a contract with the union under which the union was given exclusive authority to prosecute the member's claim for reinstatement of employment after wrongful discharge, the defense that the member and the union are co-principals will not preclude recovery on the contract for asserted failure of the officers and agents of the union to discharge the union's contractual obligations to prosecute with due diligence the member's claim, since the union has authority to make such contract and may not defeat recovery thereon by asserting that the member was a co-principal. G.S. 1-69.1.

4. **Same— Allegations held sufficient to state a cause of action in favor of union member for failure of the union to prosecute with diligence the member's claim for reinstatement of employment.**

Where, in an action by a railroad employee against his union, the complaint alleges that plaintiff was wrongfully discharged by his employer, that a supplemental contract betwen the union and plaintiff gave the union exclusive authority to prosecute plaintiff's claim for reinstatement, that the union prosecuted such claim through the National Railroad Adjustment Board, that the Board's order established the wrongful discharge and ordered reinstatement, which the carrier refused, that plaintiff had a good cause of action to compel compliance, but that the cause of action was lost by reason of the union's negligent failure to make timely application to the Federal Court to have the order enforced, and that by reason thereof plaintiff's claim for reinstatement was barred, to his loss in the minimum amount of the wages he would have received had the order been enforced, the complaint is sufficient to state a cause of action as against demurrer, and particular allegation that the courts would have enforced the order of the Board by directing the reinstatement of the member and the award of damages in the amount claimed, is not essential.

5. **Same—**

In an action by a railroad employee against his union to recover for the alleged negligent failure of the union to prosecute the member's claim for reinstatement of his employment after wrongful discharge, demurrer on the ground that the employee, as well as the union, was entitled to prosecute the claim under the Railway Labor Act, 45 U.S.C.A. 153(p), is properly overruled when the complaint alleges a contract between the member and the union under which the union was given exclusive right to prosecute the claim administratively and judicially, and the member was required to forego his right to prosecute the claim.

MOORE, J., not sitting.

PARKER, J., dissents.

BOBBITT, J., concurring.

APPEAL by plaintiff from *Moore, J.*, in Chambers, September 6, 1958, NEW HANOVER Superior Court.

Civil action for damages the plaintiff alleges he sustained because of the defendant's failure to fulfill its contract obligation to institute, and to prosecute, in his behalf a civil action in the United States District Court against the Atlantic Coast Line Railroad for the recovery of wages, seniority, and other rights which resulted from his wrongful discharge.

The plaintiff alleged: "The defendant is an unincorporated labor association (hereafter called the brotherhood) with its principal office and place of business in the City of Cinncinati, State of Ohio, . . . does business in New Hanover County, North Carolina, in performing the acts and purposes for which it was formed, . . . organizing. . . employees of the Atlantic Coast Line Railroad Company (hereafter called the carrier), accepting into the brotherhood those eligible for membership, negotiating agreements on behalf of the members concerning pay, rules of employment, working conditions, participating in efforts to settle disputes on behalf of the members, . . ."

The brotherhood was the legally authorized representative of the craft to which the plaintiff belonged. Pursuant to provisions of the Act of Congress known as the Railway Labor Act (45 U.S.C. 151 et seq.) the brotherhood had entered into a written agreement with the carrier concerning rates of pay, working conditions, etc. The contract provided that a member could not be dismissed without investigation and hearing. The carrier filed against the plaintiff, member of the brotherhood, a charge that he entered into the carrier's office building accompanied by outsiders for purposes not connected with his employment, against carrier's rules. As required, the plaintiff notified the brotherhood through its local officials who determined he was not guilty of misconduct and that the charges should be defended. (The foregoing is a summary of the first seven allegations of the complaint.)

> "8. By reason of the plaintiff's membership in the defendant association, the understanding, agreements and obligations made, entered into and assumed in connection therewith, and the by-laws, rules, regulations and customs of the defendant association, it was at all times herein mentioned required, obligated and under a legal contractual duty to represent the plaintiff in connection with any grievance and hearing thereon arising under the said collective bargaining agreement and to prosecute to a final conclusion in a timely, diligent and proper manner, both administratively and judicially, any claim existing or order or award made in his behalf against the carrier by any committee or board under the provisions of said collective bargaining agreement and the Railway Labor Act herein mentioned, and the plaintiff was

obligated and under a contractual duty to refrain from undertaking on his own behalf the defense of any such charges or the prosecution, either administratively or judicially, of any such claim, order or award against the said carrier."

The brotherhood, through its proper officials, represented the plaintiff, member, at hearings and when the carrier discharged him the brotherhood appealed to the chief operating officer of the carrier as required by the collective bargaining agreement; that just grounds for discharge did not exist and that the investigation did not disclose any misconduct or rule violation. (The foregoing is a summary of allegations 9, 10, 11 and 12 of the complaint.)

"13. No adjustment of the dispute was accomplished by the above described efforts. Thereupon, on or about January 7, 1952, the defendant, through its General Chairman, advised the plaintiff that the carrier had refused to reinstate the plaintiff and pay him for time lost and that the defendant would submit the dispute to the National Railroad Adjustment Board and in event of a favorable award it would seek enforcement thereof by Court action under the Railway Labor Act if the carrier refused to comply with such award. The plaintiff was required by said General Chairman to execute and deliver and on or about that date the plaintiff did execute and deliver to the defendant a power of attorney in writing authorizing and empowering the defendant and its duly accredited officers and agents, as his agents and attorneys in fact, to submit the dispute to the National Railroad Adjustment Board and to present, fully process and handle to a conclusion, before said Board, with the carrier, and in court, if necessary, under the provisions of the aforesaid collective bargaining agreement and the Railway Labor Act, the claim on behalf of plaintiff for restoration to service with all rights unimpaired and reimbursement of wages lost by him as a result of the wrongful discharge."

The National Railroad Adjustment Board (hereafter called the board) is created by the Railway Labor Act with jurisdiction to hear disputes involving clerical employees and the carrier. The brotherhood, acting through its Grand President, submitted the plaintiff—carrier dispute to the Board (Third Division), appeared before it on behalf of the plaintiff, made an argument and filed a brief. The board, among other things, found that the assessment of discipline imposed by the carrier was arbitrary and without just cause, and issued its order to the carrier directing it to make effective said award by restoring

the plaintiff to service with all rights unimpaired, and to compensate him for the wages lost. Efforts of the brotherhood to have the carrier carry out the board's award failed. The carrier refused to reinstate the plaintiff and to pay his lost wages. (The foregoing is a summary of paragraphs 14, 15, 16, 17, and 18 of the complaint.)

"19. Under the provisions of Section 3(p) of the Railway Labor Act, as amended (45 U.S.C. 153(p)) the defendant brotherhood was empowered to file on behalf of plaintiff in the District Court of the United States for the Eastern District of North Carolina, a civil action to enforce the above mentioned order. Said section authorized the filing of a petition setting forth briefly the causes for which relief was claimed on behalf of the plaintiff, and the order of the Division of the Adjustment Board in the matter. Said section further provides that on the trial of such suit the findings and order of the Division of the Adjustment Board shall be *prima facie* evidence of the the facts therein stated. The said Section further empowers the District Courts, under the rules of the Court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce the order of the Division of the Adjustment Board."

"20. Section 3(q) of the said Railway Labor Act (45 U.S.C. 153(q)), provides that all actions at law based upon the provisions of said section shall be begun within two years from the time the cause of action accrued under the award of the Division of the Adjustment Board and not thereafter. The cause of action which accrued in favor of the plaintiff under the award of the said Division of the Ajustment Board accrued on March 15, 1953, which was the date the said award became effective. The period of two years within which the said suit might have been instituted for the enforcement of said award expired on March 15, 1955."

"21. The defendant brotherhood, with full knowledge of limitation prescribed by said statute, failed and neglected to file said suit within the said period of two years and the cause of action existing in favor of the plaintiff and against the said carrier for the enforcement of the award of the National Railroad Adjustment Board was barred by the said statute of limitations on March 13, 1955. As a result of the defendant's delay and negligence the plaintiff's cause of action and his remedy against said carrier was thereafter and is forever barred."

"22. The plaintiff continued to be a member of the defendant association in good standing until March 15, 1955. During all

the time that plaintiff was a member of the defendant association, he complied in all respects with and duly performed all the conditions of the constitution, bylaws and regulations thereof and particularly refrained from undertaking to handle or prosecute his claim either administratively or judicially, as he was required and obligated to do. He depended and relied entirely, as he had the right and was obligated to do, on the handling and prosecution thereof to a conclusion by the defendant, through its officers and accredited representatives."

"23. Plaintiff herein had and now has, except for the running of the statute of limitations, a good and sufficient cause of action against the said carrier for his wrongful discharge as found by the award of the National Railroad Adjustment Board."

"24. As a result of the foregoing, the plaintiff was not restored to service and cannot enforce reinstatement and he has not received and cannot now recover from the said carrier the pay for time lost at the rate of pay of the position he occupied at the time of his wrongful dismissal, or any position which might have come open after December 15, 1951, to which his seniority would have entitled him. By reason thereof, he has been damaged in at least the amount of $18,000.00 which is the minimum that he would have been entitled to receive to the date of the institution of this action, no part of which has been paid although the same has been duly demanded. The full and accurate amount of damages suffered by plaintiff cannot be determined except from the books and records of the said carrier."

The defendant filed the following demurrer:

"NOW COMES the defendant in the above entitled case and demurs to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action for the reasons and on the grounds which follows:

"First. As shown on the face of the complaint by paragraphs 5 and 22, plaintiff was for some time prior to December 3, 1951, until March 16, 1955, after his alleged grievance against the defendant arose, a member of defendant Brotherhood. As such, it is well settled in both state and federal courts that a member of an unincorporated association is a co-principal jointly responsible for the acts of the agents of such association, and while he may sue an agent for dereliction of duty he may not sue his co-principals for dereliction of their common agent. The effect of

this proposition remains the same even though plaintiff's membership in the union has terminated prior to the commencement of the court action.

"Second. It is likewise well established that in an action of the character here involved, the plaintiff must allege in his complaint and prove at the trial that but for the alleged negligence of the defendant, plaintiff's claim for reinstatement to the position from which he was allegedly wrongfully dismissed by the Atlantic Coast Line Railroad could have been sustained by the courts and his claim for damages in the amount of $18,000.00 would have been collectible. The present complaint contains no statements of fact from which it can be shown or even inferred that the plaintiff had such a cause of action which the courts would have enforced by way of ordering reinstatement and damages in the amount claimed.

"Third. Section 3(p) of the Railway Labor Act as amended, 45 U.S.C.A., Sec. 153(p), upon which plaintiff relies in alleging that the defendant brotherhood should have filed a suit on his behalf to enforce an award of the Railroad Adjustment Board in plaintiff's favor, also expressly provides that 'any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises.' Under such circumstances, the alleged dereliction by defendant Brotherhood in not filing such suit fails to state a cause of action because there is no requirement, express or implied, in the said provision of the Railway Labor Act which requires the defendant Brotherhood to file such enforcement suit on behalf of the plaintiff."

The court sustained the demurrer, and dismissed the action. The plaintiff excepted and appealed.

Oliver Carter, George Rountree, Jr., for plaintiff, appellant.

J. B. Craighill, James L. Highsaw, Jr., of Counsel: Craighill, Rendleman & Kennedy, Charlotte, N. C., Mulholland, Robie & Hickey, Washington, D. C. for defendant, appellee.

HIGGINS, J. At this stage of the proceeding we are concerned with allegation only, not with proof. For the purpose of testing the suffi-

ciency of the complaint, all well-pleaded facts are deemed admitted by the demurrer. *Riddle v. Artis,* 246 N.C. 629, 99 S.E. 2d 857; *Lewis v. Lee,* 246 N.C. 68, 97 S.E. 2d 469; *Skinner v. Evans,* 243 N. C. 760, 92 S.E. 2d 209; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; *Sabine v. Gill,* 229 N.C. 599, 51 S.E. 2d 1. Do the facts so pleaded, taken as true, and liberally construed in favor of the pleader, state a cause of action? If so, the demurrer should have been overruled. *Sabine v. Gill, supra; Smith v. Sink,* 210 N.C. 815, 188 S.E. 631; *Shaffer v. Bank,* 201 N.C. 415, 160 S.E. 481.

The allegations of the complaint, by summary and by quotation, are set forth in the preliminary statement. We call attention to the substance of a few material allegations which we think, taken together, distinguish this case from those cited by the defendant as authority for sustaining the demurrer.

It appears from the record that plaintiff, at the time this action was instituted (September 25, 1956), was no longer a member of the defendant brotherhood. He alleged (1) he had been wrongfully discharged by the employer; (2) he called on the brotherhood to resist the discharge and to have him restored, and his lost wages paid. " . . . it, (the defendant brotherhood) was at all times herein mentioned required, obligated, and under a legal contractual duty to represent the plaintiff . . . and to prosecute to a final conclusion . . . both administratively and judicially, his claim . . . and the plaintiff was obligated and under a contractual duty to refrain from undertaking, in his own behalf . . . the prosecution, either administratively or judicially, of any such claim." " . . . the plaintiff was required . . . to execute and deliver . . . to the defendant a power of attorney in writing, authorizing and empowering *the defendant and its duly accredited officers and agents as his agents and attorneys in fact* (emphasis added) . . . to present, fully process and handle to a conclusion . . . in court if necessary . . . the claim on behalf of the plaintiff for restoration to service . . . reimbursement of wages lost by him as a result of the wrongful discharge."

The complaint further alleges the defendant undertook to and did prosecute the plaintiff's claim through the various administrative stages necessary to establish his rights. The employer refused to obey the order of the National Railroad Adjustment Board to reinstate the plaintiff to his former position and to pay his lost wages. The plaintiff, in effect, alleges the next and final step to restore his rights and secure his wages was by petition to the District Court of the United States for the Eastern District of North Carolina as provided in §153(p) of the Railway Labor Act.

By way of limitation, however, the Act provides, §153(q), that the action "shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Finally, the plaintiff alleges, paragraphs 20 to 24, inclusive, that by written power of attorney he gave to his agent, the defendant brotherhood, the exclusive right to prosecute his claim administratively and judicially, and that the defendant having full knowledge of the two years limitation, breached its contract to institute the action, and that he thus lost his right to compel the carrier to reinstate him and pay his wages.

As its first ground of demurrer, the defendant says: The brotherhood cannot be held responsible for the acts of its agents for the reason the agents are likewise the plaintiff's agents, he being a co-principal by reason of membership in the brotherhood. As authority the defendant cites the following cases: *Kordewick, et al v. Brotherhood of Railroad Trainmen, et al,* 181 F. 2d 963 (7th Cir., 1950); *Duplis v. Rutland Aerie No. 1001, F. O. E.,* 118 Vt. 438, 111 A. 2d 727, (Sup. Ct. Vt., 1955); *Marchitto v. Central R.R. of N. J.,* 9 N.J. 456, 88 A. 2d 851 (Sup. Ct. N. J., 1952); *Brotherhood of Railroad Trainmen v. Allen,* 148 Tex. 629, 230 S.W. 2d 325 (Ct. Civ. App. Tex., 1950), cert. den. 340 U.S. 934 (1951); *Atkinson v. Thompson,* 311 S.W. 2d 250 (Civ. App. Tex. 1958); *DeVillars, et al v. Hessler,* 363 Pa. 498, 70 A. 2d 333, (Sup. Ct. Pa., 1950); *McClees v. Grand International Brotherhood of Locomotive Engineers,* 59 Ohio App. 477, 18 N.E. 2d 812 (Ct. of App. Ohio, Hamilton C., 1938); *Hromek v. Gemeinde,* 238 Wis. 204, 298 N.W. 587 (Sup. Ct. Wis., 1941); *Carr v. Northern Pac. Beneficial Assoc.,* 128 Wash. 40, 221 P. 979 (Sup. Ct. Wash., 1924); *Martin v. Northern Pac. Beneficial Assn.,* 68 Minn. 521, 71 N.W. 701 (Sup. Ct. Minn., 1897); *Gilbert v. Crystal Fountain Lodge,* 80 Ga., 284, 4 S.E. 905 (Sup. Ct. Ga., 1887).

The rationale of the rule in the cases cited is succinctly stated by the Court of Civil Appeals of Texas in *Brotherhood of Railroad Trainmen v. Allen,* 230 S.W. 2d 325: "The appellees and the other several hundred thousand members are principals, and we are of the opinion that one or more principals cannot sue their co-principals and require them to respond in damages for the dereliction of duty of a joint agent." If we concede the soundness of the rule, it by no means follows that it applies to the plaintiff's case. The plaintiff alleges, in effect, that he entered into a contract with the brotherhood that it should be his agent with the exclusive right to prosecute his claim; and "the plaintiff was obligated and under a contractual duty to re-

frain from undertaking on his own behalf . . . the prosecution, either administratively or judicially, of such claim." When liberally construed, the complaint alleges that the plaintiff was the principal and the brotherhood was his agent, with exclusive authority, to prosecute his claim.

The plaintiff contends this case does not involve the negligence of a joint agent representing both him and the brotherhood, but it does involve the negligent failure of the brotherhood, the agent, to carry out its contract with the plaintiff, the principal. The contract is alleged. Its breach is alleged. Authority to make the contract is not now in question. Issues involving the truth of the facts alleged arise by answer, not by demurrer. On the facts alleged, we are not prepared to hold, as a matter of law, that an unincorporated labor union embracing many thousands of members, acting through its duly selected officers, lacks power to make a valid contract with one of its own members, or that the brotherhood can defeat its contract by pleading the member was a co-principal. The action against the brotherhood is authorized by G.S. 1-69.1. *Construction Co. v. Electric Workers Union*, 246 N.C. 481, 98 S.E. 2d 852. The first ground of the demurrer is not sustained.

For its second ground of demurrer the defendant says in substance: The complaint does not state a cause of action. In short summary the complaint alleges (1) the plaintiff was wrongfully discharged; (2) the administrative procedures culminating in the order of the National Railroad Adjustment Board (Third Division) established the wrongful discharge and ordered the carrier to reinstate the plaintiff and pay his back wages; (3) the carrier refused to obey the order; (4) plaintiff had a good cause of action to compel compliance; (5) that the cause of action was lost by reason of the defendant's negligent failure to make timely application to the Federal Court to have the award enforced; (6) by reason of the defendant's failure the plaintiff was damaged as set out in paragraph 24 of the complaint. When liberally construed, the complaint states a cause of action. The second ground of demurrer is not sustained.

For its third ground of demurrer the defendant says the defendant's alleged dereliction of duty in failing to file suit did not prevent the plaintiff from filing a suit himself under the provisions of the Railway Labor Act and that the Act did not require the defendant to bring the suit. The plaintiff grounds his cause of action upon the failure of the defendant brotherhood to carry out its contract with him to pursue the remedy provided by the Railway Labor Act. He alleges the brotherhood required him to forego his right to sue and that he

relied on the agent to be faithful to its trust. The third ground of the demurrer is not sustained.

The court below committed error in sustaining the demurrer. The cause is remanded to the Superior Court of New Hanover County where the defendant will be permitted to answer. The trial court will then inquire into the merits of the issues raised by the pleadings.

Reversed.

MOORE, J., not sitting.

PARKER, J., dissents.

BOBBITT, J., concurring: Under the Railway Labor Act, the defendant Brotherhood, not the individuals who composed its membership, became the exclusive bargaining agent of all employees of plaintiff's craft or class. Thus, the federal statute recognized the Brotherhood as a separate entity when representing an employee in respect of his employment relations with the carrier. In my opinion, when the Brotherhood, as such separate entity, assumes contractual obligations to employees relating to such representation, an employee may sue the Brotherhood as an entity for the alleged breach thereof. To this extent, the status conferred upon the Brotherhood by the federal statute seems sufficient to distinguish it from partnerships and from ordinary fraternal, civic or other unincorporated associations.

Whether plaintiff can maintain his alleged cause of action is another question, not presented for determination on this appeal.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. WILL SHAFFER, RALPH NEAL SHAFFER, JOHN FRANKLIN MULLIS, JOE NEELEY ORR, LOIS ORR PORTER, ADMINISTRATRIX OF THE ESTATE OF RANSON WAYNE PORTER, DECEASED, AND NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 8 April, 1959.)

1. Appeal and Error § 49—

The findings of fact by the trial court are conclusive on appeal if supported by competent evidence, notwithstanding that the evidence is conflicting and would support, also, a contrary finding.

2. Insurance § 54—

Where insured owns two automobiles covered respectively by policies

with different insurers, each providing that the policy should also cover an automobile acquired by insured if it replaces the automobile insured, and insured thereafter acquires another car, which of the two cars the newly acquired car replaces is a mixed question of law and fact, the interpretation of the policy provisions in the light of the facts found being a matter of law for the court.

3. **Insurance § 3—**

The unambiguous terms of a policy contract are to be taken in their plain, ordinary and popular sense.

4. **Insurance § 54—**

A replacement within the purview of a policy provision that the policy should cover an automobile acquired by the name insured if it replaces an automobile owned by him and covered by the policy, must be a vehicle acquired by insured after the issuance of the policy and during the policy period, and must replace the automobile described in the policy, which must be disposed of or be incapable of further service at the time of the replacement.

5. **Same—**

Insured owned two automobiles respectively covered by policies with different insurers, each providing that the policy should also cover an automobile acquired by insured if it replaces the automobile insured. One policy was issued under a rating for operation by the insured and his minor son and the second policy was issued under a rating for operation only by males over 25 years of age. Insured thereafter traded in the second car for a newer car, and this newer car was involved in a wreck while being driven by insured's son. *Held:* The second policy provided liability coverage with respect to the accident under its replacement clause.

6. **Insurance § 57—**

The fact that the premium for a liability policy is paid under a rating for the operation of the insured vehicle by a male over 25 years of age will not be given the effect of excluding liability when the vehicle is being operated by the minor son of the insured, there being no provision in the policy excluding liability for accidents occurring while the vehicle is being operated by a person under 25 years of age.

7. **Appeal and Error § 49: Trial § 54—**

Where the parties waive a trial by jury, the rules of evidence are not so strictly enforced as in a jury trial, since it will be presumed that incompetent evidence was disregarded by the court in making its decision.

APPEAL by defendant Nationwide Mutual Insurance Company from *Froneberger, J.*, September 1958 Civil "A" Term of MECKLENBURG.

This action was instituted by plaintiff, State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm), under the Declaratory Judgment Act (General Statutes of North Carolina, Chapter 1, Article 26; G.S. 1-253 to 1-267 inclusive) to de-

termine whether its policy or that of Nationwide Mutual Insurance Company (hereinafter referred to as Nationwide), issued to Will Shaffer, or either of said policies, provided liability coverage with respect to an accident in which a 1954 Ford, registered in the name of Will Shaffer, was involved. The pleadings raised issues of fact.

When the case came on for trial, all parties in open court waived trial by jury and agreed that the Judge might find the facts and render judgment on the facts found without the intervention of a jury. G.S. 1-184.

The parties entered into stipulations, the substance of which is as follows (the numbering is ours):

1. In 1953 defendant Will Shaffer applied to State Farm for a policy of automobile liability insurance on a 1948 Chevrolet. The application listed Will Shaffer as owner and Will Shaffer and his son, Ralph Neal Shaffer, as drivers. The policy was issued and was carried at all times under a premium rating of "Class 2-A," to wit:

> "CLASS 2A: (a) The automobile is used either for Business use or for Non Business Use, or for both; AND
>
> (b) There is a male operator of the automobile under 25 years of age resident in the Named Insured's household or employed as a chauffeur of the automobile, but no such male operator is the owner or principal operator of the automobile; OR
>
> (c) The male operators or owners under 25 years of age are married."

This policy was amended from time to time to describe vehicles subsequently and successively acquired. In December, 1956, Will Shaffer requested State Farm to put on the policy a 1950 Ford Two-Door, Motor No. BODA 108735 (hereinafter referred to as "State Farm Ford") as a replacement vehicle of the automobile previously described. This was done by issuance of a policy effective December 21, 1956. This policy was in full force and effect covering the State Farm Ford on 11 August, 1957, the date of the accident hereinafter referred to. This State Farm Ford was not involved in said accident and at the time thereof was at Will Shaffer's home in operable condition and was under the control and registered in the name of Will Shaffer.

2. About 3 February, 1956, Will Shaffer applied to Nationwide for a policy of automobile liability insurance to cover a 1949 Ford. The policy was issued and on 17 July, 1956, was amended by endorsement showing that the 1949 Ford was replaced by a 1950 Ford, Motor No. BOAT 121977 (hereinafter referred to as "Nationwide Ford"). This

policy was in full force and effect on 11 August, 1957, date of the accident referred to.

3. On 27 July, 1957, Nationwide Ford was used as a "trade in" on the purchase of a 1954 Ford. Title to the 1954 Ford was taken in the name of Will Shaffer. The 1954 Ford was involved in the accident on 11 August, 1957, and at the time was being driven by Ralph Neal Shaffer, who was then 19 years old, unmarried and resided with his father, Will Shaffer, as a member of his father's household.

4. Neither State Farm nor Nationwide received any notice of the disposition of the Nationwide Ford or the acquisition of the 1954 Ford prior to the accident. Neither insurance company received any request prior to the accident to amend its policy to show the 1954 Ford as a replacement automobile.

Both insurance policies were offered in evidence and they show that the policy periods in each are six months.

It is alleged in the complaint and admitted by all answering defendants that Joe Neeley Orr, John Franklin Mullis and the administratrix of Anson Wayne Porter, deceased, have severally instituted suits against Will Shaffer and Ralph Neal Shaffer to recover damages for alleged injuries received in the accident of 11 August, 1957. They allege that the negligence of the Shaffers was the proximate cause of the accident and said injuries (wrongful death in the case of Porter).

Upon undisputed evidence the court found that the Nationwide policy had been issued under a "Class 1-B" rating and the premiums had been paid on that basis. The rating as set out in Endorsement 281L is as follows:

> "Class 1B means:
>
> (a) the automobile is customarily used in the course of driving to or from work and the distance driven is less than ten road miles one-way and
>
> (b) The Named Insured is not a male operator of the automobile under 25 years of age, and there is no male operator of the automobile under 25 years of age resident in the same household as the Named Insured or employed as a chauffeur of the automobile, and
>
> (c) the use of the automobile is not required by or customarily involved in the occupational duties of any person."

Other factual considerations and findings of fact necessary to a decision are set out and discussed in the opinion.

Upon the stipulations and findings of fact the court entered judgment as follows:

"IT IS ORDERED, ADJUDGED, DECREED, AND DECLARED:

"1. State Farm Mutual Automobile Insurance Company has no obligation to Will Shaffer or Ralph Neal Shaffer or either of them to defend the Civil actions commenced against such persons by John Franklin Mullis, Joe Neal Orr, and Lois Orr Porter or to pay all or any part of any judgment which may be rendered in any of the said suits and neither Will Shaffer nor any other party to this action or person bound by this Judgment has any claim, existing or potential against State Farm Mutual Automobile Insurance Company by virtue of its policy No. 319692-F31-33 arising out of or attributable to the collision in which Ralph Neal Shaffer was involved on August 11, 1957.

"2. The defendant Nationwide Mutual Insurance Company is obligated to Will Shaffer and all other persons claiming under or through him by virtue of such defendant's policy of insurance No. 61-766544 according to the terms of its said policy with respect to the use of that certain 1954 Ford, Motor No. U4NT113163, by Ralph Neal Shaffer on August 11, 1957, and the collision in which the said Ralph Neal Shaffer was involved on such date in the course of his use thereof and all claims, demands, and suits arising therefrom in the same manner and to the same extent as though said 1954 Ford had been described in that policy; provided that this Judgment shall not be deemed to preclude or bar any defense arising out of matters or conduct occurring subsequent to this judgment to the said Nationwide Mutual Insurance Company under the terms of that policy and the law of the State of North Carolina."

From the foregoing judgment defendant Nationwide appeals, assigning error.

Clyde L. Stancil; Kennedy, Covington, Lobdell & Hickman for defendant Nationwide Mutual Insurance Company, appellant.

Winfred R. Ervin for defendants John Franklin Mullis, Joe Neeley Orr, and Lois Orr Porter, Administratrix of the Estate of Ranson Wayne Porter, Deceased, appellees.

Carpenter & Webb for plaintiff, appellee.

MOORE, J. The question for determination here is: Was there coverage under either of the policies with respect to the accident of 11 August, 1957?

The appellant, Nationwide, requested the Judge to find in substance as follows:

That the 1954 Ford acquired 27 July, 1957, replaced the State Farm Ford, which up to the time of the replacement had been principally used by Ralph Neal Shaffer; that the 1954 Ford after its acquisition was used in the same manner and for the same purposes by Ralph Neal Shaffer as he had previously used the State Farm Ford; that the 1954 Ford did not replace the Nationwide Ford, which was principally used by Will Shaffer prior to the acquisition of the 1954 Ford; that the 1954 Ford was not used by Will Shaffer in the same manner he had used the Nationwide Ford, but that after the acquisition of the 1954 Ford the State Farm Ford was used by Will Shaffer; that Ralph Neal Shaffer was the owner of the 1954 Ford.

With respect to these matters the court found as a fact that Will Shaffer was the sole owner of the 1954 Ford and owner of all the vehicles described from time to time in the policies of State Farm and Nationwide; that after February, 1956, Will Shaffer did not own more than two automobiles at any one time; that the 1954 Ford and all the vehicles named in the policies from time to time were under the personal control of Will Shaffer as to their manner, method and time of use, and such use of said vehicles as was made by Ralph Neal Shaffer was with the permission of Will Shaffer, including the use of the 1954 Ford at the time of the accident; and that the 1954 Ford did not replace the State Farm Ford but did replace the Nationwide Ford.

The evidence was sharply conflicting and there were glaring contradictions in the pleadings, statements and testimony of Will Shaffer and Ralph Neal Shaffer. There was competent evidence to support the request of Nationwide for findings and competent evidence to support the court's findings of fact. "Where facts are found by the court, if supported by competent evidence, such findings are as conclusive as the verdict of a jury." *Goldsboro v. R. R.*, 246 N.C. 101, 107, 97 S.E. 2d 486, and cases there cited.

Notwithstanding the findings of fact, it may be conceded that Ralph Neal Shaffer as a rule used the better of the two cars owned by his father — the Nationwide car prior to the purchase of the 1954 Ford, and the 1954 Ford after its acquisition. On occasions the Shaffers used the cars interchangeably. This Court is not a fact-finding body, but the foregoing facts are assumed to be true so far as this opinion is concerned.

The policy by Nationwide provides coverage for a "newly acquired automobile." A newly acquired automobile is defined by the policy to mean "an automobile ownership of which is *acquired* by the named

insured . . . if it *replaces* an automobile owned by (named insured) and covered by this policy . . ." (Emphasis and parentheses ours).

The policy issued by State Farm provides coverage for an "automobile . . . ownership of . . . which is *acquired* by the named insured during the policy period, provided it *replaces* a described automobile . . ." (Emphasis ours).

In this case the question of notice of replacement does not arise.

The appellant insists that the question as to which automobile, if either, was replaced by the 1954 Ford is one of fact to be gathered from the intent and acts of the insured and his son. We hold that it is a mixed question of law and fact. The trial court has found the facts and his findings are binding on this Court. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668. The interpretation of the policy provisions, in the light of the facts found, is a matter of law for the court, and in construing the contract its unambiguous terms are to be taken in their plain, ordinary and popular sense. *Stanback v. Insurance Co.*, 220 N.C. 494, 17 S.E. 2d 666.

The exact question involved here has not previously been decided by this Court. It will be observed that both policies of insurance in this case provide that a replacement automobile must be *acquired* and *replace* an automobile owned by the insured and covered by the policy.

In a Kentucky case the insurer issued a liability policy on a Studebaker. At that time the insured owned a Ford which was not covered by the policy. The Ford had no motor in it at the time. Later the insured put a new motor in the Ford, after which time the Studebaker quit running and was never operated again. Insured then used the Ford and had an accident in which three persons were injured. He immediately notified the insurer of the accident. The Court held that there was no coverage on the Ford. While there was a question of notice of replacement involved, the Court said: "In this instance appellant's Ford car was not 'newly acquired' but was owned by him long before he took out insurance on the Studebaker. . . . (C)ertainly it was within the contemplation of the parties that the replacement must be a car the insured would acquire in the future and not one he owned at the time the policy was issued to him." *Brown v. Insurance Co.* (Ky. 1957), 306 S.W. 2d 836.

In *Insurance Co. v. Produce Co.* (M.D. Tenn. 1940), 42 F. Supp. 31, insured purchased a truck and obtained liability coverage at the time of the purchase. The truck was excluded from a renewal policy because it was not in operating condition. It was placed back in service as a replacement for an insured truck withdrawn from service, and was involved in an accident in which four persons were killed and one

injured. The Court held that there was no coverage. The Court said: "The Court is of the opinion that the International Tractor not being a newly acquired automobile, was not covered under the automatic clause in the policy, . . . (A)nd that by reason of the fact that the ownership of the International tractor . . . was not newly acquired ownership, within the contemplation of the automatic clause in the policy, that clause did not operate to place said International tractor within the terms and provisions of the policy in question, and hence that clause did not apply to the International tractor."

In *Insurance Co. v. Wilson* (Okla. 1952), 251 P. 2d 175, the insured obtained liability coverage on a 1947 Chevrolet truck. At that time he owned also a 1948 Chevrolet truck which was not covered. The 1948 Chevrolet truck was involved in an accident. At the time of the accident the 1947 truck was not in use. In a per curiam opinion the Court held that, since insured owned the 1948 truck at the time the policy was issued on the 1947 truck, it could not have been a newly acquired vehicle under the terms of the policy.

In substantial accord are: *Howe v. Crumley Co.* (Ohio, 1944), 57 N.E. 2d 415; *Mitcham v. Indemnity Co.* (C.C.A. 4th, 1942), 127 F. 2d 27; *Insurance Co. v. Nelson* (Wash. 1957), 306 P. 2d 201; *Lease Co. v. Insurance Co.* (Utah 1958), 325 P. 2d 264.

Appellant cites *Casualty Co. v. Lambert* (N.H. 1940), 11 A. 2d 361. We do not agree that this case supports appellant's position. In this case the insured car was worn out, but still in the possession of the insured. He purchased another car to replace it. Here the Court held that there was a replacement. This case seems to support the decisions above cited. If not, we are not disposed to adopt it as authority in this case.

It is our opinion that the replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period, and it must replace the car described in the policy, which must be disposed of or be incapable of further service at the time of the replacement. *Casualty Co. v. Lambert, supra.* We hold that the State Farm Ford could not be a replacement for the Nationwide Ford. At the beginning of the policy period of the Nationwide policy Shaffer owned both automobiles. On 11 August, 1957, date of the accident, the State Farm Ford was still owned by Shaffer and under his control, in operating condition and being driven by him and his son. It was then covered by the State Farm policy. Therefore the 1954 Ford could not replace the State Farm Ford, since Shaffer still retained the State Farm Ford in operable condition.

The 1954 Ford was a newly acquired automobile. It was purchased

by Will Shaffer on 27 July, 1957. The Nationwide Ford was used as a "trade in" on the 1954 Ford, and was replaced by the 1954 Ford.

In *Kaczmarck v. La Perriere* (Mich. 1953), 60 N.W. 2d 327, insured on 23 August, 1947, secured liability coverage on a Packard for one year. On 18 November, 1947, he traded the Packard for an Oldsmobile but never attempted to make the insurance cover the Oldsmobile. On 22 June, 1948, insured traded the Oldsmobile for a Pontiac and asked for transfer of coverage. The Pontiac was in an accident on 8 July, 1948. The Court held that the Pontiac replaced the Packard notwithstanding the intervening of the Oldsmobile between the two.

The obligation of Nationwide in the instant case is the same as if the 1954 Ford had been described in its policy.

The fact that the premium was paid under a 1-B rating does not affect its obligation under the policy. In *Varble v. Stanley* (Mo.), 306 S.W. 2d 662, 665, it was said: "If the insurer intended to exclude or limit its liability in instances of operation by a male member of the household under twenty-five years of age, it could and should have said so in plain and explicit language. And we will not adopt a construction which will imply such exclusion from language which would amount to the planting of a forfeiture in ambush." A 2-A rating does not confer upon the driver any additional right or extend the coverage of the policy in any way. *Farmer v. Casualty Co.* (C.C.A. 4th 1957), 249 F. 2d 185.

Appellant made 31 assignments of error. We have carefully examined and considered each of them. No prejudicial error has been made to appear. When parties waive a jury trial "the rules of evidence as to admission and exclusion are not so strictly enforced as in a jury trial. . . . (I)t is presumed that incompetent evidence was disregarded by the Court in making up its decision." *Bizzell v. Bizzell, supra.* As we have already stated, the findings of fact by Judge Froneberger are supported by competent evidence. Proper principles of law have been applied by the Judge.

Affirmed.

STATE v. SAM T. BROWN
AND
STATE v. WESLEY C. NARRON.

(Filed 8 April, 1959.)

1. **Constitutional Law § 11—**

Neither the General Assembly nor a municipality may exercise the police power unless its exercise relates to the public health, safety, morals or general welfare.

2. **Nuisances § 6a—**

A junk yard is not a nuisance *per se*.

3. **Constitutional Law § 17—**

A property owner is entitled to use his lands for any lawful purpose unless proscribed by valid restrictive covenant or prohibited by valid exercise of the police power.

4. **Constitutional Law § 11—**

In the exercise of the police power by the State or by a municipal corporation, the thing required to be done must have a real and substantial relation to the object to be attained, otherwise it is an invalid exercise of the police power.

5. **Constitutional Law § 13—**

G.S. 14-399, making it unlawful to place, temporarily or permanently, any trash, refuse, garbage, or scrapped motor vehicles within 150 yards of a hard-surfaced highway unless concealed from view of persons on the highway, with further provision that the statute should not apply to junk yards which are properly screened from the view of persons on the highway, *is held* unconstitutional in that the requirements of the statute have no substantial relationship to the public health, safety, morals or general welfare, since the mere screening of the proscribed materials from the public view can relate only to aesthetic grounds which alone are insufficient predicate for the exercise of the police power.

APPEAL by the State of North Carolina from *McLean, J.*, January Term, 1959 of CLEVELAND.

These defendants were separately indicted in bills charging identical offenses and the cases were consolidated for trial.

The defendants, before entering a plea and before a jury was selected, moved to quash the bills of indictment on the ground that they were violative of Article I, sections 1 and 17, of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

The bills charge that the respective defendants "on the 18th day of October, 1958, and more than twelve months prior thereto, and since said date, with force and arms, at and in the County aforesaid, did unlawfully and wilfully, before and since the date aforementioned,

place and leave, and caused to be placed and left, temporarily and permanently, trash, refuse, scrap automobiles, trucks, and parts thereof, within 150 yards of a hard surface highway, the same not being concealed from the view of persons on the highway, to wit: Highway No. 74 By-Pass and No. 180, outside of an incorporated town, said condition having existed for more than 12 months and no Justice of the Peace or other court inferior to the Superior Court has taken official cognizance thereof, in violation of G.S. 14-399 against the form of the statute in such case made and provided and against the peace and dignity of the State."

The court below, after hearing the arguments of counsel, held that section 14-399 of the General Statutes of North Carolina is "unconstitutional, void and unenforceable," and sustained the motion to quash the bills of indictment.

From this ruling the State appeals, assigning error.

Attorney General Seawell, Assistant Attorney General Love, and Bernard A. Harrell, Staff Attorney for the State.

J. R. Davis, A. A. Powell for defendant.

DENNY, J. G.S. 14-399, which the defendants are charged with violating, provides: "It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left, temporarily or permanently, any trash, refuse, garbage, scrapped automobile, truck or part thereof within one hundred and fifty yards of a hard-surfaced highway where the highway is outside of an incorporated town, unless the trash, refuse, garbage, scrapped automobile, truck or part thereof, is concealed from the view of persons on the highway.

"This section does not apply to domestic trash or garbage placed for removal, nor to junk yards which are the property of bona fide junk dealers and which are properly screened or fenced from the view of persons on the highway. * * *"

The remaining portions of the statute are not relevant here.

The defendants are junk yard operators, engaged in the business of buying scrapped or wrecked automobiles, salvaging the parts therefrom and selling them to the general public.

The real question for determination is whether or not the provisions of G.S. 14-399 are in conflict with and in violation of rights guaranteed to these defendants by Article I, sections 1 and 17, of the Consti-

tution of North Carolina and the Fourteenth Amendment to the Constitution of the United States.

The precise question posed on this appeal has not been decided by this Court. The State contends, however, that the cases of *Hinshaw v. McIver*, 244 N.C. 256, 93 S.E. 2d 90, and *Ornoff v. Durham*, 221 N.C. 457, 20 S.E. 2d 380, are determinative of the question.

In the *Hinshaw* case the plaintiff sought to obtain an order compelling the defendant, as tax collector of the City of Burlington, to issue him a license to engage in the business of a junk dealer within the City of Burlington. The City of Burlington was not made a party to the action. The plaintiff's license had been revoked because of his failure to comply with ordinances regulating the use and operation by junk dealers of junk yards, requiring, among other things, that the yard be enclosed by a solid fence not less than eight feet high; that no junk or material be kept on the outside of the fence; that gates, when not in use, be kept closed; and that no placards be affixed or displayed on the fence. This Court in its opinion said: "The power to regulate the operation of a junk yard within its borders is within the police power of the city." This is true, but such regulation would have to be pursuant to a duly authorized and valid ordinance. All that the *Hinshaw* case decided was that "the Court would not undertake to decide the validity of ordinances and orders of the City of Burlington in an action to which the City was not a party."

In *Ornoff v. Durham, supra*, the plaintiff instituted an action against the City of Durham and its tax collector to obtain relief by mandamus wherein the plaintiff sought a decree directing the defendants to issue to him a license to conduct his junk business. His license had been withheld under a city zoning ordinance which prohibited the operation of a junk yard in certain areas of the city. This Court said: "If the junk business of plaintiff existed at the place alleged at the time of the passage of the ordinance, it may, according to the plain provision of the ordinance, continue; if, on the other hand, it did not so exist at the time of its passage it may be prohibited."

We do not construe either of the above cases to have adjudicated the question involved on this appeal.

The State raises this inquiry: If a municipality may regulate junk yards in the exercise of its police power, how can it be said that an act of the General Assembly intended to accomplish the same purpose is unconstitutional? The answer to this inquiry is that neither the General Assembly nor a municipality may exercise the police power unless its exercise relates to the public health, safety, morals, or general welfare. *S. v. Harris*, 216 N.C. 746, 6 S.E. 2d 854, 128

A.L.R. 658; *S. v. Lockey,* 198 N.C. 551, 152 S.E. 693; *S. v. Whitlock,* 149 N.C. 542, 63 S.E. 123, 129 Am. St. Rep. 670; *Meyer v. Nebraska,* 262 U.S. 390, 67 L. Ed. 1042, 29 A.L.R. 1446; *Liggett Co. v. Baldrige,* 278 U.S. 105, 73 L. Ed. 204; 11 Am. Jur., Constitutional Law, section 303, page 1075, et seq.

In the last cited case, the Supreme Court of the United States, speaking through *Justice Southerland,* said: "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."

The case of *Commonwealth v. Christopher,* 184 Pa. Super. 205, 132 A 2d 714, states: "The business of operating a junk yard is a legitimate enterprise which, while offending the aesthetic taste, does not constitute a dangerous business or one known to be inherently injurious or harmful to the public. By itself, it does not adversely affect the public peace or safety, nor can it be designated as a fire or health hazard."

In the absence of a zoning law or restriction imposed by deed, a purchaser of real estate has the right to use it for any lawful purpose so long as he does not create a nuisance affecting health, safety, or morals. *Menger v. Pass,* 367 Pa. 432, 80 A 2d 702, 24 A.L.R. 2d 562. We have found no authority to support the view that a junk yard is a nuisance *per se. Vermont Salvage Corp. v. Village of St. Johnsbury,* 113 Vt. 341, 34 A 2d 188.

In *City of New Orleans v. Southern Auto Wreckers,* 193 La. 895, 192 So. 523, the defendant was convicted of the violation of a city ordinance which required, among other things, that all junk yards should be enclosed with a substantial feather-edged board fence, not less than seven feet high. The admitted purpose of the ordinance was to keep the sidewalks and streets free from obstructions that might make them unsafe. Defendant's junk yard was enclosed with a mesh wire fence, some seven feet high, and it was conceded that such fence accomplished the purpose of the ordinance. The provision in the ordinance requiring a fence was not attacked, but the part requiring it to be a feather-edged board fence was attacked as being unconstitutional, and the Court so held. The Court said: "Dealing in junk is a legitimate and harmless business. Junk yards are not necessarily nuisances. They do not affect the public health, nor do they offend against public morals. Individuals have the constitutional right to use their private property for junk yards as long as such use does

not offend public morals or jeopardize the health and safety of the public. In speaking of the right of individuals to use their private property as they see fit, as long as their use of it is not offensive or dangerous, it is stated in American Jurisprudence, Volume 11, sec. 279, p. 1037: 'Nevertheless, the owner has the right to erect such structures or to use the property for such legitimate purpose as he may see fit, utilizing such portions of it as he pleases, as long as in so doing he in no manner injuriously affects the public health, safety, morals, and general welfare. Any law abridging rights to a use of property, which use does not infringe the right of others, or limiting the use of property beyond what is necessary to provide for the welfare and general security of the public is not a valid exercise of the police power.' " The decision in this case is in accord with the conclusion reached in *Vassallo v. Bd. of Com'rs. of City of Orange*, 125 N.J.L. 419, 15 A 2d 603, and *Town of Vestal v. Bennett*, 199 Misc. 41, 104 N.Y. Supp. 2d 830. See also Anno:—45 A.L.R. 2d, Regulation of Junk Dealers, page 1425, et seq.

In the case of *Town of Vestal v. Bennett, supra*, the Court, in considering the identical question before us, said: "It is difficult to imagine what danger to public health, morals or safety exists in connection with the operation of a junk yard on an unenclosed lot that could be removed or prevented by the erection of a solid board fence six feet high. Certainly there is nothing immoral about a junk yard. Neither does it constitute any menace to public health or if, by reason of unsanitary conditions being permitted, it should become a menace, putting a board fence around it would not be a reasonable solution of the problem. No danger to public safety is apparent except perhaps that materials from the yard might find their way onto the highway if piled too close, but to prevent this a solid board fence would not be required as was pointed out in the case of the *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 192 So. 523."

The statute involved in this appeal is rather unusual. The preamble to the original act, Chapter 457, Public Laws of 1935, makes no reference to junk yards, but only to the dumping of trash, refuse, or garbage, adjacent to the highway, thereby destroying the scenic beauty of such highway and injuriously affecting the health and comfort of those using the same. Furthermore, its provisions apply only to junk yards located on hard-surfaced highways. If there were any substantial relationship between the requirements of the statute and the public health, safety, morals, or any other phase of the general welfare, other than aesthetic, persons traveling on any public highway which has not been hard-surfaced, would be entitled to the

same consideration and protection which the act purports to give persons traveling on hard-surfaced highways.

In our opinion, the statute, as it relates to junk yards, was enacted solely for aesthetic reasons—that is, to make our hard-surfaced highways, particularly those which carry heavy interstate traffic, more attractive. We think the provisions of the statute support this view. It states that it shall not apply "to junk yards which are the property of bona fide junk dealers, and which are properly screened or fenced from the view of persons on the highways."

There is no contention by the State that these defendants are not bona fide junk dealers. Therefore, the sole charge against them is their failure to build a fence of such character between their junk yard and the highway as may be necessary to conceal the junk yard from the view of persons on the highway.

If any conditions presently exist or have existed on the premises of the defendants during the period set out in the bills of indictment that would warrant the exercise of the police power by the State in order to correct them, it must be conceded that building a fence as required by the statute would not correct such conditions. In the exercise of the police power by the State or by a municipal corporation, the thing required to be done must have a real and substantial relation to the object to be attained, otherwise it is an invalid exercise of the police power.

We are in sympathy with every legitimate effort to make our highways attractive and to keep them clean; even so, we know of no authority that vests our courts with the power to uphold a statute or regulation based purely on aesthetic grounds without any real or substantial relation to the public health, safety or morals, or the general welfare. *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; 25 Am. Jur., Highways, section 616, page 902.

"It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefuly patrolled. Nevertheless, it is held that aesthetic conditions alone are insufficient to support the invocation of the police power, although if a regulation finds a reasonable justification in serving a generally recognized ground for the exercise of that power, the fact that aesthetic considerations play a part in its adoption does not affect it validity." 16 C.J.S., Constitutional Law, section 195, page 939, et seq.; *Gionfriddo v. Town of Windsor,* 137 Conn. 701, 81 A 2d 266; *Federal Elec. Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect,* 398 Ill. 142, 75 N.E. 2d 359; *City*

of Watseka v. Blatt, 320 Ill. App. 191, 50 N.E. 2d 589; *Merced Dredging Co. v. Merced County,* (D.C. Cal.), 67 F. Supp. 598.

In our opinion, the statute is unconstitutional and we so hold. Consequently, we shall not discuss the questions raised with respect to its invalidity because 35 counties have heretofore been exempted from the provisions of the statute.

The ruling of the trial court quashing the bills of indictment will be upheld.

Affirmed.

HORACE RANSOM, ADMINISTRATOR OF THE ESTATE OF NELSON RANSOM, DECEASED v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 8 April, 1959.)

1. **Insurance § 54—**

A provision in a policy that it should cover, in addition to the vehicle described, an automobile temporarily used by insured as a substitute while the described vehicle was withdrawn from normal use because of breakdown, repair, servicing, loss or destruction, *is held* not to cover a vehicle of insured's brother, used by insured on the trip because insured's vehicle was "low on gas." The word "servicing" imports at least the necessity for some mechanical adjustment before the car can be used in normal service. Further, in this case, insured was making the trip in company with his brother.

2. **Same—**

Where insured and his brother lived in the house of their mother as members of one family, the use of the brother's car by the insured on a particular trip comes within the clause of a policy of liability insurance excluding from its coverage a car other than the one described in the policy and driven by insured, if such other car is furnished by a member of insured's household. In such instance, insured's brother is a member of the "household" within the definition of that word as used in the policy.

APPEAL by plaintiff from *Frizzelle, J.,* August Term, 1958 of BERTIE.

This is a civil action instituted on 19 May 1958 by the plaintiff appellant, as surviving administrator, in which he seeks to force collection against the liability insurance carrier of Francis Lee, one of the parties against whom the administrators of Nelson Ransom, deceased, had previously recovered a judgment in the sum of $10,000 as damages for his wrongful death.

Plaintiff's intestate died 3 April 1955 as a result of injuries sustained on the night of 2 April 1955 when he and his bicycle were struck by the 1947 Chrysler automobile owned by Rupert Lee and then being driven by his brother, Francis Lee.

The judgment against Rupert Lee and Francis Lee for the wrongful death of plaintiff's intestate was procured at the August Term 1957 of the Superior Court of Bertie County. Execution was duly issued on said judgment and returned unsatisfied.

At the time of the fatal injuries to plaintiff's intestate on 2 April 1955, there was in force an Automobile Policy of Liability Insurance, Policy No. VF 3560828, which the defendant appellee had theretofore issued to Francis Lee covering his 1939 Buick automobile; and the limits of that contract for personal injuries and death were up to $10,000 for any one person and up to $20,000 in any one accident.

Francis Lee and Rupert Lee both owned automobiles. There was no liability insurance on Rupert Lee's 1947 Chrysler.

The evidence is to the effect that on the night of 2 April 1955, Francis Lee drove his car over to Elbert Williams' place. Rupert Lee "showed up later on his car." The Lees and "some other folks" started to a "setting-up," in another section of the county. Rupert Lee did not have a driver's license; one James Hawkins, a next door neighbor of his, usually drove for him. On the night in question, it appears from the testimony that the 1939 Buick, owned by Francis Lee, the insured, was "low on gas." Francis Lee testified, "I was driving Rupert's car that night because I was low in gas in my car and was going with Rupert to the setting-up."

The evidence further tends to show that Rupert Lee, age 37, and Francis Lee, age 25, at the time of the trial, had lived with their mother for many years in a house which she built about 1951 or 1952 after her husband's death; that their grandmother and the daughter of Rupert Lee also lived in the home. All of the living expenses of these persons were paid by Rupert and Francis Lee, the grandmother being an invalid and the mother also being too feeble to work. Francis Lee testified, "We all lived there together as one family."

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. Motion allowed, and the plaintiff appeals, assigning error.

John R. Jenkins, Jr., for plaintiff, appellant.
James & Speight, William C. Brewer, Jr., for defendant, appellee.

DENNY, J. The sole question for determination on this appeal is

whether or not the trial court committed error in sustaining the defendant's motion for judgment as of nonsuit.

The plaintiff contends he has the right to recover from the defendant, Francis Lee's insurer, by reason of the provision in the above-numbered policy of insurance relating to temporary substitute automobile coverage, which reads in pertinent part as follows: "IV (a) * * * except where stated to the contrary, the word 'automobile' means: (3) Temporary Substitute Automobile—under coverages A, B and C, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss, or destruction."

On the other hand, the defendant contends that under the facts in this case the insured's car had not been withdrawn from normal use "because of its breakdown, repair, servicing, loss, or destruction" at the time involved, within the meaning of the policy.

Likewise, the plaintiff contends he is entitled to recover under Section V of the policy which relates to the use of other automobiles and which reads as follows: "Use of Other Automobiles. If the named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions: * * * (b) This insuring agreement does not apply (1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse."

The defendant further contends that Rupert Lee and Francis Lee belong to the same household and that the use of Rupert Lee's car by Francis Lee is expressly excluded from coverage by the above exclusion clause in the insured's policy of insurance.

No North Carolina decision has been cited or found construing either section of the policy that has been brought into question on this appeal.

In 5A Am. Jur., Automobile Insurance, section 87, page 85, it is said: "The typical 'substitution' provision provides coverage while the substituted vehicle is being temporarily used, where the described automobile is withdrawn from normal use because of its breakdown, repair, servicing, loss, or destruction. The usual general rules of con-

struction apply to such a provision, and it has been stated that the purpose of the provision is not to narrowly limit or defeat coverage, but to make the coverage reasonably definite as to the vehicles the insured intends normally to use, while at the same time permitting operations to go on should the particular vehicles named be temporarily out of commission, thus enabling the insurer to issue a policy upon a rate fair to both insured and insurer, rather than one at a prohibitive premium for blanket coverage of any and all vehicles which the insured might own or operate.

"Specifically, construing the phrase 'withdrawn from normal use' as requiring the insured vehicle to be withdrawn from all normal use, it has been held that where the insured was involved in an accident while driving a borrowed automobile on an extended trip, recovery was precluded by the failure of the injured person to establish that the truck described in the policy, although in poor mechanical condition had been withdrawn from all normal use on the day of the accident. Also, the fact that a borrowed trailer was more suitable for a contemplated trip than a trailer owned by the insured and specifically covered under the policy could not be considered a 'breakdown, repair, servicing, loss, or destruction,' within the meaning of a 'substitution' provision." *Erickson v. Genisot,* 322 Mich. 303, 33 N.W. 2d 803; *State Farm Mut. Auto. Ins. Co. v. Bass,* 192 Tenn. 558, 241 S.W. 2d 568.

In the case of *Iowa Mutual Insurance Co. v. Addy,* 132 Colo. 202, 286 P 2d 622, the reason for the substitution was strikingly similar to the case at bar. The insured owned an Oldsmobile which was covered with a policy of liability insurance issued by the defendant company and which had a substitution provision identical with the one in the case before us. The insured also had a Chevrolet automobile, the property of his employer, which he kept at his home for use in his work as an insurance adjuster. The insured and his family were preparing to attend a Thanksgiving dinner at the home of friends, when the insured discovered that his Oldsmobile automobile was "low on gasoline and had heavy snow chains on the tires." Because of this, he decided to drive the Chevrolet—the company car. While enroute to their dinner appointment a collision occurred in which the plaintiff, the insured's wife, was injured. In the trial court the case was allowed to go to the jury and the plaintiff recovered, on the theory that insured's automobile was "withdrawn from normal use because of * * * servicing * * *." On appeal this was reversed. The Court said: "The trial court determined that the car in which plaintiff was injured, and being used by her husband at the time of the accident was a

temporary substitute vehicle within the provisions of paragraph IV of the policy. This provision of the policy makes it clear that a temporary substitute automobile is one used by the insured temporarily when the automobile which is insured under the policy is withdrawn from its customary use because of its breakdown, repair, servicing, loss or destruction. No such situation could be made to apply here, because the only reason the Oldsmobile sedan covered by the policy was not used was because it was 'low on gasoline' and had heavy snow chains on the tires. This was not a breakdown, it was not destroyed, it was not being serviced at the time, neither was it being repaired, and the trial court's apparent conception of the situation, that because it was low on gasoline and had snow chains on the tires, that it fell within the servicing exception is too strained for acceptance * * *. A reasonable and logical interpretation of the word 'servicing' would seem to present a condition where the automobile covered by the policy was in some manner actually disabled."

It would seem there could be circumstances under which one might be justified in substituting another car, if the one insured was so defective mechanically that the owner was afraid to drive it on an extended trip. *Allstate Insurance Co. v. Roberts,* 156 Cal. App. 755, 320 P 2d 90. However, all the authorities hold that it must be proven that the defective car was withdrawn from normal use at the time and during the period the substitute car was used. *Pennsylvania T. & F. Mut. Cas. Ins. Co. v. Robertson* (U.S.C.A. 4th Cir.), 259 F 2d 389; *State Farm Mut. Auto. Ins. Co. v. Bass, supra; Iowa Mut. Ins. Co. v. Addy, supra; Erickson v. Genisot, supra.* The Buick automobile covered by the defendant's policy of insurance had not had a breakdown, was not in need of repair, nor was it being serviced at the time Francis Lee was driving the 1947 Chrysler car.

In our opinion, the provisions upon which the appellant relies did not authorize the substitution of another car in lieu of the insured car merely because the insured car was "low on gas." The servicing, in our opinion, contemplates at least some mechanical adjustment before the car can be used in normal service. Moreover, in light of the testimony of Francis Lee, it would seem that there is considerable doubt about there being a substitution of the Chrysler car owned by Rupert Lee. Francis Lee testified he was driving Rupert's car and was going with Rupert to the "setting-up." Unquestionably, we think if he had not been driving the car he would have been one of Rupert's guest passengers rather than in possession of the car as a substitute for the Buick.

On the other hand, the exclusion clause hereinabove set out has

been construed many times. It has been well-nigh universally construed to exclude an automobile furnished by another member of the household, furnished for regular use, as well as any hired or leased automobile. *Aler v. Travelers Indemnity Co.*, 92 F Supp. 620; *Rathbun v. Aetna Casualty & Surety Co.*, 144 Conn. 165; 128 A 2d 327; *Leteff v. Maryland Casualty Co.* (La. App.), 91 So. 2d 123; 5A Am. Jur., Automobile Insurance, section 88, page 86; Anno: 173 A.L.R. 902, et seq.

The case of *Travelers Indemnity Co. v. Pray* (U.S.C.A. 6th Cir.), 204 F 2d 821, construes the identical exclusion clause now before us as not excluding a car furnished by a member of the household unless it was furnished for regular use and not for occasional use. This decision was by a divided Court and has been criticized in the case of *Leteff v. Maryland Casualty Co., supra.*

The *Leteff* case gives an exhaustive review of cases in which the involved clause has been construed. In that case the Court said: "Bearing in mind the established rules of interpretation and the reason for such exclusion clauses as shown in the cited jurisprudence, we believe that the interpretation placed upon the exclusion clause by the majority in the *Pray* case not only stands alone but is in error. The great weight of authority is *contra.*"

There can be no doubt about Rupert Lee and Francis Lee being members of the same household under the definitions given by the various authorities. *State Farm Mut. Auto Ins. Co. v. James* (C.C.A. 4th Cir.), 80 F 2d 802; *Farm Bureau Mut. Automobile Ins. Co. v. Violano* (C.C.A. 2d Cir.), 123 F 2d 692. For many definitions of the word "household" see Words and Phrases, Volume 19, page 700, et seq.

In our opinion, the ruling of the trial court on the defendant's motion for judgment as of nonsuit was correct, and we so hold.

Affirmed.

MARGARET H. INGRAM, PLAINTIFF v. CORA T. LIBES, EXECUTRIX OF FRED A. LIBES, DEFENDANT.

(Filed 8 April, 1959.)

1. Municipal Corporations § 14a—

A contractor for the demolition of a building, who constructs a covered boardwalk adjacent to the sidewalk to provide temporary walkway for pedestrians during the progress of the work, is under substantially the same legal duty to pedestrians as the city would be in the construction of the temporary boardwalk and its ramps at either end.

2. Same—

Neither a municipality nor a contractor, constructing a temporary boardwalk adjacent to the sidewalk for use of pedestrians during the demolition of a building, is an insurer of the safety of the boardwalk and its ramps, but is under legal duty to exercise ordinary care in the construction and maintenance of the boardwalk and ramps, and to take reasonable precautions to prevent injuries to pedestrians using them in a proper manner and with due care.

3. Negligence § 1—

Reasonable care is that degree of care which a reasonably prudent man would exercise under the attendant facts and circumstances to prevent injury to others.

4. Municipal Corporations § 14a—

A contractor for the demolition of a building, who constructs a covered boardwalk with ramps at either end for the temporary use of pedestrians during the time the sidewalk is blocked incident to the work, is not negligent in failing to build a cover over the ramps to protect the ramps from snow and ice, nor does the construction of one of the ramps with a six inch fall in about two and one half feet render such ramp so steep as to constitute negligence or to require the construction of a handrail.

5. Same— Evidence held insufficient to be submitted to jury on issue of negligence in causing fall of pedestrian on snow-covered ramp of temporary boardwalk.

A contractor, demolishing a building and constructing a boardwalk with ramps at either end for the use of pedestrians during the time the sidewalk is blocked incident to the work, is not under duty to make the boardwalk and ramps no more dangerous than the sidewalk would have been, but is required only to use ordinary care in the construction and maintenance of the boardwalk and ramps, and where the evidence discloses that the ramp in question was not so steep as to make it dangerous, that it was covered with a rubber mat, and that several hours after a light snowfall a pedestrian slipped and fell on the ramp, although she saw that it was covered with about an inch of snow which had frozen over and was icy, nonsuit is proper, since the evidence discloses that her injuries were caused solely by the new fallen snow and ice, there being no evidence of negligence in the construction or maintenance of the boardwalk or ramps.

APPEAL by plaintiff from *Sharp, S.J.*, January Term 1959 of FORSYTH.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of defendant's testator. Defendant, executrix, denies negligence, and pleads as a defense that if her testator were negligent, then plaintiff was guilty of contributory negligence.

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

Deal, Hutchins and Minor By: Roy L. Deal and Ed Pullen for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice By: Charles F. Vance, Jr., for defendant, appellee.

PARKER, J. Prior to 20 December 1955 Fred A. Libes, defendant's testator, entered into a contract to demolish a brick building situate at the southeast corner of Third and Liberty Streets in the City of Winston-Salem. Before beginning the demolition Libes constructed a covered boardwalk 40 or 42 feet long adjacent to the sidewalk by the building to provide a temporary walkway for pedestrians, while the demolition was being carried out. During December 1955 the sidewalks adjacent to the building were closed, and the public used the boardwalk. The floor of the boardwalk was elevated about four inches above the surface of the street. At each end of the boardwalk was a wood ramp leading from the boardwalk to the street. The ramp at the western end of the boardwalk was about two and one-half feet wide, and about two to two and one-half feet long. It was long enough for plaintiff to take several steps on it. This ramp began at the end of the floor of the boardwalk, and had about a six-inch fall, due to an incline in the street level. A rubber mat was nailed down flat over the entire surface of this ramp. This ramp had no roof or covering over it. It had no handrail.

On 20 December 1955 there was a light snow in Winston-Salem from 6:50 a. m. to 9:15 a. m. By 9:00 a. m. there was one inch of snow on the ground. Streets were slippery from about 7:15 a. m. until about 10:00 a. m. The snow began to melt between 9:30 a. m. and 10:30 a. m., and continued to melt, with only a trace on the ground at 1:15 p. m. Underfoot conditions in shady spots were icy until about 1:00 p. m. The temperature was below freezing that morning until after 10:30 a. m.

On this morning plaintiff and her husband drove through the snow from their home in the country to Winston-Salem on business. They parked their car, and plaintiff went to the First Federal Building and Loan Association. After completing her business there, she walked westwardly along the sidewalk to the east end of the boardwalk constructed by Libes. Plaintiff was wearing shoes with medium height, broad heels and plastic overshoes with corrugated soles. There was no snow on the covered boardwalk. Plaintiff walked up the ramp at the eastern end of the boardwalk, and walked along the boardwalk to the ramp at the west end of the boardwalk. As she approached the west ramp, she saw that the whole ramp was completely covered

with snow, which had frozen over and was icy. The crust of snow and ice there was at least an inch thick. Plaintiff testified on direct examination: "When I reached the western end of the walkway and started down the ramp, I was walking down very carefully, because I could see that it was slick, and I was taking very short steps, but my feet just went out from under me, both feet at the same time, and I sat down very hard and also landed on my left elbow." On cross-examination she testified: "I had no trouble seeing the ice and snow on the ramp there; I saw it very clearly before I started down. . . . As far as that ramp not being slick without snow and ice on it, a plank would not be slick if it is nothing on it to make it slick. I do not know whether or not the ramp had a rubber mat nailed over the top of it; it was covered with snow when I went down. . . . The ramp was covered with snow and ice, and I do not know whether there were any holes in it or not. I have testified that I do not know whether or not I had seen the ramp and the walkway before this; I did see it after this, and there were no holes or ridges in the ramp that I remember. The ice or snow was what I slipped on." Plaintiff suffered injuries in her fall.

Fred A. Libes constructed a covered boardwalk with a ramp at each end adjacent to a public sidewalk in Winston-Salem to provide a temporary walkway for pedestrians, while he was demolishing under contract a brick building adjacent to the sidewalk, and while the sidewalk was closed. Therefore, he was under substantially the same legal duty to pedestrians as the City of Winston-Salem would be, if it had been in direct charge of the demolition of the building for some purpose of its own. *Cook v. Winston-Salem,* 241 N.C. 422, 85 S.E. 2d 696; *Broadaway v. King-Hunter, Inc.,* 236 N.C. 673, 73 S.E. 2d 861; *Presley v. Allen & Co.,* 234 N.C. 181, 66 S.E. 2d 789; *Kinsey v. Kinston,* 145 N.C. 106, 58 S.E. 912. See also McQuillin, Mun. Corp., 3rd Ed., Vol. 19, Sec. 54.42.

Fred A. Libes was neither a guarantor nor an insurer of the safety of pedestrians using the boardwalk and ramps. Neither did he warrant that pedestrians using the boardwalk and ramps will be absolutely safe at all times. *Presley v. Allen & Co., supra; Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571; *White v. New Bern,* 146 N.C. 447, 59 S.E. 992; *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309; 25 Am. Jur., Highways, Sec. 373.

However, Fred A. Libes was under a legal duty to exercise ordinary care in the construction and maintenance of the boardwalk and ramps, and to take reasonable precautions to prevent injuries to pedestrians

using them in a proper manner and with due care. Reasonable care is the degree of care demanded by the facts and circumstances of the particular case. It is the ordinary care which a reasonably prudent man would use, considering all the circumstances of the case, in the discharge of a duty owing to another. *Welling v. Charlotte,* 241 N.C. 312, 85 S.E. 2d 379; *Broadaway v. King-Hunter, Inc., supra; Presley v. Allen & Co., supra; Watkins v. Raleigh, supra; Houston v. Monroe, supra; White v. New Bern, supra; Fitzgerald v. Concord, supra;* 25 Am. Jur., Highways, Sec. 543; 63 C.J.S., Municipal Corporations, Sec. 802.

Plaintiff contends that the defendant was negligent in not building a roof or covering over the ramps to protect them from snow and ice, in providing no handrail for the western ramp, and in constructing the ramp at the western end of the boardwalk with a steep fall of six inches from the end of the boardwalk to the street, so that the snow and ice on the western ramp made it more dangerous for pedestrians than the sidewalk would have been if the boardwalk had not been built, and the sidewalk closed.

One engaged in work on or demolishing buildings abutting on a sidewalk or street must use ordinary care to prevent injury therefrom to travelers on pain of liability for the resulting damage. *Johnson v. Huntington,* 80 W. Va. 178, 92 S.E. 344, 11 A.L.R. 1337. "The person doing such work is sometimes required by statute or ordinance to maintain a covered passageway in front of the building, or to take other specified precautions, for the protection of travelers on the adjacent street or walk, and non-compliance therewith renders such person liable for injuries which occurred by reason of such failure, or which would not have occurred had such duty been performed. Such a provision is intended to protect persons on the walk from substances falling from the building while work is in progress there, whether such substances fall directly from the face of the building or are hurled from inside it, at least during all hours while work on the building is in progress." 25 Am. Jur., Highways, p. 828. Plaintiff has not alleged the violation of any statute or ordinance requiring that the ramp be covered to protect it from snow and ice, neither has she cited in her brief any case holding that the ramp must be covered to protect it from snow and ice, nor have we found one. In our opinion, defendant was not negligent in not building a cover over the ramp to protect it from snow and ice.

This is said in 63 C.J.S., Municipal Corporations, Sec. 809: "The mere existence of a descent, slope, or step in the sidewalk does not render it (a municipal corporation) liable for accidents to persons in

stepping from one elevation to another, where the inequality or inclination is such that injury therefrom could not reasonably be anticipated." To the same effect see *Watkins v. Raleigh, supra; Murchison v. Apartments,* 245 N.C. 72, 95 S.E. 2d 133. Sidewalks and streets have slopes and inclines. There is evidence that the western ramp's entire surface had nailed on it a rubber mat, which was covered with snow and ice when plaintiff fell. The construction and the maintenance of the ramp at the western end of the boardwalk was not so steep or abrupt, nor so excessive or dangerous, as to constitute negligence, or require a handrail.

This is plaintiff's testimony as to what she saw when she reached the ramp at the western end of the boardwalk: "I had no trouble seeing the ice and snow on the ramp there; I saw it very clearly before I started down. . . . The ice or snow was what I slipped on." The ramp was not unsafe or dangerous in its original condition. It was made unsafe solely by the ice and snow.

In *Wesley v. City of Detroit,* 117 Mich. 658, 76 N.W. 104, the Court said: "All inclined sidewalks become dangerous for pedestrians when covered with ice. All the law requires is that the municipality shall keep them otherwise in a reasonably safe condition."

This Court said in *Browder v. Winston-Salem,* 231 N.C. 400, 57 S.E. 2d 318: "The mere slipperiness of a sidewalk occasioned by smooth or level ice or snow, formed by nature, is not sufficient to charge the municipality with liability for an injury resulting therefrom where the walk itself is properly constructed and there is no such accumulation of ice and snow as to constitute an obstruction."

"The mere fact that an accident results from the slippery condition of the walk, concurring with an ordinary slope therein, does not render the municipality liable for any resulting injuries." Annotation 41 A.L.R. 2d p. 745.

Townsend v. City of Butte, 41 Mont. 410, 109 Pac. 965, relied on by plaintiff, is distinguishable. In that case the city was held liable for injuries caused by its failure to remove from a sidewalk snow and ice which had accumulated and formed a smooth, slippery and slanting surface over which it was dangerous for pedestrians to travel, and which condition the city permitted to remain for an unreasonable time, to wit, many days before plaintiff's injury, after the city had actual knowledge of such condition.

The evidence shows no defect in the construction and maintenance of the western ramp. It had an ordinary slope. Whether the snow and ice on the western ramp made it more dangerous for pedestrians than the sidewalk would have been, if the boardwalk and ramps had not

been built and the sidewalk closed, is not the test of defendant's liability. The test is whether the defendant exercised ordinary care in the construction and maintenance of the western ramp and took reasonable precautions to prevent injuries to persons using it.

In *Nolan v. King,* 97 N.Y. 565, the defendant, with due authority from the municipal authorities, removed the sidewalk of a city street, and excavated for the purpose of constructing a vault. He built a bridge over the excavation, which in order to allow the work of construction to proceed was necessarily raised above the level of the street. The Court held that the defendant was not required to make the same as perfectly safe and convenient as was the sidewalk removed. His duty was to build it with care and prudence, such as will reasonably protect persons passing. The Court further held that it was error for the trial court to charge the jury that it was defendant's duty "to have the bridge constructed in such manner that the plaintiff would not be subjected to any more personal risk than if the sidewalk had been there instead of the bridge."

Plaintiff's injuries were caused solely by the new fallen snow and ice on the western ramp, which made it slippery. The judgment of involuntary nonsuit is

Affirmed.

SOUTHERN BOX AND LUMBER COMPANY v.
HOME CHAIR COMPANY, INC.

(Filed 8 April, 1959.)

1. Pleadings § 24—

In a trial by the court under agreement of the parties, as well as in a trial by a jury, it is required that there be both *allegata* and *probata*, and the two must correspond.

2. Sales § 27— Findings of fact by court held to relate to issues of express and implied warranties raised by pleadings.

In this action to recover the contract price for plywood sold and delivered, defendant set up breach of express warranty and breach of implied warranty in that the plywood was totally worthless to defendant in making chair seats for which it was purchased. The parties waived jury trial and agreed that the court find the facts. The court found facts to the effect that there was no express warranty, that plaintiff had no notice of the particular kind of seats manufactured by defendant or of defendant's particular method of manufacture, that the plywood sold was not suitable for the manufacture of seats of the type and method employed by defendant, that defendant's method of manufacture was in

general use but that other methods were also in general use, and that defendant had failed to show by the greater weight of the evidence that the plywood was not reasonably suitable for the manufacture of chair seats generally by other methods in general use. *Held:* The findings relate to the express and implied warranties raised by the pleadings, and defendant's contentions that the findings were predicated on issues not arising on the pleadings and with respect to which it had no opportunity to make preparation, are untenable.

3. Same—

The burden is upon the buyer to prove by the greater weight of the evidence the warranties of the seller relied on, the breach thereof by the seller, and the resulting damage.

4. Appeal and Error § 49—

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal, and when the findings support the conclusions of law, the judgment thereon will not be disturbed.

5. Sales § 15—

When the seller has knowledge of the use for which the buyer purchases the goods, and the buyer relies on the skill and experience of the seller for the suitability of the goods for such purpose, there is an implied warranty that the goods are reasonably fit for such purpose, but there is no implied warranty that the goods sold are fit for a particular purpose if the seller is not informed thereof or has no express or implied knowledge of such purpose.

6. Same—

Conclusions that the law implies a warranty that the goods are reasonably suitable for the purpose for which sold, but that there is no implied warranty of fitness for a particular purpose if the seller has no express or implied notice thereof, are not inconsistent.

APPEAL by defendant from *Bone, J.*, September Term 1958 of NEW HANOVER.

Civil action to recover for plywood sold to defendant for use in the manufacture of chair seats. Defendant alleged in its answer a counter-claim for damages for breach of warranty.

The parties, pursuant to G.S. 1-184—1-185, waived trial by jury, and agreed that the Judge might find the facts, make conclusions of law, and render judgment thereon.

FINDINGS OF FACT.

"1. That in April and May, 1956, plaintiff sold and delivered to defendant a lot of plywood at the agreed price of $82.50 per thousand, which amounted to $2,555.56 after allowing due credit for freight paid by defendant.

"2. That said plywood was sold to defendant by plaintiff for use in the manufacture of chair seats.

"3. That in the sale of said plywood no express warranty was made by plaintiff to defendant.

"4. That plaintiff had no notice or knowledge of the particular kind of chair seats which defendant desired to manufacture from said plywood and had no notice or knowledge as to the particular method used by defendant in the manufacture of its chair seats and the fixing of them to chairs.

"5. That there are other types of chair seats made from plywood besides those made by defendant.

"6. That the defendant has shown by the greater weight of the evidence that a considerable quantity of said plywood was not suitable for use in making defendant's particular kind of chair seats by means of defendant's particular method of manufacture.

"7. That although the method of manufacture used by defendant has been in general use by many companies for ten or twelve years, there are other methods in general use.

"8. That defendant has failed to show by the greater weight of the evidence that the said plywood was not reasonably suitable for the manufacture of chair seats generally by other methods in general use besides those used by defendant."

CONCLUSIONS OF LAW.

"1. That where a seller makes no express warranty as to the quality of the thing sold, the law implies a warranty that it is reasonably suitable for the purpose for which it was sold.

"2. That the burden of proof is on the buyer to show by the greater weight of the evidence that the thing sold was not reasonably suitable for the purpose for which it was sold.

"3. Where plywood is sold for use in making chair seats and the seller has no notice or knowledge of the particular type of chair seats which the buyer makes, or of the particular method of manufacture employed by such buyer in making chair seats, the buyer does not make out a case for breach of implied warranty merely by showing that a considerable quantity of such plywood was not reasonably suitable for use in making its particular type of chair seat by its particular method."

Whereupon, the Judge rendered judgment that plaintiff recover of defendant $2,555.56, with interest, and that defendant recover nothing from plaintiff upon its counter-claim, alleged in its answer.

From the judgment defendant appeals.

Stevens, Burgwin & McGhee for plaintiff, appellee.
McElwee & Ferree for defendant, appellant.

PARKER, J. Defendant assigns as error findings of fact Numbers 4, 5, 7 and 8. Defendant contends, among other contentions, that an examination of findings of fact Numbers 3, 5 and 8 shows "that these findings of fact are predicated on issues which do not arise on the pleadings and with respect to which the defendant had no opportunity to make preparation."

When the parties in the instant case waived a jury trial, pursuant to G.S. 1-184—1-185, the effect of it was to invest the judge with the dual capacity of judge and juror. It is familiar learning that if the plaintiff is to succeed at all, whether the trial is by judge and jury or by the judge alone as here, he must do so on the case set up in his complaint; that there must be both *allegata* and *probata*, and the two must correspond with each other. *Sale v. Highway Commission*, 238 N.C. 599, 78 S.E. 2d 724; *Whichard v. Lipe*, 221 N.C. 53, 19 S.E. 2d 14; *Talley v. Granite Quarries Co.*, 174 N.C. 445, 93 S.E. 995.

In McIntosh North Carolina Practice and Procedure, 2d Ed., Vol. I, p. 759, it is said: "The trial by the judge is similar to a trial by the judge and jury in defining the issues to be determined, the introduction of evidence upon such issues, the argument of counsel, and in rendering a judgment upon the facts and the law."

Plaintiff alleges in its complaint that it sold and delivered to defendant plywood, specially manufactured for defendant upon defendant's order in the amount of $2,555.56, after allowing credit for freight paid by defendant, and that defendant is indebted to it in that sum.

Defendant in its answer in effect confesses the making of the contract sued upon and the breach thereof, but alleges by way of further defense and for affirmative relief that plaintiff sold and delivered to it chair seats with an express warranty that the chair seats "were of sufficient strength and quality to meet the specifications of the defendant and to enable the defendant to manufacture a quality chair of sufficient strength and stamina to meet the needs of its customers and of sufficient strength and stamina to withstand any type of reasonable breakage." Defendant in its further defense alleges that the chair seats

are totally worthless and of no use to it, except as firewood: "that the plaintiff not only breached the express warranty which it had made to the defendant, but it also breached the implied warranty which went with the sale of its product." That as a result of such breach of warranties defendant has been damaged in the sum of $35.00 representing time and machinery utilized in an effort to use the chair seats, and in the sum of $30.00 in storing the worthless chair seats. While the answer terms the articles bought from plaintiff chair seats, all the evidence shows that the articles bought were plywood to be used in the manufacture of chair seats.

Plaintiff filed a reply, which in substance denies the material allegations of the answer's further defense and request for affirmative relief.

In respect to the complaint's allegations that plaintiff sold and delivered to defendant plywood "specially manufactured for the defendant, upon defendant's order," this is the testimony of John Colucci, president of plaintiff: "We have not manufactured chair seats before or after for Home Chair Company, but we have for other manufacturers, before and after. Most of the orders we get is half an inch and this was 5/16. The half-inch is five-ply. That is what most of our orders are for. The buyer furnished the specifications for these panels. He told us the thickness and size and we manufactured it according to his specifications."

Defendant in its further answer and request for affirmative relief relies upon an alleged express warranty in the sale of the plywood and a breach thereof, and upon an alleged implied warranty in such sale and a breach thereof. Finding of fact Number 3, to which defendant does not except, is "that in the sale of said plywood no express warranty was made by plaintiff to defendant." Findings of fact Numbers 4, 5, 6, 7 and 8 relate to the alleged express and implied warranties and the alleged breaches thereof. Findings of fact Numbers 3 to 8, both inclusive, determine issues of fact raised by the pleadings.

The Trial Judge correctly placed upon the defendant the burden of proof to show, by the greater weight of the evidence, the warranties, the breach thereof, and the resulting damages. *Parker v. Fenwick,* 138 N.C. 209, 50 S.E. 627; *Ashford v. Shrader,* 167 N.C. 45, 83 S.E. 29; *Furst v. Taylor,* 204 N.C. 603, 169 S.E. 185; *Yarn Co. v. Mauney,* 228 N.C. 99, 44 S.E. 2d 601; 77 C.J.S., Sales, pp. 1283-1284; 46 Am. Jur., Sales, p. 490.

In respect to all the findings of fact there are *allegata et probata,* which correspond with each other. A careful reading of the evidence shows, in our opinion, that all the findings of fact are supported by

competent evidence. Such findings of fact are conclusive on appeal. *State of North Carolina on Relation of the North Carolina Milk Commission v. Galloway,* 249 N.C. 658, 107 S.E. 2d 631; *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486. All the assignments of error as to the findings of fact are overruled.

Defendant assigns as error conclusion of law Number 3. In *Stokes v. Edwards,* 230 N.C. 306, 52 S.E. 2d 797, it is said: "When a buyer purchases goods for a particular purpose known to the seller and relies on the skill, judgment, or experience of the seller for the suitability of the goods for that purpose, the seller impliedly warrants that the goods are reasonably fit for the contemplated purpose, and is liable to the buyer for any damages proximately resulting to him from the breach of this warranty." To the same effect 77 C.J.S., Sales, pp. 1176-1177; 46 Am. Jur., Sales, p. 529.

This is said in 77 C.J.S., Sales, p. 1180: "It is a general rule, affirmed by the Uniform Sales Act, that there is no general implication of warranty that the goods sold are fit for the particular purpose for which they are purchased if the seller is not informed of, or expressly or impliedly acquainted with, such purpose. The wants and needs of the buyer must be disclosed, and a statement of the purpose should be specific."

Conclusion of law Number 3 is correct. Defendant contends that it is inconsistent with conclusion of law Number 1. Conclusion of law Number 3 relates to the principle of law as to an implied warranty of fitness for a particular purpose, and conclusion of law Number 1 relates to the principle of law that there is an implied warranty that the articles were reasonably fit for the use for which they were sold. All the evidence shows that the plywood was sold for the purpose of making chair seats. The conclusions of law Numbers 1 and 3 are not inconsistent.

All defendant's assignments of error have received proper consideration by the Court, and all are overruled. The learned Trial Judge, with his usual care, considered and weighed the evidence. In the record there is competent evidence to support his findings of fact, and such findings of fact are sufficient to support his conclusions of law, and his judgment based thereon. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668.

Affirmed.

MOORE *v.* LEWIS.

FLORA TRUDY MOORE (WIDOW), CARRIE MOORE AND HUSBAND ELIJAH MOORE, VANDER MARSHBURN (WIDOW), MANILLA CROMARTIE AND HUSBAND WILL CROMARTIE, BLANCHIE LARKINS AND HUSBAND ALLIE LARKINS, VIOLET KEA AND HUSBAND ED KEA, HATTIE ANDREWS (WIDOW), LLOYD LEWIS AND WIFE MRS. LLOYD LEWIS v. DANIEL LEWIS AND WIFE LILLIE LEWIS, WILLIE PRIDGEN, HUSBAND OF ADDIE PRIDGEN, DECEASED; MARIE CROMARTIE AND HUSBAND GEORGE CROMARTIE, MADGE WILLIAMS (SINGLE), ETHEL DEVANE AND HUSBAND WILLIE DEVANE, GEO. PRIDGEN AND WIFE ARTHELIA PRIDGEN, WILLIE PRIDGEN AND WIFE MRS. WILLIE PRIDGEN, DAN PRIDGEN AND WIFE MRS. DAN PRIDGEN, FREDIE PRIDGEN AND WIFE MRS. FREDIE PRIDGEN, NICHOLAS PRIDGEN AND WIFE MRS. NICHOLAS PRIDGEN, ADDIE P. PRIDGEN AND HUSBAND ..... PRIDGEN, JOE PRIDGEN AND WIFE MRS. JOE PRIDGEN.

(Filed 8 April, 1959.)

1. Insane Persons §§ 2, 10—

The court is under duty to appoint a guardian *ad litem* for a defendant who is *non compos mentis* and who has no general guardian, and an inquisition to determine the sanity of the defendant is not a condition precedent to such appointment. G.S. 1-65.1.

2. Same—

The court may appoint a guardian *ad litem* for a defendant who is *non compos mentis* upon application of any disinterested person, or the court may do so upon its own motion.

3. Same—

Since the court has power to appoint a guardian *ad litem* for a person who is *non compos mentis*, the court also has power to remove such guardian, and when timely objection is made by the alleged incompetent, the court should afford him ample and adequate opportunity to be heard with respect to the need for a guardian *ad litem* and the fitness of the appointee.

4. Insane Persons § 10— Mere failue to revoke appointment of guardian ad litem is not sufficient ground to avoid judgment in absence of showing of prejudice.

In this proceeding a default judgment of sale for partition was entered, and one of the defendants was enjoined from further cutting timber from the *locus*. After this defendant was jailed for contempt for violating the order, a guardian *ad litem* was appointed upon affidavit of a disinterested person, and the default judgment was vacated and the defendant was permitted to answer. Thereafter this defendant appeared and defended in his own name. *Held:* The mere failure of the court *ex mero motu* to enter an order vacating the appointment of the guardian *ad litem* could not have prejudiced the rights of the defendant, and there being no contention that the guardian failed to take any appropriate action or that the appointment prevented the defendant from asserting any right, or that the guardian was incompetent or interested in the

litigation, the defendant's contention that all proceedings after the appointment of the guardian were void, is untenable.

5. Judgments § 27b: Partition § 4c—

Where, in partition proceedings, the fact of cotenancy is established and the owners of the land are before the court, the court has the power to order sale for partition.

6. Appeal and Error § 4—

A party who asserts no authority to speak for others, whose rights are antagonistic to his own, is not a party aggrieved by adjudication that such others have no interest in the subject of the litigation.

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

APPEAL by Daniel Lewis as movant from *Moore (C.L.), J.*, in Chambers at BURGAW on 19 September 1958.

A proceeding for partition, as here entitled, was instituted in 1953. In 1954 a default judgment was entered and sale for partition ordered. The property was offered for sale several times and resales ordered because of increased bids. A sale was made 1 March 1955 at which time a bid of $9,600 was offered. This sale was confirmed and the commissioner was directed to convey upon payment of the purchase money. Following this order the assignee of the successful bidder moved for a survey to determine the boundaries separating the land owned by Daniel Lewis individually from the land sold. The motion also asserted that Daniel Lewis had cut valuable timber from the property sold and should be required to account for the timber cut and enjoined from further cutting. In May 1955 Lewis was cited for contempt for violation of an order enjoining him from cutting timber. He was found in contempt and imprisoned. An affidavit was thereupon filed by a disinterested person stating that Daniel Lewis was old, infirm, and unable to properly conduct his defense. A guardian *ad litem* was appointed.

Daniel Lewis thereupon employed counsel. They filed a motion asserting no proper process had ever been served on Daniel Lewis, and for that reason the orders theretofore entered were void. This motion was overruled and the questioned service adjudged valid. On appeal, Judge Williams, in September 1955, affirmed the adjudication as to service, but permitted Lewis to answer. Pursuant to the permission given, an answer verified by Lewis was filed. It denied the asserted cotenancy and asserted the lands were owned solely by Daniel Lewis and the heirs of Willie Lewis. Process was served on the heirs of Willie Lewis by publication. A guardian *ad litem* was appointed to represent them.

On 28 July 1956 a consent order was entered which recites that Daniel Lewis had withdrawn his objection to confirmation of the $9,600 bid. The controversy as to ownership was, by the order, transferred to the fund and the cause placed on the civil issue docket. A reference was ordered. The referee conducted hearings, made his report including findings of fact and conclusions of law. Daniel Lewis testified at these hearings. The report was filed 19 January 1958. At the April 1958 Term Judge Frizzelle modified the findings and as modified confirmed the report and rendered judgment decisive of the rights of the parties. No exceptions were taken to that judgment. The clerk thereupon distributed the purchase monies paid to him in July 1956. His report showing distribution was confirmed 12 May 1958.

In June 1958 Daniel Lewis, acting through his present counsel, filed two motions to set aside the orders for the sale and confirmation. Answers were filed by all interested parties. Judge Moore heard the motions, made findings of fact, and denied the motions. Daniel Lewis excepted and appealed.

Taylor & Mitchell for defendant, appellant.
Clark, Clark & Grady for appellees Turnell and Morgan.
Corbett & Fisler and Isaac C. Wright, amici curiae.

RODMAN, J. The motions to set aside the orders of sale and confirmation are based on these assertions: (1) Daniel Lewis was at all times competent to manage his affairs; hence the order appointing a guardian to act for him was invalid, rendering all subsequent proceedings void. (2) The heirs of Willie Lewis had not been properly served with process and, as they were necessary parties, the court was without power to direct a sale.

These motions were not verified by Daniel Lewis, but by one of his present attorneys. Daniel Lewis made an affidavit which recites the employment of present counsel with plenary power to act for him, confirming in advance any action they might take in his behalf. The affidavit contained this statement: "(T)hat since the entry of the purported judgment in this cause by Honorable J. Paul Frizzelle at the April Term, 1958, affiant has been represented in the instant cause solely by Messrs. Taylor and Mitchell and has not authorized any other attorney or attorneys to represent him; that any acts or representations of any attorney or attorneys subsequent to the entry of the above mentioned purported judgment, other than by Messrs. Taylor and Mitchell, have not been authorized by affiant, and are not the acts or representations of affiant or on behalf of affiant." The only

action taken subsequent to the judgment of April 1958 was the distribution of the purchase money in conformity with the provision of that judgment.

By statute, G.S. 1-65.1, the court is under a duty to appoint a guardian *ad litem* for infants, idiots, lunatics, or *non compos* defendants who have no general guardian.

An inquisition to determine the sanity of the defendant is not a condition precedent to the appointment. *In re Dunn*, 239 N.C. 378, 79 S.E. 2d 921. It may be made upon application of any disinterested person or by the court on its own motion. 44 C.J.S. 307, 308. "This is necessary, because of his presumed lack of discretion and want of capacity to understand and manage his own affairs." *Tate v. Mott*, 96 N.C. 19.

As said in *Morris v. Russell*, 26 A.L.R. 2d 947: "The rule requiring guardians for incompetents is for their protection. Its purpose is not to burden nor hinder them in enforcing their rights; nor to confer any privilege or advantage on persons who claim adversely to them or who may be trying to take advantage of them."

As the court has the power to appoint, it has the power to remove. *Tate v. Mott, supra; Abbott v. Hancock*, 123 N.C. 99; and when timely objection is made by the alleged incompetent, the court should afford him ample and adequate opportunity to be heard with respect to the need for a guardian *ad litem* and the fitness of the appointee. *Graham v. Graham*, 240 P 2d 564.

Here the appointment was made after movant had been sentenced to jail for contempt of court. The application for the appointment was not made by a party to the litigation but by a minister who swore movant was, on account of age, incompetent and "utterly innocent of court proceedings." Movant also filed an affidavit stating "I am an old colored man, utterly ignorant of Courts and Court proceedings."

The appointment was made in July 1955. The motion to vacate the appointment was made in June 1958.

It is not suggested that the appointee was incompetent or interested in the litigation.

By the intervention of the guardian *ad litem* a default judgment was vacated and movant was permitted to answer. Judge Moore found: "From this point (order permitting the filing of answer) Daniel Lewis defended the action in his own name, and the guardian *ad litem* took no further part in the proceedings."

In view of this finding, supported as it is by the evidence, the mere failure of the court *ex mero motu* to enter an order vacating the ap-

pointment cannot be held to have prejudiced the rights of movant. Such a holding would substitute formality for practicality.

If movant were here complaining of a loss of rights resulting from the abdication and inaction of the guardian, the finding would justify remedial action for the protection of his ward. But movant does not complain of inaction. He merely asserts the appointment was not authorized. He nowhere indicates how the appointment prevented him from asserting his rights. It follows that the court correctly denied the motion based on the assertion that the appointment of the guardian *ad litem* made all subsequent proceedings void or irregular. *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479.

The findings of the referee, confirmed on appeal, established a cotenancy. The owners were before the court. This gave the court power to order the sale.

The findings of the referee, confirmed on appeal, negative the assertion now made by movant that Willie Lewis or his children have an interest in the property. This finding is beneficial to movant. It enlarges his share in the property. If, as movant now asserts, there are outstanding rights, they must speak for themselves. Movant does not assert any authority to speak for them. That their rights might be affected does not make him a party aggrieved. *In re Application for Reassignment,* 247 N.C. 413, 101 S.E. 2d 359; *Gregg v. Williamson,* 246 N.C. 356, 98 S.E. 2d 481; *Templeton v. Kelley,* 216 N.C. 487, 5 S.E. 2d 555; *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797.

Affirmed.

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

JAMES M. DOWNS, ADMINISTRATOR OF THE ESTATE OF JAMES DOWNS, JR., DECEASED v. CLYDE W. ODOM AND J. T. ODOM, T/A ODOM TILE COMPANY, AND ERNEST TAYLOR, JR.

(Filed 8 April, 1959.)

1. Automobiles § 17—

G.S. 20-155(a), providing that the vehicle on the right has the right of way at an intersection which has no stop signs or traffic signals, applies only when two vehicles approach or enter the intersection at approximately the same time.

2. Same—

The vehicle first reaching an intersection which has no stop signs or traffic signals has the right of way over a vehicle subsequently reaching

it, irrespective of their directions of travel, and it is the duty of the driver of the later vehicle to delay his progress and allow the vehicle which first entered the intersection to pass in safety.

3. Automobiles §§ 41g, 42g— Evidence held for jury on question of negligence in entering intersection after another car had entered the intersection.

The evidence tended to show that the car in which plaintiff's intestate was riding was being operated by his mother, south at a speed of 15 or 20 miles per hour, and that defendant's truck was being operated east at a speed of 35 or 40 miles per hour, in approaching an intersection having a legal speed limit of 25 miles per hour, that the car in which intestate was riding was first in the intersection, and was struck on its right side just back of the headlight, and that the impact occurred on the west side of the center of the intersection. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligence and does not disclose negligence as a matter of law on the part of intestate's mother which could be imputed to plaintiff as a bar to recovery.

APPEAL by plaintiff from *Sharp, Special Judge,* November Term 1958 of EDGECOMBE.

This is an action instituted by the plaintiff to recover damages from the defendants on account of the wrongful death of plaintiffs intestate when a truck belonging to defendants Odom and operated by the defendant Taylor collided with the Downs automobile.

Plaintiff's intestate, a 4-months-old child, was riding in the automobile being operated by Joyce S. Downs, the mother of plaintiff's intestate, which was proceeding South on St. Patrick's Street in Tarboro, North Carolina. The defendants' pick-up truck being operated by the defendant Ernest Taylor, Jr. was proceeding East on Park Avenue. In the intersection of these streets the automobile in which plaintiff's intestate was riding was struck on its right side just behind the headlight back to the door. Skid marks from the point of impact westward up Park Avenue made by the defendants' pick-up measured 45 feet. Testimony indicated that the Downs automobile was traveling 15 or 20 miles per hour and the pick-up truck was traveling 35 or 40 miles per hour in a 25 miles per hour zone. Joyce S. Downs testified after regaining consciousness in the hospital that she had no recollection of the wreck. It was testified that the driver of the pick-up truck said that he observed the Downs automobile when he was 45 feet from the intersection and put on brakes but was unable to stop before hitting the car.

John Henry Taylor was riding with the defendant Ernest Taylor, Jr. as a guest passenger in the Odom truck at the time of the accident. He was not an employee of the Odoms. This witness testified:

"As we were approaching the intersection of St. Patrick Street I looked out the right window across the Common. I turned my head back and looked down Park Avenue just before we reached the intersection. At that time Ernest Taylor was putting on brakes. I don't know exactly how far in feet the truck was from the intersection of St. Patrick and Park Avenue. We had not completely reached the intersection as I turned around. I saw the front end of Mrs. Downs' car. It was entering the intersection. * * * I did not see anything but the front end in the intersection. * * * When I first turned around and saw the Downs car I don't know exactly where the truck was but the brakes were already skidding * * *. I can say for sure the truck had not already got to the intersection."

Plaintiff's evidence tends to show that the accident occurred on the West side of the center of the intersection; that the skid marks of the truck ended in the intersection approximately six feet from the curb line. St. Patrick's Street on the North side of Park Avenue is 27 feet wide and on the South side of Park Avenue it is 30 feet 6 inches wide. Park Avenue is 24 feet wide.

At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit. Motion was allowed and the plaintiff appeals, assigning error.

Fountain, Fountain, Bridges & Horton for plaintiff.

Battle, Winslow & Merrell, by Robert M. Wiley, for defendants.

DENNY, J. The only question presented for determination on this appeal is whether or not the trial court committed error in sustaining the defendants' motion for judgment as of nonsuit.

The accident occurred at an intersection which had no stop signs or traffic signals. The statute governing such an intersection is G.S. 20-155, which in pertinent part reads 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 * * *. (b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right of way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction * * *."

Subsection (a) of the above statute does not apply unless the two vehicles approach or enter the intersection at approximately the same time. Under subsection (b) of the statute the vehicle first reaching an intersection which has no stop sign or traffic signal has the right

of way over a vehicle subsequently reaching it, irrespective of their directions of travel; and it is the duty of the driver of the latter vehicle to delay his progress and allow the vehicle which first entered the intersection to pass in safety. *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Kennedy v. Smith,* 226 N.C. 514, 39 S.E. 2d 380; *Crone v. Fisher,* 223 N.C. 635, 27 S.E. 2d 642; *Yellow Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631.

The defendants cite and rely on *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159; and *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147. We think the facts in these cases are distinguishable from those in the instant case.

In *Taylor v. Brake supra,* the facts were somewhat similar to those involved on this appeal, except there was no evidence that either car involved in the collision was exceeding the speed limit. At the close of all the evidence the court sustained the defendants' motion for judgment as of nonsuit. On appeal, this Court, speaking through *Parker, J.,* said: "Plaintiff contends that the case should have been submitted to the jury on the theory that he was already within the intersection when the defendant Brake approached it. This Court said in *Cox v. Freight Lines* and *Matthews v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25: 'The court cannot submit a case to the jury on a particular theory unless such theory is supported by both the pleadings and the evidence.' Plaintiff has not alleged any where in his complaint that he was already within the intersection, when the defendant Brake approached the intersection but had not entered it, nor has he testified that he entered the intersection first. It is true that plaintiff alleged the defendants were negligent by 'negligently, recklessly and carelessly failing to yield the right of way to this plaintiff's automobile as by law required.' 'To characterize an act or course of conduct as negligent without more is insufficient. As stated in McIntosh on Prac. and Proc., sec. 388, "In negligence cases, a general allegation of negligence is insufficient and the facts constituting negligence must be given and that it was the cause of plaintiff's injury." ' *Fleming v. Light Co.,* 232 N.C. 457, 61 S.E. 2d 364. This allegation is insufficient to support plaintiff's theory that plaintiff had the right of way by virtue of G.S. 20-155 (b)." The judgment as of nonsuit was affirmed.

In the instant case the plaintiff alleged in his pleadings and offered testimony at the trial tending to show that the Downs car entered the intersection first.

In the case of *Freeman v. Preddy, supra,* the case was submitted to the jury on plaintiff's cause of action and the defendants' cross-action. Issues of negligence, contributory negligence and damages

were submitted to the jury. The jury answered the issues of negligence and contributory negligence in the affirmative as to both causes of action. On appeal by the defendants, we found no error.

In the case of *Bennett v. Stephenson, supra,* the evidence was to the effect that both cars were being operated around 30 miles per hour; that the collision occurred in the intersection of West Edgerton Street and North Orange Avenue, in the Town of Dunn, slightly West of the center of the intersection. Skid marks from each car measured 36 feet. On appeal from a judgment as of nonsuit, we affirmed.

In the instant case it was stipulated that the legal speed limit where the accident occurred was 25 miles per hour. There is evidence that the Downs car was being operated at a speed of 15 or 20 miles per hour and that the Odom truck was being operated at a speed of 35 or 40 miles per hour.

On a motion for judgment as of nonsuit a plaintiff is entitled to have the evidence considered in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom. When the evidence is so considered, we think it is sufficient to carry the case to the jury. *Donlop v. Snyder, supra,* and cited cases.

In our opinion, the question as to whether or not the driver of the Downs car was guilty of contributory negligence by entering the intersection at the time and under the conditions then existing, is for the jury. *Donlop v. Snyder, supra; Kennedy v. Smith, supra.*

The judgment of the court below is

Reversed.

STATE v. LINNIE HAMILTON
AND
STATE v. GARFIELD HAMILTON.

(Filed 8 April, 1959.)

1. Criminal Law § 120—

The court, in the exercise of a limited legal discretion, may refuse to accept a verdict only when the verdict is incomplete, imperfect, insensible, repugnant or non-responsive to the issues or indictment.

2. Criminal Law §§ 116, 169— Conviction of aider and abettor of graver offense than that of which principal was convicted held to require new trial.

In a prosecution of one defendant as a principal and another defendant as an aider and abettor, the jury returned a verdict against the principal of guilty of an assault with a deadly weapon, and against the aider and

abettor of guilty of aiding and abetting an assault with a deadly weapon with intent to kill. The court directed the jury to reconsider its verdict, and instructed it that it could change its verdict either up or down in both cases. Thereafter the jury returned a verdict as to each defendant of guilty of an assault with a deadly weapon with intent to kill. *Held:* The first verdict against the principal, being complete, sensible and responsive to the bill of indictment, should have been accepted by the court, and the cause is remanded as to him for judgment on the first verdict. As to the aider and abettor, there was error in the instruction of the court and a new trial must be awarded.

APPEAL by defendants from *Preyer, J.*, at October Criminal Term of 1958 of ASHE.

Criminal prosecutions upon two bills of indictment, Numbers 2180 and 2186, respectively, charging each with the offense of assault upon one Jake Garrett with a deadly weapon, to wit: a pistol, with intent to kill, inflicting serious bodily injury, not resulting in death, to his great damage, by consent consolidated for purpose of trial.

Defendants each pleaded not guilty.

Upon the trial in Superior Court the State offered evidence tending to support the charge against each defendant,—the defendant Garfield Hamilton with the actual shooting of Jake Garrett, inflicting injury to his spinal cord— resulting in paralysis of his lower extremities; and the defendant Linnie Hamilton, present aiding and abetting Garfield. The defendants each testified as to his version of the incident.— defendant Garfield that he shot in self-defense, and defendant Linnie that he only acted as peacemaker.

The trial judge charged the jury at some length, terminating with this instruction: "You may return one of three verdicts in each case, (1) You may find each defendant guilty of assault with a deadly weapon with intent to kill, inflicting serious injury, (2) or you may find the defendant in each case guilty of assault with a deadly weapon, that is without the elements of intent to kill and serious injury, or (3) you may find the defendant not guilty in each case." (The numbering is supplied).

The jury, after some deliberation, details of which are not essential, returned into open court in a body, and requested the court to repeat his charge as to what verdicts the jury could return. The court did this. Then the jury retired for further deliberation, and later returned in a body into open court and returned verdict finding "Garfield Hamilton guilty of assault with a deadly weapon, Linnie Hamilton guilty of aiding and abetting of an assault with a deadly weapon with intent to kill."

Thereupon this colloquy between the court and the spokesman for the jury followed:

"Court: Mr. Foreman, I will ask you was it your intention * * * you have returned a verdict as to Linnie Hamilton of aiding and abetting of an assault with a deadly weapon with intent to kill?

"Juror: * * * Yes, sir.

"Court: May I ask you again what your verdict was as to Garfield Hamilton? Juror: Assault with a deadly weapon. Court: Without intent to kill? Juror; Yes."

Thereupon the court, addressing the jury, said: "Members of the jury, I would like to ask you to reconsider your verdict * * * ."

Each defendant objected to reconsideration of the verdict by the jury. Overruled. Exception. No. 1 by each defendant.

And the court continued at some length in reviewing to jury his instructions, and concluded with this: "Gentlemen of the Jury, to sum up the court's instructions, that if you find that the defendant Garfield Hamilton is guilty of assault with a deadly weapon, that is in that event if you find that Linnie Hamilton was guilty of aiding and abetting Garfield Hamilton that your verdict would be as to Linnie Hamilton guilty of aiding and abetting in an assault with a deadly weapon that is, your verdict was returned of guilty of aiding and abetting of assault with a deadly weapon with intent to kill, but the court has instructed you that you cannot find the aider and abettor guilty of more than the principal, so that if you find he aided and abetted Garfield Hamilton your verdict would be guilty of aiding and abetting of an assault with a deadly weapon. The court asks if you would return to your jury room and see if you can arrive at a verdict on the Linnie Hamilton case in that respect."

The defendants object to sending the jury back to jury room to reconsider its verdict. Objection. Overruled. Exception. No. 2 by each defendant.

Whereupon the jury again retired to the jury room for further deliberation. Later the jury returned in a body in open court, when and where the following transpired:

("Juror: * * * If it please your Honor, the jury would like to know if we are allowed to change our verdict either up or down on this? Court: In other words, change your verdict in both cases? Juror: Yes * * * . Court: Members of the jury, the court instructs you that what the verdict is in either of these cases is entirely a matter for you gentlemen to decide. The court has nothing to do with it and the court has no opinion about the case and it would be error for the court to express any opinion, and the court does not express any opinion about

the case and the court instructs you that it is entirely a matter for you gentlemen as to what verdict you return in either of these cases.

"Now the court instructs you that if you misunderstood the form of the verdict in either of these cases that then you have the right to return into the court the verdict you intended to return, and you would have a right to change either of your verdicts accordingly, so that the court will ask you if you will return to your jury room and see if you can reach a verdict in the case.")

Each defendant excepts to all the foregoing set forth in parenthesis. Exception No. 3, by each.

And after further deliberations the jury returned into open court this verdict: "In both cases guilty of assault with a deadly weapon with intent to kill with a plea of mercy for Garfield Hamilton."

Defendants each moved to set aside the verdict on grounds stated, and in each instance the motion was overruled, and each excepted. Numbers 4 and 5.

Then the court pronounced the judgment: That the defendant Linnie Hamilton be confined in the Central Prison for a period of not less than six nor more than ten years; and that the defendant Garfield Hamilton be confined in the Central Prison for a period of not less than four nor more than six years. Each defendant excepts thereto, and appeals therefrom to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard for the State.

R. F. Crouse for Linnie Hamilton, appellant.

Johnston & Johnston for Garfield Hamilton, appellant.

WINBORNE, C. J. At the threshold of appeal this question arises. Did the trial court err in refusing to accept the verdict first returned by the jury? Manifestly, (first) as to defendant Garfield Hamilton, the answer is "Yes". See *S. v. Perry*, 225 N.C. 174, 33 S.E. 2d 869, and *S. v. Gatlin*, 241 N.C. 175, 84 S.E. 2d 880, and cases cited.

In the *Perry* case, *supra*, "While a verdict is a substantial right * * * it is not complete until it is accepted by the court for record * * * This does not imply, however, that in accepting or rejecting a verdict the presiding judge may exercise unrestrained discretion. While he should scrutinize a verdict with respect to its form and substance and to prevent a doubtful or insufficient finding from becoming the record of the court, his power to accept or reject the jury's finding is restricted to the exercise of a limited legal discretion." And "when, and only when, an incomplete, imperfect, insensible, or repugnant verdict

or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict."

Testing the verdict first returned as to Garfield Hamilton, it appears to be complete, perfect, sensible and consonant with and responsive to charge contained in the bill of indictment. It is clear and definite in meaning. Therefore defendant Garfield Hamilton had a substantial right to have judgment pronounced in accordance therewith. And for error in this respect, the verdict last returned and the judgment pronounced thereon will be set aside, and the case remanded to Superior Court for proper judgment on the verdict first returned.

Secondly, as to defendant Linnie Hamilton: If it be that the verdict first returned against him were incomplete, defendant contends and we think rightly so there is error in the instruction given in response to the inquiry from the jury as to whether the jury be allowed to change its verdict either up or down in both cases, the subject of Exception 3. Assignment 3.

Thus it seems proper that the verdict secondly rendered and the judgment pursuant thereto be set aside and that the cause be remanded for new trial. *S. v. Gatlin, supra.*

On appeal by Garfield Hamilton—Remanded for Judgment.

On appeal by Linnie Hamilton—New Trial.

CHARLES M. IVEY, JR., ADMINISTRATOR OF THE ESTATE OF JOHN W. HADNOT v. CLYDE T. ROLLINS, ADMINISTRATOR OF THE ESTATE OF LUKE R. HADNOT, JR.

(Filed 8 April, 1959.)

1. Courts § 20—

In an action in this State involving an automobile accident in another state, the substantive law of the state in which the accident occurred determines the cause of action and measure of damages, and the law of this State governs in regard to matters of evidence, including the application of the doctrine of *res ipsa loquitur* and the joinder of causes.

2. Automobiles §§ 36, 41a—

Evidence tending to show merely that an automobile driven by defendant's intestate, traveling at a lawful speed on a dry, paved highway in its proper lane, suddenly swerved sharply to its right and collided into a bridge abutment, without any evidence of any mechanical defect in the car or unusual conditions in regard to traffic or the road, *is held* insuf-

ficient to be submitted to the jury on the issue of the driver's negligence, the doctrine of *res ipsa loquitur* not being applicable.

BOBBITT AND HIGGINS, JJ., concur in result.

APPEAL by plaintiff from *Johnston, J.*, at May 26, 1958 Civil Term of GUILFORD— Greensboro Division, argued at Fall Term, 1958 as No. 609.

Civil action to recover of defendant damages under the South Carolina statute for alleged wrongful death, designated "First Cause of Action", and by reason of reckless, willful and wanton negligence for conscious pain and suffering prior to death, designated "Second Cause of Action".

The action is brought by the Estate of John Hadnot, deceased (infant age four), alleging that he was a passenger in an automobile operated by his older brother, Luke R. Hadnot, Jr. (age 13 years, 11 months), when the car struck a bridge abutment near Walterboro, South Carolina, killing all the occupants,— plaintiff's and defendant's intestates, and the mother and father of said intestates.

The facts alleged, and as the testimony tends to support, offered upon the trial in Superior Court are substantially these:

On 4 July, 1956, at approximately 4:30 P. M., the 1955 Chrysler automobile belonging to Luke R. Hadnot collided with a concrete bridge abutment on the west side of U. S. Highway No. 17, about one-tenth of a mile south of the corporate limits of Walterboro in Colleton County, South Carolina. The weather was clear; the highway was dry. It runs generally north and south, and is a two-lane paved road. It is 23 feet in width. The concrete bridge abutments on each side of the highway, forming the bridge, are approximately four feet high and two feet wide. And the automobile struck the bridge abutment squarely across the front of the vehicle, that is, "head on". There were seven-foot shoulders on each side of the highway. It was down hill and straight on its approach to the bridge for approximately two-tenths of a mile, but at the bridge it is fairly level.

The only eye witnesses to the collision were Mr. and Mrs. John L. Grady, of Fort Myers, Florida, who were also traveling southwardly on the same highway,— following the Hadnot automobile. The speed of the two automobiles was between 30 and 35 miles per hour. The Grady automobile had been following the Hadnot automobile for a distance of one quarter to one-half mile. The Hadnot car was traveling on its right-hand side of the highway, six or seven hundred feet in front of the Grady automobile. And although the Gradys had waited in their automobile at a filling station to permit the Hadnot

automobile to pass, neither of them could state who was the driver of it. There was no unusual movement or action of the Hadnot automobile until it reached a point about ten or fifteen feet north of the concrete abutment on its right, when it "suddenly swerved sharply" to its right and into the abutment. There was no other traffic on the highway at the time. Afterwards there were no skidmarks or any other marks on the highway. No loud noise or explosion was heard prior to the occurrence of the impact. And the Gradys stopped their car and he ran up to the Hadnot car in about ten seconds. Luke Hadnot, Jr., was seated in the driver's seat. The mother was sitting on the front seat on the right-hand side, holding in her lap the child John W. Hadnot, who was alive and whimpering for her. And Luke R. Hadnot, Sr., father of the boys and owner of the 1955 Chrysler automobile, was sitting on the floor with his back against the left rear door with his feet sprawled out. All of the occupants of the automobile were either killed immediately in the collision, or died shortly thereafter. Even the family dog died on the way to the veterinarian. John W. Hadnot, plaintiff's intestate, the last surviving, expired at approximately 7:30 P.M., on that date, in the hospital.

Defendant's intestate, Luke R. Hadnot, Jr., was not a licensed automobile operator under the laws of either North Carolina or South Carolina. However, he was accustomed to driving the family automobile from time to time under the supervision of his mother or father, and his grandparents, likewise grandparents of plaintiff's intestate, knew of and condoned the operation by defendant's intestate.

Mr. Grady testified that after the collision "there was (were) water melon and ice cream carton containers in the car * * * on the floor, front and back, as I recall. The water melon was in eating slices, partly consumed."

There was testimony tending to show that the Hadnot Chrysler automobile involved in the accident was equipped with power steering mechanism; that there was nothing wrong with it; that it makes the steering wheel extremely sensitive to the touch; that you can steer a car with one finger; and that "a four-year old" could pull power steering enough to turn it.

At the close of plaintiff's evidence the defendant demurred thereto, and moved for judgment as of nonsuit. The motion was granted. Plaintiff excepted and appeals to Supreme Court, and assigns error.

McLendon, Brim, Holderness & Brooks, L. P. McLendon, Jr., Hubert B. Humphrey for plaintiff, appellant.

Smith, Moore, Smith, Schell & Hunter for defendant, appellee.

WINBORNE, C. J. The accident involved in present case, having occurred in the State of South Carolina, and the action having been instituted in the State of North Carolina, the parties concede (1) that the substantive law of South Carolina determines the cause of action maintainable by plaintiff as well as the measure of damages, *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82; (2) that the law of the forum governs in regard to matters of evidence, including the application of *res ipsa loquitur* doctrine and procedure, and including the joinder of claims for wrongful death and conscious pain and suffering. Restatement of the Law of Conflict of Laws, Sections 585, 587 and 595.

Appellant, in brief filed in this Court, states substantially this as the question here involved: Did the trial court err in granting the defendant's motion for nonsuit at the close of plaintiff's evidence? Stating, that basically this involves two questions of law: (1) Is the doctrine of *res ipsa loquitur* applicable to the facts at bar? And (2) Was plaintiff's intestate, a child of tender years, a "guest" within the meaning of the South Carolina Guest Statute, requiring proof of intentional, heedless or reckless conduct?

Negative answer to the first question is found in opinion delivered this day by this Court in the case of *Lane v. Dorney, ante,* 15, where an almost identical question is presented.

In the instant case, there is no evidence of any negligence on the part of anybody. The only established fact is that there was a collision when the automobile in which plaintiff's intestate was riding, traveling in its proper lane, "suddenly swerved sharply" head-on into the bridge abutment. What caused it nobody knows. The cause of it rests in the realm of conjecture, speculation and guesswork.

Therefore the second question becomes moot. It is immaterial whether plaintiff's minor intestate was a guest under the South Carolina Guest Statute or not. *Res ipsa loquitur* manifestly does not apply— for reasons shown in *Lane v. Dorney, supra.*

Hence the judgment as of nonsuit entered in court below is

Affirmed.

BOBBITT AND HIGGINS, J.J., concur in result.

STATE v. HAROLD JUNIOR HART.

(Filed 8 April, 1959.)

1. Automobiles § 38—

Testimony of a witness that when the car driven by defendant passed the car in which the witness was riding defendant's car was traveling 50 to 60 miles per hour, and that from the way in which the car "pulled on away from us" and the flash of the car's tail lights, observed almost to the moment of the accident, the car was traveling 70 to 80 miles per hour, is competent, the weight to be given the witness' estimate of speed being a matter for the jury.

2. Automobiles § 59— Evidence held sufficient to support conviction of involuntary manslaughter.

Evidence tending to show that defendant stated immediately before the trip in question that if the car would not make 115 miles per hour from that point to a certain curve, he would give the car to his companion, that defendant thereupon drove the car, with his companion as a passenger, and that the car turned over on the hard surface at the curve, resulting in the death of the passenger, that the State Highway Commission had erected a 35 mile per hour speed zone before the curve in question, together with testimony of a witness that the car was traveling 70 to 80 miles per hour just prior to the wreck, *is held* sufficient to be submitted to the jury in a prosecution for involuntary manslaughter, and further, the opinion testimony as to speed, if accepted by the jury, is alone sufficient to support the verdict.

APPEAL by defendant from *Gwyn, J.*, August 1958 Term of IREDELL.

Defendant was indicted for killing James Thomas Goode, Jr. The jury returned a verdict of guilty of involuntary manslaughter. Sentence was imposed and defendant appealed.

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

McLaughlin & Battley for defendant, appellant.

RODMAN, J. The criminal conduct charged is the operation of an automobile at an excessive and unlawful speed, causing the vehicle to turn over, thereby killing Goode, who was an occupant with defendant.

Defendant was the owner and operator of the automobile. It was stipulated that death was caused by the wrecking of the automobile.

Defendant argues there was no credible evidence from which a jury could find the automobile was being operated at an unlawful rate of speed and because of the absence of such evidence, his motion to nonsuit, his only assignment of error, should have been allowed.

To show unlawful speed and culpable negligence, the State offered

evidence from which the jury could find: The wreck occurred in a curve; the paved portion of the highway at that point is nineteen feet. Defendant was traveling east. The vehicle turned over in the paved portion of the highway, coming to rest sixteen feet west of the point where it turned over and headed in a westwardly direction. There were skid marks extending 177 feet west from the point where it turned over. The State Highway Commission had erected a 35 m.p.h. speed zone sign west of the point where the wreck occurred. Defendant and deceased had left a restaurant just before the wreck. At the restaurant defendant had boasted that the preceding night he had driven his car at a speed of 119 m.p.h. He told deceased if the car would not make 115 m.p.h. from there to the curve, he would turn the keys over to deceased and give him the car. Whereupon deceased said: "O.K., let's go." "(W)hen they left they left real fast and slid out just about sideways." The car passed the witness Kearns, who was traveling east at 30-35 m.p.h. He estimated defendant's speed at the moment of passing at 50-60 m.p.h. He did not observe defendant's car thereafter.

Witness Lawing, riding with Kearns, testified that defendant "passed us doing about 50 to 60 m.p.h. and he pulled on away from us. You could see his tail lights at certain points and then we seen the flash of his lights up in the air. I saw the car from the time it passed me till it reached the curve. In my own opinion I would say the car was going between 70 and 80. I base my opinion on the way he walked off and left us. He gradually pulled away from us and speeded up."

Defendant assumes that his conviction rests solely on the estimate by Lawing that he was going 70 to 80 m.p.h.; and based on that assumption, he asserts his motion to nonsuit should have been allowed because the testimony was lacking in probative value. Defendant cites *S. v. Roberson*, 240 N.C. 745, 83 S.E. 2d 798, and *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828, as supporting his contention. The opinion as to speed given in those cases was predicated on facts other than an observation of the moving vehicle.

Here the vehicle passed Lawing at an estimated speed of 50-60 m.p.h. He continued to observe it and noted the increase in speed. Defendant did not by exception challenge its competency.

Defendant's conviction does not rest solely on the testimony of Lawing. That testimony was competent and sufficient if accepted by the jury to support the verdict. The weight to be given to Lawing's estimate of speed was a matter for the jury. *Lookabill v. Regan*, 247 N.C. 199, 100 S.E. 2d 521; *S. v. Becker*, 241 N.C. 321, 85 S.E. 2d 327;

Harris v. Draper, 233 N.C. 221, 63 S.E. 2d 209; *Tyndall v. Hines Co., supra; Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170.

No error.

CHARLIE DUDLEY, BY HIS NEXT FRIEND, CALVIN DUDLEY v. ROBERT DUDLEY AND HIS WIFE, VERA MAE DUDLEY.

(Filed 8 April, 1959.)

Pleadings §§ 20½, 21—

Plaintiff has the right to move for leave to file an amended complaint upon three days' notice after judgment sustaining a demurrer from which no appeal is taken, but he does not have the right to file such amendment without notice and without leave, G.S. 1-131, and such amended complaint filed without notice or leave is properly dismissed, and the defendant may thereafter move that the action be dismissed for failure to comply with the statute.

APPEAL by plaintiff from *Gambill, J.,* December, 1958 Term, FORSYTH Superior Court.

Civil action to remove cloud upon title to specifically described real estate and have plaintiff declared to be the true owner. The defendant filed a demurrer to the complaint and on September 9, 1958, Judge Sharp entered a judgment sustaining the demurrer but retaining the cause for further orders. There was neither exception to, nor appeal from the judgment. On September 17, 1958, the plaintiff, without notice and without leave of the court, attempted to file an amendment to the original complaint. The defendant moved in writing "to dismiss the alleged amendment to the complaint," among other grounds, for failure to obtain leave of the court to file it. On November 21, 1958, Judge Gambill, after hearing, entered an order "That the amendment to the complaint filed in this cause on the 17 day of September, 1958, be, and the same is hereby dismissed." The plaintiff excepted and appealed.

Clyde C. Randolph, Jr., Robert M. Bryant for plaintiff, appellant.

J. F. Motsinger for defendants, appellees.

HIGGINS, J. G.S. 1-131 provides: "Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff

may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action." *Burrell v. Transfer Co.*, 244 N.C. 662, 94 S.E. 2d 829; *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409; *Teague v. Oil Co.*, 232 N.C. 469, 61 S.E. 2d 345.

The statute and the decisions authorized dismissal of the action if leave to amend is not obtained. Judge Gambill merely dismissed the amended complaint, thus leaving the cause upon the docket without a pleading. "An order sustaining the demurrer in effect merely strikes the complaint. The action remains on the docket *sans* a pleading and will be dismissed only in the event the plaintiff fails to amend or file a new complaint as he is by statute permitted to do." *Teague v. Oil Co., supra.*

Judge Gambill's order dismissing the amended complaint (filed without leave) did not dismiss the action but merely left it still pending without a pleading. The defendant has the right to move that the action be dismissed for failure to comply with the statutory requirement. The order dismissing the amended complaint is

Affirmed.

JAMES H. NANCE v. KENNETH J. LONG AND JUDITH P. LONG.

(Filed 8 April, 1959.)

1. **Appeal and Error § 42—**

Where the charge of the court declares and explains the law arising on all phases of the evidence and is without prejudicial error when considered contextually, an exception thereto will not be sustained.

2. **Appeal and Error § 46; 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 no appeal lies from the court's refusal to grant the motion.

APPEAL by plaintiff from *Sharp, S. J.*, September Civil Term, 1958, of FORSYTH.

This action was instituted for recovery of an alleged unpaid balance of indebtedness due plaintiff for labor performed and materials furnished under contract in the construction of a dwelling house for defendants. The defendants denied the alleged indebtedness. The jury returned a verdict favorable to the defendants.

From judgment upon the verdict plaintiff appeals, assigning error.

Robert M. Bryant for plaintiff, appellant.
Buford T. Henderson for defendants, appellees.

PER CURIAM. Plaintiff makes two assignments of error: (1) that the charge of the court upon a phase of the evidence does not comply with the requirements of G.S. 1-180, and (2) that the court erred in denying plaintiff's motion to set the verdict aside as being contrary to the weight of the evidence. This was a case for the jury, and the court submitted it upon proper issues. When the charge of the court is considered contexually as a whole, as we are required to do, it is clear that the learned Judge declared and explained the law arising on all phases of the evidence. *Motor Co. v. Ins. Co.*, 220 N.C. 168, 16 S.E. 2d 847. The refusal to set aside the verdict as being contrary to the weight of the evidence was a matter within the discretion of the court and no appeal lies therefrom. *Roberts v. Hill*, 240 N.C. 373, 82 S.E. 2d 373.

No Error.

IN THE MATTER OF THE WILL OF GEORGE TAYLOR, DECEASED.

(Filed 8 April, 1959.)

APPEAL by caveators from *Thompson, Special Judge*, October Civil Term, 1958, of GREENE.

The late George Taylor, a resident of Greene County, died June 7, 1957. The paper writing purporting to be his last will and testament, referred to in the issues, was probated in common form on June 18, 1957. Under its terms, Annie Taylor, widow of George Taylor, was sole beneficiary and executrix. She qualified and acted as executrix.

Annie E. Taylor died January 18, 1958, intestate. Neither George Taylor nor Annie Taylor was survived by lineal descendants. A caveat was filed February 8, 1958. The caveators are the heirs and next of kin of George Taylor, deceased. The propounders are (1) the Administrator c.t.a.d.b.n. of the Estate of George Taylor, deceased, (2) the Administrator of the Estate of Annie Taylor, deceased, and (3) the heirs and next of kin of Annie Taylor, deceased.

Issues raised by the pleadings were submitted to and answered by the jury, to wit: "1. Was the paper writing dated April 29, 1957, and offered for probate as the last will and testament of George Taylor, deceased, signed and executed according to law? ANSWER: Yes. 2. If so, did the said George Taylor, deceased, on April 29, 1957, have

sufficient mental capacity to make and execute a valid Last Will and Testament? ANSWER: Yes. 3. If so, was the execution of the said Last Will and Testament procured by undue influence, as alleged in the Caveat? ANSWER: No. 4. Is the paper writing, and every part and clause thereof, the Last Will and Testament of George Taylor, deceased? ANSWER: Yes."

Thereupon, the court adjudged that said paper writing and every part and clause thereof is the last will and testament of George Taylor, deceased, and taxed the costs, including allowances to counsel for both propounders and caveators, against the estate of George Taylor, deceased.

The caveators excepted and appealed.

Jones, Reed & Griffin for caveators, appellants.
Lewis & Rouse for propounders, appellees.

PER CURIAM. The evidence offered by the respective interested parties was in sharp conflict. The issues, submitted under instructions in substantial accord with well settled legal principles, were resolved in favor of the propounders. We have carefully considered each of caveators' forty assignments of error. Suffice to say, none discloses error deemed sufficiently prejudicial to caveators to warrant a new trial.

No error.

STATE v. JAMES CHESTER OAKLEY.

(Filed 8 April, 1959.)

APPEAL by defendant from *Williams, J.*, September, 1958 Term, PERSON Superior Court.

Criminal prosecution upon a warrant charging the defendant with the unlawful operation of a motor vehicle upon the public highways while he was under the influence of intoxicating liquor. From a conviction and judgment of the County Court of Person County, the defendant appealed to the Superior Court, and from a jury verdict of guilty and judgment there, he appealed, assigning errors.

Malcolm B. Seawell, Attorney General, T. W. Bruton, Assistant Attorney General for the State.
T. Jule Warren for defendant, appellant.

PER CURIAM. The State's evidence tended to show the defendant was driving a certain automobile upon the public highways. The defendant's evidence tended to show one of the defendant's companions was the driver. All the evidence tended to show the defendant was intoxicated. The contest involved a question of fact as to the identity of the driver. The jury resolved the issue against the defendant.

No Error.

WILLIAM HENRY BELK v. BELK'S DEPARTMENT STORE OF COLUMBIA, S. C., INC., A CORPORATION, JOHN M. BELK, IRWIN BELK AND THOMAS M. BELK.

(Filed 15 April, 1959.)

1. Judgments § 18—

The validity of a judgment *in personam* is dependent upon jurisdiction over the person of the defendant.

2. Same: Corporations § 25—

A judgment *in personam* can be rendered against a foreign corporation only when it exercises its corporate functions within the State.

3. Process § 8c—

Findings to the effect that the majority of the officers and directors of a foreign corporation maintained their offices in this State, that meetings of its board of directors was held here except for one meeting a year under the requirement of the state of its incorporation, that its officers within this State purchased substantial quantities of merchandise here for the corporation, that its accounting is performed here, etc., are sufficient to support adjudication that service on the corporation by service on its president and executive officer in this State constituted valid service.

4. Corporations § 4—

The directors of a corporation are entrusted with the actual management of the corporate affairs by the shareholders, and no external authority should interfere with their exercise of the power so entrusted to them when the power is honestly exercised for the benefit of the corporation and all of its shareholders.

5. Corporations § 19—

Courts will not interfere with the discretionary power vested in the directors of a corporation with respect to the declaration of dividends when such power is honestly exercised, but a court of equity will intervene only when it is made to appear that the directors are acting in bad faith and clearly abusing their discretion for some ulterior and improper purpose.

6. Courts § 3—

There is a distinction between the power of a court of equity to exercise jurisdiction and the expediency of exercising its jurisdiction, and ordinarily a court of equity will not exercise its jurisdiction if it lacks the power to enforce its decree.

7. Same: Corporations §§ 19, 25—

Whether the courts of this State will entertain an action to compel the declaration of a dividend by a foreign corporation rests on expediency and convenience, G.S. 55-133(a), and where in such action it appears that the foreign corporation is doing business here, that the question of declaring dividends had heretofore been determined by its directors in regular meetings in this State, and that the court has power to enforce any decree it may render by order directed to a majority of the directors of the corporation who reside here, motion to dismiss the action for want of jurisdiction is properly denied.

APPEAL by Belk's Department Store of Columbia, S. C., Inc., from *Craven, S. J.*, September 1st 1958 Special Civil Term of MECKLENBURG.

Plaintiff, a resident of Florida, the owner of 1227 out of a total of 8000 shares of stock issued by Belk's Department Store of Columbia, S. C., Inc. (hereafter designated as Department Store) seeks to compel the declaration and payment of a cash dividend and an injunction prohibiting the use of corporate funds except as may be customary and appropriate in the operation of a department store as authorized by the charter of Department Store.

The individual defendants are stockholders and directors of Department Store. They reside in Mecklenburg County. Process has been served on them in their home county. Process was served on Department Store by delivering a copy of the summons and a copy of the complaint to John M. Belk, its president.

Department Store entered a special appearance and moved to dismiss for that (1) it was a foreign corporation which had not domesticated or done business in North Carolina; hence the service on its president gave the court no jurisdiction over it, and (2) the action involved the internal affairs of a foreign corporation, and as to such cause of action the court was without, or should not exercise, jurisdiction. No challenge is made with respect to the sufficiency of the facts alleged to justify a South Carolina court in awarding the requested relief.

The court heard evidence and, based thereon, made findings which, so far as pertinent to a decision, are summarized as follows: Department Store was incorporated in South Carolina on 23 December 1930. It was organized to conduct a general mercantile business, both wholesale and retail. Its principal place of business is Columbia, S. C.; but

it is authorized to have branch offices or places of business in or outside of South Carolina. John M. Belk is a director and president, Irwin Belk is a director and co-ordinating vice-president, Thomas M. Belk is a director and assistant secretary-treasurer. The board of directors is composed of the individual defendants and Henderson Belk, Charlotte, N. C., and Sarah Belk Gambrell, New York, N. Y. She is also assistant treasurer. The other officer of the corporation is Norman N. Scott, Columbia, S. C., who is executive vice-president and secretary. Department Store conducts a mercantile business in Columbia where it regularly employs more than 300 and in holiday periods more than 450. It does not have a store outside of Columbia nor does it have any individual employee, officers excepted, outside of South Carolina.

All stockholders' meetings, except one each year as required by South Carolina law, have been held at 308 East 5th Street, Charlotte, N. C. There the individual defendants maintain their offices. There in annual session the stockholders elect the directors. There the board of directors regularly meet, elect officers, hear reports, review the company's fiscal affairs, and make decisions. The book of stock certificates, the stock register, the corporate seal are all kept in Charlotte. The minutes of the stockholders' and directors' meetings are prepared and kept in Charlotte. There the president maintains his office "where he performs the duties of chief executive officer of the defendant corporation. In such capacity, the said President of the defendant corporation exercises control over and discretionary power in respect to the corporate functions of the defendant corporations." There Irwin Belk and Thomas M. Belk maintain their offices "where they also engage in the transaction of business for the corporate defendant and in the exercise of executive control over and discretionary power with respect to the corporate functions of the defendant corporation." Some of the duties performed by these officers in Charlotte relate to "the purchase of substantial quantities of merchandise at Charlotte, N. C., in a regular and continuous fashion, which also involves the attendance at frequent intervals during each year at Charlotte, N. C., of numerous employees of the corporate defendant for the purpose of selecting and ordering merchandise." Accounting and auditing services, including the preparation of income tax returns, are performed in Charlotte as are purchases of all types and kinds of insurance, office supplies, wrapping paper, order books, and office equipment. The investment of corporate funds, purchase of stock in other corporations, leases and purchases of property, designing of merchandise, selection of trade names and the development of sales and adver-

tising policies are handled in Charlotte. From the inception of the corporation all transfers of stock have been made and stock dividends issued at the above address in Charlotte, N. C.

The stock, according to unchallenged allegations, of the company is owned as follows:

	shares
W. H. Belk	1227
John M. Belk	1227
Henderson Belk	1227
Thomas M. Belk	1227
Irwin Belk	1227
Sarah Belk Gambrell	1227
Belk's Department Store of Batesburg, S. C., Inc.	318
Trustees under the Will of W. H. Belk, Sr., deceased	320
Total outstanding shares	8000

Based on the findings so made, the court concluded Department Store was engaged in business in North Carolina when process was served on it by delivering copy to its president, and that the court had jurisdiction of the parties and cause of action. It denied the motion to dismiss. Department Store excepted and appealed.

Weinstein & Muilenburg for plaintiff, appellee.

Helms, Mulliss, McMillan & Johnston and David M. McConnell for defendant, appellant.

RODMAN, J. The validity of an *in personam* judgment is of course dependent on jurisdiction over the person of the defendant. *Pennoyer v. Neff*, 95 U.S. 714, 24 L. ed. 565; *Rutherford v. Ray*, 147 N.C. 253; *Doyle v. Brown*, 72 N.C. 393. It follows that a judgment *in personam* can only be rendered against a foreign corporation when it has exercised its corporate functions within the State. *Lambert v. Schell*, 235 N.C. 21, 69 S.E. 2d 11; *Goldey v. Morning News*, 156 U.S. 518, 39 L. ed. 517.

"Whether a foreign corporation is doing business in North Carolina, so as to subject it to the jurisdiction of the State's Courts, is essentially a question of due process of law under the U. S. Constitution, Amendment 14 (1), which must be decided in accord with the decisions of the U. S. Supreme Court." *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057, the Supreme Court decided that "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.' "

Based on the findings made by the court, it is manifest that "traditional notions of fair play and substantial justice" do not immunize Department Store from service of process and *in personam* judgments by the courts of this State. *Shepard v. Manufacturing Co.*, 249 N.C. 454; *Painter v. Finance Co.*, 245 N.C. 576, 96 S.E. 2d 731; *Harrington v. Steel Products, Inc.*, 244 N.C. 675, 94 S.E. 2d 803; *Lambert v. Schell, supra; Lightner v. Pilgrim Paper Corp.*, 152 F Supp. 504; *Perkins v. Benguet Consol. Min. Co.*, 107 N.E. 2d 203 (Ohio); *Moe v. Stearns*, 288 F 992; *Johnson v. Atlantic & Pacific Fisheries Co.*, 224 P 13 (Wash.); *Sterling Nov. Corp. v. Frank & Hirsch D. Co.*, 86 N.E. 2d 564, 12 A.L.R. 2d 1435 (N.Y.); *Hartstein v. Seidenbach's Inc.*, 222 N.Y.S. 404; *Fleischmann Const. Co. v. Blauner's*, 179 N.Y.S. 193.

Admittedly, the court had jurisdiction of the individual defendants, who are officers of and constitute the majority of the board of directors of Department Store.

Did the court have jurisdiction of the asserted cause of action?

Normally private corporations are created to permit the use of funds contributed by a designated minimum number of shareholders for the operation of a commercial enterprise of the kind specified in the charter. The funds are provided by the shareholder upon the assumption they will be profitably used, and he will benefit thereby. The statutes of South Carolina recognize the motives which prompt the creation and continued operation of business corporations. Code of Laws of S. C., 12-201 and 12-651.

Stock ownership in this country has reached such proportions that many corporations list more than 50,000 shareholders, and some have in excess of 500,000 shareholders.

Actual management of corporate affairs is entrusted by the shareholders to a board of directors. Shareholders elect as directors those in whom they have confidence because of known or reputed integrity or ability. Given, as they are by the shareholders, the power to manage, it necessarily follows that no external authority should interfere with the exercise of the power so entrusted when honestly exercised for the benefit of the corporation and all of its shareholders.

One of the important duties imposed on directors is the ascertainment of a fiscal policy best adapted to the needs of the corporation. An incident to this policy is a determination of the course to pursue

with respect to the declaration of dividends. What part of the profits should be disbursed to the shareholders and when the disbursements should be made are of utmost importance to the corporation and its shareholders. Courts will not interfere with the discretionary power vested in the directors with respect to dividends when honestly exercised; but when it is made to appear that the directors are acting in bad faith and clearly abusing their discretion for some ulterior and improper purpose, a court of equity will intervene and require the declaration and payment of a dividend to prevent what is in effect a fraud on shareholders. *Gaines v. Mfg. Co.*, 234 N.C. 331, 67 S.E. 2d 355; *Gaines v. Mfg. Co.*, 234 N.C. 340; 67 S.E. 2d 350; *Johnson v. Brandon Corp.*, 69 S.E. 2d 594 (S.C.); *Thompson v. Thompson*, 51 S.E. 2d 169 (S.C.); *Kroese v. General Steel Castings Corp.*, 179 F 2d 760, 15 A.L.R. 2d 1117; Fletcher, Cyc. Corporations (Perm. ed.) sec. 5325; 13 Am. Jur. 678; 18 C.J.S. 1112.

Some courts have stated that they did not have jurisdiction of a suit against a foreign corporation which involved questions of management and fiscal policies. *Condon v. Mutual Reserve Assn.*, 73 Am. St. Rep. 169 (Md.); *Fuller v. Ostruske*, 296 P 2d 996 (Wash.); *Relief Assn. v. Equitable Assur. Soc.*, 42 N.E. 2d 653 (Ohio); *Boyette v. Preston Motors Corp.*, 89 So. 746 (Ala.).

It is not, we think, a question of the power to judge but the ability to secure the evidence to properly judge or power to enforce the judgment which controls. There is a distinction between the power to exercise and the wisdom of exercising jurisdiction. The distinction is, we think, aptly phrased by the Supreme Court of Illinois in *Babcock v. Farwell et al.*, 91 N.E. 683, 19 Ann. Cas. 74: "The reasons which influence courts of chancery to refuse to interfere in the management of the internal affairs of a foreign corporation are, that the rights arising between a corporation and its members out of such management depend on the laws of the State under which the corporation is organized; that the courts of that state afford the most appropriate forum for adjudication upon the relation between the stockholders and the corporation, and that frequently such courts alone possess power adequate to the enforcement of all decrees that justice may require. It is the inability of the court to do complete justice by its decree, and not its incompetency to decide the question involved, that determines the exercise of its power. The general statement that courts will not interfere with the management of the internal affairs of foreign corporations must be construed in connection with the facts. The rule rests more on grounds of policy and expediency than on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it."

This is, we think, the basis on which the majority of the courts have acted in refusing to exercise jurisdiction. *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 77 L. ed. 652, 89 A.L.R. 720; 23 Am. Jur. 425, 426; 20 C.J.S. 99; Fletcher, Cyc. Corporations (Perm. ed.) sec. 8427. In *Brenizer v. Royal Arcanum*, 141 N.C. 409, and *Howard v. Insurance Co.*, 125 N.C. 49, this Court recognized the inability of the courts of this State, on the facts established in those cases, to enforce any decree which might be entered with respect to the management of the foreign corporation, and because of such want of authority, jurisdiction was denied.

In 1955 the Legislature declared the policy of this State. It enacted: "No action in the courts of this State shall be dismissed solely on the ground that it involves the internal affairs of a foreign corporation but the court may in its discretion dismiss such an action if it appears that more adequate relief can be granted or that the convenience of the parties would be better served by an action brought in the jurisdiction of its incorporation or in the jurisdiction where the corporation has its executive or managerial headquarters or, because of the circumstances, in some other jurisdiction." G.S. 55-133(a).

The authors of the bill which contained this provision directed this comment to the Legislature: "While the doctrine of nonintervention in the internal affairs of a foreign corporation is still frequently asserted, the courts have increasingly taken jurisdiction in cases which that doctrine would seem to deny. At this date it is believed that a test more nearly approaching 'forum non-conviens' should govern the court's decision and that a statute making that apparent would represent a sound innovation."

The individual defendants demurred to the complaint for the same reasons assigned by Department Store in its motion to dismiss, i.e., lack of jurisdiction over the asserted cause of action. Their demurrer was overruled.

Defendants have not asserted that the facts alleged, if established, are insufficient to justify a proper court of competent jurisdiction in awarding plaintiff appropriate relief. For that reason we have not stated the facts on which plaintiff bases his right to the relief demanded. The law in South Carolina with respect to the facts to be established before a court will interfere and direct the payment of a cash dividend is stated in *Thompson v. Thompson, supra,* and *Johnson v. Brandon Corp., supra.*

Based on the findings, specifically including the finding that the question of declaring dividends had heretofore been determined in Charlotte and not in South Carolina, coupled with the fact that the

court has power to enforce such decree as it may render by orders directed to the directors who are present before it constituting the majority of the board, and the conclusion which the court drew that the convenience of the parties would not be better served by an action in the State of its incorporation, we are of the opinion and hence hold that the motion to dismiss was properly denied.

Affirmed.

CRAIN AND DENBO, INC. v. HARRIS & HARRIS CONSTRUCTION COMPANY, INC., AND AETNA INSURANCE COMPANY.

(Filed 15 April, 1959.)

1. **Venue § ½: Courts § 3—**

The Superior Court is one court having statewide jurisdiction, and the question of venue is not jurisdictional.

2. **Same—**

Venue is exclusively statutory.

3. **Insurance § 1: Process § 8c—**

Compliance with G.S. 58-150 by a foreign insurance company gives it the right to sue and be sued in our courts under the rules and statutes applicable to domestic corporations and designates the State Commissioner of Insurance its true and lawful attorney upon whom all lawful process against it may be served, but does not constitute Wake County the principal office of such company for the purpose of determining venue.

4. **Corporations § 2—**

Statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read *in pari materia*, but G.S. 58-150 does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business, and where it has not done so, compliance with G.S. 58-150 does not constitute Wake County the county of its residence.

5. **Venue § 1a—**

Where the evidence discloses that neither the foreign insurance company nor the domestic corporation, sued jointly as defendants, had its principal place of business in Wake County, neither is entitled to have the cause, instituted in another county, removed to Wake County as a matter of right, and the contention of the insurance company that its compliance with G.S. 58-150 rendered Wake County the county of its residence for the purpose of venue, is untenable. G.S. 1-79, G.S. 1-82.

CRAIN AND DENBO, INC. *v.* CONSTRUCTION CO.

APPEAL by defendants from *Paul, J.*, August Civil Term 1958 of WAYNE.

Civil action to recover damages for an alleged breach of a subcontract entered into between plaintiff and Harris & Harris Construction Company, Inc., and for an alleged breach by Harris & Harris Construction Company, Inc., as principal, and by Aetna Insurance Company, as surety, of a bond given by them jointly and severally to indemnify plaintiff against any breach of the subcontract by Harris & Harris Construction Company, Inc., heard upon a separate and similar motion by each defendant to remove the action for trial as a matter of right to the Superior Court of Wake County.

From a denial of the motions for removal of the action as a matter of right by the Clerk of the Superior Court of Wayne County, each defendant appealed to the Judge of the Superior Court.

The Judge hearing the appeal from the Clerk's order, after considering the complaint, the affidavits offered in evidence, and the arguments of counsel, made findings of fact, which are not excepted to by defendants, and are summarized as follows:

This action was instituted by plaintiff in the Superior Court of Wayne County by issuance of summons on 21 April 1958. The summons were duly served on each of the defendants, and each of them on 19 May 1958 filed separate motions within the time allowed by law to remove the action as a matter of right to the Superior Court of Wake County for trial.

Plaintiff is a North Carolina corporation, and has its principal office in Durham, North Carolina. Defendant, Harris & Harris Construction Company, Inc., is a North Carolina corporation, and has its principal office in Durham, North Carolina. Defendant, Aetna Insurance Company, is a Connecticut corporation, and has its principal office in Hartford, Connecticut. The Aetna Insurance Company has complied with the provisions of N. C. G. S. Section 58-150, and was, at all times relevant to this action, admitted and authorized to do business in North Carolina, which business included the writing of insurance policies and the executing of indemnity bonds as surety.

The Aetna Insurance Company has not filed with the Commissioner of Insurance of North Carolina any instrument in writing designating a registered or principal office in North Carolina, and there are no official records on file in the office of the State Commissioner of Insurance indicating that the Aetna Insurance Company has a registered or principal office in Wake County.

The Aetna Insurance Company maintains in Charlotte, Mecklenburg County, North Carolina, a supervisory office. Earl K. Whitney,

who lives in Mecklenburg County, is manager of this office, and is secretary of the Aetna Insurance Company in North Carolina. This office in Charlotte supervises all of the local and special agents and adjusters of the Aetna Insurance Company throughout North Carolina, including offices located in Winston-Salem and Raleigh, North Carolina.

No motion has been made by any of the parties that this action should be removed for trial to the Superior Court of Durham County.

The complaint alleges that Harris & Harris Construction Company, Inc., entered into a subcontract with plaintiff to construct and install certain water and sewer improvements for the Town of Mt. Olive, Wayne County, North Carolina, and that Harris & Harris Construction Company, Inc., as principal, and Aetna Insurance Company, as surety, executed and delivered to plaintiff their joint and several bond indemnifying plaintiff against loss upon failure of Harris & Harris Construction Company, Inc., to perform the said subcontract, and that there has been a breach of the subcontract and of the bond.

From the facts found by the Judge, he made the following conclusions of law:

"1. That by Statutory direction, G.S. 58-150, the defendant, Aetna Insurance Company, has constituted and appointed the Commissioner of Insurance as its true and lawful attorney upon whom all lawful process in any action or legal proceeding against said defendant in this State may be served; that the purpose of this Statute is limited solely to the designation of said Commissioner of Insurance as process agent upon whom service on said defendant, Insurance Company, may be made; that compliance with this Statute by the defendant, Aetna Insurance Company, does not constitute the office of the Commissioner of Insurance of North Carolina as the registered or principal office of said Company in this State.

"2. That Wake County is not a proper county for the removal of this cause of action; that the defendants are not entitled, as a matter of right, to have said action removed to Wake County."

Whereupon, the Judge entered an order denying the motion of each defendant, and each defendant appealed to the Supreme Court. Harris & Harris Construction Company, Inc., has filed no brief in the Supreme Court.

Fletcher & Lake By: I. Beverly Lake for Aetna Insurance Company, appellant.

No Counsel for Harris & Harris Construction Company, Inc., appellant.

Taylor, Allen & Warren By: L. C. Warren, Jr., and E. C. Brooks for Crain and Denbo, Inc., appellee.

PARKER, J. The Aetna Insurance Company has three assignments of error. The first two are to Judge Paul's conclusions of law Numbers One and Two, and the third is to the entry of the order. Harris & Harris Construction Company, Inc., filed no brief in this Court, but it has three similar assignments of error in the Record.

Neither of the defendants has any exception to Judge Paul's findings of fact. A reading of the Record shows that they are supported by competent evidence, and there seems to be no controversy in respect to their correctness.

Judge Paul in his order did not pass upon the question as to whether or not Wayne County is a proper venue for the trial of this action.

The jurisdiction of the Superior Court of Wayne County is not challenged.The Superior Court is one court having statewide jurisdiction. *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723; *Rhyne v. Lipscombe,* 122 N.C. 650, 29 S.E. 57.

The sole question presented for decision of this appeal by the Aetna Insurance Company is this: Does the Aetna Insurance Company have the right to have this action removed to the Superior Court of Wake County for trial?

The point here is one of venue. "The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. *Cooperage Co. v. L. Co.,* 151 N.C. 456. It deals with procedure and is not jurisdictional, in the absence of statutory provisions to that effect." *Latham v. Latham,* 178 N.C. 12, 100 S.E. 131.

N. C. G. S. 58-150 prescribes the conditions for a foreign insurance company to be admitted and authorized to do business in North Carolina. Judge Paul found as a fact that the Aetna Insurance Company has complied with the provisions of this statute, and was, at all times relevant to this action, admitted and authorized to do business in the State, which business included, among other things, the execution of indemnity bonds as surety. The Aetna Insurance Company contends that having complied with the requirements of N. C. G. S. 58-150, and having, pursuant to this statute, designated the North Carolina Commissioner of Insurance as its agent for service of process, it thereby fixed Wake County as its residence in North Carolina for purposes of venue.

When the Aetna Insurance Company, pursuant to N. C. G. S. 58-150(3), designated the State Commissioner of Insurance its true and lawful attorney upon whom all lawful processes in any action

against it may be served, it created "a passive agency" for the service of lawful process alone, and the statute gives no authority to the Commissioner even to accept service of process for the Aetna Insurance Company. *Hodges v. Insurance Co.*, 232 N.C. 475, 61 S.E. 2d 372. N. C. G. S. 58-150(3) provides residents of this State a simple procedure to be followed in obtaining service of lawful process upon foreign insurance companies doing business here, and nothing more. There cannot be read into the clear language of N. C. G. S. 58-150(3) the contention of the Aetna Insurance Company, that when it designated the State Commissioner of Insurance its agent for service of process, it thereby fixed Wake County as its residence in North Carolina for purposes of venue. If the General Assembly had so intended, as contended by the Aetna Insurance Company, it would have incorporated language to that effect in the statute.

However, when the Aetna Insurance Company complied with the provisions of N. C. G. S. 58-150, it acquired the right to sue and be sued in the State courts under the rules and statutes, which apply to domestic corporations. *Noland Co. v. Construction Co.*, 244 N.C. 50, 92 S.E. 2d 398; *Hill v. Greyhound Corp.*, 229 N.C. 728, 51 S.E. 2d 183; *Nutt Corp. v. R. R.*, 214 N.C. 19, 197 S.E. 534; *Insurance Co. v. Lawrence*, 204 N.C. 707, 169 S.E. 636; *Smith-Douglass Co. v. Honeycutt*, 204 N.C. 219, 167 S.E. 810. For purposes of venue, it is generally held that domesticated foreign corporations are residents of the state in which they have been domesticated. Annotation 126 A.L.R. 1510.

Provisions in our statutes "referring to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read *in pari materia*, subject to the limitation that domestication does not deprive the Federal courts of their jurisdiction in respect to foreign corporations." *Noland Co. v. Construction Co., supra.*

The Aetna Insurance Company states in its brief: "G.S. 1-80, dealing with the venue of suits against foreign corporations likewise has no application to this case. The defendant, Aetna Insurance Company, has been domesticated in North Carolina since 1901. It is, therefore, treated as a domestic corporation for purposes of venue."

Hill v. Greyhound Corp., supra, was a transitory action, as this instant case is a transitory action, heard on a motion to remove the action to Forsyth County for trial. Plaintiff was a nonresident of North Carolina. Defendant is a foreign corporation duly domesticated in this State, with its principal place of business in this State, in Winston-Salem, North Carolina. The Court said: "The plaintiff contends that, inasmuch as defendant is a foreign corporation, venue in this

cause is controlled by G.S. 1-80. The defendant insists that for the purpose of suing and being sued the defendant is in effect a domestic corporation and the proper venue for the trial of this case is the county of its residence. G.S. 1-79, 1-82. The contention of the defendant must prevail. . . . Since the plaintiff is a nonresident and the defendant, for the purposes of this action, is a resident of Forsyth County, G.S. 1-82 is controlling and Forsyth County is the proper venue for the trial of this cause." When the *Hill* case was decided N. C. G. S. 1-79 read: "For the purpose of suing and being sued the principal place of business of a domestic corporation is its residence."

The General Assembly in 1951 Session Laws, Chapter 837, amended G.S. 1-79 to read as follows: "For the purpose of suing and being sued the principal office of a domestic corporation, as shown by its certificate of incorporation pursuant to G.S. 55-2, is its residence." In *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732, (1953) the Court said: "And the words 'principal place of business,' as so used in the statute, G.S. 1-79, are regarded as synonymous with the words 'principal office' as used in the statute G.S. 55-2 requiring the location of the principal office in this State to be set forth in the certificate of incorporation by which the corporation is formed."

This Court said in *Noland Co. v. Construction Co.*, (1956), *supra*: "The location of the principal office and place of business of a corporation is a fact. The instrument a foreign domesticated corporation is required to file in the office of the Secretary of State, G.S. 55-118, is merely notice of that fact. It is not require dfor the benefit of the corporation but for the information of the public. And it does not, in and of itself, fix the location of the place of business of the corporation which files the same." The *Noland* case does not involve a foreign insurance company.

G.S. 1-79, as rewritten by the 1957 General Assembly, now reads: "For the purpose of suing and being sued, the residence of a domestic corporation is as follows: (1) Where the registered office of the corporation is located. (2) If the corporation having been formed prior to July 1, 1957 does not have a registered office in this State, but does have a principal office in this State, its residence is in the county where such principal office is said to be located by its certificate of incorporation, or amendment thereto, or legislative charter."

G.S. 58-150 does not require a foreign insurance corporation desiring to be admitted and authorized to do business in North Carolina to file a statement in the office of the Commissioner of Insurance setting forth its "principal place of business" or "principal office" or "a registered office."

N. C. G. S. 1-82 reads in part: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement."

In *Bank v. Kerr,* 206 N.C. 610, 175 S.E. 102, the plaintiff was a corporation organized and doing business under the laws of the United States, with its principal office in the City of Durham, Durham County, North Carolina. The defendants were citizens of the State, and residents of Sampson County. The Court said: "Durham County is the proper venue for the trial of the action." Citing C.S. 469, now N. C. G. S. 1-82, and cases.

This is said in 13 Am. Jur., Corporations, Section 148: "In the absence of express statutory provision fixing the locality of the residence of a corporation for particular purposes within the state by which it was created, the general rule is that its residence is where its principal office or place of business is."

Judge Paul's findings of fact show that the Aetna Insurance Company has no registered or principal office located in Wake County. Therefore, it is not entitled as a matter of right to have this action removed for trial to Wake County by virtue of N. C. G. S. 1-79.

Judge Paul's further findings of fact show that the Aetna Insurance Company maintains in Charlotte, Mecklenburg County, North Carolina, a supervisory office, that this office supervises all of the local and special agents and adjusters of the company throughout North Carolina, including offices located in Winston-Salem and Raleigh, North Carolina, and that Earl K. Whitney, who lives in Mecklenburg County, is manager of this office, and secretary of the company in North Carolina. This finding of fact, not excepted to by the Aetna Insurance Company and supported by competent evidence, shows that the Aetna Insurance Company, for purposes of venue, is not a resident of Wake County, within the purview of N. C. G. S. 1-82.

Insurance Co. v. Lawrence, supra, is easily distinguishable. In that case the plaintiff, a foreign insurance company, was duly domesticated in North Carolina, with its head office and principal place of business in the City of Raleigh, Wake County, North Carolina. All of its records are kept in its head office and principal place of business in Raleigh, which is the place of business of all the offices of the company. Its by-laws provide that the principal and head office shall be in Raleigh, and that meetings of stockholders, directors and the executive committee shall be held in the principal and head office.

The Aetna Insurance Company is not entitled as a matter of right to remove this action for trial to the Superior Court of Wake County, and its assignments of error are overruled.

Harris & Harris Construction Company, Inc. is a North Carolina corporation, and has its principal office in Durham County, North Carolina. It is not entitled as a matter of right to remove this action for trial to the Superior Court of Wake County, and its assignments of error appearing in the Record are overruled. N. C. G. S. 1-79—1-82.

The order entered by Judge Paul is

Affirmed.

STATE v. RAYMOND BRYANT, DAVID LEE HICKS, BENNIE LEE FORD, WILLIAM ALLEN ATKINSON, HENRY WILLIAMS, WILLIAM EDWARD WILSON, ELOYSE FORD.

(Filed 15 April, 1959.)

1. Criminal Law § 87—

Separate indictments for rape are properly consolidated for trial when the charges relate to successive rape of the same person by defendants, and each of the convicted defendants, in the presence of the others, confesses that in the presence of the others he had sexual intercourse with the prosecuting witness forcibly and against her will, since the crimes are the same and are so connected that evidence at the trial upon one of the indictments would be competent and admissible in the trial of the others. G.S. 15-152.

2. Criminal Law § 101—

Discrepancies and contradictions, even in the testimony of the prosecuting witness, do not justify nonsuit, but are for the jury and not the court to resolve.

3. Rape § 4—

The evidence tending to show the guilt of each defendant, including the confession of each in the presence of the others, *is held* sufficient to show that each had sexual intercourse with the prosecutrix by force and against her will, and discrepancies in the testimony of the prosecuting witness as to circumstances preceding the commission of the offenses do not justify nonsuit.

APPEAL by defendants from *Paul, J.*, November Term, 1958, of WAYNE.

This is a criminal action. The defendants were charged in separate bills of indictment with rape. The respective bills of indictment charged that the defendant named therein, "on or before the 24th day of August, 1958, with force and arms, at and in the county aforesaid, did, unlawfully, wilfully and feloniously ravish and carnally know Mrs. Leslie Gerald Strickland, a female, by force and against her will" etc.

The Solicitor for the State moved to consolidate all seven cases for the purpose of trial. The motion was allowed. The defendants objected and excepted.

There is ample evidence that the prosecuting witness was first assaulted by the defendant David Lee Hicks, while she was walking in an alley or path across a field around 10:30 o'clock on the night of 24 August 1958. The evidence tends to show that while the prosecuting witness was walking along Elm Street in Goldsboro, the defendant Hicks passed the prosecuting witness and spoke to her. She inquired of him where a certain family lived; he directed her to an alley or path off Leslie Street. After she had proceeded a short distance along the alley, she was seized from behind by Hicks. She struggled to free herself but was unable to do so. Hicks had sexual intercourse with her, and before he finished the defendant Wilson appeared on the scene and helped remove some of her clothing. Almost immediately thereafter the other defendants appeared. Hicks again had sexual intercourse with her before the others did.

The evidence is to the effect that each of the defendants had sexual intercourse with the prosecuting witness, forcibly and against her will; that some of the defendants, after having sexual intercourse with her, left the immediate group but remained nearby. Testimony further tends to show that at all times while the respective defendants were having sexual intercourse with the prosecuting witness, she was being held by some of the other members of the group, except when Hicks had intercourse with her the first time.

The defendants were arrested and each thereafter admitted to police officers that he did have sexual intercourse with the prosecuting witness, forcibly and against her will, at the time and place charged. All of these defendants were together when they made their oral confessions, except Eloyse Ford who was arrested later and who also admitted that he did have sexual intercourse with the prosecuting witness, forcibly and against her will as charged.

When the oral confessions were offered in evidence, counsel for the defendants asked to be heard on the voluntariness of the statements made by the defendants. The court heard the evidence in the absence of the jury; whereupon, counsel for the defendants stated in open court "that they did not question the voluntariness of the statements made by the several defendants to Mr. Carter" (the chief detective of the Goldsboro Police force and the officer who was testifying about the confessions). The jury returned to the courtroom and the confessions were admitted.

At the conclusion of all the evidence the defendants Henry Williams

and Eloyse Ford pleaded guilty, which pleas were accepted by the State. At that time the court instructed the jury that the cases against these two defendants were no longer before them and would not be considered by them.

The jury returned a verdict of guilty of rape as to all the remaining defendants with the recommendation that punishment of life imprisonment in the State's Prison be imposed as to the defendants Raymond Bryant, Bennie Lee Ford, William Allen Atkinson and William Edward Wilson. As to the defendant David Lee Hicks, the verdict of the jury was guilty of rape without making any recommendation. Accordingly, the sentence of death was pronounced against him. A sentence of life imprisonment was entered as to each of the other defendants, including Eloyse Ford and Henry Williams who pleaded guilty.

From the sentences imposed, the defendants Raymond Bryant, David Lee Hicks, Bennie Lee Ford, William Allen Atkinson and William Edward Wilson appeal, assigning error.

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

Herbert B. Hulse, Mitchell E. Gadsen, Earl Whitted, Jr., for the defendants.

DENNY, J. The defendants' first assignment of error is based on their exception to the ruling of the trial court in granting the Solicitor's motion to consolidate the cases for trial.

The general rule with respect to the consolidation of criminal cases is stated in *S. v. Combs,* 200 N.C. 671, 158 S.E. 252. "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C.S. 4622 (now G.S. 15-152). *S. v. Cooper,* 190 N.C. 528, 130 S.E. 180; *S. v. Jarrett,* 189 N.C. 516, 127 S.E. 590; *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248."

In *S. v. Norton,* 222 N.C. 418, 23 S.E. 2d 301, the three defendants were charged in separate bills of indictment with an assault upon the same person and the cases were consolidated for trial. Although the defendants did not challenge the consolidation, the Court in its opinion said: "The offenses charged are of the same class, relate to an assault upon the same person, and appear to be so connected in time

and place as that evidence at the trial upon one of the indictments would be competent and admissible at the trial of the other. In such cases there is statutory authority for consolidation." The following cases are in accord with the above view: *S. v. McLean,* 209 N.C. 38, 182 S.E. 700; *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104; *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460; and *S. v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670.

These appellants cite and rely on *S. v. Dyer,* 239 N.C. 713, 80 S.E. 2d 769, and *S. v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45. These cases are distinguishable from the one now before us.

In the *Dyer* case the defendants were charged with separate offenses of the same class, but of offenses having been committed at different times and places. Moreover, the separate offenses were not provable by the same evidence.

In the *Bonner* case the two defendants were being tried under separate bills of indictment for the first degree murder of the same person, and the cases were consolidated for trial. The State was relying solely for conviction upon alleged separate confessions, each of which incriminated the other defendant and which had not been made in his presence or acquiesced in by him. The consolidation for that reason was held improper.

In the instant case, all of the defendants who were convicted by the jury were together when they made their confessions, and each defendant, according to the evidence, expressly admitted in the presence of the others that he did have sexual intercourse with the prosecuting witness, forcibly and against her will. This assignment of error is overruled.

The defendants also assign as error the refusal of the court below to allow their motion for judgment as of nonsuit at the close of the State's evidence and upon the renewal thereof at the close of all the evidence.

The defendants insist that the evidence of the prosecuting witness was not worthy of belief, since she first told the officers that she was at home with her two small children; that it was late at night and her husband was away from home looking for work; that she heard a car she thought was her husband's and went out to see. She said at that time a two-tone car drove up beside her and stopped and that two colored boys got out and forced her into the car; that they drove to some place, she didn't know exactly where, and she was forced out of the car; that the driver drove off and the other colored boys raped her. She later repudiated her statements in this respect, stating that when she was assaulted she was on her way to the home of some

friends who lived on Slocum Street, for the purpose of getting someone to come stay with her until her husband came home; that she was afraid to stay by herself. She said she told about the automobile because "she knew her husband would be mad with her if he knew she was that far from home, as he didn't want her to leave the house at night."

Discrepancies and contradictions in the testimony of a witness goes to the credibility of the witness and not necessarily to the competency of the testimony. Discrepancies and contradictions in the State's or in a plaintiff's evidence are matters for the jury and not for the court. *S. v. Smoak,* 213 N.C. 79, 195 S.E. 72; *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463; *S. v. Herndon,* 223 N.C. 208, 25 S.E. 2d 611; *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449; *S. v. Humphrey,* 236 N.C. 608, 73 S.E. 2d 479.

The evidence in this case is voluminous and lurid. Therefore, we have purposely refrained from setting it out in full herein. However, the State's evidence as revealed on the record in this appeal was not only sufficient to carry the case to the jury against each of these defendants, but amply sufficient to support the verdict rendered. This assignment of error is without merit.

Thirty-one of the remaining assignments of error are to the court's charge to the jury. We have carefully examined all the exceptions upon which all of the remaining assignments of error are based, and no prejudicial error is shown that would justify a new trial. Hence, in the trial below, we find no error in law.

No Error.

STATE v. WILLIAM FAIN.

(Filed 15 April, 1959.)

1. Larceny § 10—

A sentence of not less than twelve and not more than fifteen years upon conviction of defendant of storebreaking and larceny of property of a value of more than $100, is in excess of that allowed by statute, G.S. 14-70, the maximum punishment being imprisonment for not more than ten years.

2. Criminal Law §§ 149, 169—

Where it appears on *certiorari* that defendant's sentence is excessive, both as to its maximum and its minimum, but that defendant has not served for a period in excess of that to which he might have been lawfully sentenced, the cause must be remanded for the imposition of a

sentence not in excess of that authorized by law, and the defendant having been subsequently sentenced for escape with provision that the sentence should begin at the expiration of the prior sentence, the cause must then be remanded to the county in which the second sentence was imposed for appropriate sentence to begin at the expiration of the first.

CERTIORARI upon petition of William Fain to review prison sentences imposed at the February-March Term 1957 of the Superior Court of Gaston County and the July Term 1958 of the Superior Court of Stanly County. From GASTON.

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

At the February-March Term 1957 of Gaston Superior Court defendant was charged in a bill of indictment with storebreaking and larceny of property of a value of more than $100.00. Another count in the bill of indictment charged him with receiving stolen goods. Defendant in open court entered a plea of not guilty to the charge of breaking, entering, and larceny. He apparently was not tried on the other count. Upon the jury verdict of guilty, the court entered judgment "that the defendant be confined in the State's Prison at Raleigh at hard labor for a term of not less than twelve years nor more than fifteen years." Pursuant to the foregoing judgment commitment was issued 13 April 1957. He is presently confined pursuant to this commitment.

At the July Term 1958 of Stanly Superior Court defendant was charged in a bill of indictment with an escape. Defendant entered a plea of guilty, whereupon the court entered judgment "that the defendant be imprisoned in the County jail for the term of 6 months and assigned to work under the supervision of the State Prison Department," the "sentence to run at the expiration of the sentence he is now serving."

Defendant applied to Judge Clarkson for a writ of *habeas corpus*, asserting in his petition that he was entitled to his discharge on the facts as stated above. Judge Clarkson, by order dated 18 December 1958, denied the prayer without prejudice to prisoner's right to seek relief by application for *certiorari* to this Court.

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

Defendant in propria persona.

PER CURIAM. The defendant prays this Court for review of the records and for his discharge from custody.

The sentence of not less than twelve years and not more than fifteen years, imposed in Gaston County in 1957, is excessive. The applicable statute, G.S. 14-70, provides for punishment of not less than four months nor more than ten years. Consequently, the sentence is excessive both as to its maximum and its minimum. Even so, the defendant is not entitled to his discharge since he has not served for a period in excess of that to which he might have been lawfully sentenced. *S. v. Austin,* 241 N.C. 548, 85 S.E. 2d 924; *S. v. Byers,* 248 N.C. 744, 105 S.E. 2d 71.

This cause is remanded to Gaston County for the imposition of a sentence not in excess of that authorized by law. The sentence imposed will be effective as of 13 April 1957, so that the defendant will have the benefit of the time already served. *S. v. Clendon,* 249 N.C. 44, 105 S.E. 2d 93.

Since the sentence imposed in Gaston County in 1957 will be vacated, this will make uncertain the time the sentence imposed in Stanly County is to begin; therefore, upon the imposition of the authorized sentence in Gaston County the cause will then be remanded to Stanly County for imposition of an appropriate sentence based on the defendant's plea of guilty on the bill of indictment charging him with an escape at the July Term 1958 of the Superior Court of Stanly County. *S. v. Clendon, supra.*

Remanded.

STATE v. A. E. PERRY.

(Filed 29 April, 1959.)

1. **Criminal Law § 167: Grand Jury § 1—**

Findings of fact by the trial court to the effect that persons of defendant's race were not excluded from the jury lists or from the grand jury because of race, and that there had been no racial discrimination in the selection of grand jurors, are conclusive on appeal if supported by competent evidence, in the absence of some pronounced ill consideration of the evidence by the trial court.

2. **Constitutional Law § 29: Grand Jury § 1— Evidence held to support finding that there was no racial discrimination in selection of grand jury.**

Where, in support of defendant's motion to quash the bill of indict-

ment on the ground that persons of his race were arbitrarily excluded from the grand jury, defendant's evidence tends to show that the jury lists of the county were made up of the names of qualified persons without regard to race, that the grand jury was selected therefrom in accord with statutory procedure, G.S. 9-1, G.S. 9-2, G.S. 9-3, G.S. 9-24, G.S. 9-25, and that during the prior eight years two Negroes had served on the grand jury, without any evidence that any qualified Negro had been excluded at any time from serving on the grand and petit juries of the county, the evidence supports the court's finding to the effect that there had been no racial discrimination in the selection of the grand jury returning the indictment against defendant, and the denial of the motion to quash is affirmed.

3. Criminal Law § 167—

Where the crucial findings of fact are supported by the evidence and support the court's conclusions of law, the order will not be disturbed even though the evidence is not sufficiently clear to justify a subordinate finding, and such subordinate finding will be amended in conformity with the evidence, and the order affirmed.

4. Grand Jury § 1: Constitutional Law § 29—

A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in its selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color.

5. Same—

A Negro accused of crime has no right to demand that the grand or petit jury shall be composed in whole or in part of citizens of his own race nor has he the right to proportional representation of his race thereon, but only that Negroes not be intentionally excluded therefrom because of their race or color.

6. Criminal Law § 167—

Where the findings of the trial court are amply supported by the evidence, they will not be disturbed on the ground that some incompetent evidence was introduced, since it will be presumed that the court disregarded the incompetent evidence in making its findings.

7. Abortion § 3—

The evidence in this case *is held* amply sufficient to be submitted to the jury in a prosecution under G.S. 14-45.

8. Same: Criminal Law § 52—

In a prosecution under G.S. 14-45, hypothetical questions asked an admitted medical expert witness, based upon a full and fair recital of all relevant and material facts theretofore introduced in evidence, as to whether the prosecutrix had had a miscarriage, and if so, what was the cause of it, *held* competent.

9. Criminal Law § 159—

Assignments of error not supported by any reason or argument or citation of authority in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

STATE *v.* PERRY.

APPEAL by defendant from *Olive, J.*, November Criminal Term, 1958 of STANLY.

Criminal prosecution on a bill of indictment charging the defendant A. E. Perry on 4 October 1957 with using drugs and instruments with intent thereby to procure the miscarriage of Lillie Mae Rape, a pregnant woman, — a violation of N.C.G.S. 14-45.

Prior to pleading to the bill of indictment, the defendant moved to quash it for reasons which will be set forth in the opinion. The trial court denied the motion to quash. Whereupon, the defendant pleaded Not Guilty. The jury returned a verdict of Guilty as charged.

From a judgment of imprisonment the defendant appeals.

Malcolm B. Seawell, Attorney General, T. W. Bruton, Assistant Attorney General, and Ralph Moody, Assistant Attorney General, for the State.

Taylor & Mitchell for defendant, appellant.

PARKER, J. This action was here on a former appeal by the defendant. *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404. An examination of the case on the former appeal and of the instant case shows that the bill of indictment in this case is the same bill of indictment that was before this Court on the former appeal of this case.

This appears from our decision of the former appeal: The defendant is a negro doctor. Lillie Mae Rape is a white woman. The bill of indictment, which charges that the offense was committed in Union County on 4 October 1957, was found on 28 October 1957 by the grand jury of Union County at the October 1957, Mixed Term Union County Superior Court, which convened on the day the indictment was found. The defendant on 28 October 1957, in apt time, before pleading to the bill of indictment, (*S. v. Linney,* 212 N.C. 739, 194 S.E. 470; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537), filed a written motion to quash the bill of indictment, for the reason that negroes because of their race have been systematically excluded from serving upon grand juries of Union County for a long period of time, and that negroes because of their race were excluded from serving upon the grand jury of Union County at the term of court when the bill of indictment was found, and that such systematic exclusion of members of the defendant's race from the grand juries of Union County is a violation of his rights guaranteed to him by the due process and equal protection clauses of the Federal Constitution, and by Art. I, Sec. 17, of the State Constitution. On the day the bill of indictment was found, the trial court ordered a special venire of 50 persons from

Anson County to appear in court on 30 October 1957, from which a trial jury was to be selected in the case. On 30 October 1957, the State announced it was ready to proceed with the trial. Whereupon, counsel for the defendant requested that they be given time and opportunity to inquire into the alleged systematic exclusion of negroes from grand jury service in Union County, and in support of their request and motion to quash the bill of indictment filed an affidavit by one of defendant's counsel. The material parts of said affidavit are summarized in our opinion on the former appeal, and need not be repeated here. The trial court then found as a fact that the defendant had offered no evidence on his motion to quash the bill of indictment, except this affidavit, and denied the motion. To such denial the defendant excepted. The defendant then pleaded Not Guilty. He was convicted by the jury, and sentenced to a term of imprisonment by the court. From such sentence he appealed to the Supreme Court.

The Court on the former appeal reversed the verdict and judgment of imprisonment, and closed its opinion with this language:

"Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. After a careful examination of all the facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination as to the grand jury set forth in the motion to quash and in the supporting affidavit of Samuel S. Mitchell. Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any.

"The judgment and verdict below are reversed, and the case is remanded for further proceedings. In the Superior Court the defendant will have the opportunity to present the evidence, if any, that he may have as to the alleged racial discrimination in the grand jury panel. If the trial court at such hearing then finds there was no racial discrimination, the trial will proceed on the present indictment. If the trial judge then finds there was racial discrimination in the grand jury panel, and quashes the indictment, the defendant is not to be discharged. He will be held until an indictment against him can be found by an unexceptionable grand jury. *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537."

Our opinion on the former appeal was filed 7 May 1958. At the 25 August Term 1958 of the Superior Court of Union County, the defendant, pursuant to N.C.G.S. 1-84, made a motion for removal of his case for trial to some adjacent county, and supported the motion by an affidavit suggesting that there are probable grounds to believe that a fair and impartial trial of the case cannot be had in Union County. Judge Olive presiding granted the motion, and entered an order decreeing that the case be removed to the Superior Court of Stanly County for trial at the 24 November 1958 Term, or at a later term.

At the 24 November Term 1958 of Stanly Superior Court, the defendant, again in apt time, before pleading to the bill of indictment, moved to quash the bill of indictment on the identical grounds that he did at his former trial at the October 1957, Mixed Term of Union County, as above stated. In his motion to quash the defendant requested that the trial court issue subpoenas and subpoenas *duces tecum* requiring the presence in court of the Clerk of the Superior Court of Union County, the County Commissioners of Union County, the Sheriff of Union County, the Tax Collector of Union County, and the County Accountant of Union County as witnesses to be examined by him in respect to his contention that members of the negro race were purposely excluded by reason of their race from the grand jury of Union County which indicted him, and that such officials bring with them "certain records, documents and papers pertaining to Union County Grand Jury Compositions since 1936 through the present year."

When the motion to quash the bill of indictment came on to be heard, the defendant placed on the stand and examined J. Hampton Price, Clerk of the Superior Court of Union County; B. F. Niven, the Tax Collector of Union County; Roy J. Moore, Tax Accountant and Tax Supervisor of Union County, and also Clerk to the Board of County Commissioners of Union County; James R. Braswell, Chairman of the Board of County Commissioners of Union County; and Shelly Griffin, a Deputy Sheriff of Union County for eight years, and in charge of the courtroom when court is in session. Ben Wolfe, Sheriff of Union County, did not appear, but sent a statement by a reputable physician to the effect that he is receiving treatment for severe high blood pressure, has frequent blackout attacks, and has been advised by his physician not to appear in court for any reason because of his health. The Record shows that these witnesses brought with them many and voluminous records, documents and papers pertaining to the composition of Union County Grand Juries for many years and up to the time of the hearing of defendant's motion to quash the bill

of indictment. Defendant offered no other witnesses than those named above.

Judge Olive having heard all the evidence and arguments of counsel made the following finding of facts:

"1. That the said Grand Jury at the October 1957 Term of Union County Superior Court was regularly drawn and constituted as provided by the North Carolina Statute and there was no systematic, purposeful, intentional or arbitrary exclusion of any qualified person from said jury by reason of race, or otherwise.

"2. That adult negroes constitute approximately 12½% of the total adult population of Union County, North Carolina.

"3. That, although there was no member of the colored race on the Grand Jury of Union County in 1957 (the Grand Jury of said County was chosen for a period of one year as provided by law), members of the colored race served on the Grand Jury at various times before and subsequent to 1957; and members of the colored race have served on the trial panel of said court regularly before, including and subsequent to 1957.

"4. That no evidence was offered by movant that any qualified person to serve as a juror was wrongfully excluded from serving on the Grand and Petit juries of Union County at any time.

"5. That the Bill of Indictment in this case was regularly and legally found and returned by a duly and legally constituted Grand Jury of Union County, North Carolina, at the October 1957 Term of Superior Court of said County.

"6. That none of the movant's constitutional rights were violated or abridged in the selection of the Grand Jury which found and returned the Bill of Indictment in this case."

Whereupon Judge Olive denied the motion to quash the bill of indictment.

Defendant assigns as errors Judge Olive's findings of fact Numbers 1, 3, 4, 5 and 6, for the reason that these findings of fact are contrary to the evidence offered by the defendant, and to all the competent evidence offered during the hearing of the motion to quash the bill of indictment. Defendant neither excepts to, nor assigns as error, the finding of fact Number 2 "that adult negroes constitute approximately 12½% of the total adult population of Union County, North Carolina."

The findings of fact of Judge Olive are conclusive on appeal, if supported by competent evidence, "in the absence of some pronounced ill consideration" of the evidence by Judge Olive. *S. v. Koritz*, 227 N.C. 552, 43 S.E. 2d 77, cert. denied, 332 U.S. 768, 92 L. Ed. 354;

S. v. Speller, 231 N.C. 549, 57 S.E. 2d 759, cert. denied, 340 U.S. 835, 95 L. Ed. 613; *S. v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613; *S. v. Bell,* 212 N.C. 20, 192 S.E. 852; *S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Cooper,* 205 N.C. 657, 172 S.E. 199; *Akins v. Texas,* 325 U.S. 398, 89 L. Ed. 1692; *Thomas v. Texas,* 212 U.S. 278, 53 L. Ed. 512.

Prior to 1947, it was provided by N.C.G.S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source, and from this source shall be selected for the jury list the names of all such persons as have paid all the taxes assessed againt them for the preceding year and are of good moral character and of sufficient intelligence. To meet the constitutional change of the previous year election, N. C. Const., Art. I, Sec. 13, making women eligible to serve on juries, N.C.G.S. 9-1 was amended in 1947, 1947 Session Laws, Ch. 1007, enlarging the source to include not only the tax returns of the preceding year but also "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age," to be prepared in each county by the Clerk of the Board of Commissioners. The 1947 amendment struck out the provision as to the payment of taxes for the preceding year, and further provided that names for the jury list shall be secured from such sources of information as are deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. Excluded from the list are persons who have been convicted of crime involving moral turpitude, or are *non compos mentis.*

N.C.G.S. 9-2 provides that the jury list shall be copied on small scrolls of paper of equal size and put into the jury box. N.C.G.S. 9-3 provides that at least twenty days before a term of the Superior Court, the Board of County Commissioners shall cause to be drawn from the jury box by a child not more than ten years of age the required number of scrolls, and the persons who are inscribed on such scrolls shall serve as jurors at the term of the Superior Court next ensuing such drawing.

N.C.G.S. 9-24 provides that a Judge of the Superior Court presiding over a term of court at which a grand jury is to be selected "shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court." N.C.G.S. 9-25, Grand Juries in Certain Counties, provides as to Union County as follows: "A grand jury for Union County

shall be selected at each February Term of the Superior Court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection."

The grand jury which indicted the defendant at the October 1957, Mixed Term of the Union County Superior Court, was selected, sworn and impaneled at the February Term 1957 of Union County Superior Court, pursuant to N.C.G.S. 9-25, which appears in the Record of this case on the former appeal.

J. Hampton Price, Clerk of the Superior Court of Union County for 9 years, and prior to that County Tax Collector of Union County for about 13 years, testified in substance as follows: I have the jury book with me covering the period from 1945 up to the present. I think the Minutes of the Court took care of the jury up until that time. I have the Minutes Docket Book of the Court back to 1936. I am familiar with most of the names on the jury list since I have been Clerk. Ike Montgomery, a negro, was on the grand jury in 1954. Lex Houston, a negro, is on the grand jury in 1958. There were other negroes in the panels, but when you are drawing them by lot it is not always possible to get a negro on the grand jury, due to the small ratio between negroes and whites in Union County. From 1950 to 1958, both inclusive, no negroes served on the grand juries of Union County, except Ike Montgomery and Lex Houston. In 1942 there is the name of Curtis Smith, and I think we have a Curtis Smith, white, and a Curtis Smith, negro. In 1945 there is one W. I. Helms, and I don't know if he is a negro or white. In 1948 there is a Hoyle Helms, and I don't know if he is a negro or white. In 1939 there is a Curtis Helms, and I don't know if he is a negro or white.

B. F. Niven, County Tax Collector of Union County for 8 years, and prior to that Deputy Sheriff of the county for 4 years, and Sheriff of the county for 16 years, testified in substance as follows: He has with him his records and ledgers for about 21 or 22 years. From his records he testified as to the numbers of whites and the numbers of negroes in the 9 townships of Union County for a number of different years. He didn't miss a court during the 20 years he was Deputy Sheriff and Sheriff. He did not attend court after he was Sheriff. He testified as follows: "I cannot say that any negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the courtroom in the presence of the Court by a child out of a hat. The whole panel is in there. I think if a negro had been chosen to serve on the Grand Jury I would have known it. I could not say for sure that any negroes did not serve on the Grand Jury, but I do know that they have been on

the regular juries and there could have been one on the Grand Jury, but I could not name one by name. I know Ike Montgomery. I am not sure which township he lives in but I think it is Vance. I have my scroll for the year 1954."

Roy J. Moore, Tax Accountant and Tax Supervisor of Union County since 15 May 1935, testified in substance: He is Clerk to the Board of County Commissioners of Union County. He helps prepare the jury list. The jury list is prepared every two years from the tax scroll for men, both negroes and whites. He gets the names of women, both negroes and whites, from the precinct lists. About 10% of the names placed in the jury box are women. When the jury list is prepared, it is presented to the Board of County Commissioners. The names so presented are cut from this list, and put in the jury box. From the jury list presented to the Board of County Commissioners is excluded those people exempt from jury service by N.C.G.S. 9-19, to wit, all practicing physicians, regular ministers of the gospel, practicing attorneys at law, etc. No negroes have been excluded from grand juries because of race to his knowledge.

An affidavit of Roy J. Moore in the Record shows that 48 persons were drawn from the jury box for service as jurors at the February Term 1957 of the Union County Superior Court, and that of this number one person at least was a negro.

James R. Braswell, Chairman of the Board of County Commissioners of Union County for the past four years testified in substance: The jury list has been prepared and put in the jury box twice since he was chairman — in 1955 and 1957. The jury list is made up from the tax records and precinct scrolls. He has been present each time the jury was drawn from the jury box during his term of office. At no time during his chairmanship of the Board has there been any discrimination.

This appears from an affidavit of James R. Braswell in the Record: "Affiant further says that in selecting the names of male persons for jury service, in the manner above stated, no consideration or regard is given to race, creed or color; that all names of women are selected from the precinct registration books for jury service without regard to race, creed, color or party affiliation; that the names of the white race and the negro race selected from the tax returns are therefore in direct proportion to the names of persons of the white race and the negro race appearing on the tax returns and the precinct registration books."

Deputy Sheriff Shelly Griffin, Deputy Sheriff for 8 years, a Policeman for 6 years, and just elected Sheriff of Union County, testified,

in part, on direct examination by defendant's counsel: "I have been Deputy Sheriff for eight years. When court is in session, I take charge of the courtroom. The Sheriff is there most of the time and I am there most of the time also. During the period, I knew personally that Lex Houston served on the Grand Jury and I believe that he served this year. He is serving now. He began to serve in February, 1958. I cannot remember any others who served; there may have been one more, but I can't remember." On cross-examination by the State he testified: "During my eight years of public service there, I have observed the trial panel and have observed negroes serving on the trial juries. About every term of Court we have, from one to two, maybe more. And that has been true within the past eight years. I have just been elected Sheriff of the County." On redirect examination by defendant's counsel he testified: "During my eight years I have observed negroes on the jury panel, one or two on practically every jury panel. Prior to that time, I was a City Police Officer and I did not get too much chance to go into the courtroom. But during those eight years, I can only remember seeing two negroes on the Grand Jury."

Defendant introduced in evidence the grand jury lists of Union County Superior Court for the years 1936 through 1958.

Defendant has offered no evidence that any qualified negro, man or woman, has had his or her name excluded at any time from the jury list or the jury box of Union County, or has been excluded at any time from serving on grand and petit juries in Union County Superior Court, by reason of race.

Defendant has offered no evidence of any racial discrimination at any time against members of the negro race in the preparation of the jury list and the jury box in Union County, and in drawing jurors from the jury box for a term of court. Defendant has offered no evidence of any racial discrimination at any time against members of the negro race in the drawing in open court by a child under ten years of age of the names of eighteen jurors to serve as a grand jury from the names of all persons returned as jurors at that term from a box or hat containing the names of all the jury panel, as is required by N.C.G.S. 9-24.

According to Judge Olive's finding of fact Number 2, to which defendant has not excepted, adult negroes constitute about 12½% of the adult population of Union County. The defendant's evidence clearly shows that for at least eight years prior to November 1958 one or two negroes have served on practically every jury panel at terms of Union County Superior Court, and from these panels during that

time the grand juries of Union County Superior Court have been selected. The evidence is undisputed that the names of jurors drawn from the jury box to serve as jurors at the February Term 1957 Union County Superior Court contained at least the name of one negro, and that from this list of jurors the grand jury was drawn that found the bill of indictment in this case. Defendant's evidence also plainly shows that for at least eight years prior to November 1958, only two negroes, to wit, Ike Montgomery in 1954, and Lex Houston in 1958, have served upon the grand juries of Union County Superior Court. Considering all of the evidence, the facts that for at least eight years prior to November 1958 only two negroes were drawn from a box or hat in open court by a child under ten years of age, as grand jurors from a list of jurors, practically all of which contained the names of one or two negroes, and that the grand jury finding the bill of indictment in this case was drawn from a jury panel containing at least one negro, do not show, in our opinion, that negroes because of their race have been systematically excluded from serving upon grand juries of Union County for at least eight years prior to November 1958, and in particular fails to show that negroes because of their race were wrongfully excluded from serving on the grand jury that found the bill of indictment against defendant in this case.

This Court said in *State v. Walls, supra:* "The child draws from the jury box the names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality."

Judge Olive's findings of fact are amply supported by competent legal evidence, with this exception: Judge Olive found in his findings of fact Number 3 that "members of the colored race served on the grand jury at various times before and subsequent to 1957." The evidence plainly shows, and he should have found, that two negroes have served on Union County grand juries for at least eight years prior to November 1958, to wit, Ike Montgomery in 1954, and Lex Houston in 1958. We amend his findings of fact in that respect alone. Before 1950 the evidence is not sufficiently clear to justify a finding of fact that negroes have served upon the grand juries of Union County from 1936 to 1950. A study of the evidence plainly shows that this is not a case where Judge Olive's crucial findings of fact are so lacking in support in the evidence that to give them effect would work that fundamental unfairness which is at war with due process or equal protection. Defendant's assignments of error to Judge Olive's findings of fact, as amended by us, are overruled.

Defendant's assignments of error to Judge Olive's failure to find that negroes have been systematically excluded from serving on grand juries of Union County for more than twenty years, and including the grand jury impaneled in 1957, and from the grand jury that indicted defendant, are overruled.

Defendant assigns as error the denial of his motion to quash the bill of indictment.

A negro objecting to a grand or petit jury because of alleged discrimination against negroes in its selection must affirmatively prove that qualified negroes were intentionally excluded from the jury because of their race or color. *S. v. Perry, supra; Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513, cert. denied, 345 U.S. 930, 97 L. Ed. 1360; *Fay v. New York,* 332 U.S. 261, 91 L. Ed. 2043; *Akins v. Texas, supra.*

This Court speaking by *Ervin, J.,* said in *Miller v. State, supra:* "The Fourteenth Amendment to the Constitution of the United States does not confer upon a negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a negro must be composed of persons of each race in proportion to their respective numbers as citizens of the political unit from which the jury is summoned. Citing numerous cases from the U. S. Supreme Court and from our Court."

Eubanks v. Louisiana, 356 U.S. 584, 2 L. Ed. 2d 991, is plainly distinguishable. The procedure in the State of Louisiana in selecting grand jurors is entirely different from the procedure in North Carolina. The facts of the two cases also differ.

The Supreme Court of the United States has held consistently for 80 years that the indictment of a negro defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution. *S. v. Perry, supra; Miller v. State, supra; Eubanks v. Louisiana, supra.* A like conclusion is reached in North Carolina by virtue of our decision on "the law of the land" clause embodied in the Declaration of Rights, Art. I, Sec. 17, of the North Carolina Constitution, and we have consistently so held since 1902. *S. v. Peoples,* 131 N.C. 784, 42 S.E. 814; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537; *Miller v State, supra; S v. Perry, supra.* However,

the evidence in this case and Judge Olive's findings of fact do not show a systematic exclusion of members of the defendant's race, solely because of their race, from the grand jury which found the bill of indictment against him, and from grand juries of Union County for at least seven years before that time.

Judge Olive designates all of his findings as findings of fact. They are both findings of fact and conclusions of law. His findings of fact, as amended by us, amply support his conclusions of law and his order. Judge Olive properly denied defendant's motion to quash the bill of indictment, and his assignment of error thereto is overruled.

Defendant's assignment of error for the failure of the court to strike out an affidavit of James R. Braswell, Chairman of the Board of County Commissioners, offered in evidence by the State is overruled. The learned trial judge was well able to weigh the evidence, and to disregard incompetent evidence, if any, in the affidavit. There is nothing in Judge Olive's findings of fact to show, that if the affidavit contained incompetent evidence, which we do not admit, it influenced in any way his findings of fact, his conclusions of law, and his order refusing the motion to quash the bill of indictment. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668; *Insurance Co. v. Shaffer*, 250 N.C. 45, 108 S.E. 2d 49.

Defendant has in his brief his exceptions to the failure of the trial court to sustain his motions for judgment of nonsuit. He makes no argument in his brief in respect thereto. He closes his brief by stating that if his assignment of error to the refusal of the court to quash the bill of indictment is overruled, that he should be awarded a new trial. There was sufficient evidence offered by the State to carry the case to the jury. The trial court correctly overruled defendant's motions for judgment of nonsuit.

Defendant's only other assignments of error, brought forward and discussed in his brief, relate to a hypothetical question asked Dr. J. G. Faulk. Dr. Faulk is a physician and surgeon. Defendant admitted he is a medical expert specializing in surgery. In October 1957 Dr. Faulk was chief of surgery in Union Memorial Hospital. On 12 October 1957 he saw Lillie Mae Rape in the hospital. He took her to an examination room, and did a pelvic examination. The hypothetical question contained a full and fair recital of all relevant and material facts already in evidence, and it was sufficiently explicit for the witness to give an intelligent and safe opinion. It was properly framed so as to inquire of Dr. Faulk, if he had a professional opinion, whether Lillie Mae Rape had had a miscarriage, and if so, what was the cause of it. Dr. Faulk drew no inference from the testimony. He merely ex-

pressed his professional opinion upon an assumed state of facts supported by evidence previously offered. Dr. Faulk's answers to the hypothetical question related to matters requiring expert knowledge in the medical field about which a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert testimony from one learned in the medical profession. All defendant's assignments of error relating to the hypothetical question and the answers thereto are overruled. *S. v. Knight,* 247 N.C. 754, 102 S.E. 2d 259; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85; *S. v. Smoak,* 213 N.C. 79, 195 S.E. 72.

Defendant's other assignments of error set forth in the Record are not brought forward and mentioned in his brief. In respect to them no reason or argument is stated, and no authority is cited in defendant's brief. They are, under our Rules and decisions, deemed to have been abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562; Ibid in G.S., Vol. 4A 157, 185; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507; *S. v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63; *S. v. Adams,* 245 N.C. 344, 95 S.E. 2d 902; *S. v. Smith,* 249 N.C. 653, 107 S.E. 2d 311. See *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

In the trial below we find

No Error.

ROY CHARLIE BEAUCHAMP, JR., v. CLIFFORD STONEWALL CLARK, JR., AND PILOT FREIGHT CARRIERS, INC.

(Filed 29 April, 1959.)

1. Automobiles § 41c— Conflicting evidence as to which vehicle was on wrong side of highway requires submission of the issue to the jury.

The vehicle operated by plaintiff and the vehicle owned by one defendant and operated by the other, traveling in opposite directions, collided or "sideswiped" each other, resulting in serious personal injury to plaintiff and damage to both vehicles. There was conflict in the testimony as to which vehicle was over the center line of the highway and diverse inferences were permissible from the physical facts in evidence, including the damage to the respective vehicles and skid marks. *Held:* The conflicting evidence was for the determination of the jury, and the denial of defendants' motion to nonsuit was without error. G.S. 20-148.

2. Automobiles § 39—

In view of the great weight of the respective vehicles, the physical damage resulting from the collision in suit *held* not to establish as a

matter of law that plaintiff's vehicle was being operated at such a high rate of speed as to constitute a violation of statute or the rule of the prudent man, plaintiff's vehicle being a ton and a half truck, loaded with cinders, and defendants' vehicle being a tractor-trailer with a load weighing some 33,000 pounds.

3. Same: Automobiles § 41a—

The physical facts at the scene of a collision cannot warrant nonsuit if they are not in harmony and diverse inferences can be drawn therefrom.

4. Compromise and Settlement—

Authority of the person negotiating a compromise settlement is necessary for the settlement to bar the alleged principal.

5. Same: Insurance § 62—

Provisions of a policy of liability insurance authorizing insurer to make investigation, negotiation and settlement of any claim against insurer as it deems expedient, and including in its coverage a person driving the vehicle with the permission of insured, do not authorize insurer, in obtaining a compromise settlement with the other party involved in the collision for damage to the other vehicle, to settle the claim for serious personal injuries sustained by the person driving the insured vehicle with the permission of insured, even though he was advised by insurer's agent that insurer was going to settle the claim for damages to the other car, there being nothing to indicate that he was informed that insurer was planning to give away his claim for personal injuries, and it appearing that he consistently denied that he was at fault.

6. Appeal and Error § 42—

The charge of the court will be construed as a whole, and exceptions thereto will not be sustained when the charge so construed is a correct instruction upon the law.

APPEAL by defendants from *Sharp, S.J.*, December 1, 1958 Term of FORSYTH.

Hayes & Wilson for plaintiff, appellee.
Womble, Carlyle, Sandridge & Rice for defendant, appellants.

RODMAN, J. Defendants appeal from a judgment awarding plaintiff damages for personal injuries sustained in a collision which occurred about noon 5 December 1956 on U. S. Highway 158. Plaintiff was driving his father's ton and a half 1950 Chevrolet truck westwardly from Winston-Salem towards Mocksville. The truck had an overall length approximating eighteen feet. It had a stake body and dual wheels on the rear. It was loaded with cinders.

Defendant Clark was driving a tractor-trailer for defendant Pilot Freight Carriers, Inc. (hereafter designated as Pilot) in an eastward

direction from Mocksville towards Winston-Salem. The tractor-trailer had an overall length of 44½feet. The tractor had a Diesel motor, was 14 to 16 feet long. It was equipped with two wheels on the front and dual or four wheels on a single axle on the rear. It weighed approximately 11,000 pounds. The trailer was connected to the trailer by means of a "fifth wheel" on the tractor. The trailer fits on this "fifth wheel" and is held in place by a king pin. Near the rear of the trailer were two axles separately connected to the trailer. Each axle carried dual or a total of four wheels per axle. The body of the trailer was approximately four feet from the ground. It was twelve feet high. The body was of stainless steel or aluminum with vertical ribs on the side to provide additional strength. The trailer weighs about 10,000 pounds. It was loaded with carbon. The cargo weighed about 33,000 pounds. The gross weight of the vehicle and cargo was approximately 54,000 pounds.

Plaintiff based his right to recover on his assertion that the tractor-trailer was being operated at an unreasonable speed and on the wrong side of the road; that Clark failed to keep a proper lookout and failed to yield the right of way to oncoming traffic.

Defendants denied the allegations of negligence and pleaded contributory negligence on the part of plaintiff, asserting plaintiff was driving his vehicle at an unreasonable rate of speed and on the wrong side of the road and failed to keep a proper lookout and to yield the road to oncoming traffic.

The first asserted error presented by defendants is the refusal to allow their motion to nonsuit. This motion is based on the contention that the physical facts observed after the collision demonstrate as a matter of law plaintiff's negligent operation of his motor vehicle, proximately causing his injuries.

The collision occurred near Sheets Barbecue, a restaurant situate on the north side and about 150 feet from the highway. The space between the restaurant and the highway was unobstructed. Traveling west in approaching Sheets Barbecue there is a slight decline and curve to the driver's right.

Plaintiff testified: "When I was coming around this curve I saw this Pilot truck; he was approximately 2 to 3 foot across the line on my side of the road, and when I saw him I applied my brakes, and the first thing that I remember hitting was the drive wheel, which is the first set of dual wheels on the tractor, right behind the cab. Then I went on down the side of the trailer, made marks down the side of the trailer." Plaintiff fixed his speed at 35 to 40 m.p.h. and that of the tractor-trailer at 35 m.p.h.

A witness at the restaurant testified: "I heard the racket from the wreck, and when I did, I turned around and saw Mr. Beauchamp's truck spinning around. At the time I first glimpsed it, Mr. Beauchamp's truck was headed west, and it made a complete turn and headed back east. When I first saw Mr. Beauchamp's truck he was on the right side of the highway."

An employee at the restaurant testified: "As I stood there and looked out that window, I saw the two vehicles just before they hit, just a few seconds, and the transfer truck was around a foot on Beauchamp's side of the road. When I speak of the 'transfer truck,' I am speaking of the Pilot truck. Mr. Beauchamp was on his side of the road."

Defendant Clark testified that he was passing westbound traffic. One of the vehicles by signal indicated it intended to turn to the right to go to the restaurant. The following vehicle slowed down. Plaintiff was behind that vehicle. Plaintiff was 150 to 160 feet from Clark when he rounded the curve and first came in Clark's sight. Plaintiff was then traveling approximately 60 m.p.h. Clark was traveling 25 to 30 m.p.h. When he first saw the Chevrolet, the driver had applied his brakes, "and I noticed that the Beauchamp truck's rear tires were sliding, and he got, I would say, somewheres around 30 feet of me, and the wheels quit sliding, and he just angled across the road and hit me as I have described, my left wheels were I would say roughly about two feet from the center line, to the south side of the center line. When I say 'left wheels,' I am referring to all of the wheels, the tractor wheels and the trailer wheels."

Following the collision the Chevrolet was to the north of the center line of the highway, headed in a northeasterly direction, partly off the highway. The front wheels were broken, the hood badly crushed, with a crease in it from which it could be inferred that it had been caught under the trailer. The cab was injured. The panel on the right side of the body was gone.

The tractor was headed south, occupying practically all of the south lane of the highway. The trailer, still coupled by the fifth wheel, was headed in an easterly or southeasterly direction. The right rear wheels were south of but within a few inches of the white line marking the center line of the highway. The front end of the trailer was likewise over the center line of the highway but occupied less of the north lane than did the rear end. The left tire on the drive wheel of the tractor had burst and the wheel had been knocked back 2 or 3 inches. This disconnected the drive shaft and dropped it on the ground. One of the upright ribs on the body had been knocked off. The body

was otherwise damaged on the left side. There were signs under the body showing where it had been scraped. The left forward axle under the trailer was broken loose and knocked back and out of alignment. Clark testified: "When the left part of my tractor was struck, I was knocked into the floorboard, down underneath the steering wheel, between the seat and the brake pedals, and so forth. After the collision took place, the wheels being knocked out of line and the road slanting there, my unit rolled down across the white line, and the tractor went into a jackknifed position. I'd say my tractor-trailer traveled around 8 feet after the Beauchamp truck struck the tandem wheels on the lefthand side of the trailer."

Controversy exists as to brake marks made by the tractor-trailer. On the north side of the highway and to the east of the portion occupied by the vehicles after the collision were skid marks made by dual wheel tires. The northernmost of these skid marks were about eighteen inches from the north edge of the road. The southernmost were well to the north of the center line of the highway. These skid marks terminated abruptly some five feet or more from the rear of the trailer. These skid marks were apparently made by the Chevrolet.

Does this evidence force one to a single conclusion as to the cause of the collision? The answer must, we think, be in the negative. Where were the vehicles prior to the collision? If plaintiff's testimony is accepted, he was to his right of the center of the highway, and Clark was to his left. If so, Clark was violating the statute which commands: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible." G.S. 20-148.

The skid marks made by the Chevrolet may reasonably support plaintiff's assertion that having discovered Clark's violation of the law, he was trying to avoid a collision with the tractor-trailer.

That the vehicles came together with such force as to cause the damage depicted to each vehicle does not necessarily mean that the Chevrolet was being operated at such a high rate of speed as to demonstrate a violation of the statute law or the rule of the prudent man.

When the front portion of the vehicles came in contact, was the Chevrolet then moving or had it stopped? Does the termination of skid marks from its wheels indicate they had ceased to move? Would the momentum given to a mass moving with the velocity which Clark accords his vehicle produce the damage shown to that mass by striking a motionless body like the loaded Chevrolet? On these questions reasonable persons may reach different conclusions. That being true,

the court correctly overruled the motion to nonsuit. *Kirkman v. Baucom,* 246 N.C. 510, 98 S.E. 2d 922; *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Adcox v. Austin,* 235 N.C. 591, 70 S.E. 2d 837.

The factual situation presented in this case is readily distinguished from the situation depicted in *Powers v. Sternberg & Co.,* 213 N.C. 41, 195 S.E. 88. If physical facts can speak louder than living witnesses, all notes produced by the facts must be in harmony. Discord in the inferences drawn from physical facts requires a jury interpretation just as discord in parol testimony requires an evaluation before a final determination can be made.

Defendants pleaded compromise and settlement to defeat plaintiff's recovery. To establish their plea, they offered:

(1) A policy of insurance issued by Nationwide Mutual Insurance Company to plaintiff's father, owner of the Chevrolet truck. This policy provided insurance coverage for specified amounts with respect to designated risks. Coverage E, insuring against property damage liability, reads: "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Coverage F provides protection in substantially the same language for bodily injury liability.

By definition of "insured" the policy covers and insures one who operates the vehicle with permission of the owner. Plaintiff was, at the time of his injury, operating with the permission of his father.

The policy contained this provision: "With respect to such insurance as is afforded by this policy under Coverages E, F and H. the Company shall: (a) defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false of fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

(2) A release dated 15 January 1957 executed by Pilot. This release recites a payment of $2,565.72 for which Pilot released plaintiff and his father "from any and all actions, causes of action, claims, demands . . . and property damage resulting or to result from accident that occurred on or about the 5th day of December 1956, at or near Highway 158, Winston-Salem, Forsyth County, N. C." The sum paid represents the amounts expended by Pilot in repairing its vehicles.

The release contained this provision: "I/we understand that this

settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons, firms and corporations hereby released by whom liability is expressly denied."

(3) A check of the insurer to Pilot for the sum stated in the release. This check shows the policy number, the claim number, and date of the collision. The check was paid by drawee bank.

(4) Parol testimony from Jack Hughes, an adjuster representing the insurer. This testimony was offered for the sole purpose of supporting the plea of settlement. Hughes testified that about a week after the collision he sent Mr. Smith to the hospital to ascertain from plaintiff how the collision occurred and the names of witnesses who could confirm plaintiff's statement. Smith reported to Hughes purporting to give plaintiff's version of the accident. (Plaintiff testified that he did not recall talking with Smith, and the attending physician testified that plaintiff probably would not remember because of the sedatives given plaintiff.) Smith's report of plaintiff's admission would tend to place responsibility for the collision on plaintiff. Hughes further testified that he made other investigations, including an interview with a highway patrolman who was at the scene shortly after the collision occurred. He testified that on 10 or 12 January he visited plaintiff in the hospital. He then told plaintiff that the investigation made by the witness indicated plaintiff was on the wrong side of the road and the collision was caused by plaintiff. He testified: "I explained to him that in view of the investigation, that if we did not pay Pilot for their damages, that they would, in all probability, file a lawsuit against him, and that since our investigation indicated that he was at fault, we would be in no position to defend him on that case, and, therefore, we felt that we would have to go ahead and pay for the damages.

"Mr. Roy Beauchamp, Jr. made no objection to the statements I made to him, just repeated, other than to say to the effect, 'I don't think I was at fault.'

"I had also told him what our investigation had disclosed, in the statement in my file, indicating that he didn't know which side of the road he was on at the time of the accident, and he didn't object to it, he just — and he didn't deny it. His main comment was that, 'I don't think I am at fault.' But I explained to him at that time that I would have to go ahead and make a settlement with Pilot Freight Carriers for their damages." The witness testified that following this conversation he entered into negotiations with Pilot, made the payment, and took the release from them.

It is conceded that plaintiff sustained serious injuries. He was in the hospital the first period from 5 December 1956 to 5 March 1957. He was subsequently hospitalized in April. Doctors testified that it will be some years yet before the full extent of his injuries can be definitely determined. While in the hospital he was given large amounts of sedatives.

The court held the settlement made by the insurer with Pilot did not bar plaintiff's action and for that reason excluded the evidence. Defendants assign this ruling as error entitling them to a new trial. The assignment presents the question: Does the evidence offered tend to establish the plea of compromise?

We quote, as a correct statement of the law, from the opinion of *Parker, J.*, in *Jenkins v. Fields*, 240 N.C. 776, 83 S.E. 2d 908. "A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise, and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein, as would a judgment duly entered in an action between said persons. *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805; *Hinson v. Davis*, 220 N.C. 380, 17 S.E. 2d 348; *Armstrong v. Polakavetz*, 191 N.C. 731, 133 S.E. 16; *Sutton v. Robeson*, 31 N.C. 380; 11 Am. Jur., Compromise and Settlement, Sec. 23."

It will be noted that authority with respect to the subject matter of the compromise is essential. Did insurer have any authority to defeat plaintiff's right to compensation for injuries which the jury has found were negligently inflicted on him by defendants? To establish such authority they rely solely on the policy provisions authorizing it to settle claims or suits against the insured, and the policy definition of insured. There is no suggestion that plaintiff paid any part of the premium or that he knew when he drove the truck that the driver was insured against liability for property damage to the amount of $5,000 and against personal injuries to the amount of $5,000 to one person with total personal injury liability amounting to $10,000, or in any way assented to the settlement.

The insurance company, although authorized to investigate, had not interviewed Craft and Blake, patron and employee of Sheets Barbecue, who saw the collision and testified that plaintiff was on his right side of the highway. True, representatives of the insurance company say they inquired of plaintiff if he could furnish it names of witnesses who would negative their conclusion that he was at fault, but plaintiff was at that time in a helpless condition in the hospital.

Apparently plaintiff located these witnesses after he left the hospital. When the insurer informed plaintiff of its conclusion that he was at fault and for that reason it intended to settle, he protested: "I don't think I was at fault." There is no suggestion that plaintiff was informed that the insurance company was planning to give away plaintiff's claim for personal injuries or that the company then so intended. The insurance company is not here contending that it used plaintiff's right of action for personal injuries to settle a claim for which it was primarily liable. That contention is made by defendants.

The company, for a stated compensation, had assumed contingent liabilities for maximum amounts. Here, as noted, the maximum liability for injury to any person is limited to $5,000. Is it conceivable that the insurer and the policyholder ever contemplated that the policy provision authorizing the insurer to settle claims was ever intended to vest the insurer with the right to obligate the policyholder for an unlimited amount over and beyond the amount the insurer was obligated to pay; or by settling a claim for property damage deprive the policyholder of his right of action for substantial permanent injuries? If the policy provisions are broad enough to permit such a settlement without specific assent from the policyholder, could it do so over the protest of the insured? Logic and a fair interpretation of the policy provision compel the conclusion that under the facts here depicted insurer had no authority to compromise and settle plaintiff's claim for the injuries tortiously inflicted on him.

This conclusion is in harmony with a practically unanimous line of decisions from other appellate courts. *Fikes v. Johnson,* 248 S.W. 2d 362 (Ark.), 32 A.L.R. 2d 934; *Foremost Dairies v. Campbell Coal Co.,* 196 S.E. 279 (Ga.); U.S.A.C. *Transport v. Corley,* 202 F. 2d 8 (applying Georgia law); *Burnham v. Williams,* 194 S.W. 751, compare *Keller v. Keklikian,* 244 S.W. 2d 1001 (Mo.); *Countryman v. Breen,* 271 N.Y.S. 744, affirmed by Court of Appeals, 198 N.E. 536; *Haluka v. Baker,* 34 N.E. 2d 68 (Ohio); *De Carlucci v. Brasley,* 83 A 2d 823 (N.J.); *Isaacson v. Boswell,* 86 A. 2d 695 (N.J.); *Daniel v. Adorno,* 107 A. 2d 700 (D.C.); *Last v. Brams,* 238 Ill. App. 82; *Perry v. Faulkner,* 102 A. 2d 908 (N.H.); *Jetton v. Polk,* 68 S.W. 2d 127 (Tenn.); *Hurley v. McMillan,* 268 S.W. 2d 229 (Tex.); *Graves Truck Line Inc. v. Home Oil Company,* 312 P. 2d 1079 (Kan.); *Bratton v. Speaks,* 286 S.W. 2d 526 (Ky.); 5A Am. Jur. 119 and 120.

The Supreme Judicial Court of Mass. has apparently reached a different conclusion. *Long v. Union Indemnity Co.,* 178 N.E. 737, 79 A.L.R. 1116.

Defendants assign as error portions of the charge. They contend

the portions excepted to unduly restrict the effect of statements by plaintiff against his interest. We think it apparent from an examination of the entire charge that the court carefully instructed the jury with respect to admissions by plaintiff. She expressly charged the jury that statements made by plaintiff were substantive evidence and admissible against him. She further charged that a failure to deny asserted wrongful operation of the truck could be taken as an admission. Considered as a whole and not as separate sentences, the charge is a correct statement of the law. This is the proper way to test the charge. *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356; *In re Humphrey,* 236 N.C. 142, 71 S.E. 2d 915; *Hooper v. Glenn,* 230 N.C. 571, 53 S.E. 2d 843.

No Error.

STATE v. MACK ATWOOD.

(Filed 29 April, 1959.)

1. Criminal Law § 53: Homicide § 14—

Where, in a homicide prosecution, defendant contends that deceased committed suicide, it is competent for an expert witness who has testified as to the angle the bullet entered the body of deceased, to stand up and point the pistol at his own body at such angle to demonstrate his testimony that it was physically difficult to get his arm in a position to shoot a bullet at such angle.

2. Same—

Where, in a homicide prosecution, defendant contends that deceased committed suicide, it is competent for an expert witness to testify from his examination of deceased's clothing, skin tissue taken from deceased's body, the pistol and the ammunition used, that the fatal shot was fired by a pistol not closer than 40 inches from deceased, and that the size of the wound of entry did not indicate a contact shot.

3. Same: Criminal Law § 38—

Testimony of an expert as to the amount of powder burns left on white blotting paper when similar ammunition was fired from the death pistol at various distances is competent in explaining his testimony, based upon powder burns in deceased's clothing and in deceased's body around the wound, as to the distance the pistol was from deceased's body when the fatal shot was fired.

4. Criminal Law § 162—

Where the State introduces an exhibit without objection, but defendant's objection to testimony of witnesses in regard thereto is sustained, and the court charges the jury not to consider the exhibit or any evi-

dence relating thereto, defendant's objection to the admission of the exhibit is untenable.

5. Criminal Law § 85—

The State, in offering in evidence statements of defendant that deceased had the pistol in his own hand and had himself fired the fatal shot, is not precluded from showing by the testimony of other witnesses that the facts in regard to the firing of the pistol were otherwise.

6. Homicide § 20—

The State's evidence tending to show that defendant intentionally shot deceased with a pistol, inflicting fatal injury, is sufficient to be submitted to the jury and support a conviction of murder in the second degree.

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

APPEAL by defendant from *Preyer, J.*, September Term 1958 of ALLEGHANY.

Criminal prosecution on a bill of indictment charging first degree murder.

When the case was called for trial, the Solicitor for the State stated that he would put the defendant on trial for second degree murder or manslaughter.

Plea: Not Guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment, defendant appeals.

Malcolm B. Seawell, Attorney General, Claude L. Love, Assistant Attorney General, and Bernard A. Harrell, Staff Attorney, for the State.

R. Floyd Crouse, Worth Folger, J. Erle McMichael and Deal, Hutchins and Minor for defendant, appellant.

PARKER, J. At the close of all the evidence, defendant made a motion for judgment of nonsuit. G.S. 15-173.

The State's evidence is in substance as follows: About 2:00 a. m. on Sunday, 2 February 1958, Talmage Whitaker, a 26-year-old man, and the defendant were in a small storage room adjoining a large room in which defendant operated a beer parlor and grocery store. While there, a bullet fired from a 32 caliber Smith & Wesson pistol with a four-inch barrel, belonging to defendant, entered the front of Talmage Whitaker's chest and went through his body. About 3:00 or 3:30 a.m. on the same morning, Dr. Gayle Jackson Ashley, found by the trial court to be an expert witness as a physician, examined Talmage Whitaker's dead body in the emergency room at a hospital.

In his opinion, his death was caused by the above described wound.

About two weeks before Talmage Whitaker was killed, Hallie Blevins Hamm was in defendant's place of business. A conversation came up about George Whitaker. The defendant said: "He did not like none of the Whitakers, none of the damned Whitakers." She was in defendant's place of business a short time before Talmage Whitaker was killed. Defendant said: "He and Talmage were good friends, and he got up a conversation about the Whitaker boys and said he and Talmage were good friends, that Talmage had worked for him and that Talmage was in there the night before and called for some money he owed him and he was not going to pay it, that if he came back in there, he would stick a bullet in his damned guts."

About midnight of the night Talmage Whitaker was killed, Richard Andrews was at defendant's place of business. The defendant, Talmage Whitaker, Bert Reeves, Morris Moulder, a boy he did not know, and defendant's wife were present. While there he heard a conversation between defendant and Talmage Whitaker as follows: "Mack said to Talmage, 'You told Old Bell. I know you did,' and Talmage replied, 'No, I didn't.' Talmage started walking away and Mack said, 'You are a g. d. s. o. b. and a liar. I know you did,' and Talmage repeated, 'No, I didn't.' Then Mack said something else, to which I did not pay too close attention, and that he, Mack Atwood, talked to Talmage Whitaker in a kind of rough tone of voice, and that I saw no gun there that night. That I stayed there 15 or 20 minutes."

About midnight on 1 February 1958, or shortly thereafter on 2 February 1958, Bert Reeves, his friend, Morris Moulder, who is in the U. S. Navy and lives in Indiana, Talmage Whitaker and a girl arrived in an automobile at defendant's place of business, which is situate about four miles north of the town of Sparta on U. S. Highway 21. Defendant and his wife were there. Reeves and Moulder went into defendant's place of business: Talmage Whitaker and the girl remained in the automobile. Talmage Whitaker came in later. The girl remained in the automobile. While there, Reeves drank some whisky and beer. He got the whisky from the defendant. It was bootleg liquor, and was in the storage room. Moulder drank some beer there. As one enters defendant's place of business there is a big room about 25 x 50 feet. At the end of this room on the left is a storage room about 10 x 25 feet.

Reeves heard Whitaker say, "lets go back and get a drink." Defendant and Talmage Whitaker went into the storage room. Reeves testified as follows: "When Talmage and Mack went into the storeroom, they closed the door and I was sitting between the juke box

and the stove and had been drinking some. There were some chairs around the stove and Morris and Mrs. Atwood and I were there and I went to sleep. The next thing I remember is when Morris got me awake and I turned around and Talmage was lying on the floor behind me. Someone said Talmage had been shot and I went over and looked at Talmage and kicked him kind of on the leg and told him to wake up. I thought he was asleep. Mack said to me, 'Leave him alone; he has been shot.' I was standing over Talmage and Mack brought a pistol in and Mack stuck the butt of it in Talmage's left hand and said, 'This is the way he had it.' Mack took the pistol and stuck Talmage's hand in there and pushed his hand upon it and took it away. Shortly thereafter the ambulance came and I went to the hospital."

Moulder testified as follows: "I went to sleep sitting around the stove. Mack woke me up when he hollered to his wife that 'Talmage shot himself with that old gun.' We were standing around the stove. Mack hollered about three times that Talmage shot himself fooling with that old gun. I woke up and got up out of my chair. He went into the back room and when he came out he had Talmage, dragging him, and he dragged him in and laid him down. Mack had his arms under Talmage's arms and his feet were dragging the floor. He drug him from the back room and laid him down in the big room. Then Mack brought the gun out. I do not remember whether it was in the back room or whether he had it on him or what, but I saw him put the gun in Talmage's hand and wiggle it around and said, 'That is the way he had the gun.' The gun was put in Talmage's left hand. I saw Mack walk behind the counter and I do not know whether he laid the gun up there or what. I did not see the gun any more."

Talmage Whitaker's thumb on his left hand was off to about the first joint; his two middle fingers on the same hand were off down to the second joints; and his little finger on the same hand was stiff. His left hand had been in that condition since he was 12 years old. It was caused by a dynamite cap. He was right-handed. He was five feet, six or seven inches tall, and weighed 140 pounds.

Sheriff Dent Pugh arrived at the hospital about 3:30 a. m. on 2 February 1958. Talmage Whitaker was dead. He talked there with the defendant. He smelt the odor of alcohol on defendant's breath, and, in his opinion, he was under its influence. This in substance is what defendant said to Sheriff Pugh at the hospital: Whitaker asked him to go into the back room. They did. Whitaker asked to see his pistol. He handed him his pistol, and told him to be careful, it was loaded. He walked over to the other side of the back room, and had his back

turned to Whitaker. He heard the pistol fire. He looked around, and Whitaker had fallen among the empty cases. Whitaker was holding the pistol in his right hand. He took it out of his hand, and laid it on the floor. He called an ambulance, and carried Whitaker to the hospital. About 6:00 a. m. on the same day Sheriff Pugh and Melvin Crawford, a special agent of the State Bureau of Investigation, went to defendant's home, waked him, and they went to defendant's place of business. The pistol was lying on the floor in the back storage room. The defendant said then that he took the pistol out of Whitaker's hand, and laid it on the floor, and that he hadn't moved it before we picked it up. That he gave Whitaker a drink of nontax-paid whisky, and he walked over to the stairway leading upstairs to get a drink of red liquor that he had stuck down by the stairway, and then the pistol fired. That he was several feet away, when the pistol fired. That he got Whitaker under the arms, and dragged him into the front room. Sheriff Pugh testified he had subpoenaed Talmage Whitaker as a witness against defendant in a hit and run case.

Melvin Crawford picked up the pistol, wrapped it in a handkerchief, carried it to Raleigh, and turned it over to special agent Haywood R. Starling at the State Bureau of Investigation Laboratory. He was present when Starling tested the pistol for fingerprints. Crawford took fingerprints from Talmage Whitaker's hands, which were put on a card. The pistol had in the chamber five unfired bullets and one fired shell. He got Talmage Whitaker's clothes from a stretcher at the undertakers, put them in a bag, and carried them to Raleigh.

The trial court found as a fact that Haywood R. Starling was an expert on fingerprint identification. He testified in substance: He examined this pistol on 3 February 1958, and found fingerprints on it on the frame just below the cylinder release. The fingerprint represents the right thumb. The end of the thumb in that fingerprint was pointing directly upward toward the cylinder release. It was directly behind and below the cylinder. He made a comparison of this fingerprint, a right thumb fingerprint, with the right thumb print on the fingerprint card he received from Melvin Crawford, bearing the identification "fingerprints of Talmage Whitaker." In his opinion, the right thumb fingerprint on the pistol is identical with the right thumb fingerprint on the card he received from Melvin Crawford, bearing for identification "fingerprints of Talmage Whitaker."

On 3 February 1958 Dr. Gayle Jackson Ashley performed an autopsy on the body of Talmage Whitaker to determine the path of the bullet through his body. The bullet entered the front of the chest just below the left nipple, and went through the body at an angle of about

10 degrees upward and 25 degrees toward the middle portion, or midline, of the body. There was a small wound on the anterior chest wall, about three-eights of an inch in diameter. There was another wound on the back of the left chest cage approximately one-fourth of an inch in diameter. He testified in detail as to the angle and course of the bullet through the body, using a pencil to illustrate his testimony. In response to a question asked by the State, Dr. Ashley was permitted, over an objection and exception by the defendant, to stand up and point the pistol at his body at the angle which the bullet wound penetrated Talmage Whitaker's body. The court in overruling the objection by defendant instructed the jury that they could only consider this demonstration as it may illustrate Dr. Ashley's testimony, and could not consider it as substantive evidence. Over objections and exceptions by the defendant, Dr. Ashley was permitted to testify that it wasn't a very convenient angle to pull the trigger with his right hand, and that it was physically difficult to get his arms in a position to demonstrate the angle of the wound with that pistol. The Record shows later on that the trial court, without any objection on defendant's part, permitted the jury to examine the pistol in any manner they desired to do. Dr. Ashley further testified that he did not obtain sufficient information to enable him to give an opinion as to the distance the pistol was from the body at the time the bullet was fired.

Defendant's assignments of error to the demonstration by Dr. Ashley to illustrate his testimony, and to his testimony as to the angle of the pistol set forth above are overruled. *S. v. Powell,* 238 N.C. 527, 78 S.E. 2d 248, and cases cited therein; *People v. Willis,* (Cal. App.), 233 P. 812. The California case was a prosecution for murder. The Court held admissible in evidence an expert's testimony as to operation of gun used by defendant, and difficulty of pulling trigger while holding it in position from which defendant was alleged to have fired. "A witness may use his own body, or a member of his body, or an article, to illustrate or explain the evidence." 32 C.J.S., Evidence, Sec. 603. *S. v. Carr,* 196 N.C. 129, 144 S.E. 698, relied on by defendant, is factually distinguishable. In that case the issue was whether the deceased committed suicide or was killed by the defendant. A new trial was awarded because medical expert testimony was erroneously admitted to the effect that it was not possible for deceased to have fired the gun, and made the wound the expert saw, which was the very issue the jury had to decide.

John Boyd, a special agent of the State Bureau of Investigation, does firearms identification work, and is assigned to the ballistics laboratory. He holds a degree from North Carolina State College,

which includes extensive training in microscopy. He has received specialized technical training in the field of firearms identification and in different types of weapons in five different manufacturing plants. He has received technical training in the H. P. White Technical Laboratories in Bel Air, Maryland. He has made 500 or 600 ballistics tests in the last six years. In the last six years he has testified about 100 times as an expert in the field of ballistics in the State and Federal Courts. Without any objection on the part of defendant, the trial court found that he was an expert in the field of ballistics. He testified in substance: The field of ballistics includes, among other things, powder and shot concentration or shot patterns, and making chemical tests for nitrates and gun powder. He examined Talmage Whitaker's jacket, which he got from special agent Melvin Crawford. The jacket had a stain on the front left upper portion and a point of penetration at this point. From a visual inspection the stain was believed to be blood. A standard nitrate test made on the area around the hole in the jacket for the purpose of determining if there were any burned or unburned particles or powder residue around this area of the jacket showed the powder residue at that point on the jacket was only negligible. He also ran a nitrate test on Talmage Whitaker's sweat shirt and undershirt, which revealed only a negligible an ount of nitrates. The nitrate test is for gunpowder residue. In Sparta about 3 February 1958 he saw Dr. Gayle Jackson Ashley remove from Talmage Whitaker's body some skin tissue from the point of penetration of the wound and the left chest. He saw William Best, chemist of the State Bureau of Investivation, make a chemical test to determine whether or not those portions of skin tissue contained burned or unburned powder particles or powder residue. The test was negative. He fired the Smith & Wesson pistol belonging to defendant, and which pistol was the death weapon, into white blotter paper to try to duplicate the nitrate tests on Talmage Whitaker's garments that he tested. This weapon was fired in contact with the blotter paper, and was backed away from the paper periodically at definite intervals until a distance of 40 inches was reached. In doing this he used 9 or 10 pieces of this paper. Powder residue and partially burned and unburned powder particles were noted at every point back to 40 inches. There was only a negligible amount of nitrate at 40 inches. This very favorably compares at 40 inches to the nitrate tests which were conducted on Talmage Whitaker's garments. He used the same type of ammunition as was found discharged in the cylinder of the pistol. He used these pieces of paper to illustrate his testimony. He used white blotter paper so as to give a contrast between the black unburned and burned

powder particles and powder residue and the white background of the paper. From his examination of Talmage Whitaker's clothing, of the skin tissue taken from his body, and of the pistol, he has an opinion satisfactory to himself that the pistol was fired at a distance of 40 inches or more from Talmage Whitaker's body. If this Smith & Wesson pistol were fired in contact with a human body, the wound of entry would be a large gaping hole due to the fact that the force of the gas pressure forcing the bullet down the barrel must be allowed to escape in the body down the wound of entry. That force blows a large hole in the human body. Whereas, if the pistol were fired at a distance, the only force the human body would receive is that of the impact of the striking of the bullet. The hole that this pistol would impart to a body fired at a distance would be a hole approximately the size of the bullet. He observed the wound on the front of Talmage Whitaker's body. In his opinion, the size of the wound of entry did not indicate a contact shot. On a contact shot it would be practically impossible to remove all of the nitrates from the clothing regardless of how they are handled. It would nearly be impossible to remove them other than by washing them, because the nitrates, the burned and unburned powder particles are imbedded into the fabric. They are not just gently laid on it. They are thrown there by terrific force. A shot that was fired at some distance, part of the nitrates would still be imbedded in the fabric from the force that pushed them there. You could not remove them all.

Defendant assigns as error the admission in evidence, over his objection and exception, of the testimony of John Boyd that, in his opinion, the pistol was fired at a distance of 40 inches or more from Talmage Whitaker's body, and that, in his opinion, the size of the wound of entry did not indicate a contact shot. *S. v. Fox,* 197 N.C. 478, 149 S.E. 735, was a prosecution for murder. A doctor, admitted to be a medical expert, examined the body of Jesse Taylor, the man killed. He was asked this question by the State: "Have you an opinion satisfactory to yourself on this question, as to whether or not Jesse Taylor, the wound which was found in his neck, was inflicted while he was lying or standing up?" "Answer: "Yes, sir my opinion is that he was lying down." This Court held the testimony competent, as clearly within the domain of expert testimony. In *S. v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196, a physician testified that, in his opinion, deceased was lying on the floor when fatal injuries inflicted; in *McManus v. R. R.,* 174 N.C. 735, 94 S.E. 455, a physician testified the intestate, in his opinion, was lying down at time of injury; in *George v. R. R.,* 215 N.C. 773, 3 S.E. 2d 286, there is similar testi-

mony as in the *McManus* case. In *S. v. Powell, supra,* a medical expert testified as to the bullet wounds in, and powder burns on the head and hand of deceased. This Court held that it was competent for him to testify from his examination of the body as to the position of deceased's hand when the fatal shot was fired. John Boyd is an expert witness on ballistics. He saw and tested the deceased's garments, and saw the wound on the front of Talmage Whitaker's chest—the point of entry of the bullet. The opinions he expressed are clearly competent as within the realm of expert testimony. The above assignments of error, and defendant's assignment of error Number 8 related thereto, are overruled.

Defendant's assignment of error Number 3 is that the court erred in permitting John Boyd to testify, over his objection and exception, as to the tests he made in firing the death pistol, with similar ammunition to the empty shell in the chamber of the pistol, into white blotting paper. This assignment of error is overruled.

S. v. Phillips, 228 N.C. 595, 46 S.E. 2d 720, was a prosecution for murder. The Court stated: "The State contended on the second trial, as well as on the first, that the range of the death bullet plus the absence of powder burns left the theory of suicide with no substantial basis of fact. In support of this contention, the prosecution had experiments made to determine whether bullets fired from the death pistol at close range would show powder burns on the targets. They did. On cross-examination, one of the officers who made the experiments stated that 'the amount of powder in a shell and the type of powder would have right much to do with discoloration, but it would have nothing to do with what we call powder burns. These are powder burns. That is what I am talking about.' . . . While the experimental conditions here were not identical with those attending the matter under review, still they were sufficiently similar for the experimental results to throw light upon the controversy and to assist the jury in making true deliverance in the case, 20 Am. Jur., 628. Hence, the ruling of the court in admitting the evidence will be sustained." The targets were white cheese cloth.

Thrawley v. State, 153 Ind. 375, 55 N.E. 95, was a prosecution for homicide. Defendant contended there was a hand to hand combat. The prosecution adduced evidence to show deceased had been shot from a distance. The Court held it was competent to permit a witness for the State to testify to the results of experiments in shooting with defendant's revolver at blotting pads for the purpose of showing how far unburned grains of powder would carry, the same make and grade of cartridges being used as defendant had employed in the homicide,

and it appearing that the cartridges are standard and uniform in operation. In *Newkirk v. State,* 134 Md. 310, 106 A. 694, experiments made with the same revolver and the remaining ammunition contained therein by shooting at a light cloth, for the purpose of determining the distance at which the revolver must have been held to produce the burned effect upon the clothing of a woman, were held admissible upon the question whether she was murdered or committed suicide.

In *Shepherd v. State,* (Oklahoma), 300 P. 421, the State's evidence disclosed that there were no powder burns on the body, nor on the shirt worn by deceased at time he was shot. The theory of the defense was that the shooting was accidental. The State offered the following evidence to show the pistol was farther from the deceased at the time it was discharged than the defense claimed: Two police officers testified they placed shirting material on the side of a box and fired at it at a distance of 6, 15, 24 and 36 inches, and the results of such shots as showing powder burns. The Court said: "We are satisfied that the court did not err in admitting evidence of the experiments as tending to shed some light on the firing of the fatal shot, and its weight was for the jury to determine." To the same effect see: *Sullivan v. Commonwealth,* 93 Pa. St. 284; *People v. Clark,* 84 Cal. 573, 24 P. 313; *Irby v. State,* (Okla. Crim. App.), 197 P. 526; *Wynes v. State,* 182 Ga. 434, 185 S.E. 711.

John Boyd testified that he fired the pistol into a piece of pork or fatback. The pork was in court. It was offered in evidence without objection. The prosecuting officer asked him to cut the pork open. The defendant objected. The objection was sustained. Beneath in the Record appears Exception 10. This is all in the Record in respect to the pork. Before the State concluded its case, the court instructed the jury: "The court at this time will exclude Exhibit No. S-9, which is the piece of fatback meat that was introduced into evidence and the court will instruct you, lady and gentlemen of the jury, that you won't consider that exhibit, State's Exhibit No. 9, the piece of fatback meat in any way in this case, and you won't consider any evidence relating to that exhibit." Defendant's assignment of error, based on Exception 10, is overruled.

The other assignments of error as to the evidence have been carefully examined, and are all overruled.

The State offered in evidence the statements of defendant as to the firing of the pistol in the hands of deceased, but that does not prevent the State from showing that the facts were different. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904.

In our opinion, the evidence introduced by the State, when considered in the light most favorable to the State, is of sufficient probative force to justify the jury in drawing the inference that the defendant shot the deceased with his pistol, and is guilty of murder in the second degree. The assignment of error to the refusal of the court to nonsuit the case at the close of all the evidence is overruled.

There are no assignments of error to the charge.

In the trial below we find

No Error.

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

FLORENCE GARNER v. ATLANTIC GREYHOUND CORPORATION AND HAL M. O'BRIEN, T/A CARDINAL GIFT SHOP.

(Filed 29 April, 1959.)

1. Negligence § 4f(2)—

The proprietor of a store owes the duty to his customers of exercising ordinary care to keep that portion of the premises designed for their use in a reasonably safe condition so as not to expose them unnecessarily to danger, and to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision should know.

2. Same—

A proprietor is not an insurer of the safety of his customers, but may be held liable only for injuries resulting from negligence on his part.

3. Landlord and Tenant § 11—

The fact that a proprietor of a store is a lessee does not relieve him from liability to a customer for a fall caused by the dangerous condition of the entrance to the store resulting from the plan of construction, since the fact that he is a lessee in no way lessens his duty of keeping the premises in a reasonably safe condition.

4. Negligence § 4f(2)—

The doctrine of *res ipsa loquitur* does not apply to a fall of a customer on the premises of a store.

5. Same—

While, in a customer's action to recover for a fall at the entryway of a store, the evidence is to be considered in the light most favorable to her, allegation that the place in question was slippery and uneven is to be disregarded when there is no evidence that the entryway was worn, broken or structurally imperfect.

6. Same—

Evidence tending to show that the entryway to a store abutting some

12 feet along the sidewalk was even with the sidewalk at one end and was elevated some 6 inches above the sidewalk at the other end because of the grade of the street, does not disclose negligence in the construction or maintenance of the entryway.

7. Same—

Evidence that the entryway of a store had a declination of some 6/10 of a foot in the 42 inches between the doors of the store and the sidewalk does not disclose negligence in the construction or maintenance of the entryway.

8. Same— Evidence held insufficient to show that proprietor of store should have anticipated that customer would fail to perceive difference in levels because of asserted optical illusion.

Evidence that the entryway of a store for the distance of some 42 inches from the doorway to the sidewalk was constructed of terrazzo and had a slope of some 6/10 of a foot, that it abutted the sidewalk for some 12 feet, that it was level with the sidewalk at one end but was elevated above the sidewalk some 6 inches at the other end because of the grade of the street, and that the sidewalk was ordinary concrete, *is held* insufficient to be submitted to the jury on the issue of the proprietor's negligence in causing the fall of a customer in stepping from the entrance to the sidewalk in broad daylight, on the ground that the slope of the entrance created an "optical illusion" preventing the customer from seeing the step-down, since, the material of the entryway and the sidewalk being different in fact, the proprietor, in the absence of evidence of knowledge on his part of the asserted optical illusion prior to the accident, was not under duty to anticipate that the different materials on different levels would look the same to the customer.

9. Same—

The proprietor of a store is not under duty to warn customers of a condition which is obvious, nor under duty to provide handrails at a stepdown of some 6 inches to the sidewalk at one end of the entrance to the store.

APPEAL by defendant, Hal M. O'Brien, trading as Cardinal Gift Shop, from *Gwyn, J.*, October 1958 Term of DAVIDSON.

This action was instituted by plaintiff against defendants, Atlantic Greyhound Corporation, hereinafter referred to as "Greyhound," and Hal M. O'Brien, trading as Cardinal Gift Shop, hereinafter referred to as "defendant," to recover for personal injuries received when she fell at the entrance of defendant's shop because of the alleged negligent construction and maintenance of the entryway. The answers denied negligence and pleaded contributory negligence.

At the close of plaintiff's evidence Greyhound, owner of the building, and defendant, shopkeeper and lessee, moved for judgment as of nonsuit. As to Greyhound, the motion was allowed; as to defendant, it was overruled. Defendant offered no evidence, renewed the motion

and excepted to the overruling of same. The jury answered the issues of negligence and contributory negligence in plaintiff's favor and awarded damages.

Plaintiff's evidence was substantially as follows:

Defendant owns and operates the Cardinal Gift Shop on Cherry Street in the City of Winston-Salem in a building leased by him from Greyhound. The shop is on the west side of Cherry Street. In front of the shop is an ordinary concrete sidewalk which slopes downwardly to the south. The entryway to defendant's shop serves two business establishments, the Stork Shop on the north side and the Cardinal Gift Shop on the south side. The entryway is 12 feet wide at the sidewalk and 8 feet 2 inches at the shop doors. It has a depth of 42 inches from the doors to the sidewalk. At the south end of the entryway there is a 6-inch perpendicular drop-off to the sidewalk; in the middle a 3-inch drop-off; and at the north end the entryway and sidewalk are approximately flush. There is a downward slope from the doors toward the sidewalk. The slope is 6/10 of a foot from the doors to the sidewalk, 2 5/16 inches per foot or a slope of 18% to 19%. The entryway is of terrazzo construction and has strips of abrasive material cemented to the terrazzo at intervals of 2 to 3 inches to prevent slipping thereon. There was no covering over the sidewalk.

The plaintiff lives in Thomasville and is 58 years old. On 27 June, 1955, she and Mrs. R. K. Farrington drove to Winston-Salem, left the automobile in a parking lot, ate lunch at a cafe and later went to defendant's shop. Plaintiff had visited this shop 3 or 4 times before, but she could not recall the time of her last previous visit. She entered the shop 2 to 4 feet north of the center of the entryway where the difference in grade of the sidewalk and entrance is slight. She and Mrs. Farrington were in the shop 25 to 30 minutes. They left about 1:00 p. m. Plaintiff came out ahead. The weather was clear. Plaintiff had nothing in her hand but her purse. She came to the sidewalk about 2 feet from the south end of the entryway where the drop-off is approximately 6 inches. At the drop-off she fell and was injured. She is over 5 feet tall and on this occasion was wearing shoes with medium heels, about 2 inches high. She has normal eyesight and wears glasses only for reading. There were not many people passing at the time. The plaintiff described the circumstances of her fall as follows:

"I was looking down where I was going and the entrance looked just like it went into the sidewalk all in one, the slope that goes down. I was not aware that there was a drop-off at the end of the slope, not that much. I stepped off and started falling. My foot hit right where it goes off on the drop-off. My heel was on the incline and the front

part of my foot was off on the sidewalk or about halfway on and halfway off. That made me go forward and fall and Mrs. Farrington hollered and said lookout and I turned to try to grab to something and there was nothing to grab to and I fell on my left hip. I did not see any warning sign nor any handrail nor anything to grab to. . . . I looked down as I came out of the Gift Shop. It looked like it went straight into the sidewalk. . . . (N)othing to prevent me from seeing 5 or 6 feet in front of me. . . . When I stepped out here my heel was right on there and the ball of my foot was out in space, just hanging. I fell. I fell so fast you can't tell. . . . It (the entryway) looked like it was just the plain sidewalk. . . . I have been back there and looked at the place and I can tell you that I could not see it because it looked like it all went into the sidewalk. . . . My heel caught because I didn't know the step was there . . .but it (the entryway and sidewalk) was the same color. . . . It looked practically all the same to me."

There was evidence as to injuries and the treatment thereof.

From judgment conformable to the verdict of the jury defendant appealed, assigning error.

Charles F. Lambeth, Jr., for plaintiff, appellee.
DeLapp & Ward for defendant, appellant.

MOORE, J. Defendant's only assignment of error, except to the signing of the judgment, was to the failure of the court to sustain his motions for judgment of involuntary nonsuit. The sole question for decision here is whether upon the evidence the defendant, shopkeeper, failed in his duty to plaintiff, customer.

The duty of a shopkeeper with respect to the safety of cutomers is as stated in *Lee v. Green & Co.*, 236 N.C. 83, 85, 72 S.E. 2d 33, as follows: "Those entering a store during business hours to purchase or look at goods do so at the implied invitation of the proprietor, upon whom the law imposes the duty of exercising ordinary care (1) to keep the aisles and passageways where customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose the customer to danger, and (2) to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know. *Ross v. Drug Store*, 225 N.C. 226, 34 S.E. 2d 64; (and other cases there cited).

"However, such proprietor is not an insurer of the safety of customers and invitees who may enter the premises, and he is liable only for injuries resulting from negligence on his part. *Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E. 2d 242; *Bowden v. Kress & Co.*, 198 N.C. 559,

152 S.E. 625." See also *Little v. Oil Corp.*, 249 N.C. 773, 776, 107 S.E. 2d 729, and *Sledge v. Wagoner*, 248 N.C. 631, 635, 104 S.E. 2d 195.

"The proprietor of a place of business which is kept open to public patronage is obligated to keep the approaches and entrances to his store in a reasonably safe condition for the use of customers entering or leaving the premises. The proprietor, however, is not under an insurer's liability in this respect. To hold a storekeeper liable in damages for injury to a customer who fell at the entrance to the store, the customer must show a failure on the part of the storekeeper to exercise reasonable care for the safety of customer." 38 Am. Jur., Negligence, Sec. 134, p. 795; Anno: 33 A.L.R. 222; 162 A.L.R., 986; 31 A.L.R. 2d 177.

"The fact that the proprietor of a store is a lessee of the premises upon which it is located in no way lessens his duty of keeping the premises reasonably safe for his customers." 38 Am. Jur., Negligence, Sec. 131, p. 791.

The doctrine of *res ipsa loquitur* has no application to a case in which recovery is sought for injuries received in a fall upon or from the entryway of a shop or store. In *Markham v. Stores Co.*, (Pa. 1926) 132 A. 178, 43 A.L.R. 862, the Court said: "It is first insisted that plaintiff failed to establish any actionable negligence on the part of the defendant. The burden rested upon her, for its presence is not to be presumed from the mere fact that the injury was caused by the fall at the entrance of the store. *Chapman v. Clothier*, 274 P. 394, 118 Atl. 356. The doctrine of *res ipsa loquitur* does not apply in such cases and the fact that damage was occasioned by some breach of duty must be affirmatively proved. (citing cases)." See also: *Lee v. Green & Co., supra; Fanelty v. Jewelers*, 230 N.C. 694, 699, 55 S.E. 2d 493; *Broadston v. Clothing Co.* (Neb. 1920) 178 N.W. 190; Anno: 33 A.L.R. 197 *et seq.*

In the instant case, in determining whether there was some breach of duty on the part of the defendant, 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 of fact to be drawn therefrom. *Primm v. King*, 249 N.C. 228, 234, 106 S.E. 2d 223. But the evidence is to be considered within the framework of the allegations of the complaint. There must be both allegation and proof. *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 572, 101 S.E. 2d 458.

The substance of plaintiff's allegations of defendant's negligence is that defendant knew, or in the exercise of due care should have known, of the defective, "dangerous and ruinous" condition of the entryway

and failed to correct the condition. It is alleged that the entryway was dangerous and defective in that: (1) it sloped from the doorway of the store toward the sidewalk; (2) the sloping surface was slippery and uneven; (3) at the sidewalk it "fell off vertically," at varying distances up to 6 inches; (4) the sloping entryway had the appearance of going straight into the sidewalk, creating an optical illusion and camouflaged effect, and constituted a latent defect; (5) no handrails or supports were provided along the slope; and (6) no warnings were posted.

There is no allegation or evidence that the entryway was worn, broken or structually imperfect, nor that it was wet or had any foreign substance thereon. There was no testimony that the plaintiff either slipped or tripped upon the entryway. Plaintiff's evidence is to the contrary. Therefore the allegation that the entryway was defective in that it was slippery and uneven is to be disregarded.

It is true that the entryway at the door was slightly more than 7 inches higher than at the sidewalk and the slope was about 19%. This circumstance alone does not render it dangerous and does not constitute negligent construction or maintenance. In *Fanelty v. Jewelers, supra,* the slope was much less, ½ inch per foot, and the Court said: ". . . the fact that the surface of the terrazzo flooring was smooth and sloped downward from the entrance door to the sidewalk was insufficient of itself to show negligent construction of the entryway." In *Hogan v. Building Co.* (Wash. 1922), 206 P. 959, it was held that defendant was not negligent in constructing and maintaining an entrance which had a slope of 11 inches in 7½ feet. In *Mullen v. Mercantile Co.,* (Mo. 1924), 260 S.W. 982, the entrance sloped about 1 inch per foot and the Court said: "Such entrances are used in business buildings, as much or more so than steps. We therefore hold that the slope of said incline of itself was no evidence of negligence." In *Schaefer v. De Neergaard,* (N. Y. 1921), 196 App. Div. 654, 188 N.Y.S. 159, the main contention of the plaintiff was that the ledge at the entrance should have been level or about level. Its slope was about 15% or 4½ inches in 2 feet and 10 inches. The Court held that there was a total absence of proof of negligence. The only case, which has come to our attention, that holds the mere slope of an entryway evidence of negligence to be submitted to the jury is *Long v. Breuner Co.,* (Cal. 1918), 172 P. 1132. In that case the slope was at places as much as 50%. In *Lunny v. Pepe,* (Conn. 1933), 165 A. 552, the elevation of a ramp inside a building was considered so slight (1 inch per foot) as to appear to be level. Dimness of light and sameness of appearance and color were other factors considered. Slope alone was not the basis for the decision. In

an Utah case the elevation of the entrance was considered only in connection with another factor. The Court said: "While it is true that the construction and maintenance of the entranceway of terrazzo on an inclined plane does not of itself constitute negligence, it comes within the rule that a negligent act may be one which 'creates a situation which involves an unreasonable risk to another because of the expectable action of the other, a third person, an animal or a force of nature.' " *De Weese v. J. C. Penney Co.*, (Utah 1956), 297 P. 2d 898.

In the instant case the sloping of the entryway cannot be said to constitute negligence in and of itself. As we understand the testimony, plaintiff does not contend that her fall resulted from the slope of the entrance as such. It would seem that her contention is that the sloping was a part of what she termed "an optical illusion."

The complaint alleges that the perpendicular drop-off or step-down from the entryway to the sidewalk constituted a dangerous condition, especially in view of the grade of the sidewalk and the fact that the drop-off varied in height.

This Court in *Reese v. Piedmont, Inc.*, 240 N.C. 391, 395, 82 S.E. 2d 365, quoting from *Benton v. Building Co.*, 223 N.C. 809, 813, 28 S.E. 2d 491, said: "Generally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees." In the *Reese* case the step in question was 7¾ inches high. In the *Benton* case the step-down was 6 inches. In *Hadden v. Snellenburg*, (Pa. 1928), 143 A. 8, it is said: "It is not negligence *per se* or negligent construction in a store or other public place to have one floor at a lower level by a few inches than another." Here the difference in levels was 6 inches. In *Garret v. Theatres, Inc.*, (Mich. 1933), 246 N.W. 57, there was a 4½ inch step-down. The Court stated: "Different floor levels in private and public buildings, connected by steps, are so common that the posibility of their presence is anticipated by prudent persons." The same principles are declared in the following cases: *Boyle v. Preketes*, (Mich. 1933), 247 N.W. 763; *Kern v. Tea Co.*, (N.Y. 1924), 209 App. Div. 133, 204 N.Y.S. 402; *Watkins v. Bird Co.*, (CCA 8 C. 1929), 31 F. 2d 889; and *Sterns v. Hotel Co.*, (Mass. 1940), 29 N.E. 2d 721.

In *Hoyt v. Woodbury*, (Mass. 1909), 86 N.E. 772, we have an entryway substantially similar to the one in the instant case, with the added feature that the entryway itself was at two levels. The sidewalk was at a considerable grade, was about level with one part of the entrance and below the other portion. The entryway served two stores. The plaintiff stumbled at the step-up between the two levels of the

entryway as she left one of the stores. The two levels were made of the same design and color of tiling. The accident occurred on a sunny afternoon. Plaintiff sued the owner of the building, charging negligent construction and maintenance of the entryway. Speaking to the subject the Court said: "He owned a lot of land on a slight hillside, and it abutted upon a street which descended the hill. He had a right to improve his real estate in any reasonable way. He chose to maintain upon it a block with two stores separated by an entrance to upper stories. The problem which confronted him in doing this was so to arrange the means of access to these three entrances as to adapt them to the varying grade of the adjacent sidewalk. This could have been done in any one of several different ways. But it obviously must have been done in some way. So long as the present physical configuration of this commonwealth continues to exist, substantially the same difficulties will confront those who undertake to erect structures for use of the public. Methods may change, and facilities of access may grow better, but the situation of buildings abutting upon hilly streets will abide. Persons entering this building were charged with knowledge that they were not entering from a perfectly level sidewalk, and that generally the floors of buildings are not of precisely the same elevation as the sidewalk, even where it is level. Customers entering or leaving stores cannot be oblivious of these almost universally prevailing conditions. Owners of buildings have a right to proceed in their constructions in view of this common observation on the part of the public and assume in the actions of those, who may frequent their buildings, the exercise of ordinary circumspection as to their footing. Steps of greater or less height are the usual, although not the only, means of overcoming such differences in level as existed in this case between the street and the entrance. People cannot expect upon land obviously in private ownership next a street the same condition that they might anticipate in a public sidewalk. In arranging an approach to the store wider at the street line and converging toward the door and the approach to the upper floors at a conveniently higher level with a low step in ordinary form between, the defendant violated no duty which he owed to the plaintiff."

Tyler v. Woolworth Co., (Wash. 1935), 41 P. 2d 1093, is another case involving a sloping sidewalk. There were three ramps or entrances to the store. These entryways sloped slightly from the store to the sidewalk. Two of them were about level with the sidewalk, the third had a drop-off ranging from 6 to 8 inches. Plaintiff entered at a ramp flush with the sidewalk and fell in leaving the store at the drop-off. Plaintiff had never been in the store before, the ramp was so

crowded she had to edge her way through to get out. There was judgment for the plaintiff, but the ground upon which recovery was allowed was the crowded condition of the ramp and the lack of opportunity of plaintiff to see and appreciate the danger. But in speaking of the construction and maintenance of the entryway itself, the Court said: "The mere fact that a step up or down, or a flight of steps up or down, is maintained at the entrance or exit of a building is no evidence of negligence, if the step is in good repair and in plain view. *Hollenbaek v. Clemmer,* 66 Wash. 565, 119 P. 1114, 37 L.R.A. (N.S.) 698. If the step is properly constructed, but poorly lighted, and by reason of this fact one entering the store sustains an injury, recovery may be had. On the other hand, if the step is properly constructed and well lighted so that it can be seen by one entering or leaving the store, by the exercise of reasonable care, then there is no liability."

In the instant case, the weather was clear, the entryway was not crowded, only a few persons were passing on the sidewalk, and the plaintiff was not carrying bundles of merchandise. In the absence of some unusual condition, the mere fact that the entryway and sidewalk sloped, and that there was a drop-off of varying height at the sidewalk, did not constitute negligence.

But plaintiff asserts that the entryway was defective and dangerous for the reason that it, in conjunction with the sidewalk, created an optical illusion or camouflaging effect and made it appear that there was no drop-off.

In *Mulford v. Hotel Co.,* 213 N.C. 603, 197 S.E. 169, a case involving the alleged imperceptibility of a step-down, it was held that the evidence made out a prima facie case of negligence. Plaintiff left a well lighted coffee shop and stepped into a dimly lighted basement which was at a lower level. The walls of the basement and coffee shop were the same color. Plaintiff testified that it all looked to be on the same level and that she did not see any difference. Other cases involving the idea of optical illusion or imperceptibility of change of level are: *Chain Stores, Inc., v. De Jarnette,* (Va. 1935), 178 S.E. 34; *Lunny v. Pepe, supra; Crouse v. Stacy-Trent Co.,* (N. J. 1933), 164 A. 294. In all of these cases the drop-off was inside a building, the lighting conditions were poor, and there was a similarity in color, design or material of the floor levels.

The case of *Touhy v. Drug Co.* (Cal. 1935), 44 P. 2d 405, presents perhaps the strongest authority for appellee's position. In the *Touhy* case the plaintiff made a purchase at a soda fountain. In order to be served she sat on a stool mounted on a raised platform. The platform was 7 inches above the floor level. The platform and floor were covered

with the same design, size and color of tiles. In leaving the fountain plaintiff fell at the drop-off. Plaintiff recovered judgment. The decision rested solely on the deceptive appearance caused by the tiling.

However, it is observed that the *Touhy* case involved a situation inside a building. No case has come to our attention where recovery has been allowed on the basis of optical illusion where the situation existed outside a building in full daylight.

In the case at bar it was 1:00 p. m. The weather was clear. Plaintiff's view was entirely unobstructed. She had normal eyesight. The fall occurred in open daylight. It is true that she testified that "the entrance looked just like it went into the sidewalk all in one, the slope that goes down. . . . It looked like it was just the plain sidewalk. . . . (I)t was the same color. . . . It looked practically all the same to me." In *Hoyt v. Woodbury, supra,* both levels in the vicinity of the fall were paved with identical black and white tile, yet there was a holding upon all the evidence of no negligence. It will be observed that the fall in that case took place in daylight. Bearing in mind, in the instant case, that there was similarity in the colors of the entryway and sidewalk, yet from plaintiff's own evidence there was a difference in material and design. The sidewalk was of ordinary concrete construction. The entryway was of terrazzo construction. Terrazzo "consists of small chips of marble set irregularly in cement and polished." *Fanelty v. Jewelers, supra;* Webster's New International Dictionary, Unabridged, Second Edition, 1951. Abrasive materials were cemented onto the terrazzo surface at intervals of 2 to 3 inches to prevent slipping. The surfaces "looked the same" to the plaintiff, but according to her evidence were not the same. In *Reese v. Piedmont, Inc., supra,* the surfaces in question were indoors and seen partially, at least, by artificial light. There was a black rubber mat on the lower level, and the upper level was covered with black and white tile. Yet the plaintiff in that case said: "I did not observe any change in the level of the floor. . . . It all looked the same." As in the instant case, it looked the same to the plaintiff, but was not the same in fact. In the *Reese* case this Court affirmed the judgment of involuntary nonsuit. When the material and design of the two levels are not the same in fact, is the defendant under duty to anticipate that they will appear the same to another? We think not. If in fact they did on occasion look the same to others, there is no evidence in this case that the defendant had any knowledge thereof prior to the time of plaintiff's fall. The alleged "optical illusion" under the facts and circumstances in this case was not a defect or danger against which the defendant had a duty to guard.

With respect to the alleged failure to give warning, it sufficeth to quote from *Benton v. Building Co., supra,* as follows: "Where a condition of premises is obvious . . . generally there is no duty on the part of the owner of the premises to warn of that condition. *Sterns v. Highland Hotel Co.,* 307 Mass., 90, 29 N.E. 2d 721. There is no duty resting on the defendant to warn the plaintiff of a dangerous condition provided the dangerous condition is obvious. *Mulkern v. Eastern S. S. Lines,* 307 Mass., 609, 29 N.E. 2d 919." See also *Hunnewell v. Haskell,* (Mass. 1899), 55 N.E. 320. As to the failure of defendant to provide handrails, under the facts and circumstances of the case the defendant was under no duty to provide handrails at the ordinary step-down described in this case, which was in plain view and broad daylight. *Hunnewell v. Haskell, supra.*

It is our opinion, and we so hold, that the motion for judgment of involuntary nonsuit should have been allowed.

Reversed.

BENJAMIN A. DEBRUHL AND WIFE, NELL E. M. DEBRUHL; MARY E. DEBRUHL; GLENNIE DEBRUHL JOHNSON AND HUSBAND, WILLIE W. JOHNSON; JOSEPHINE DEBRUHL SMITH AND HUSBAND, CARL M. SMITH, AND JAMES E. DEBRUHL AND WIFE, POLLY H. DEBRUHL v. L. HARVEY & SON COMPANY, INC.; MARY HEARTT HARVEY, WIDOW; LEO H. HARVEY AND WIFE, LAURA HYMAN HARVEY; MARY LEWIS WILSON, WIDOW; C. F. HARVEY, III AND WIFE, MARGARET BLOUNT HARVEY; R. A. WHITAKER, TRUSTEE; FLOYD HILL AND WIFE, PEARL HILL; AND WALTER D. LAROQUE.

(Filed 29 April, 1959.)

1. Appeal and Error § 49—

Where, in a trial by the court under agreement of the parties, the court makes no specific findings of fact, but enters judgment of involuntary nonsuit, the only question presented on appeal is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover.

2. Appeal and Error § 38—

Exceptions not set out in the brief or in support of which no argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Mortgages § 35c—

The *cestui que trust,* either directly or through an agent, may purchase the property at a foreclosure sale conducted by the trustee.

4. Mortgages § 39c(3)—

Where the trustee's deed is regular upon its face, was duly executed and contains recitals which show compliance with the statutes regulating foreclosure of deeds of trust, the burden of proof rests upon the party asserting irregularity in the foreclosure to prove same.

5. Mortgages § 39e(1)—

Where a deed of trust covers one tract in fee and the life estate of the *femme* mortgagor in another tract, subject to prior liens, and only the tract conveyed in fee as security is foreclosed and the proceeds of sale are exhausted in the payment of the prior liens, the validity of the foreclosure is not affected by the fact that the *cestui* in the deed of trust foreclosed receives nothing out of the proceeds of sale or the fact that his indebtedness is thereafter discharged by application of the rents and profits from the lands in which the *femme* mortgagor owned a life estate.

6. Same— Nonsuit held proper in this action to recover land foreclosed upon alleged agreement of the cestui-purchaser to reconvey.

Deed of trust conveying as security for the debt a tract of land in fee and a life estate in another tract of land was foreclosed solely as to the first tract and the *cestui* purchased at the sale. The proceeds of sale were applied to prior liens without any payment on the deed of trust foreclosed. Under agreements of the parties that the life estate should not be foreclosed, the rents and profits from the life estate were applied to the indebtedness, and some thirteen years after the foreclosure the notes were marked paid and surrendered to the mortgagors, and the deed of trust marked paid and canceled. Mortgagors alleged an agreement by the *cestui* to reconvey the land to them upon the payment of the indebtedness, but did not allege that the *cestui* agreed to hold legal title as trustee for mortgagors. *Held:* In the absence of evidence tending to support the allegation of the spicific agreement to reconvey, or any sufficient evidence that the mortgagors remained in possession after foreclosure, nonsuit was properly entered.

7. Adverse Possession § 20—

Every possession is presumed to be under the true title and permissive rather than adverse. G.S. 1-42.

8. Pleadings § 24—

A plaintiff must make out his case *secundum allegata.*

APPEAL by plaintiffs from *Parker, J.,* October Term, 1958, of JONES.

J. A. DeBruhl and wife, Delia DeBruhl, both now deceased, instituted this action February 4, 1946, to recover a 227.2-acre tract of land in Beaver Creek Township, Jones County, and for an accounting as to rents and profits.

The heirs at law and next of kin of said original plaintiffs were made and are now the parties plaintiff. The present plaintiffs adopted, without modification, the original complaint. Hence, J. A. DeBruhl

and Delia DeBruhl are the persons referred to as plaintiffs in the complaint. Too, they are the persons referred to in this statement and in the opinion as the DeBruhls.

Upon the death of Mary Heartt Harvey, an original defendant, the Executor and Executrix of her estate were made parties defendant and adopted the answer theretofore filed on her behalf.

The parties waived jury trial as to all issues raised by the pleadings except those relating to an accounting, and agreed that the presiding judge should hear the evidence, find the facts, make the necessary conclusions of law and render judgment thereon.

Record evidence discloses these facts:

By deed of trust dated February 4, 1921, J. A. DeBruhl and wife, Delia DeBruhl, conveyed to C. Oettinger, Trustee, as security for the payment of their indebtedness of $6,136.80 to L. Harvey & Son Company, a corporation, evidenced by their five "sealed bonds," each for $1,227.36, payable on the first day of January of the years 1922-1926, inclusive, the following:

1. The said 227.2-acre tract, then owned by J. A. DeBruhl subject to two prior mortgage liens executed by the DeBruhls, to wit: (a) a first lien mortgage deed dated February 16, 1920, to the Federal Land Bank of Columbia, securing $4,000.00, payable in thirty-five annual installments, and (b) a second lien mortgage deed dated February 16, 1920, to Kinston Insurance & Realty Company, securing three notes of $333.30 each, aggregating $999.90, payable on the 16th day of February of the years 1921-1923, inclusive. (A 51.35-acre tract, not involved herein, was also conveyed by the mortgage deeds described in (a) and (b).)

2. The *life estate* of Delia DeBruhl in a separate tract of land in said Beaver Creek Township, containing 83½ acres, more or less, hereafter called the "life estate tract." This tract is sometimes referred to as the DeBruhl homeplace. In 1913, this tract had been conveyed "to said Delia DeBruhl for the term of her natural life, and after her death, to the children of said Delia DeBruhl begotten of her by the said J. A. DeBruhl, whether they be now in esse or are hereafter begotten, and their heirs and assigns."

On April 20, 1923, C. Oettinger, Trustee, offered for sale at public auction the said 227.2-acre tract subject to said *first lien* mortgage deed to the Land Bank. L. Harvey & Son Company became the last and highest bidder at $1,190.00 cash and the assumption of approximately $4,257.00 due the Land Bank. There was no upset bid. L. Harvey & Son Company assigned its said bid to Leo H. Harvey.

By deed dated May 4, 1923, C. Oettinger, Trustee, conveyed said 227.2-acre tract to Leo H. Harvey, his heirs and assigns, subject to said first lien deed of trust to the Land Bank. This deed contains full recitals as to default, due advertisement, etc., incident to said foreclosure.

C. Oettinger, Trustee, in final report filed with and approved by the clerk of superior court, reported that he had disbursed the $1,190.00, received by him as cash purchase price, as follows: (a) A total of $67.50 in payment of foreclosure expenses, and (b) the balance of $1,122.50 to Kinston Insurance & Realty Company to apply on the indebtedness secured by its *second lien* mortgage deed. This report states that "there is a balance due on a prior mortgage indebtedness to Kinston Insurance & Realty Company after the payment of the amount set out above." The original of said *second lien* mortgage deed was marked "Satisfied in full" by Kinston Insurance & Realty Company on May 5, 1923, and it was cancelled of record by the Register of Deeds on May 15, 1923.

The said "life estate tract" was not involved in said foreclosure by C. Oettinger, Trustee.

By agreement dated February 6, 1926, Delia DeBruhl leased said "life estate tract" to her husband, J. A. DeBruhl, for a period of five years, ending December 31, 1930, at an annual rental of $250.00; and, by an assignment of lease dated February 6, 1926, executed by J. A. DeBruhl and wife, Delia DeBruhl, the rental payable under said lease was assigned to L. Harvey & Son Company to be applied on the DeBruhls' said indebtedness of $6,136.80 to L. Harvey & Son Company. In said assignment of lease, L. Harvey & Son Company agreed that said deed of trust to C. Oettinger, Trustee, would not be foreclosed as to said "life estate tract" during the term of said lease if J. A. DeBruhl complied with his obligations thereunder in respect of the payment of rents and taxes.

By deed dated June 10, 1926, Leo H. Harvey conveyed to L. Harvey & Son Company said 227.2-acre tract subject to said mortgage deed to the Land Bank. (Other lands were included in this conveyance.)

By agreement dated January 1, 1931, Delia DeBruhl leased said "life estate tract" to her husband, J. A. DeBruhl, for a period of five years ending December 31, 1935, at an annual rental of $200.00; and the DeBruhls executed an assignment of lease dated January 1, 1931, which, with reference to this lease, contained the same provisions, stated above, set forth in the assignment of the first lease of February 6, 1926.

These entries appear on the margin of the record of said deed of trust to C. Oettinger, Trustee: 1. "Satisfied and Paid in Full this Dec. 31, 1936. L. Harvey & Son Company, Leo H. Harvey, Pres." 2. "This LIEN AND MORTGAGE with note attached has this day been presented marked paid and satisfied and according to law I therefore cancel same. This 31 day of December 1936. GEO. G. NOBLE, Register of Deeds."

By deed dated January 15, 1943, L. Harvey & Son Company conveyed to Mary Heartt Harvey, Leo H. Harvey, Mary Lewis Harvey Wilson and C. F. Harvey, III, said 227.2-acre tract subject to said mortgage deed (then securing a balance of $2,363.50) to the Land Bank. (Other lands were included in this conveyance.)

By deed dated October 17, 1945, Mary Heartt Harvey, et al., for a recited consideration of $5,000.00, conveyed said 227.2-acre tract to Floyd Hill and wife, Pearl Hill.

By deed of trust dated October 30, 1945, Floyd Hill and wife, Pearl Hill, conveyed said 227.2-acre tract to R. A. Whitaker, Trustee, as security for the payment of a principal indebtedness of $4,000.00 to Walter D. LaRoque.

The deed and deed of trust described in the two preceding paragraphs were filed for registration on November 17, 1945. The Land Bank, on November 16, 1945, acknowledged payment and satisfaction of its said mortgage deed, which, on January 4, 1946, was cancelled of record by the Register of Deeds.

While other allegations will be referred to in the opinion, the following paragraphs (our numbering) constitute the gist of plaintiffs' alleged cause of action, viz.:

1. Prior to February 6, 1926, the DeBruhls and L. Harvey & Son Company, through C. F. Harvey, Sr., its president, entered into the following agreement: (1) The DeBruhls "agreed to pay the indebtedness evidenced by said five notes, totaling $6,136.80, plus accrued interest, said payments to be made in the nature of rent for the 227.2-acre tract of land," and "as additional security for the payment of the said indebtedness and as a part of the same agreement," executed the lease and assignment of lease dated February 6, 1926. (2) L. Harvey & Son Company agreed that, "upon payment of the said indebtedness . . . through the application of the rents provided for in the said lease . . . and the application of rents and other income from the 227.2-acre farm the said notes should be cancelled and the deed of trust cancelled of record and title to the said premises revested in . . . J. A. DeBruhl, free and clear of any claim or demand" on the part of L. Harvey & Son Company.

2. ". . . the plaintiffs, in compliance with the terms and provisions of their agreement, cultivated the 227.2-acre tract of land continuously from and after February 6, 1926, and until the beginning of the calendar year 1946, during which time they paid or caused to be paid to . . . L. Harvey & Son Company, Inc., the amounts agreed to be paid under the terms and provisions of the agreement . . . as rents."

3. ". . . through the application of the rents provided for in the said lease executed between the plaintiffs and assigned to the said defendant (L. Harvey & Son Company), and the application of rents and other income from the 227.2-acre farm," the DeBruhls paid in full their said indebtedness of $6,136.80, plus accrued interest, to L. Harvey & Son Company, and thereupon the five notes and the deed of trust to C. Oettinger, Trustee, were cancelled of record by the Register of Deeds.

4. The grantees in the several conveyances made subsequent to plaintiffs' payment of their said indebtedness to L. Harvey & Son Company had notice of plaintiffs' equities in said 227.2-acre tract and these conveyances should be adjudged void.

Defendants Hill and LaRoque, in separate answer, denied plaintiffs' said allegations. They allege, *inter alia,* that they are *bona fide* purchasers for value, without notice of any alleged equities of the DeBruhls; and that the Hills are the owners and entitled to the continued possession of said 227.2-acre tract. These defendants, on facts alleged, plead various statutes of limitation.

The other defendants, referred to hereafter as the Harvey defendants, in their joint answer, deny plaintiffs' said allegations. On facts alleged, they plead, in bar of plaintiffs' right to recover, (1) laches, (2) various statutes of limitation, and (3) adverse possession under known and visible lines and boundaries for more than twenty years and under color of title for more than seven years. The Harvey defendants allege, *inter alia,* that $3,636.80 of the DeBruhls' debt had been charged off on the books of L. Harvey & Son Company, and that, in accordance with an agreement made by J. A. DeBruhl and C. F. Harvey, Sr., the DeBruhl indebtedness was cancelled upon their payment of $2,500.00, without interest, the final payment on said $2,500.00 having been made on December 31, 1936, and that the cancellation of record was solely to clear the record as to the "life estate tract."

Plaintiffs and defendants offered evidence. At the close of all the evidence the court entered judgment of involuntary nonsuit and dismissed the action. Plaintiffs excepted and appealed, assigning errors.

Jones, Reed & Griffin for plaintiffs, appellants.

Geo. R. Hughes, Whitaker & Jeffress and Wallace & Wallace for defendants, appellees.

BOBBITT, J. Where, upon waiver of jury trial in accordance with G.S. 1-184, the court makes no specific findings of fact but enters judgment of involuntary nonsuit, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508, and cases cited.

Certain of the documents included in the record evidence were offered by defendants and admitted over plaintiffs' objections. However, assignments of error based on exception to the admission thereof are deemed abandoned under Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562. These exceptions are not set out in plaintiffs' brief and no reason or argument is stated and no authority is cited in support thereof.

While plaintiffs' allegations refer to the *purported* foreclosure by C. Oettinger, Trustee, and in general terms declare it void, they do not attack in any particular the regularity thereof. They do allege that Leo H. Harvey purchased the 227.2-acre tract as agent for L. Harvey & Son Company. As to this, Leo H. Harvey testified: "I purchased it for L. Harvey & Son Company. The Trustee's Deed was made to me." An example of his further testimony, relative to the rental of the farm until the sale and conveyance in 1945 to the Hills, is the following: "That year (1924) *we* rented the farm to Mr. J. B. Huggins, . . ." (Our italics)

"It is well settled in this jurisdiction that the *cestui que trust* has the right to buy at the trust sale unless fraud or collusion is alleged or proved." *Hare v. Weil,* 213 N.C. 484, 487, 196 S.E. 869, and cases cited; *Graham v. Graham,* 229 N.C. 565, 50 S.E. 2d 294. Here there is neither allegation nor evidence of fraud or collusion. L. Harvey & Son Company had a legal right to purchase at the foreclosure sale.

When it appears that the trustee's deed (1) is regular upon its face, (2) was duly executed, and (3) contains recitals which show compliance with the statute regulating the foreclosure of a deed of trust, the burden of proof rests upon him who asserts irregularity in the foreclosure. *Jones v. Percy,* 237 N.C. 239, 74 S.E. 2d 700, and cases cited.

One fact is clearly established, namely, that nothing was realized from the foreclosure by C. Oettinger, Trustee, for application on the DeBruhl indebtedness of $6,136.80, plus interest, to L. Harvey & Son

Company. Indeed, the DeBruhls, in the lease and assignment of lease of February 26, 1926, set forth that their indebtedness in that amount was then outstanding and unpaid. In this connection, it is noted that these documents, and the similar documents of January 1, 1931, relate solely to the "life estate tract." They contain no reference whatever to the 227.2-acre tract.

It is quite clear that the DeBruhls and L. Harvey & Son Company on February 6, 1926, and again on January 1, 1931, acted upon the assumption that the deed of trust to C. Oettinger, Trustee, continued as a lien on the "life estate tract" notwithstanding the 1923 foreclosure sale of the 227.2-acre tract. *Layden v. Layden,* 228 N.C. 5, 44 S.E. 2d 340, decided in 1947, has no legal bearing on the status of the 227.2-acre tract *that was sold* under foreclosure in 1923. It would be relevant only if C. Oettinger, Trustee, had attempted to sell the "life estate tract" in an attempted second foreclosure.

Conceding, for present purposes, that L. Harvey & Son Company was the purchaser at said foreclosure sale, and that Leo H. Harvey, from May 4, 1923, until his conveyance of June 10, 1926, to L. Harvey & Son Company, held legal title solely as trustee, L. Harvey & Son Company became the owner of said 227.2-acre tract in 1923 free and clear of any right, title or interest of the DeBruhls.

In this connection, it is noted that plaintiffs do not allege that L. Harvey & Son Company or Leo H. Harvey purchased at said foreclosure sale under any agreement to hold title to the 227.2-acre tract in trust for plaintiffs. Plaintiffs allege (defendants deny) that "prior to February 6, 1926," J. A. DeBruhl was informed by C. F. Harvey, Sr., that "there had been an attempted foreclosure" of the deed of trust to C. Oettinger, Trustee, but that plaintiffs "should ignore and pay no attention to the purported foreclosure sale." The gravamen of plaintiffs' cause of action is *the alleged agreement* between J. A. DeBruhl and C. F. Harvey, Sr., acting for L. Harvey & Son Company, made as part of the transaction in which the lease and assignment of lease of February 6, 1926, relating to the "life estate tract," were executed.

While there is no evidence that C. F. Harvey, Sr., was *president* of L. Harvey & Son Company, the Harvey defendants admit, indeed allege, that prior to his death on February 11, 1931, C. F. Harvey, Sr., acted for L. Harvey & Son Company in all conferences and dealings with the DeBruhls.

The alleged agreement, if made, was made in this factual setting: L. Harvey & Son Company owned the 227.2-acre tract. The DeBruhls owed $6,136.80, plus interest. The parties *understood* that the deed of

trust to C. Oettinger, Trustee, was a lien on Delia DeBruhl's life estate in the "life estate tract."

It is noted that plaintiffs *allege* that they "cultivated the 227.2-acre tract of land continuously from and after February 6, 1926, and until the beginning of the calendar year 1946." The Harvey defendants *allege* that *they* had been in continuous adverse possession since May 4, 1923, and that such possession as plaintiffs had from time to time was as tenants of defendants and in full recognition of their title. Disregarding unsupported allegations, there is no evidence that J. A. DeBruhl had any possession of the 227.2-acre tract from May 4, 1923, until 1938. (Note: Leo H. Harvey's testimony that the 227.2-acre tract had been rented to J. A. DeBruhl in 1932 for $150.00 was, upon plaintiffs' motion, stricken.)

G.S. 1-42, in pertinent part, provides: "In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action."

For present purposes, we disregard defendants' evidence as to their possession. Plaintiffs' evidence consists of the testimony of three witnesses. Williams and Chapman testified that they lived on the Hill farm in 1938 and 1943, respectively, and that they rented for these years from J. A. DeBruhl and paid the rent to him. Ethel Blizzard testified that in 1944 she and her husband (now deceased) lived in the house now occupied by the Hills; and that her husband rented the place for that year from J. A. DeBruhl.

We need not appraise the testimony of these three witnesses as to its bearing upon defendants' affirmative pleas of adverse possession under visible lines and boundaries and under color of title. Suffice to say, plaintiffs offered no evidence to show that they made any payments to L. Harvey & Son Company "in the nature of rent for the 227.2-acre tract of land" or other income therefrom.

The Harvey defendants admit, indeed allege, that on December 31, 1936, L. Harvey & Son Company, by Leo H. Harvey, President, marked each of the notes "Paid" and delivered them to the DeBruhls. (Note: They *allege* that this was done when the DeBruhls had paid $2,500.00, not $6,136.80, plus interest.) The fact that the owner and holder of the notes aggregating $6,136.80 entered "Paid" thereon and

surrendered them to the makers is evidence, nothing else appearing, that the makers had made payment in full. Even so, the entries made in 1936 on the notes aggregating $6,136.80 and on the margin of the record of the deed of trust to C. Oettinger, Trustee, could not and did not impair the validity of the foreclosure sale of the 227.2-acre tract in 1923.

Plaintiffs allege that, after the DeBruhls made full payment, they called upon L. Harvey & Son Company "to revest them with the title to the said lands in accordance with the agreement, which demands the defendant L. Harvey & Son Company, Inc., declined to comply with, and continued thereafter to collect rents from the said lands and retain the same."

Considered in the light most favorable to plaintiffs' their case comes to this: L. Harvey & Son Company, on or about February 6, 1926, agreed that, upon payment by the DeBruhls of their indebtedness of $6,136.80, plus interest, it would convey to J. A. DeBruhl the said 227.2-acre tract; and that, notwithstanding the payment in full by the DeBruhls of their said indebtedness, L Harvey & Son Company refused to convey this land to J. A. DeBruhl.

A plaintiff must make out his case *secundum allegata*. There can be no recovery except on the case made by his pleadings. *Andrews v. Bruton*, 242 N.C. 93, 95, 86 S.E. 2d 786, and cases cited; *Mesimore v. Palmer*, 245 N.C. 488, 96 S.E. 2d 356.

The fatal defect in plaintiffs' case is that they have offered no evidence that L. Harvey & Son Company, by C. F. Harvey, Sr., or otherwise, entered into *the alleged agreement*. Hence, we need not explore what plaintiffs' remedy would be if such alleged agreement had been made, orally or in writing, or what statute of limitation would be applicable in such case to such remedy.

If, in fact, the DeBruhls paid the $6,136.80, plus interest, in full, they paid no more than the amount of their admitted indebtedness to L. Harvey & Son Company. Nothing else appearing, a debtor, upon payment of an honest debt, acquires no right to any of his creditor's property.

Since only the correctness of the judgment of involuntary nonsuit is presented, we have considered only the portions of defendants' evidence favorable to plaintiffs.

For the reasons stated, the court properly entered judgment of involuntary nonsuit as to L. Harvey & Son Company. Since the other defendants derive title from L. Harvey & Son Company, the court properly entered judgment of nonsuit as to them. Hence, it is un-

necessary to consider defenses that may be available to them in addition to those available to L. Harvey & Son Company.

Affirmed.

THE TOWN OF FARMVILLE, A MUNICIPAL CORPORATION v. A. C. MONK & COMPANY, INC., ELBERT C. HOLMES AND WIFE, SUE T. HOLMES; JOHN D. HOLMES AND WIFE, LEYMON B. HOLMES; CARROLL R. HOLMES AND WIFE, HANNAH F. HOLMES; JOHN HILL PAYLOR AND WIFE, ALICE F. PAYLOR; W. D. MORTON AND WIFE, JANE C. MORTON; SARAH CAMERON BLOUNT AND HUSBAND, SHAW BLOUNT; ZYPHIA CAMERON MOSELEY AND HUSBAND, RALPH MOSELEY, AND PATRICK CAMERON.

(Filed 29 April, 1959.)

1. Declaratory Judgment Act § 1—

Whether certain property had been dedicated to the public as a street may be determined in an action between the interested parties under the Declaratory Judgment Act.

2. Dedication § 1—

A conveyance of land describing its southern boundary as the center of a named street extended, without any reference to a plat or map, there being no street in existence at the southern boundary at the time of the conveyance, is insufficient to show a dedication of any part of the land as a street, the reference to the street extended being merely word of description to make definite the location of the property line.

3. Same—

If, at the time of the conveyance of land by registered deed calling for the center line of a named street extended as its southern boundary, there is no street existing along the southern boundary and no plat of the subdivision has been registered and no lots sold therein, persons thereafter purchasing lots in the subdivision may not maintain that the southern portion of the land lying south of the extension of the northern line of the street had been dedicated for street purposes, since neither the grantee in the deed nor any of its predecessors in title are in privity with the later purchasers of lots or could have induced them to buy in reliance upon the belief that the existing street would be extended.

4. Adverse Possession § 14—

Neither the public nor a municipality can acquire the right to use a strip of land as a public way unless there has been twenty years user under claim of right adverse to the owner, and evidence that purchasers of lots to the west of a dead-end street began to use a strip of land equal to the southern half of the dead-end street were the street extended, without any evidence of any further use along any definite or specific line, is insufficient to show adverse use of the northern half of the street extended.

5. Dedication § 3—

Where the owner of a subdivision outside the boundaries of a municipality, prior to the sale of any lots therein, conveys the fee to a northern portion thereof without any reference to a map showing streets, it withdraws such land from any contemplated dedication of a street or portion of a street along the southern boundary of the land conveyed, and neither the later recording of a map showing a street along the southern portion of the land conveyed, nor the later extension of the boundaries of the municipality to include the *locus in quo*, can have the effect of reviving any previous offer of dedication.

6. Dedication § 2—

A municipality is without power to accept an offer of dedication of a street which lies outside its territorial limits.

MOORE, J., not sitting.

APPEAL by defendants other than A. C. Monk & Company, Inc., from *Moore (Clifton L.)*, October Term 1958 of PITT.

This is an action instituted by the plaintiff, a municipal corporation, pursuant to the provisions of Chapter I, Article 26, Section 253, et seq., of the General Statutes of North Carolina, known as the Declaratory Judgment Act, to obtain a declaration by the court of the right, status and legal relationship as between the parties to the action with respect to whether or not a certain strip of land described in paragraph 5 herein has been dedicated to public use.

The facts essential to a disposition of this appeal are as follows:

1. In the year 1920, a corporation known as the Farmville Insurance and Realty Company, hereinafter called Realty Company, purchased a tract of land situate near the Town of Farmville and known as Block "Z" in the division of lands among the heirs of S. N. Albritton and A. G. Dupree, and known as a part of the J. W. May lands, according to a map by W. C. Dresbach & Son dated April 1913 and recorded in Map Book 1, page 16, in the office of the Register of Deeds of Pitt County. (Hereinafter, when we refer to a map or deed as being duly recorded, it will mean duly recorded in the office of the Register of Deeds of Pitt County.)

2. The Realty Company subdivided most of Block "Z" and named the subdivision Washington Heights. A plat was made of said subdivision dated 4 February 1920, which plat was not filed for record until the year 1927, when it was duly recorded in Map Book 2, page 179.

3. The Realty Company conveyed all the lots in Washington Heights to the Farmville Land Company, hereinafter called Land Company, by deed dated 4 December 1923, and duly recorded in Book S-14, page 433, on 11 December 1923.

4. By deed dated 26 May 1920, and duly recorded in Book S-13, page 138, one Henry Clark Bridgers, conveyed seven acres of land to the Farmville Tobacco Development Company, hereinafter called Development Company. This tract of land adjoined the entire northern frontage of the Washington Heights subdivision.

5. The Realty Company sold a portion of Block "Z" to the Development Company by deed dated 30 July 1920, and duly recorded in Book S-13, page 254, and described as follows:

> "BEGINNING at a point located in the center of Pine Street extended where the same intersects the West side of East Carolina Railroad right of way and runs with said East Carolina Railroad right of way, N 10-30 E about 60 feet to a stake, corner of the Farmville Tobacco Development Company; thence with the line of said Farmville Tobacco Development Company, N 47-15 W 718½ feet to a stake; thence S 11 W 60 feet, more or less, to the center of Pine Street extended; thence, with the center of Pine Street extended, about S 47-15 E 718½ feet, more or less, to the point of beginning."

At the time of this conveyance no other lots had been conveyed by the Realty Company from Block "Z" or from the subdivision known as Washington Heights.

6. The lands referred to in paragraphs 4 and 5 above were conveyed by the Development Company to the Imperial Tobacco Company by deed dated 14 May 1929 and duly recorded in Book X-17, page 49, on 14 May 1929.

7. In the year 1931, the General Assembly of North Carolina enacted Chapter 16 of the Private Laws of North Carolina, amending the charter of the Town of Farmville, extending the corporate limits of said town to include all the lands hereinabove referred to or described.

8. The lands referred to as seven acres in paragraph 4 above and the lands described in paragraph 5 above, were conveyed by the Imperial Tobacco Company to the Southern States Tobacco Company, hereinafter called Tobacco Company, by deed dated 5 October 1948 and duly recorded 29 October 1948 in Book F-25, page 561, and described as follows:

> "BEGINNING at a point formed by the intersection of the Southwest property line of Church Street with the Western property line of the Western right of way of East Carolina Railway, said stake being 50 feet West of the center of the main line of said right of way; thence along the Southwest property line of Church Street, N 45 W 711 feet to an iron stake in the line of

the lands of Mrs. T. C. Hooker; thence along the Hooker line, S 12-15 W 570.2 feet to an iron stake in the center of Pine Street extended; thence S 45-49 E 714.9 feet to an iron stake at the intersection of the center line of Pine Street extended with the Western line of the right of way of East Carolina Railroad; thence along the Western line of East Carolina Railroad, N 11-20 E 563.4 feet to an iron stake, the point of beginning, containing 7.84 acres, as shown on plat recorded in Map Book 4, page 11, made by W. C. Dresbach & Son in July, 1948."

9. The lands described in paragraph 8 above were conveyed by the Tobacco Company to A. C. Monk & Company, Inc. by deed dated 30 March 1956. Copy of this deed was introduced in evidence by the defendant A. C. Monk & Company, Inc. as its exhibit "A." This exhibit shows that it was ordered registered but does not show the book and page; its registration, however, was stipulated.

10. Washington Heights lies south of what is known as Pine Street extended; the property claimed by A. C. Monk & Company, Inc., and hereinabove described, lies to the north of what is known as Pine Street extended; Pine Street extended lies to the west of East Carolina Railroad right of way in the Town of Farmville and is an unimproved dirt street.

11. The defendants, other than A. C. Monk & Company, Inc., are the owners of lots in Washington Heights which abut on the south of what is referred to as Pine Street extended.

12. The defendants' evidence tends to show that when Washington Heights subdivision was laid out in February 1920 it was an undeveloped area without any streets or buildings thereon, but after homes were built in the subdivision, the southern half of Pine Street extended, as shown on the original plat of Washington Heights, was used by the residents of the subdivision as a way of *ingress* and *egress* to and from their residences. The evidence further tends to show that the Town of Farmville did some maintenance work on the particular part of Pine Street extended used by the residents of Washington Heights before and after the corporate limits of the town were extended to include the area.

13. Pine Street east of East Carolina Railroad is a paved street 30 feet wide, and the Town of Farmville has duly authorized that Pine Street west of the railroad be paved for a similar width.

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

"1. Was the land of Farmville Insurance and Realty Company

Inc., at the time of the survey of same on February 4, 1920, for a subdivision to be known as Washington Heights, an undeveloped area without any streets or buildings thereon? Answer: Yes.

"2. Was the conveyance of land from the Washington Heights area by Farmville Insurance and Realty Company, Inc., to Farmville Tobacco Development Company, Inc., by deed dated July 30, 1920, and recorded October 6, 1920, in Book S-13, page 254, Registry of Pitt County, made before the sale of any lots therein with respect to the map of said subdivision? Answer: Yes.

"3. Were the officers, stockholders, purposes and aims of Farmville Insurance and Realty Company, Inc. and the Farmville Tobacco Development Company, Inc. sufficiently identical to justify the court in regarding them as one and the same corporation? Answer: No.

"4. Was Pine Street in Washington Heights first used as a street by the occupants of the buildings which were constructed after Washington Heights was surveyed and subdivided? Answer: Yes.

"5. Was a map of Washington Heights subdivision first legally recorded on January 25, 1927, in Map Book 2, page 179, Registry of Pitt County? Answer: Yes.

"6. Did the Farmville Insurance and Realty Company, Inc. make its first conveyance of lots south of Pine Street in Washington Heights to Farmville Land Company, Inc., by deed dated December 4, 1923, in Book S-13, page 433, Registry of Pitt County? Answer: Yes.

"7. Were the city limits of Farmville extended by law to include Washington Heights in 1931? Answer: Yes.

"8. Has the City of Farmville maintained Pine Street in Washington Heights from 1931 to the present time throughout that area south of the center line of Pine Street extended? Answer: Yes.

"9. Did the City of Farmville maintain and use as a public street an area of a definite width north of the center line of Pine Street extended throughout the subdivision known as Washington Heights continuously and adversely for twenty (20) years prior to the institution of this action? Answer: No."

On each of the above issues, except Nos. 3 and 9, the court instructed the jury as follows: "The court instructs you that if you believe the evidence in the case and find the facts to be as all the evidence tends to show, it will be your duty to answer the (first, second,

etc.) issue YES." In similar language the jury was instructed on the third and ninth issues to answer them NO.

The court entered judgment which adjudged and decreed,

"1. That the City of Farmville, N. C., owns a right of way and easement for street purposes over and through Washington Heights subdivision of a width of 24 feet, and the northern line of said right of way is the center line of Pine Street (as it exists east of the East Carolina Railroad) extended.

"2. That the City of Farmville, N. C., owns no right of way and easement for street purposes immediately north of the center line of Pine Street extended within said subdivision.

"3. That the defendants (other than A. C. Monk & Company, Inc.) own no rights in and to that area lying immediately north of Pine Street extended in Washington Height's subdivision.

"4. That the plaintiff pay the costs to be taxed by the Clerk."

The defendants, other than A. C. Monk & Company, Inc., appeal, assigning error.

Lewis & Rouse for plaintiff, appellee.
Thorp, Spruill, Thorp & Trotter for defendant, appellee.
Jones, Reed & Griffin for defendants, appellants.

DENNY, J. As we interpret the record on this appeal, the action was instituted pursuant to the provisions of our Declaratory Judgment Act for the sole purpose of having the court determine whether or not any portion of the property owned by A. C. Monk & Company, Inc. has been dedicated as a public street by it or by any of its predecessors in title. *Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E. 2d 679; *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E. 2d 458; *Carver v. Leatherwood*, 230 N.C. 96, 52 S.E. 2d 1.

On 30 July 1920, when the Realty Company sold the 60-foot strip of land described in paragraph 5 of the statement of facts herein, lying to the north of the center of Pine Street extended, there was no Pine Street west of East Carolina Railroad. Furthermore, the plat of the subdivision of Washington Heights, dated 4 February 1920, was not referred to in the deed and no lot in that subdivision had been sold at that time. Moreover, the plat of the subdivision of Washington Heights was not recorded until 1927.

It is clear from the evidence in this case that no deed conveying the above described land ever referred to the map of the subdivision of Washington Heights. It is true the deed from the Realty Company

to the Development Company and the respective deeds to the other predecessors in title of A. C. Monk & Company, Inc., as well as the deed to A. C. Monk & Company, Inc., did refer to the center of Pine Street extended, but, as we interpret the evidence, since Pine Street had not been opened west of East Carolina Railroad when the deed from the Realty Company to the Development Company was executed, the words "Pine Street extended" were mere words of description to make definite the location of a property line. Pine Street as it then existed came to a dead end east of East Carolina Railroad, which was immediately east of Washington Heights.

Moreover, it was stipulated in the court below that the first lot sold in the subdivision of Washington Heights was to John Henry Dunn by deed dated 12 December 1923 and duly recorded 26 May 1924. Therefore, there is nothing in the documentary evidence or the oral evidence introduced in the trial below that tends to show that A. C. Monk & Company, Inc., or any of its predecessors in title, beginning with the Development Company in 1920, were in privity with or induced the defendant appellants or any of their predecessors in title to purchase property in Washington Heights under the belief that the property would be developed as shown on the unrecorded map of said subdivision.

We find nothing in the chain of title of A. C. Monk & Company, Inc. that tends to show a dedication of any portion of Pine Street, unless such street was shown on that certain plat made by W. C. Dresbach & Son in July 1948 and duly recorded in Map Book 4, page 11, and referred to in the deed from Imperial Tobacco Company to Southern States Tobacco Company as set forth in paragraph 8 of the statement of facts herein. However, it does not appear that a copy of the map made by Dresbach & Son was introduced in evidence in the court below, and no such map was forwarded as an exhibit to this Court.

The Town of Farmville does not contend that it has acquired an easement in the 24-foot strip of land in controversy by prescription. Furthermore, it concedes that the evidence adduced in the trial below establishes the fact that the general public has not used the disputed area under any claim of right adverse to the owner, nor has travel thereon been confined to a definite and specific line. *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153. If there has been a dedication of the 24-foot strip of land included in the deed from the Realty Company to the Development Company, dated 30 July 1920, and to the defendant A. C. Monk & Company, Inc. by *mesne con-*

veyances, such dedication must be established as a matter of law from the documentary evidence introduced in the trial below.

In *Hemphill v. Board of Aldermen, supra,* this Court said: "Before a highway can be established by prescription it must appear that the general public used the same under a claim or right adverse to the owner and the travel must be confined to a definite and specific line, although slight deviations in the line of travel, leaving the road substantially the same, may not destroy the rights of the public. 18 C.J., page 107; Elliott on Roads and Streets, section 194; *S. v. Haynie,* 169 N.C. 277; *Milliken v. Denny,* 141 N.C. 227; *Bailliere v. Shingle Co.,* 150 N.C. 633; *Snowden v. Bell,* 159 N.C. 500; 9 R.C.L., page 776.

"To establish the existence of a road or alley as a public way, in the absence of the laying out by public authority or actual dedication, it is essential not only that there must be twenty years user under claim of right adverse to the owner, but the road must have been worked and kept in order by public authority. * * * "

In the case of *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13, it is said: "It is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them to the use of the purchasers, and those claiming under them, and of the public." (Authorities cited.)

Even if it were the intention of the owner of Washington Heights subdivision to dedicate Pine Street for a width of 48 feet as shown on the map thereof, when it sold the northern half of the purported street without any reference to the map it constituted a withdrawal of any contemplated dedication it might have had as to the conveyed portion thereof. *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171. Moreover, since the corporate limits of the Town of Farmville were not extended to include the area now in dispute until approximately eleven years after the owner of the subdivision had conveyed the disputed area without any reference to the map of the subdivision, neither the recording thereafter of the map of said subdivision, nor the extension of the town limits to include the area, can have the effect of reviving any previous offer of dedication, if one had been made. *Rowe v. Durham, supra.*

"A municipality is without power to accept an offer of dedication of a street which lies without its territorial limits." *Rowe v. Durham, supra; Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104. The evidence discloses no offer of dedication since 1931, the year the

corporate limits of the Town of Farmville were extended to include the disputed area.

We have carefully examined the appellants' 36 assignments of error and, in our opinion, they present no error that is sufficiently prejudicial to justify a new trial. A *seriatim* discussion of these numerous assignments would serve no useful purpose.

No Error.

MOORE, J., not sitting.

ELEANOR DEANE BROOKS v. CHARLIE WILLIAM HONEYCUTT AND CHARLES YORK.

(Filed 29 April, 1959.)

1. Automobiles § 42d—

Plaintiff's testimony to the effect that she was traveling at a lawful rate of speed at night, and, blinded by the lights of a vehicle traveling in the opposite direction, failed to see an automobile standing without lights in her lane of travel until within approximately fifty feet thereof, and that she turned left, but was unable to avoid striking the left rear of the standing vehicle, precludes nonsuit on the ground of contributory negligence under the 1953 amendment to G.S. 20-141(e).

2. Automobiles § 46—

An instruction stating the principles of law involved in the action and the respective contentions of the parties, but failing to apply the principles of law to the various state of facts arising on the evidence, must be held for prejudicial error. G.S. 1-180.

APPEAL by defendants from *Sink, E. J.*, at August Civil Term 1958 of UNION.

Civil action to recover for personal injury and property damage sustained in motor vehicle collision proximately resulting from actionable negligence of defendants as alleged in the complaint.

Plaintiff alleges in her complaint substantially the following: That on said date at about 6:20 P. M., she was operating her 1957 Ford on her right-hand side of the highway #200, when she came in sight of a vehicle standing in the road to her left; headed in northerly direction, with its headlights on bright, later ascertained to be the truck of defendant Charles York, operated by him; that just before she reached the point where this truck was standing, it started moving in northerly direction along said highway with its headlights still on bright, partially blinding her; that then when within fifty feet thereof she saw the 1951 Hudson automobile of defendant Charlie William Honeycutt, standing unlighted in her lane of traffic just parallel

with the place where the truck of Charles York had been standing; and that when she so observed said Hudson automobile, she applied her brakes and pulled her car to the left, but was unable to go between the standing Hudson and the back of the truck operated by Charles York, and ran into the back of the Hudson with the right front of her Ford automobile, causing damage to it and injury to her.

Plaintiff further alleged in her complaint in substance that defendant, Charlie William Honeycutt, was negligent in the following ways: That he left his Hudson automobile standing in the traveled portion of said highway and in its right-hand lane of traffic, without lights upon it, or other warning signals, for a period of twenty minutes in the night time, all in violation of G.S. 20-161; and that he failed to exercise due care under existing circumstances contrary to G.S. 20-140, and that this negligence on the part of defendant Charlie William Honeycutt was one of the proximate causes of the injury to plaintiff and damage to her automobile as aforesaid.

And plaintiff further alleges in her complaint substantially the following: That the defendant, Charles York, was negligent in these ways:

"A. That he parked his motor vehicle in the northbound lane of the paved portion of N. C. Highway #200 just parallel with the parked Hudson automobile of Charlie William Honeycutt, thereby blocking the entire paved portion of the highway, contrary to G.S. 20-161.

"B. That he left his headlights on bright, thereby blinding drivers of vehicles heading south on said highway, contrary to G.S. 20-161.1.

"C. That he failed to sound his horn, dim or flicker his lights, or do anything in order to warn the plaintiff of the dangerous situation existing on the highway, contrary to G.S. 20-140.

"D. That he failed to use the care, caution and circumspection that a person of ordinary reason and prudence would have used under the circumstances and in the situation then and there existing, contrary to G.S. 20-140 * * * ."

And that said negligence on the part of defendant, Charles York, was the proximate, or one of the proximate causes of the collision and the resulting damages and injuries to the plaintiff.

On the other hand, the defendants Charlie William Honeycutt and Charles York, each in separate answer, deny in material aspects the allegations of the complaint so set forth; and each avers that plaintiff was contributorily negligent in the operation of her Ford automobile in that:

"(a) She was driving * * * at a fast and unlawful rate of speed, under the circumstances and conditions then existing.

"(b) She was operating her said automobile in a careless and reckless manner, without due care and caution and at a speed and in a manner so as to endanger or be likely to endanger the person or property of others upon said highway.

"(c) * * * without keeping a proper lookout * * * and without keeping her said automobile under proper control, as required by law * * * ."

And the record of case on appeal shows (1) that at the trial term of Superior Court it was stipulated "that on or about the 25th day of October 1957, plaintiff was the owner and operator of a 1957 Ford automobile * * * traveling south on N. C. Highway #200 and had reached a point about 7.2 miles north of Monroe, N. C., when the collision referred to * * * occurred; that on said date defendant Charlie William Honeycutt was the owner and operator of a 1951 Hudson automobile; that on said date the defendant, Charles York, was operating a truck headed north on * * * Highway #200, in the close vicinity of the place where the 1951 Hudson automobile was standing on the highway, when the collision * * * occurred; that N. C. Highway #200 at the scene of the collision is a paved highway 20 feet wide with an 8-foot wide shoulder on each side; that at the point of said collision, said highway is straight and approximately level; that at the time of said collision, said highway was dry and the sky was clear and that at the point of such collision, said highway runs in a northerly-southerly direction."

(2) That upon the trial in Superior Court both plaintiff and defendants offered testimony tending to support their respective contentions as set forth in the pleadings,— plaintiff testifying particularly that " * * * I was driving approximately forty miles an hour or forty-five, when I came in sight. As I came closer to the lights in the highway, I reduced my speed approximately 5 or 10 miles. When I came closer to those lights, I saw this car sitting on the road. It was a dark looking car and I did not see it until I got past the lights on the truck enough that my lights shined on the other car. * * * I was approximately 50 feet or something like that from the Hudson automobile the first time I saw it sitting on my side of the road. I applied my brakes. The truck was up above the car just a little. There was 20 or 30 feet, I mean yards, between the back of the Hudson automobile and the truck. I applied my brakes and turned to the left. The right front of my automobile hit the left back of the * * * Hudson automobile * * * ."

The case was submitted to the jury upon these issues, which were answered by the jury as indicated:

"1. Was the plaintiff, Eleanor Deane Brooks injured and was her automobile damaged by the negligence of Charlie William Honeycutt, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff, Eleanor Deane Brooks, injured and her automobile damaged by the negligence of Charles York, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff, Eleanor Deane Brooks, by her own negligence contribute to her damages and injuries as alleged in the answer? Answer: No.

"4. What amount, if any, is the plaintiff, Eleanor Deane Brooks, entitled to recover for personal injuries? Answer: $7,500.00.

"5. What amount, if any, is the plaintiff, Eleanor Deane Brooks, entitled to recover for damages to her automobile? Answer: $750.00."

Judgment was signed in accordance with the verdict, and each of defendants excepts thereto, and appeals to Supreme Court and assigns error.

Coble Funderburk for plaintiff, appellee.
Smith & Griffin for defendants, appellants.

WINBORNE, C. J. The appellants, Charlie William Honeycutt and Charles York, and each of them, by assignments of error based upon exceptions duly taken present two questions: (1) Did the trial court err in denying their motions for judgment as of nonsuit on the ground that plaintiff by her own negligence contributed to her injury and damage as alleged in the answer as a matter of law?

And (2) if not, did the court err in failing to charge the jury in conformity with the provisions of G.S. 1-180 in manner stated?

The first assignment of error merits a negative answer on the authority of *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232, where this Court interpreted Chapter 1145 of 1953 Session Laws amending G.S. 20-141 (e), the speed law, by adding thereto the proviso: "That the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits described by G.S. 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

It is there stated, "Hence, interpreting the amendatory act, if the driver of a motor vehicle who is operating it within the maximum speed limits prescribed by G.S. 20-141 (b) fails to stop such vehicle within the radius of the lights of the vehicle or within the range of his vision, the courts may no longer hold such failure to be negligence *per se*, or contributory negligence *per se*, as the case may be, that is negligence or contributory negligence, in and of itself, but the facts relating thereto may be considered by the jury, with other facts in such action in determining whether the operator be guilty of negligence or contributory negligence as the case may be. However, this provision does not apply if it is admitted, or if all the evidence discloses, that the motor vehicle was being operated in excess of the maximum speed limit under the existing circumstances as prescribed under G.S. 20-141 (b)."

Therefore, in the light of the testimony of plaintiff hereinabove quoted, tested by the provisions of the amendatory act as so interpreted, the issue of contributory negligence of plaintiff was one for the jury in the instant case. This principle is followed in *Wilson v. Webster*, 247 N.C. 393, 100 S.E. 2d 829; *Hutchins v. Corbett*, 248 N.C. 422, 103 S.E. 2d 497.

Now in respect to assignments of error Numbers 4, 5, 6, 7, 8 and 9, based on exceptions of like numbers to the charge, a reading of the charge in the light of decided cases leads to the conclusion that prejudicial error appears. *Chambers v. Allen*, 233 N.C. 195, 63 S.E. 2d 212; *Glenn v. Raleigh*, 246 N.C. 469, 98 S.E. 2d, 913, and cases cited, and numerous others.

In Assignment 4, Exception 4, for example, it is pointed out that "the court in charging the jury with reference to issues of negligence, erred in that, in all of its statements of principles of law, the court stated the principles of law in general terms and thereafter merely stated to the jury some of the testimony and some of the contentions of the parties and failed and neglected to state to the jury the application of the principles of law as to the facts arising from the evidence or any of the several possible findings of fact by the jury, and thereby failed to declare and explain the law arising on the evidence given in the case as required by G.S. 1-180." The other assignments in this aspect are of similar import.

In the *Chambers* case, *supra* the Court said: "Nowhere in the charge did the court explain the law applicable to the evidence upon which the defendants' contentions were based, should the jury find the facts from the evidence to be as contended for by them. Such

omission constitutes a failure to comply with the provisions of G.S. 1-180," citing cases.

Hence the Court is constrained to hold that for error in the charge in respects pointed out, defendants appellants are entitled to a new trial, and it is so ordered.

New Trial.

MRS. GENEVIEVE BROOKS v. CHARLIE WILLIAM HONEYCUTT AND CHARLES YORK.

(Filed 29 April, 1959.)

APPEAL by defendants from *Sink, E. J.*, at August Civil Term 1958 of UNION.

Civil action to recover for personal injury sustained by plaintiff in motor vehicle collision,— the same as that involved in No. 449 at this term, entitled *Eleanor Deane Brooks v. Charlie William Honeycutt and Charles York ante*, 179, the plaintiff here having been a passenger in the Ford automobile of the plaintiff,—proximately resulting from actionable negligence of defendants as alleged in complaint.

The two cases were consolidated for the purpose of trial, and tried upon similar issues. But in the instant case there was no issue as to contributory negligence, or as to property damage. The other issues submitted to the jury upon the same charge as in No. 449 were answered in favor of plaintiff. And from judgment in accordance therewith, defendants appeal to Supreme Court and assign error.

Coble Funderburk for plaintiff, appellee.
Smith & Griffin for defendants, appellants.

PER CURIAM. The record of case on appeal here discloses that appellants make the same assignment of error, based on same exceptions as in the case of *Eleanor Deane Brooks against Charlie William Honeycutt and Charles York*, decided cotemporaneously herewith. Hence the error pointed out, and for which a new trial is ordered there, necessitates on this appeal a

New Trial.

OFFIE ELLIOTT, ED ELLIOTT AND PARTHENIA ELLIOTT v. JULIA ANN McCALL GOSS, ADMINISTRATRIX OF SAM McCALL, DECEASED, AND INDIVIDUALLY; MAGGIE McCALL BALDWIN, GEORGIANA McCALL ALLSBROOK AND HENRY McCALL.

(Filed 29 April, 1959.)

1. Limitation of Actions § 15—

The defense of the statute of limitations must be raised by answer and cannot be interposed by demurrer.

2. Limitation of Actions § 5b—

The statute of limitations does not begin to run against an action to reform a deed for fraud until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence, G.S. 1-52(9), and since the statute is not a condition annexed to the cause of action, the bar of the statute can be raised only by answer.

3. Limitation of Actions § 5a—

The mere registration of a deed, standing alone, will not start the statute of limitations running against an action for reformation.

4. Adverse Possession § 20: Ejectment § 7—

In an action for the recovery of possession of realty, the failure of the complaint to allege that plaintiffs had been seized and possessed of the premises at some time within twenty years prior to the institution of the action is not ground for demurrer, since G.S. 1-39 and G.S. 1-42 must be construed together, so that upon proof of title in plaintiffs the possession of others, in the absence of proof that it was adverse, will be presumed to be under the legal title.

5. Deeds § 7—

Both delivery of the deed and intention to deliver are necessary to a transmission of title, and when grantors retain possession under agreement that they should hold the instrument until payment of the balance of the purchase price, and the grantee dies before the purchase price is fully paid and the deed delivered, there is no delivery to the grantee and no title can pass to him.

6. Reformation of Instruments §§ 6, 7— Equity will not reform deed by inserting as grantee a person who had died prior to the delivery of the deed.

Plaintiffs alleged that deed was executed to their ancestor but that grantors retained possession thereof under an agreement to hold the instrument until the balance of the purchase price was paid, that the ancestor died prior to payment of the full purchase price, that thereafter the grantee's widow and her second husband paid the balance of the purchase price, had the deed delivered to them, and, after substituting the name of the second husband as grantee, had the deed registered. Plaintiffs prayed that the deed be reformed by inserting the name of their ancestor as grantee. *Held:* The complaint fails to state a cause of action for reformation, since, the ancestor having died prior to delivery, no title could pass to him under the instrument. Further, upon

a proper statement of the cause of action in plaintiffs' favor, the original grantor or his heirs should be made parties.

7. Pleadings § 20½—

An action should not be dismissed upon demurrer when the complaint states a good cause of action in a defective manner, since plaintiffs' are entitled to move for leave to amend, if so advised. G.S. 1-131.

APPEAL by plaintiffs from *Johnston, J.*, January 1959 Term of MOORE.

This action was instituted by the issuance of summons and filing of complaint. Defendants in apt time demurred.

The allegations of the complaint are in substance as follows:

The plaintiffs are heirs at law of William Elliott, who died 5 October, 1918. About 6 March, 1916, William Elliott bargained with one R. S. Boger for the purchase of a tract of land in McNeill Township, Moore County, at an agreed price. On said date R. S. Boger and wife executed a deed of bargain and sale with general covenants and warranties to William Elliott for said land, acknowledged the execution of same before a Notary Public, and agreed with William Elliott to withhold delivery of the deed until the full purchase price had been paid. At the time of the death of William Elliott there was an unpaid balance of $23 on the purchase price. Thereafter, the widow of William Elliott, step-mother of plaintiffs, married Sam McCall. In 1921 she and McCall paid the $23 balance and the deed was delivered to her. Sam McCall altered the deed so as to substitute his name for that of William Elliott as grantee in the deed. The deed, as altered, was filed for record on 19 December, 1921, and recorded in Book 81, at page 477, Moore County Registry. Sam McCall died 17 April, 1957. The defendants are his heirs at law and the administratrix of his estate. The substitution of McCall's name for that of Elliott was not discovered until after McCall's death when his heirs took possession of the land. Plaintiffs pray that the deed be reformed so as to name William Elliott as grantee therein and for the possession of the land.

From judgment sustaining the defendants' demurrer to the complaint and dismissing the action, plaintiffs appealed.

Johnson & Johnson and Barrett & Wilson for plaintiffs, appellants.
E. J. Burns for defendants, appellees.

MOORE, J. The defendants set up three causes for demurrer: (1) that the complaint shows on its face that the alleged cause of action to correct and reform the deed for fraud on the part of Sam McCall

is barred by the applicable statute of limitations; (2) that the complaint does not allege that plaintiffs have been in possession of the land within the twenty years immediately preceding the institution of the action; and (3) that the complaint does not state facts sufficient to constitute a cause of action.

The bar of a statute of limitations must be raised by answer and is not a proper subject of demurrer. *Stamey v. Membership Corp.*, 249 N.C. 90, 96, 105 S.E. 2d 282, and cases there cited.

"The rule is that unless statutes of limitations are annexed to the cause of action itself, the bar of limitation must be specifically pleaded in order to be available as a defense and may not be raised by demurrer." *Batchelor v. Mitchell*, 238 N.C. 351, 356, 78 S.E. 2d 240; *Motor Co. v. Credit Co.*, 219 N.C. 199, 202, 13 S.E. 2d 230. Lapse of time does not discharge liability. It merely bars recovery. *Ins. Co. v. Motor Lines*, 225 N.C. 588, 591, 35 S.E. 2d 879.

Furthermore, a cause of action for fraud does not accrue and the statute of limitations (G.S. 1-52, subsection 9) does not begin to run until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence, and the mere registration of a deed, standing alone, will not be imputed for constructive notice. *Vail v. Vail*, 233 N.C. 109, 116, 63 S.E. 2d 202; *Lowery v. Wilson*, 214 N.C. 800, 802, 200 S.E. 2d 861. G.S. 1-52, subsection 9, is not annexed to the cause of action in this case. The bar thereof may only be raised by answer.

But the defendants contend that the failure of plaintiffs to allege that they were seized or possessed of the premises in question within twenty years before the commencement of the action is ground for sustaining the demurrer. G.S. 1-39.

In *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E. 2d 402, plaintiff claimed color of title under a deed executed less than seven years prior to the institution of the action. There was "no allegation in the complaint of adverse possession for twenty years by the plaintiffs under G.S. 1-39 and G.S. 1-40." The Court sustained the demurrer on the ground that it appeared from the complaint that plaintiffs had no title, right or interest in the land. This case seems to give some support to defendants' contention. But we do not agree that the *Washington* case decides that in an action for possession of land the plaintiff is required to plead affirmatively that he has been possessed of the premises within the twenty years immediately preceding the institution of the action.

A plaintiff may allege generally that he is the owner of the land in controversy and that the defendant is in the wrongful possession

thereof. When he has so pleaded, he may proceed to prove title in himself in any lawful way he can. *Taylor v. Meadows,* 169 N.C. 124, 126, 85 S.E. 1, quoting the second headnote in *Davidson v. Gifford,* 100 N.C. 18, 6 S.E. 718, says: "When the complaint in ejectment does not set up any particular evidence of title in plaintiff, or that plaintiff claims under any specific title, the plaintiff is at liberty, on the trial, to prove title in himself, in any way he can, allowed by law." G.S. 1-39 and G.S. 1-42 must be construed together. *Conkey v. Lumber Co.,* 126 N.C. 499, 36 S.E. 42.

In *Johnston v. Pate,* 83 N.C. 110, 112, the Court said: ". . . it is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought. For if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action." The *Johnston* case is quoted with approval in *Conkey v. Lumber Co., supra,* and is cited with approval in *Barbee v. Edwards,* 238 N.C. 215, 222, 77 S.E. 2d 646.

It is our opinion and we so hold that in an action for possession of land failure to affirmatively allege that plaintiff had been seized or possessed of the premises within twenty years prior to the institution of the action is not ground for demurrer.

Defendants contend that the complaint does not state facts sufficient to constitute a cause of action for correction or reformation of a deed. We agree. It will be observed that there was no delivery of the deed during the lifetime of William Elliott. The deed had been signed and acknowledged and William Elliott was named therein as grantee. The grantor retained possession of the deed under an agreement with William Elliott that it would not be delivered until the full purchase price had been paid. William Elliott died before the purchase price was fuly paid and before the deed was delivered.

Delivery is essential to the validity of a deed of conveyance. Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title. *Barnes v. Aycock,* 219 N.C. 360, 362, 13 S.E. 2d 611; *Ins. Co. v. Cordon,* 208 N.C. 723, 725, 182 S.E. 496. In the *Barnes* case it is said: ". . . to constitute delivery there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee at the time of delivery. (Citing authorities.) To constitute delivery the papers must be put out of possession of the maker."

". . . (I)t is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it and with all power of dominion and control over it, by the grantor, for the benefit of the grantee at the time of the delivery. There is no delivery in law where the grantor keeps the deed in his own possession with the intention of retaining it, particularly if he keeps possession of the property as well; dominion over the instrument must pass from the grantor with the intent that it shall pass to the grantee, . . ." 16 Am. Jur., Deeds, Sec. 128, p. 510.

From the complaint in the instant case it is clear that there was no delivery of the deed, actual or constructive, during the lifetime of William Elliott, and no title passed thereunder to him. Equity will not do a futile thing. To reform the purported deed, as recorded, so as to show William Elliott as grantee would pass no title. The plaintiffs have not stated a good cause of action for reformation of the deed.

It is our opinion that the court was correct in sustaining the demurrer but was in error in dismissing the action. G.S. 1-131; *Teague v. Oil Co.*, 232 N.C. 469, 470, 61 S.E. 2d 345. The demurrer should have been sustained without prejudice to plaintiffs' right to move for leave to amend their complaint. "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." *Skipper v. Cheatham*, 249 N.C. 706, 711, 107 S.E. 2d 625, and cases there cited. The complaint discloses facts which might be the basis of a good cause of action against defendants if such cause is sufficiently pleaded. *Hoffman v. Mozeley*, 247 N.C. 121, 123, 100 S.E. 2d 243, and cases there cited; and *Davis v. Davis*, 228 N.C. 48, 53, 44 S.E. 2d 478, and cases there cited. Plaintiffs, if so advised, may desire to ask leave of court to amend the complaint so that a cause of action may be alleged and to make R. S. Boger a party, if living, and his heirs at law, if deceased.

The judgment below is modified by striking therefrom the portion dismissing the action. As thus modified, the judgment is affirmed.

Modified and Affirmed.

HAZEL FOSTER JORDAN v. BARBARA ELMORE BLACKWELDER, ROBERT R. BLACKWELDER AND EDITH LORENE JONES.

(Filed 29 April, 1959.)

1. Automobiles § 43—

The evidence, considered in the light most favorable to the original

defendants, *held* sufficient to carry the case to the jury on their cross-action against the additional defendant joined for contribution.

2. Automobiles § 17—

G.S. 20-155 does not apply to an intersection of a servient highway with a dominant highway, but the driver along the servient highway or street upon which a stop sign has been duly erected is required not only to stop, but to exercise due care to see that he may enter or cross the dominant highway or street in safety before he enters the intersection, G.S. 20-158(a), and an instruction charging the law under G.S. 20-155 in an action involving a collision at an intersection of a dominant and servient highway, must be held for prejudicial error.

3. Torts § 6—

G.S. 1-240 does not contemplate that a party brought in as an additional defendant should pay more than her pro rata part of the verdict rendered against the original defendants.

4. Same— Tort-feasor is entitled to have sums paid to plaintiff deducted from his pro rata liability.

Where the insurer for the additional defendant has paid medical and hospital bills of the injured person, and the parties stipulate that the court might, in its discretion, deduct such amount from the verdict of the jury, upon the jury's verdict for plaintiff against the original defendants, and in favor of the original defendants against the additional defendant on the cross-action, the court should render judgment for plaintiff against the original defendants for the amount of the verdict and in favor of the original defendants against the additional defendant for one half the amount of the verdict less the sums paid for medical and hospital bills, and it is error for the court to deduct such amount from the verdict before providing for contribution.

APPEAL by additional defendant Edith Lorene Jones from *Gwyn, J.*, Regular August Term 1958 of IREDELL.

This is a civil action instituted by the plaintiff to recover damages for personal injuries she received as a result of an automobile collision in the Town of Troutman on 31 August 1956. The collision occurred at the intersection of Main and Morgan Streets and involved a 1952 Chevrolet automobile, owned and operated by the additional defendant, and a 1947 Ford automobile being operated at the time by Barbara Elmore Blackwelder.

Both Main and Morgan Streets are paved, Main being a street 21 feet wide, and Morgan 17 feet wide. Main Street runs north and south, parallel to a railroad track and is the dominant street; there is a stop sign erected at the entrance thereto from Morgan Street, the intersecting street, which runs east and west.

Plaintiff was a passenger in the car of the additional defendant Jones. She alleged in her complaint that the defendant Barbara Elmore Blackwelder was negligent in the operation of the 1947 Ford

automobile, and that defendant Robert R. Blackwelder owned said automobile. The defendants answered, denying negligence, and by way of cross-action alleged that if they were negligent in any manner, the negligence of the additional defendant Jones contributed to plaintiff's injuries and prayed the court that defendant Jones be made an additional party defendant pursuant to the provisions of G.S. 1-240. The defendant Jones was made a party defendant to the action and in her answer to the cross-action denied negligence on her part.

It was stipulated by all the parties that the stop sign testified to by certain witnesses for the plaintiff as being situated on Morgan Street where it intersects with Main Street from the east in the Town of Troutman, was and is a standard stop sign duly posted thereon by authority of the governing body of the Town of Troutman, North Carolina, and by ordinances enacted prior to this accident and for such purposes, and that Main Street is a through street and Morgan Street is a servient street.

During the course of the trial, plaintiff sought to introduce into evidence the amounts of medical bills and expenses which she incurred as a result of the injuries sustained in the collision. This was objected to on the ground that some or all of the bills had been paid by the insurance carrier of the additional defendant Jones. Upon an intimation by the court that plaintiff would not be entitled to show damages for which she had already been compensated, it was stipulated that such amounts as had been paid ($688.73) might, in the court's discretion, be deducted from any verdict recovered by the plaintiff. Thereupon, it was agreed that the plaintiff might offer in evidence proof of the hospital, doctor, and medical bills.

Upon proper issues submitted, the jury returned a verdict that plaintiff had been injured by the negligence of the defendant Barbara Elmore Blackwelder; that defendant Barbara Elmore Blackwelder was at the time of the alleged injuries an agent of Robert R. Blackwelder and acting within the scope of her authority; that plaintiff had been damaged in the amount of $6,000; and that defendant Jones was jointly and concurrently negligent in causing the injuries suffered by plaintiff. Thereupon, the court entered judgment which reduced the amount of damages recoverable by plaintiff by $688.73, and decreed that plaintiff recover $5,311.27 from the defendants Blackwelder, and that defendants Blackwelder recover $2,655.63 from the defendant Jones.

The additional defendant Jones appeals, assigning error.

Carpenter & Webb for appellant.
Scott, Collier, Nash & Harris for appellees.

DENNY, J. The appellant's first exception and assignment of error is directed to the refusal of the trial judge to sustain her motion for judgment as of nonsuit to the cross-action, interposed at the close of the evidence of the original defendants and renewed at the close of all the evidence.

In our opinion, when the evidence is considered in the light most favorable to the original defendants, as it must be on motion for nonsuit of their cross-action, it is sufficient to carry the case to the jury, and we so hold.

The appellant's fourth assignment of error is to that portion of the court's charge to the jury, set out below between the letters (A) and (B), and her fifth assignment of error is to that portion of the charge set out herein between the letters (C) and (D): "(A) Mrs. Blackwelder, approaching the intersection from the east, that is admitted, and being on the left of the automobile driven by Miss Jones, if the two automobiles entered or approached the intersection at approximately the same time, then it was the duty of Mrs. Blackwelder to yield the right of way to the automobile driven by Miss Jones and if she failed to yield the right of way under such circumstances, that would be negligence on the part of Mrs. Blackwelder. Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules, whenever their respective distance from the intersection, their relative speed and other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of a collision unless he delays his progress until the vehicle on the right has passed, (B)

"(C) but the driver of a vehicle approaching but not having entered an intersection shall yield the right of way to the vehicle already within such intersection, so if at the time the defendant Miss Jones approached the intersection but not having entered the intersection the defendant Mrs. Blackwelder had already driven her automobile within the intersection, then it was the duty of Miss Jones to yield the right of way to Mrs. Blackwelder, and if she failed under such circumstances to yield the right of way, that would be negligence on the part of Miss Jones. (D)"

The above instructions were given pursuant to the provisions of G.S. 20-155 which in pertinent part reads 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 section 20-156 and except where the vehicle on the right is required to stop by a sign

erected pursuant to the provisions of section 20-158 * * *. (b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right of way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction * * *."

The above statute is not applicable to the facts in this case. The factual situation with respect to the right of way of the respective parties involved on this appeal is governed by G.S. 20-158 which in part reads as follows: "(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."

This latter statute not only requires the driver on the servient highway or street to stop, but such driver is further required, after stopping, to exercise due care to see that he may enter or cross the dominant highway or street in safety before entering thereon. *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223; *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Edwards v. Vaughn,* 238 N.C. 89, 76 S.E. 2d 359; *Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239; *Matheny v. Central Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Satterwhite v. Bocelato,* 130 F. Supp. 825. Cf. *Downs, Admr. v. Odom, ante* 81.

We think these assignments of error were well taken and must be upheld. Consequently, the appellant is entitled to a new trial on the cross-action and it is so ordered.

The appellant's seventh assignment of error deals with the failure of the court below to allow the appellant credit for the amount which her insurance carrier paid the plaintiff, which amount was deducted by the court below from the verdict in favor of the plaintiff.

In light of the stipulation entered into by and between the parties, the court was authorized, in its discretion, to reduce the amount of

any verdict recovered by the plaintiff by such amounts ($688.73) as had been paid to the plaintiff by the additional defendant's insurance carrier to cover medical expenses.

The plaintiff, pursuant to her pleadings, could recover no verdict against the additional defendant, but only against the original defendants. Hence, if the jury had not found the additional defendant guilty of concurrent negligence, the original defendants would, under the stipulation, have been entitled to credit, in the court's discretion, for the amount voluntarily paid by the additional defendant's insurance carrier. However, the jury returned a verdict for $6,000 in favor of the plaintiff, and also found that the negligence of the original defendants and the negligence of the additional defendant jointly and concurrently caused the plaintiff's injuries and damage.

Liability for contribution under G.S. 1-240 does not contemplate that one brought in as an additional defendant shall pay more than her pro rata part of any verdict rendered against the original defendants. We do not think the stipulation that the court, in its discretion, might deduct the sum of $688.73 from any verdict the plaintiff might recover against the original defendants, militates against the right of the additional defendant to have the entire amount of $688.73 credited on her half of the verdict as rendered by the jury.

Under the judgment as signed below it is contemplated that the original defendants will be required to pay only $2,655.63 in settlement of their liability of at least $3,000 under the verdict. On the other hand, the judgment as entered would require the additional defendant and her insurance carrier to pay $3,344.37 in settlement of a claim that has been litigated and for which her liability under G.S. 1-240 in no event may exceed $3,000. Certainly, the medical bills involved were paid for and on behalf of the additional defendant, and we think that she is entitled to full credit therefor on any judgment for contribution that may hereafter be rendered against her. This view is consonant with law and equity within the purview of G.S. 1-240. *Scales v. Scales,* 218 N.C. 553, 11 S.E. 2d 569.

New Trial.

WILLIAM A. CHAMBERS, JAMES HARTMAN, JOHN H. HARTMAN, W. L. SWAIN, A. E. KILLIAN, ROY G. SAUNDERS AND CHARLES HAMM, JR. v. THE ZONING BOARD OF ADJUSTMENT OF WINSTON-SALEM: CARL DULL, JR., C. C. SMITHDEAL, JR., CLYDE D. WEATHERMAN, ROY SETZER AND A. T. HARRINGTON.

CHAMBERS *v.* BOARD OF ADJUSTMENT.

(Filed 29 April, 1959.)

1. Municipal Corporations § 37—

Neither a housing authority, nor a planning board, nor a zoning board of a municipality has authority to waive a requirement of a municipal zoning ordinance.

2. Municipal Corporations § 36: Statutes § 5a —

Under the doctrine of *ejusdem generis*, where a statute or ordinance enumerates items by specific words or terms followed by general words or terms, the general refers to the same classification as the specific. Therefore, a provision for "garage or other satisfactory automobile storage space" refers to a garage or something in the nature of a garage or of that classification.

3. Municipal Corporations § 36: Constitutional Law § 10—

Arguments that a proposed housing project should be permitted under the zoning regulations of the city because of the urgent housing needs, and *contra*, that it should be denied because of the annoyance and loss of property values which would result to land owners in the area, involve policy and relate to political and not legal matters, it being the function of the court to construe a zoning ordinance as written.

4. Municipal Corporations § 37—

Where a municipal ordinance requires that multi-family dwellings in a residential district should have garage or other satisfactory automobile storage space provided on the premises, the municipal zoning board of adjustment is without authority to approve a housing project plan providing only on-street parking.

5. Same—

A municipal zoning ordinance dividing the city into districts, with uniform requirements in each class of district, is valid, and will not be held void because of power in the board of adjustment to waive side, rear and front yard requirements in a particular type of residential district.

6. Administrative Law § 4: Municipal Corporations § 40—

Certiorari to review action of municipal authorities in applying a zoning ordinance presents the record as certified, and authorizes the Court to review the record for errors appearing on its face, including the questions of jurisdiction, power and authority to enter the order complained of, and objection that the application for the writ failed to specify the particular ground of objection is untenable.

APPEAL by petitioners from *Olive, J.*, January, 1959 Civil Term, FORSYTH Superior Court.

In this proceeding the Housing Authority of the City of Winston-Salem applied to the City Zoning Board of Adjustment for a permit to construct a multi-family housing project consisting of 293 dwelling units on approximately 29 acres of land, bounded by Kilkare Avenue,

Twenty-fourth Street, Lime Avenue, and Glenn Avenue in the City of Winston-Salem. At the time of the application, October 27, 1958, the land was zoned as "Residential A-2." The Housing Authority had submitted to the Planning Board of the City the plans for the project. See Chapter 677, Session Laws of 1947, and City Zoning Ordinance, §48-31, et seq., for duties and powers of the Planning Board.

The Board made the following disposition: "On February 26, 1958, the Planning Board approved as to size and location, the 293-unit Public Housing project north of Glenn Avenue and east of Lime Street. On September 18, 1958, the Planning Board approved the specific site plan for the project. The Board felt that the provision for on-street parking along the wide (34-foot) paved roads was adequate."

Due notice was given of the application and upon a filing of protests by interested persons living in the zoned area, a hearing was held by the Zoning Board, of which full minutes were kept and made a part of the record. Approximately 200 persons appeared in opposition to the project. The Zoning Board, by a 3-2 vote, approved the project and granted the permit.

The petitioners obtained from the superior court a writ of *certiorari* which sent up for review the entire record of the hearing before the Board of Adjustment, including full minutes of its meeting. In the superior court, Judge Olive reviewed the record, made no findings of fact, but affirmed the decision of the Zoning Board and ordered the permit issued. The petitioners excepted to and appealed from the order.

Eugene H. Phillips for petitioners, appellants.

Womble, Carlyle, Sandridge & Rice, By: H. Grady Barnhill, Jr., for respondents, appellees.

HIGGINS, J. The City of Winston-Salem, acting through its proper authorities, adopted a zoning code and appointed a Board of Adjustment as provided in G.S. 160-172 and succeeding sections. By §48-2 of its zoning code, the city was divided into 10 "classes of districts," four of which (A-1, A-2, B, and C) are residential. The two first designated are the more restricted. The only difference in the building restrictions of zones A-1 and A-2 are set forth in paragraph (c) of the Zoning Code, §48-13 The section provides that after hearing, the Board of Adjustment may authorize the issuance of a permit for the construction of multi-family dwellings, not more than two and one-half stories high, as integral parts of a large-scale housing project in a residential A-2 district, provided: "(1) The area for development is not less than ten acres and, when fronting upon an existing

street or streets of record, the area extends throughout the block, from intersecting street to intersecting street; (2) the total coverage of the net land area (exclusive of streets) does not exceed eighteen per cent; (3) the number of dwelling units per acre does not exceed eighteen; (4) the same front yards are provided as are required for other buildings in the residence 'A-2' districts, and the same provisions are observed in respect to the location of garages and other outbuildings; (5) *garage or other satisfactory automobile storage space is provided on the premises, sufficient to accommodate one car for each building unit contained within the development.* The board of adjustment may waive side, rear, and front yard requirements, . . ." (emphasis added)

At a regular meeting of the Zoning Board of Adjustment held November 4, 1958, the multi-family dwelling project came up for consideration at an open hearing. In explaining the plans, the director of the planning board stated: "It was the opinion of the Planning Board that the buildings were properly located *and that the provision of on-street parking along the wide (34-foot) paved roads was adequate.*" (emphasis added)

We are unable to find in the record any evidence as to the plan for garage or automobile storage space, except that which is reported by the approval memorandum of the Planning Board and the oral statement to the same effect made in the meeting by the Planning Board director. Of course, neither the Housing Authority nor the Planning Board, nor the Zoning Board had authority to waive a requirement of the zoning ordinance. The ordinance, 48-13, provides that the Board of Adjustment may waive side, rear, and front yard requirements which are designated as (4), but there is no such authority to waive the requirement number (5) — garage and automobile storage space. Does on-street parking along a 34-foot wide paved road comply with condition (5)? There is no provision whatever for a garage for even one automobile. Certainly on-street parking does not qualify as a garage. Does it qualify as "other satisfactory automobile storage space?" It is a well-settled rule of construction, applicable to statutes and ordinances, that under the doctrine *ejusdem generis,* when enumerations by specific words or terms are used, and they are followed by general words or terms, the general shall be held to refer to the same classification as the specific. See Note 2, C.J.S., 28, p. 1049. The term "other automobile storage space," following "garage," refers to something in the nature of a garage or of that classification. But if we eliminate the word "garage," it would be difficult even then to treat on-road or on-street parking as *satis-*

factory automobile storage space. The storage of an automobile must mean more than leaving it parked on the street. The requirement for garage or other satisfactory automobile storage space was ordained by the city council. It can be changed by the city council — not otherwise.

The respondents make an appealing argument that the court should be liberal in the construction of the zoning ordinance because of the dire need for better facilities to meet urgent housing needs. The petitioners stress with equal earnestness the annoyances, loss of property values, etc., this project in the area which is classified as Residential A-2 would cause them and their neighbors. Both arguments involve policy. They are political—not legal. The question of law involved in the appeal is whether the plan providing for on the roads parking space which the Planning Board and the Zoning Board of Adjustment "deem adequate" is a substantial compliance with the requirement (c) (5) of Zoning Ordinance 48-13. The wording of the ordinance leaves little or no doubt as to its meaning, and to approve the plan on the present showing would be to eliminate (5) in its entirety. If the provision is to be removed, it should be done by the authority that ordained it — the city council.

It is plain from the record that we are dealing with a highly controversial project. In passing on the legality of (5), we must assume the city council said what it meant and meant what it said.

Valid reason appears for the requirements as to garage and storage space. In a project with 293 family housing units, we may assume that many children of all age groups will be playing in and around the premises; and that many automobiles will be used by the occupants. We may assume also that children, heedless of danger, will be darting into the streets from behind parked automobiles, creating a situation the dangers of which are obvious. Whether the parking plan contemplates the use of the present four perimeter streets or the building of others, the difference in the danger involved would be one of degree only.

We conclude the evidence before the Adjustment Board, and consequently before Judge Olive, was insufficient to show the plans for the project were in substantial compliance with the garage and storage provision of the zoning ordinance.

The appellant has argued the zoning ordinances involved are invalid for want of authority to enact them and for failure to set up standards for enforcement. These contentions are without merit. *Harden v. Raleigh,* 192 N.C. 395, 135 S.E. 151; *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306. On the other hand, the appellee has argued

the application for the *writ of certiorari,* not having specified the failure of the plans to provide for garage and automobile storage space, the writ does not present the question for review. This contention is likewise without merit. "The *writ of certiorari,* as permitted by the zoning ordinance statute, is a writ to bring the matter before the court, upon the evidence presented by the record itself." *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1. "The allowance of the writ, however, like an appeal, constitutes an exception to the judgment, and the Court may review errors of law appearing on the face of the record proper." *Winston-Salem v. Coach Lines,* 245 N.C. 179, 95 S.E. 2d 510. "This anomaly in procedure makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with a view to protecting the fundamental rights of parties, . . ." *Russ v. Board of Education,* 232 N.C. 128, 59 S.E. 2d 589. ". . . its *(certiorari)* office extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of . . ." *Belk's Department Store v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897.

Under the foregoing authorities, and for the reasons assigned, the order of the Superior Court of Forsyth County is set aside. The proceeding will be remanded to the Board of Adjustment with direction that the Board withhold approval until the plans show substantial compliance with provision (c) (5) of the zoning ordinance.

Reversed.

F. M. BOLDRIDGE v. CROWDER CONSTRUCTION CO.

(Filed 29 April, 1959.)

1. Negligence § 11—

An affirmative finding by the jury on the issue of contributory negligence precludes any recovery based on defendant's negligence.

2. Evidence § 35—

Testimony of a witness that he would not have fallen over a ridge of dirt if additional dirt had not been put along the ridge is properly stricken as a conclusion.

3. Negligence § 1: Nuisance § 1—

In an action seeking to recover damages solely for personal injury resulting from plaintiff's fall on a ridge of dirt placed in the street incident to the performance by defendant of its contract with the municipality for the repair of the street, plaintiff may not allege, in addition to his cause of action based on negligence, a cause of action based on

nuisance, since the asserted nuisance has its origin in negligence, and plaintiff may not avert the consequences of contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance.

4. Nuisance § 1: Municipal Corporations § 14a—

A municipal corporation has the authority to repair its streets, notwithstanding that the work necessarily involves inconvenience and annoyance to the public.

5. Appeal and Error § 45—

The exclusion of evidence which is competent solely upon an issue answered by the jury in appellant's favor cannot be prejudicial.

6. Municipal Corporations § 14a—

In this action by a pedestrian to recover for injuries sustained when he fell in broad daylight on loose dirt placed in the street incident to street repairs, the evidence *is held* sufficient to warrant the jury's finding that plaintiff's own negligence contributed to his injury, and the court's charge on the issue of contributory negligence *is held* without prejudicial error.

APPEAL by plaintiff from *Nettles, J.*, September 29, 1958 Regular Schedule B. Term, MECKLENBURG Superior Court.

Civil action to recover damages for personal injuries plaintiff alleged he sustained as a result of a fall while crossing a street under repair. The plaintiff alleged three causes of action, all growing out of the alleged negligent, wrongful and intentional manner in which the defendant performed its contract with the City of Charlotte to widen Selwyn Avenue.

In his complaint, the plaintiff attempted to allege three causes of action. The first was based on the alleged negligence of the defendant in the manner in which it had placed a ridge of dirt two and one-half to three feet high between the traveled portion of Selwyn Avenue and the gutter and curb in such manner as to require the plaintiff to cross this dirt ridge on foot in order to leave and enter his home. Additional fresh dirt was added to the street side of the ridge a few minutes before he attempted to recross to his parked automobile. The defendant negligently failed to give notice of this change of condition which created a hidden danger not observable from the curb side. In attempting to cross the ridge at his accustomed place, the new dirt gave way under his feet, causing him to fall and to receive serious and permanent injuries.

The second cause of action was based on nuisance. The plaintiff alleged the street repair work was an unnecessary, intentional, and unwarranted interference with the plaintiff's use of the street; that the defendant thereby created both a public and a private nuisance by

obstructing the street. His injury was brought about by his fall in the manner and with the result substantially as set out in his first cause.

The third cause of action emphasises the defendant's failure to carry out its contract with the city to the effect the repair work should be done with the least possible obstruction to the normal use of the street. The defendant unnecessarily obstructed the plaintiff's use by the addition of fresh dirt and was negligent in that it failed to give notice of the changed condition which was not observable; and that the negligence proximately caused the plaintiff's injury.

In each of the causes of action the plaintiff detailed the same injury, the same pain and suffering, the same loss of time, and the same medical expenses, all as a proximate result of the one fall. No other element of damage or loss is alleged or supported by evidence.

The defendant answered the first cause of action. It demurred to the second and third causes. The answer denied negligence and pleaded contributory negligence. The demurrer to the second cause of action was based on the failure to state sufficient facts and on misjoinder of causes. The demurrer to the third cause was based on its duplication of and inclusion in the first cause.

After hearing, Judge Sharp overruled the demurrer to the second cause of action, sustained it as to the third. Whereupon, the defendant answered the second cause of action, claiming it performed the street work with due care, and that the construction of the ridge of dirt was a necessary part of the street work to protect the freshly poured concrete, gutter, and curb from water in case of rain, and to prevent travel over it; that the plaintiff was not properly attentive to what he was doing, was careless in failing to observe the obvious conditions of which he had due and timely notice; and that his failure to use due care for his own safety was the proximate cause of his injury.

Both parties introduced evidence. At the close of all the evidence the court overruled the motion for nonsuit as to the first cause of action, but sustained it as to the second. The jury, upon proper issues of negligence and contributory negligence arising on the pleadings to the first cause of action, answered both issues in the affirmative. From the judgment dismissing the action, the plaintiff appealed.

Carswell & Justice, Robinson, Jones & Hewson for plaintiff, appellant.

Kennedy, Covington, Lobdell & Hickman, Mark R. Bernstein, Fairley & Hamrick for defendant, appellee.

HIGGINS, J. The appeal presents two questions of law: (1) Did

the court commit error in dismissing the second cause of action at the close of all the evidence? (2) Did the court commit error in its rulings on admissibility of evidence and in the charge on the issue of contributory negligence?

The finding against the plaintiff on the latter issue precludes any recovery based on negligence. *Wilson v. Camp,* 249 N.C. 754; *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357.

The plaintiff's principal contention is that the case should have been submitted to the jury on his second cause of action: "That defendant's unnecessary and intentional obstruction in the public street . . . constituted both a public nuisance from which plaintiff suffered special damages and a private nuisance causing injury to the plaintiff . . . As a proximate result of the intentional conduct of the defendant . . . and of the maintenance of a nuisance by the defendant, the plaintiff was caused to fall or be thrown into the street and caused to sustain severe, painful and permanent injuries . . ."

As bearing on his right to proceed both on negligence (first cause) and nuisance (second cause) the plaintiff cites *Morgan v. Oil Co.,* 238 N.C. 185, 77 S.E. 2d 682; *Swinson v. Realty Co.,* 200 N.C. 276, 156 S.E. 545; *Beckwith v. Town of Stratford,* 29 A 2d 775, (Conn., 1942). Other cases on the subject are *Jenkins v. Duckworth,* 242 N.C. 758, 89 S.E. 2d 471; *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311. Examination will disclose, however, that the cases cited are not applicable to a single physical injury of the type sustained by the plaintiff in the manner disclosed by the evidence.

The prayer for relief in each alleged cause of action is for $25,000.00 as compensation for all injuries, (temporary and permanent) physical pain and suffering, loss of time, and cost of medical treatment, all of which was proximately caused by the plaintiff's fall while trying to negotiate the ridge of dirt the defendant had wrongfully and negligently placed in his pathway. He testified: "I fell on the inside—the street side, . . . When I fell I got up and I was so surprised I had fallen and I looked and I saw this side here, . . . wasn't like what I had been going over previously—that there had been some other dirt put along in there and it just gave way. *If it had been like it was when I had been walking on it I wouldn't have fallen.*" The sentence underscored was stricken on defendant's motion, to which the plaintiff excepted. In passing, we may say the sentence was properly stricken as a conclusion. *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768.

It is all too plain from the evidence, the allegations, the prayers for relief, that the plaintiff's cause of action is based on negligence, not on nuisance either public or private. *Swinson v. Realty Co., supra;*

Butler v. Light Co., 218 N.C. 116, 10 S.E. 2d 603; *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485. Quotations from the *Butler* case seem particularly pertinent here:

> "Indeed, taking the evidence according to its reasonable inferences, the nuisance, if it may be called such, was negligence-born, and must, in the legal sense, make obeisance to its parentage.
>
> "Doctrinal distinctions may not be pressed too far. To be helpful in administration and to lend themselves in aid of justice, they must be kept close to the realities. After all, it is the factual situation out of which the legal consequences flow, not the formal aspect, or the technical label which we conveniently apply.
>
> "Under the facts of this case, we see no transmutation of negligence into nuisance which would prevent the rights and liabilities of the parties from being properly probed by the issues submitted to the jury. As adequately expressing the opinion of this Court upon the matter, we quote from an opinion written by *Chief Judge Cardozo* of the New York Court of Appeals, subsequently renowned Associate Justice of the United States Supreme Court, in *McFarland v. City of Niagara Falls*, 57 A.L.R., 1, 247 N.Y. 340, 160 N.E. 391: 'Not a little confusion runs through the reports as to the effect of contributory negligence upon liability for nuisance. Statements appropriate enough in the application to nuisance of one class have been thoughtlessly transferred to nuisance of another. There has been forgetfulness at times that the forms of actions have been abolished and that liability is dependent upon the facts and not upon the name. Confining ourselves now to the necessities of the case before us, we hold that whenever a nuisance has its origin in negligence one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance.' "

In our opinion, the evidence in this case was insufficient to establish plaintiff's right to recover on the basis of nuisance, either public or private. *Andrews v. Andrews*, 242 N.C. 382, 88 S.E. 2d 88; *Barrier v. Troutman*, 231 N.C. 47, 55 S.E. 2d 923; *King v. Ward*, 207 N.C. 782, 178 S.E. 577; *Holton v. Oil Co.*, 201 N.C. 744, 161 S.E. 391; 66 C.J.S., "Nuisance," §8, p. 739, et seq.; 39 Am. Jur., "Nuisance," p. 280, et seq. The plaintiff's own evidence shows that the new dirt which caused his fall had been in place less than 15 minutes. It was put there incident to street work then under way. That this street work caused the plaintiff and others some inconvenience may be assumed.

In the nature of things road work and street repairs involve some inconvenience and annoyance. This the individual must put up with in order to provide facilities for safe and convenient travel. *Sanders v. R.R.*, 216 N.C. 312, 4 S.E. 2d 902.

The first cause of action offered the plaintiff full opportunity to present the pertinent facts relating to his injury. After hearing, the jury found negligence in the plaintiff's favor, contributory negligence against him. Errors on the latter issue only would be prejudicial.

The trial court properly refused to permit the plaintiff to introduce in evidence the contract between the city and the defendant showing the manner in which the repair work should be carried on. Conceivably the contract might have some bearing on the defendant's negligence. But that was established. Its pertinency, however, on the plaintiff's contributory negligence is not apparent. See *Council v. Dickerson*, 233 N.C. 472, 64 S.E. 2d 551.

The objections to the parts of the charge relating to the issue of contributory negligence are without merit. The court properly charged as to the burden of proof, the constituent elements of contributory negligence, properly reviewed the evidence, and applied the law to the facts as testified by the witness. The evidence of the plaintiff's fall in broad daylight, under the circumstances described, was sufficient to warrant the finding that the plaintiff's own negligence contributed to his injury. *Presley v. Allen & Co.*, 234 N.C. 181 66 S.E. 2d 789; *Houston v. City of Monroe*, 213 N.C. 788, 197 S.E. 571. The defendant, not having appealed, does not raise the question whether it could reasonably foresee that serious injury would result from the placing of fresh dirt on the ridge. It should have expected that one who crossed the ridge on foot would get dirt on his shoes or in the cuff of his trousers; but it is questionable whether serious injury was reasonably foreseeable.

The plaintiff's assignments of error fail to disclose any reason why the result of the trial should be disturbed.

No Error.

STATE v. JOHN WILLIAMSON, ALIAS BUTTERFIELD.

(Filed 29 April, 1959.)

1. Criminal Law § 94—

The statutory prohibition against an expression of opinion on the evidence by the court in the hearing of the jury applies at any time during

the trial, and whether the language of the court amounts to an expression of opinion on the facts is to be determined by its probable meaning to the jury and not by the motive of the judge. G.S. 1-180.

2. Same: Intoxicating Liquor § 15—

In this prosecution for violations of the liquor laws, the court, in explaining its ruling admitting testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's house, stated that "they both go hand in hand." *Held:* The statement of the court must be held prejudicial as intimating that evidence of the intimacy of the girls and men was direct proof of liquor dealings by defendant.

3. Criminal Law § 94—

A statement by the court at the conclusion of the evidence that counsel might argue the case but that the court was going to instruct the jury peremptorily, must be held for prejudicial error as a prohibited expression of opinion as to whether a fact had been fully or sufficiently proven. Such statement may not be held harmless even when the evidence is sufficient to support a peremptory instruction, since a peremptory instruction should be given directly to the jury at the proper time in the orderly progress of the trial and not during a discourse with attorneys in the presence of the jury.

4. Intoxicating Liquor § 12—

In a prosecution for possession of intoxicating liquor for the purpose of sale it is competent for the State, after introducing evidence that defendant possessed or sold liquor at his house, to introduce evidence as to the conduct and intoxication of persons found at defendant's house, even including testimony of a statement of the defendant that "he was running a whore-house in his back yard."

5. Indictment and Warrant § 14—

Motion to quash the warrant for duplicity is addressed to the discretion of the court when the motion is not made until after plea, since failure to make the motion prior to plea waives the question of duplicity.

6. Criminal Law § 33—

In a prosecution on a warrant charging a number of distinct criminal offenses in one court, the court is compelled to permit the introduction of evidence which is competent and pertinent on any of the charges.

7. Indictment and Warrant § 8—

Where a warrant charges a number of distinct criminal offenses in one count, defendant may in apt time move to quash on the ground of duplicity, in which event the solicitor may either take a *nol pros* as to all but one charge and proceed to trial thereon, or he may move for leave to amend the warrant and state in separate counts the charges upon which he desires to proceed, provided they are originally set out in the warrant. G.S. 18-10.

APPEAL by defendant from *Gambill, J.*, October 1958 Criminal Term of FORSYTH.

Defendant appealed from an adverse judgment in the Municipal Court of the City of Winston-Salem and was tried *de novo* in the Superior Court upon a warrant charging the violation of the liquor laws. The State offered evidence tending to show that the defendant possessed illicit intoxicating liquor, possessed intoxicating liquor for the purpose of sale and sold intoxicating liquor. The defendant did not testify and offered no evidence in his behalf. The jury returned a verdict of guilty.

From judgment of imprisonment defendant appealed, assigning error.

Spry, White & Hamrick for defendant, appellant.

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

MOORE, J. The fifth and eleventh assignments of error relate to statements made by the judge in the presence of the jury during the course of the trial. Defendant challenges these statements on the ground that they constitute expressions of opinion as to the weight and sufficiency of the evidence and were prejudicial to him.

Fifth Assignment of Error: Donald Parker testified for the State. Over the objection of the defendant he testified in substance that at the defendant's house on an occasion when he made a purchase of liquor he saw girls sitting on men's laps. At this point the following colloquy took place:

> "*Mr. Turner* (attorney for defendant): If your Honor please, would you hear me on it? This is a specific indictment about liquor, and that has nothing to do with liquor, on the face of the earth, is my contention.
>
> "*Court*: They both go hand in hand."

Eleventh Assignment of Error: At the close of the evidence there was the following exchange between the attorney for the defendant and the court:

> "*Court*: All right. Do you want to argue the case?
>
> "*Mr. Turner*: Yes, Sir.
>
> "*Court*: I will tell you, frankly, I am going to instruct the jury if they believe the evidence and find beyond a reasonable doubt from the evidence that he had liquor there and had it for sale, they will find him guilty. That is a peremptory instruction."

There were arguments both for the defendant and the State. The court instructed the jury but not peremptorily.

G.S. 1-180 is, in part, as follows: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion

whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case." This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. *State v. Cook*, 162 N.C. 586, 77 S.E. 759.

In *State v. Simpson*, 233 N.C. 438, 442, 64 S.E. 2d 568, this 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. *Withers v. Lane*, 144 N.C. 184, 56 S.E. 855. 'The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial' — *Walker, J.*, in *S. v. Ownby*, 146 N.C. 677, 61 S.E. 630."

"Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge." *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173.

The epigrammatical statement of the judge that "they both (liquor and a display of amorousness) go hand in hand" was prejudicial error when considered in the light of the charge upon which the defendant was being tried and the other circumstances of the case. It suggests that one does not exist without the other, and that evidence of the intimacy of the girls and men was direct proof of liquor dealings by the defendant. In short, it was an expression of opinion upon the weight of the pertinent evidence adverse to the defendant, and must necessarily have been so understood by the jury. It is better practice for the court not to explain a ruling on the admission of evidence, certainly not by way of *maxim*. This statement falls within that forbidden class illustrated by the case of *Meadows v. Telegraph Co.*, 131 N.C. 73, 42 S.E. 534, in which the judge used the expression: "Proverbial slowness of the messenger boy." The defendant was being sued for late delivery of a telegram.

We do not hold that the court was in error in the admission of the

testimony of the witness Donald Parker. Our opinion is that it was competent and relevant under the circumstances.

As to the exchange between the court and defendant's attorney immediately preceding the jury speeches, we are of the opinion that the statements of the judge were understood by the jury to mean that it was the judge's opinion that the evidence was sufficient for conviction and that a jury speech in his behalf would be useless and a waste of time. It is said in *State v. Hart*, 186 N.C. 582, 120 S.E. 345, that "this statute (G.S. 1-180) has been interpreted by us to mean that no judge, in charging the jury, or at any time during the trial shall intimate whether a fact is fully or sufficiently proved." (Parentheses ours).

We do not decide and we refrain from discussing whether or not a peremptory instruction would have been proper in the light of the evidence. Suffice it to say on this point that there are situations in which peremptory instructions are appropriate. *State v. Taylor*, 236 N.C. 130, 71 S.E. 2d 924. However, the statement made by Judge Gambill when he was speaking to defendant's counsel does not fully comply with the essentials of such an instruction as set out in the *Taylor* case, nor does it specifically apply the instructions to the charges in the warrant. Furthermore, peremptory instructions, to avoid the objection that they are expresssions of opinion, should be given directly to the jury at the proper time in the orderly progress of the trial and not during a discourse with attorneys in the presence of the jury.

Certain of the defendant's assignments of error relate to the correctness of the judge's charge. Since there must be a new trial, we refrain from a discussion of these assignments. They involve no novel or unsettled propositions of law.

There were a number of assignments of error based upon exceptions to the admission of evidence. We have carefully considered each of them and find them without merit. When a defendant is charged with the possession of intoxicating liquor for the purpose of sale and it appears from the evidence that he has possessed or sold liquor at his house, it is competent for the State to show the number, conduct and condition as to intoxication of persons found at his house when it is shown that he has liquor in his possession. The declaration attributed to the defendant "that he was running a whore-house in his back yard" is certainly competent on that charge and under those circumstances.

Since there must be a new trial, we think the following discussion appropriate. It is observed that the warrant in this case charges nine

distinct criminal offenses in one count. Not having moved to quash the warrant before pleading, defendant waived the question of duplicity. *State v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9. After a plea of not guilty a motion to quash is allowable only in the discretion of the court. *State v. Burnett,* 142 N.C. 577, 55 S.E. 72. Since issue was joined on all the charges, the court was compelled to permit any evidence to be offered which was competent and pertinent on any of the charges. When a defendant in apt time moves to quash the warrant on the ground of duplicity, the solicitor may take a nol. pros. as to all of the charges except one and then proceed to trial on the one charge. *State v. Avery,* 236 N.C. 276, 72 S.E. 2d 670; *State v. Cooper,* 101 N.C. 684, 8 S.E. 134. Or the solicitor may upon motion and leave of court amend the warrant and state in separate counts the charges upon which he desires to proceed, provided they were originally set out in the warrant. G.S. 18-10 is in part as follows: "In any affidavit, information, warrant, or indictment for the violation of this article, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty for all offenses may be imposed."

New Trial.

STATE v. LIVINGSTON BROWN.

(Filed 29 April, 1959.)

1. Criminal Law § 16—

In a prosecution in a county not excepted from the provisions of G.S. 7-64, the Superior Court has original jurisdiction of misdemeanors and may try a defendant on a bill of indictment even when no warrant for such offense has been issued.

2. Criminal Law § 87—

Where the evidence tends to show that defendant, the discovery of liquor on his premises being imminent, sped away in his car, leading the officers a chase at an illegal speed, the court may properly consolidate for trial a bill of indictment charging unlawful possession of nontaxpaid liquor and unlawful possession of such liquor for the purpose of sale with an indictment charging reckless driving and speeding. G.S. 15-152.

3. Automobiles § 63—

The general maximum speed limit in this State is 55 miles per hour, and in a prosecution for speeding the court properly charges the jury to the effect that the operation of a motor vehicle at a speed greater than

55 miles per hour is a misdemeanor, since G.S. 20-141(b) (5) merely provides an exception to the general law in those instances in which the Highway Commission has erected appropriate signs giving notice of a maximum speed of not more than 60 miles per hour.

4. Criminal Law § 32—

While the State has the burden of establishing the *corpus delicti*, if the statute creating the offense contains an exception constituting a proviso and not a part of the description of the offense, the burden is on defendant to bring himself within the exception when relied on by him.

APPEAL by defendant from *Johnston, J.*, at September 1958 Term of RANDOLPH.

Criminal prosecutions upon two bills of indictment against defendant Livingston Brown, No. 2729 containing two counts charging (1) unlawful possession of non-taxpaid intoxicating liquors, and (2) unlawful possession of non-taxpaid intoxicating liquors for the purpose of sale.

And No. 2730 containing three counts charging (1) unlawful operation of a motor vehicle upon a public road, street or highway of Randolph County carelessly and heedlessly in wilful and wanton disregard of the rights and safety of others and without due caution and circumspection and at a speed and in a manner so as to endanger and be likely to endanger the lives and property of others, etc.; (2) unlawful operation of a motor vehicle upon a public road, street or highway of Randolph County at a greater rate of speed than allowed by law, to wit: 75 miles per hour, etc.; and (3) unlawful operation of a motor vehicle upon a public road, street or highway of Randolph County and upon approach of a police car giving audible signal by siren, "did fail to immediately stop and remain in such position, otherwise directed by a police traffic officer."

The case was submitted to the jury upon the evidence introduced by the State under the charge of the court.

Verdict: In bill of indictment No. 2729: (1) on the charge of possession of non-taxpaid liquor— Guilty; but (2) on the charge of possession of non-taxpaid liquor for purpose of sale, the jury reported inability to agree, and as to that count the court withdrew a juror and declared a mistrial.

Verdict: In bill of indictment No. 2730: (1) On the charge of reckless driving— Guilty; and (2) on the charge of speeding— Guilty.

Thereupon and in accordance therewith the court entered judgment, to which defendant excepts and appeals to Supreme Court, and assigns error.

STATE *v.* BROWN.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard for the State.

Ottway Burton, Don Davis for defendant, appellant.

WINBORNE, C. J. Upon the several assignments of error, based upon exception taken in the course of the trial in Superior Court, defendant raises three questions substantially as follows:

1. Did the court err in refusing to quash the bill of indictment No. 2729 found as a true bill by the Grand Jury of Randolph County charging defendant with the offense of possession of non-taxpaid liquor when no warrant for such charge had been issued against defendant?

Suffice it to say the decisions of this Court in *S. v. Daniels*, 244 N.C. 671, 94 S.E. 2d 799, and *S. v. Morgan*, 246 N.C. 596, 99 S.E. 2d 764, applicable to similar factual situation, hold in effect that the denial of this motion to quash is proper. In fact counsel for defendant, in brief filed here in this case, concede as much.

II. Did the trial court err in granting the State's motion for consolidation of the two bills of indictment, Nos. 2729 and 2730? In the light of applicable statute G.S. 15-152, applied to the evidence offered on the trial in Superior Court "No" is the proper answer to the question.

G.S. 15-152, in pertinent part, declares that "when there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * * ."

Here the Attorney General, in brief filed, argues, and the Court holds rightly so, that the possession of the liquor and the motor vehicle law violations, as revealed by the evidence offered upon the trial, arise out of this situation: "The officers, armed with a search warrant, went to the defendant's premises. The trailer door was locked. An officer located defendant within four or five minutes about three blocks from the trailer after it was discovered that he was not at home. The defendant, pretending to agree to return to the trailer, knowing full well that the illegal possession of liquor was on the point of being discovered * * * immediately speeded away leading the officers in a wild chase at 75 miles per hour along the public roads including one on which children were playing, abandoning his flight by

automobile only after he wrecked his car. When he wrecked his car 'he jumped out and ran'."

III. Did the trial court err in conducting trial against defendant on charge of operating a motor vehicle upon a public road at a greater rate of speed than allowed by law, 75 miles per hour?

Under the speed statute, of this State, properly interpreted, this question merits a negative answer.

In this connection the defendant appellant points to these two portions of the charge of the court to the jury to which Exceptions 6 and 7 relate:

"Now, Members of the jury, the Court instructs you that Chapter 20, Section 141 of the General Statutes provides in subsection (c) that if any person drives a motor vehicle upon the public highways at a speed greater than 55 miles per hour, that such person is guilty of a misdemeanor."

And again: "Now, Members of the jury, the court instructs you that if the State has satisfied you beyond a reasonable doubt, the burden being upon the State to so satisfy you, that this defendant drove a motor vehicle upon a public street or highway within the State at a greater rate of speed than 55 miles an hour, and if the State has so satisfied you beyond a reasonable doubt, then it would be your duty to convict the defendant of speeding as charged in the bill of indictment * * * ."

Turning to the statute it is seen that subsection (b) of G.S. 20-141 provides:

"(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; (3) Forty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for vehicles other than passenger cars, regular passenger vehicles, pick-up trucks of less than one ton capacity, and school buses loaded with children; (4) Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars, regular passenger carrying vehicles and pick-up trucks of less than one ton capacity. (5) Whenever the State Highway Commission shall determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subdivisions 3 and 4 of this subsection is reasonable and safe under the conditions found to exist upon any part of a highway with respect to the vehicles described in said subdivisions 3 and 4, said Commission shall determine and declare a reasonable and safe speed limit, not to exceed

a maximum of 60 miles per hour, with respect to said part of any highway, which maximum speed limit with respect to subdivisions 3 and 4 of this subsection shall be effective when appropriate signs giving notice thereof are erected upon the parts of the highway affected."

It may be noted that subdivision 5 of subsection (b) just quoted was added by 1957 Session Laws Chapter 214.

The State contends, and we hold properly so, that under the statute fifty-five miles per hour is the general maximum speed limit in this State, and that the provisions of subdivision 5 above set out are in the nature of an exception, and the defendant must bring himself within the provisions of the exception in order to receive the benefits of the exceptions.

We find it stated under title "Criminal Law", Section 572, C.J.S. Vol. 22, page 886, that "In general, accused has the burden of proving, as a matter of defense, that he is within an exception in the statute creating the offense, at least, where such exception is not a part of the enacting clause, but is a proviso thereto, or is in fact not part of the description of the offense."

Indeed this Court in *S. v. Davis*, 214 N.C. 787, 1 S.E. 2d 104, had this to say: " * * * it has long been settled in this State that although the burden of establishing the *corpus delicti* is upon the State, when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense beyond the essentials of the legal definition of the offense itself, the onus of proof as to such matter is upon the defendant * * * ."

In the light of this principle applied thereto, the portions of the charge to which exception is thus taken are proper.

Other assignments of error have been duly considered, and in the matters to which they relate prejudicial error is not made to appear.

No Error.

MARIE S. KIRKPATRICK, MARGARET S. HAYES, AND J. H. PEARSON, CO-ADMINISTRATORS OF ESTATE OF N. B. SMITHEY, DECEASED v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 29 April, 1959.)

1. Constitutional Law § 23—

An opportunity to be heard as an essential of due process applies with respect to an asserted tax liability.

2. Constitutional Law § 24: Taxation § 38c—

Statutory provision precluding injunction against the collection of a tax unless assessed for an illegal or unlawful purpose, but permitting the taxpayer to pay a tax under protest and bring action to recover the monies so paid, accords the taxpayer due process and is constitutional. G.S. 105-267, G.S. 105-406.

3. Taxation § 38c—

A taxpayer electing to pursue the remedy provided by G.S. 105-267 must comply with the conditions precedent set forth in the statute for the institution of an action to recover the tax, and if the taxpayer fails to allege and prove demand for refund of the monies paid within thirty days after payment nonsuit is proper, since failure to make such demand forfeits the right to institute the action.

4. Same: Taxation § 38d—

An action for the recovery of a tax paid under protest, originated in the Superior Court, without compliance with the conditions precedent to the institution of such action, cannot be maintained under the provisions of G.S. 105-266.1, since this statute provides an alternative remedy if the taxpayer elects to seek administrative review instead of instituting action to recover the monies paid, and relates solely to proceedings begun by request for administrative review.

APPEAL by plaintiffs from *Preyer, J.*, September 1958 Term of WILKES.

On 16 December 1941 N. B. Smithey executed deeds to his daughters Margaret S. Hayes and Mattie S. Kirkpatrick conveying lands in Wilkes County. One deed recites a consideration of one dollar "and other consideration," the other, $100 "and other valuable considerations." The deed to Mrs. Hayes was recorded 8 September 1953, after the death of Mr. Smithey. The deed to Mrs. Kirkpatrick was recorded in October 1951.

Plaintiffs filed Federal Estate Tax and North Carolina Inheritance Tax returns. They did not include in the returns the properties described in those deeds.

In July 1955 the Federal tax authorities imposed additional estate taxes based in part on the contention that the deeds dated in 1941 were deeds of gift and because not recorded in two years were void. (G.S. 47-26) The land described in each deed was valued at $35,000. Plaintiffs, asserting the validity of the conveyances of 1941, because based on valuable considerations, paid the Federal tax and sued to recover. *Kirkpatrick v. Sanders*, 261 F. 2d 480.

Plaintiffs, without waiting for notice of an assessment of additional inheritance taxes, on 19 July 1955 paid to the Commissioner of Revenue additional inheritance taxes in the amount of $18,353. Of the sum so paid, $13,395.66 was admittedly owing. The remainder, $4,-

957.34, representing the amount of tax owing if the land described in the 1941 deeds was a part of Mr. Smithey's estate, was paid by check on which was written: "Paid under Protest by the administrators for that the tax assessed is not a part of the estate of N. B. Smithey." This check was paid by drawee bank on 28 July 1955.

On 20 February 1957 counsel for plaintiffs wrote a letter to the Commissioner of Revenue and referred to the payment made under protest in July 1955. In concluding his letter he said: "We are writing this letter to make formal demand for re-payment of that amount of tax."

This action was brought to collect the amount paid under protest. At the conclusion of plaintiffs' evidence defendant moved to nonsuit. The motion was allowed and plaintiffs, having excepted, appealed.

Hayes & Hayes for plaintiff, appellants.

Attorney General Seawell and Assistant Attorney General Abbott for defendant, appellee.

RODMAN, J. We must determine plaintiffs' right to maintain the action before looking at the evidence to ascertain if any was offered to show the deeds of 1941 were based on valuable consideration.

The constitutional provisions guaranteeing due process (N. C. Const. Art. I, sec. 17, U. S. Const., 14th Amend.) are mandatory and require an opportunity to be heard with respect to asserted tax liability. *Bowie v. West Jefferson,* 231 N.C. 408, 57 S.E. 2d 369.

The taxpayer asserting nonliability may be afforded constitutional protection by either administrative or judicial review. Where not prohibited by statute, judicial action may be sought in equity to enjoin the levy, *Worth v. Commissioners,* 60 N.C. 617; or at law to recover taxes paid under protest, *Huggins v. Hinson,* 61 N.C. 126.

The Legislature in 1887, by s. 84, C. 137, provided that no court should enjoin the collection of a tax unless assessed for an illegal or unlawful purpose. This statute authorized payment of the tax under protest with the right to sue to recover the amount paid, if upon demand made within thirty days the tax was not refunded.

This statutory provision has in substance been brought forward in all subsequent codifications of our statute laws. Rev. 821 and 2855, C.S. 858 and 7979, G.S. 105-267 and 105-406.

This statute permitting payment to be made under protest with a right to bring an action to recover the monies so paid is constitutional and accords the taxpayer due process. *R.R. v. Lewis,* 99 N.C. 62; *Mace v. Commissioners,* 99 N.C. 65; *Henrietta Mills v. Rutherford County,* 281 U.S. 121, 74 L.Ed. 737.

The right to sue to recover is a conditional right. The terms prescribed are conditions precedent to the institution of the action. Plaintiffs must allege and prove demand for refund made within thirty days after payment. A failure to make such demand forfeits the right. *R.R. v. Reidsville,* 109 N.C. 494; *Uzzle v. Vinson,* 111 N.C. 138; *Hatwood v. Fayetteville,* 121 N.C. 207; *Bristol v. Morganton,* 125 N.C. 365; *Teeter v. Wallace,* 138 N.C. 264; *Blackwell v. Gastonia,* 181 N.C. 378, 107 S.E. 218; *Power Co. v. Clay County,* 213 N.C. 698, 197 S.E. 603; *Williamson v. Spivey,* 224 N.C. 311, 30 S.E. 2d 46.

Plaintiffs elected to pay on 19 July 1955 without requiring notice and assessment, but under protest. They made no demand for refund until February 1957.

Manifestly this action cannot be maintained under G.S. 105-267, nor can it, we think, be maintained, as plaintiffs argue, under the provisions of G.S. 105-266.1. That statute, by express language, relates to proceedings begun by request for administrative review. It was enacted in 1957 and is a part of s. 10, C. 1340, S.L. 1957. It is an extension and enlargement of the policy declared by the Legislature in 1949, C. 392, S.L. 1949 (G.S. 105-241.1). This policy is predicated on the theory that an administrative hearing may be preferred by the taxpayer to an action at law to determine liability for the tax. In 1955 this idea was expanded to permit an appeal from the Commissioner's decision to a Tax Review Board. C. 1350, S.L. 1955. Proceedings so initiated may ultimately find their way to the courts. Here no hearing was requested or held. The action originated in the Superior Court.

The taxpayer was not compelled to seek administrative hearings or review. He was accorded the right provided by G.S. 105-267 to pay under protest and sue to recover if his demand for refund was not complied with.

Sec. 10, C. 1340, S.L. 1957, amending Art. 9, schedule J. of the Revenue Act (C. 105 of the General Statutes), not only added what is now G.S. 105-266.1, but amended G. S. 105-267. Significantly, it did not change the requirement that demand for refund be made in thirty days if the taxpayer intended forthwith to seek judicial review rather than a hearing by the Commissioner as permitted by G.S. 105-266.1

Plaintiffs had a right to choose which course they would pursue. Having chosen, they are bound by the limitations fixed for that route. Not having made the demand within the time fixed by the statute, they have failed to establish a right to recover. The judgment of nonsuit is

Affirmed.

ALLEN B. WILKINS v. EARL WARREN.

(Filed 29 April, 1959.)

1. Negligence § 4f(1)—

A person paying the admission fee for the privilege of swimming in a public pond is an invitee.

2. Negligence § 4f(2)—

The proprietor of a pond maintained for public swimming is not an insurer of the safety of his patrons, but is under duty to exercise ordinary care to maintain the premises in a reasonably safe condition for all ordinary and customary uses by his patrons.

3. Same— Evidence held for jury in this action to recover for injuries resulting when plaintiff struck his head on submerged wall after diving from dam of public swimming pond.

The evidence tended to show that a public swimming pond had a dirt and cinder-block dam with a diving board extending from the dam, that a diving platform was maintained some fifty to sixty feet from the dam with a sign thereon reading "Danger Deep Water," that a cinder-block wall had been constructed parallel with the dam about eight feet therefrom, that the water of the pond was muddy and that the top of this wall was some foot and a half below the surface of the pond, and that plaintiff, standing on the dam some five or six feet from the dam diving board, did not use the diving board because two boys were sitting on it, but dived into the water from the dam and struck his head on the submerged concrete wall. *Held:* The evidence is sufficient to be submitted to the jury on the issue of the negligence of the proprietor of the pond and does not disclose contributory negligence as a matter of law on the part of plaintiff.

APPEAL by defendant from *Thompson, Special J.*, September Civil Term, 1958, of HARNETT.

Civil action to recover damages for personal injuries sustained by plaintiff on June 16, 1957, when, upon diving into defendant's pond, he struck an underwater cinder block wall.

On and prior to June 16, 1957, defendant owned and operated "Warren's Mill Pond" for use by the public as a bathing and swimming establishment, maintaining bathhouses and other facilities for the use and convenience of his patrons, for which defendant charged an admission fee.

The only evidence was that offered on behalf of plaintiff, to wit, plaintiff's testimony and the testimony of Robert Lee Faulk, plaintiff's companion. Their testimony tends to show the facts narrated below.

Prior to June 16, 1957, plaintiff had not been to defendant's pond; but on that date he and Faulk paid the required admission fees, went to the bathhouse and changed into their bathing suits, and then

walked to and upon the dam of said pond. The dam, six or eight feet wide, was constructed of dirt and cinder blocks. A diving board extended from the dam out over the water for a distance of about eight feet. It extended towards a "platform," "float," or "tower," on which there was a diving board for high diving, located some fifty to sixty feet from the dam. A sign on this "platform" read: "Danger Deep Water." Two sets of steps (not particularly described) extended from the dam down into the water.

Faulk went upon the diving board at the dam, dived off into the pond and swam to the "platform." While he did so, plaintiff, smoking a cigarette, was standing on the dam. When plaintiff had finished his cigarette, plaintiff noticed two boys sitting on the diving board. Plaintiff then dived, head first, into the pond, from a point on the dam five or six feet from the diving board. When he did so, he struck the underwater cinder block wall.

The cinder block wall had been constructed by defendant. It was parallel with the dam and about eight feet therefrom. It extended upward from the bottom of the pond about three feet. On June 16, 1957, the top of this cinder block wall was about one and a half feet below the surface of the pond.

On June 16, 1957, the pond was muddy. Plaintiff could not see beneath the surface of the water. He could not see the cinder block wall. He had no knowledge it was there. There were no warnings by signs or otherwise of its presence. The area within eight feet of the dam had not been roped off or otherwise designated as separate from the portion of the pond below the end of the diving board or in the area of the "platform." Plaintiff dived towards the "platform" bearing the "Danger Deep Water" sign.

Plaintiff's head hit the cinder block wall first, then his chest, causing injuries.

Shortly after plaintiff was injured, defendant said: "I guess it was all my fault. I should have drained the water off, but I just had not taken the time to do it."

Plaintiff alleged, in substance, that defendant's construction and maintenance in said pond of said underwater cinder block wall and his failure to warn patrons of its presence constituted negligence and proximately caused his injuries.

Defendant, answering, denied negligence; and, as the basis of his plea of contributory negligence, alleged that plaintiff dived from the dam into the water without exercising due care to determine whether he could do so in safety.

The jury answered issues of negligence and contributory negligence

in plaintiff's favor and awarded damages.

Defendant, appealing from judgment in accordance with verdict, assigns as error the court's denial of his motion for judgment of involuntary nonsuit.

Wilson & Johnson and Bryan & Bryan for plaintiff, appellee.
McLeod & McLeod for defendant, appellant.

BOBBITT, J. Defendant rightly concedes that plaintiff was an invitee. *Hahn v. Perkins*, 228 N.C. 727, 46 S.E. 2d 854.

In 52 Am. Jur., Theaters, Shows, Exhibitions, etc., § 71, the general rule is stated in these words: "The owner or proprietor of a bathing or swimming resort or pool as a place of public amusement is not an insurer of the safety of his patrons, but he must exercise ordinary and reasonable care and prudence to have and maintain his place and all appliances intended for the use of patrons in a reasonably safe condition for all ordinary, customary, and reasonable uses to which they may be put by patrons, and to use ordinary and reasonable care for the safety of his patrons, and he may be liable for injury to a patron from breach of his duty." To like effect: 86 C.J.S., Theaters & Shows § 41; *Hiatt v. Ritter*, 223 N.C. 262, 25 S.E. 2d 756; *Hahn v. Perkins, supra;* Annotation: "Liability of private owner or operator of bathing resort or swimming pool for injury or death of patron." 48 A.L.R. 2d 104-171.

In *Hiatt v. Ritter, supra,* this Court, in opinion by *Denny, J.,* quoted with approval this statement from 26 R.C.L., Theaters, Shows, etc., § 20: "Where a party maintains a bath house or a diving or swimming place for the use of the public for hire, and negligently permits any portion of the same or its appurtenances, whether in the house or of the depth of the water or in the condition of the bottom or in things thereon, to be in an unsafe condition for its use in the manner in which it is apparently designed to be used, a duty imposed by law is thereby violated; and if an injury to another proximately results from the proper use of the same without contributory negligence, a recovery of compensatory damages may be had."

Appellant relies principally on *Richardson v. Ritter,* 197 N.C. 108, 147 S.E. 676, and *Hiatt v. Ritter, supra;* but these cases are factually distinguishable.

In *Richardson's* case, the plaintiff dived into shallow water and was injured when his head struck the concrete bottom of the pool.

In *Hiatt's* case, the alleged underwater hazard was a bolt, which fastened a brace that supported a slide board and protruded approxi-

mately ¾ of an inch beyond the nut. The plaintiff, instead of going down the slide and getting off at the end in the usual and customary manner, elected to jump off of the side of the slide board and in so doing his foot was hurt when it came into contact with the protruding end of the bolt. It was held that the defendant could not have reasonably foreseen that this bolt, a part of the slide board equipment, would cause injury.

It is noted that the evidence is silent (1) as to the depth of the water on either side of the underwater cinder block wall and (2) as to the level of the surface of the water in relation to the top of the dam.

The statement attributed to defendant would seem to indicate that ordinarily or at times the level of the water in the pond was such that a portion of the cinder block wall was exposed to view.

When considered in the light most favorable to plaintiff, there was ample evidence from which the jury could infer that defendant, who had knowledge of the underwater cinder block wall, could and should have reasonably foreseen that it was a hazard of such nature that injury to his patrons on account thereof was probable. On the other hand, the evidence was not such as to necessitate the conclusion that plaintiff, who had no knowledge or warning of the presence of the underwater cinder block wall, was contributorily negligent when he dived into the pond.

It is noted that plaintiff, when he made his dive, was in close proximity (5 or 6 feet) to the diving board; and that his dive was towards the "deep water" portion of the pond. It is noted further that plaintiff did not strike the bottom of the pond but a cinder block wall, concealed from his view by the muddy water, extending upward from the bottom of the pool; and nothing in the evidence indicates that plaintiff could and should have anticipated the presence of such cinder block wall or other obstruction between the bottom of the pond and the surface of the water.

Plaintiff was not injured because he misjudged the depth of the water into which he dived. There is nothing to indicate that he would have received any injury by diving into the pond under the circumstances disclosed by the evidence if the cinder block wall had not been there.

Upon the evidence, the issues of negligence and contributory negligence were properly submitted for jury determination.

No Error.

HARRY D. McLAUGHLIN, R. O. WINCHESTER, WILLIAM LLOYD STARNES AND WILLIAM E. HUEY, IN BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND RESIDENTS AND TAXPAYERS OF UNION COUNTY WHO WISH TO MAKE THEMSELVES PARTIES, *v.* ROWLAND BEASLEY, VERNON A. MOORE, BAXTER F. HOWIE, JAMES L. DAVIS AND ALLEN W. COLLINS, CONSTITUTING THE UNION COUNTY BOARD OF EDUCATION; DAN S. DAVIS, SUPERINTENDENT OF UNION COUNTY SCHOOLS; JAMES R. BRASSWELL, R. HALL McGUIRT, ROBERT O. HELMS, TOM B. RUSHING, FRANK H. HAWFIELD, CONSTITUTING THE BOARD OF COMMISSIONERS OF UNION COUNTY.

(Filed 29 April, 1959.)

1. Schools § 4b—

A county board of education is a body corporate and may sue and be sued in its corporate name. G.S. 115-45 (G.S. 115-27).

2. Same: Schools § 6a—

In a suit to restrain a county board of education from proceeding further with its plans for the purchase of a school site and from erecting a consolidated school thereon, the demurrer *ore tenus* is properly sustained as to the individual members of the board in their individual capacity, since as individuals they possess no authority to exercise any of the powers sought to be enjoined.

3. Injunctions § 2—

In a suit to restrain a county board of education from proceeding with plans for the purchase of a school site and to restrain the board of commissioners of the county from approving a contract therefor, the demurrer of individuals comprising the board of commissioners of the county and of the superintendent of the county schools is properly sustained when the amended complaint contains no allegations that any of these defendants acted or threatened to act in any manner whatsoever.

4. Schools §§ 4b, 6a—

The selection of school sites is a discretionary power vested in the county board of education alone, which authority it may exercise only at a duly constituted meeting, and therefore a suit to restrain the selection of a particular school site is properly dismissed upon demurrer *ore tenus* when the suit is not instituted against the board of education as a corporate entity and such board, as distinguished from the individual members comprising the board, is not served with process. The filing of answers by the board of education and the board of commissioners of the county can have no effect upon the sufficiency of the complaint to state a cause of action.

APPEAL by plaintiffs from *Olive, J.*, October Term, 1958, of UNION.

Plaintiffs, citizens and taxpayers of Union County and residents of a consolidated school district therein, pray that the Union County Board of Education be enjoined "from proceeding further with its plans for the purchase of the so-called 'Broome site' and from the

erection of a consolidated school on said site," and that the Board of Commissioners of Union County be enjoined "from approving the contract for the purchase of said 'Broome site' and from the expenditure of bond funds for said site."

Plaintiffs allege that the Board of Education, by a vote of three to two, selected the "Broome site" for the proposed consolidated high school, but that those who voted for this site acted from improper motives and in such unreasonable and arbitrary manner that the selection thereof by the Board of Education amounted to "a manifest abuse of its discretionary power to select a school site."

The appeal is from a judgment sustaining defendants' demurrer *ore tenus* to the amended complaint on the ground that it "fails to state a cause of action."

Taliaferro, Grier, Parker & Poe and Thomas & Griffin for plaintiffs, appellants.

Smith & Griffin and E. Osborne Ayscue for defendants, appellees.

BOBBITT, J. The Union County Board of Education is a body corporate. As such, it may purchase real property for school purposes, build schoolhouses thereon, *and sue and be sued in its corporate name.* G.S. 115-45; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; *Edwards v. Board of Education,* 235 N.C. 345, 70 S.E. 2d 170; *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322.

G.S. Ch. 115 was rewritten by Ch. 1372, Session Laws of 1955, which brought forward these provisions of G.S. 115-45. (Subch. II, Art. 5, Sec. 10, of the 1955 Act, now codified as G.S. 115-27 in the 1957 Supplement.)

Plaintiffs alleged: "2. The defendants are citizens and residents of said county and hold the respective offices and titles set forth in the caption of this suit."

The amended complaint contains no reference whatever to defendant Dan S. Davis. The only reference to the Board of Commissioners of Union County appears in plaintiffs' prayer for relief. Neither the Board of Commissioners nor any member thereof is referred to in the body of the amended complaint.

Plaintiffs do not allege that the Board of Education is a body corporate. Nor is the Union County Board of Education, as a corporate entity, named as defendant in the caption.

Among those named as defendants in the caption are "Rowland Beasley, Vernon A. Moore, Baxter F. Howie, James L. Davis and

Allen W. Collins, constituting the Union County Board of Education." The amended complaint does not refer to any of these individuals by name. Plaintiffs' allegations are to the effect that the majority members of the Union County Board of Education, in voting for the "Broome site," did not exercise their honest discretion and judgment.

As to the individuals who, according to the caption, constitute the members of the Board of Education, the demurrer *ore tenus* was properly sustained. *Kistler v. Board of Education, supra.* As stated by *Denny, J.*: "These defendants *as individuals* possess no authority to exercise any of the powers the plaintiff seeks to enjoin." (our italics)

As to the other individuals who, according to the caption, are the Superintendent of the Union County Schools and members of the Board of Commissioners of Union County, the demurrer *ore tenus* was properly sustained because the amended complaint contains no allegation that any of these defendants either acted or threatened to act in any manner whatsoever.

The Union County Board of Education, a body corporate, has a legal existence separate and apart from its members. It can exercise the powers conferred upon it by law only at a duly constituted meeting. *Edwards v. Board of Education, supra.* Plaintiffs' allegations expressly recognize that the "discretionary power to select a school site" vests in the Union County Board of Education. Thus, plaintiffs seek to enjoin the exercise of authority possessed by the Union County Board of Education and by it alone. *Kistler v. Board of Education, supra.*

The inescapable fact is that plaintiffs did not sue the Union County Board of Education, a corporate entity. The record filed in this Court does not contain the summons. However, at our request, the Clerk of the Superior Court of Union County has filed, as an *addendum* to the record, a certified copy of the summons. It appears therefrom that the sheriff was commanded to serve and did serve the individuals whose names are set forth in the caption. It did not command the sheriff to serve, nor did he serve, the corporation, to wit, the Union County Board of Education.

It is noted that the record includes answers filed (1) by the "Union County Board of Education and Dan S. Davis, Superintendent of Union County Schools," and (2) by the "Union County Board of Commissioners." The allegations thereof have no bearing upon the sufficiency of the complaint. Suffice to say, plaintiff does not, in the summons, amended complaint or otherwise, identify the Union County Board of Education, a corporate entity, as a defendant herein.

The demurrer *ore tenus* was properly sustained without regard to whether the factual allegations of the amended complaint would suffice to support the alleged legal conclusions *if* the action had been instituted against the Union County Board of Education, a corporate entity.

Affirmed.

J. HENRY CROMARTIE v. WILLARD A. COLBY, JR., AND WIFE, EILEEN COLBY.

(Filed 29 April, 1959.)

Brokers and Factors § 6—

Evidence tending to show that property was listed by the owners with plaintiff broker, that the broker procured a client interested in the property and advised the owners of the name of the client, and that the owners sold the property to the client at the agreed price before the broker had opportunity to complete the negotiations and show the property to the client, *is held* to preclude involuntary nonsuit in the broker's action for commission.

APPEAL by plaintiff from *Nettles, E. J.*, at September 15, 1958 Regular Schedule "B" Civil Term of MECKLENBURG.

Civil action to recover certain amount of commissions of brokerage alleged to be due to plaintiff by defendants in the sale of property of defendants.

It is admitted in the pleadings that plaintiff at the time mentioned in the complaint was a duly licensed real estate agent or broker, and was doing business as J. H. Cromartie Company in Mecklenburg County, North Carolina; that in September 1956, defendants were, and for sometime had been the owners of a house and lot used as a residence at 2222 Cloister Drive in said county as shown on map recorded in Map Book 6 at pages 817 and 819 of the Mecklenburg Registry; "that on or about March 20, 1957, defendant Eileen Colby talked with the plaintiff about selling defendants' house"; and that defendants sold and conveyed to Norman J. Mears and wife, Fannie Mae F. Mears, the lot, and the house thereon, at 2222 The Cloisters, as evidenced by a deed which is recorded in Mecklenburg Registry in Book 1913 at page 326, at the sale price of $45,000.00.

Upon the trial in Superior Court plaintiff offered in addition to the foregoing admissions evidence tending to show the following narrative of events transpiring between plaintiff and defendants:

Plaintiff was acquainted with and had done business as real estate broker with the defendants in this cause. The plaintiff talked with the defendant Mr. Colby in September 1956, and reported to him that Mrs. Colby had mentioned to him on several occasions that she would like to sell their house. The defendant, Mr. Colby, said that he did not particularly want to move but that if he could get the price he wanted for the house he would be glad to sell it. Plaintiff told him whenever he got ready to sell he would be glad to hear from him.

And on the morning of 20 March, 1957, the defendant, Mrs. Colby, called plaintiff and told him that they had decided to sell the house and she wanted him to come out and talk to her about it. The plaintiff went to the Colby house described in the pleadings and testimony herein and had discussion of the details of the construction of the house and the price they wanted for it, and finally agreed on price of $45,000. and plaintiff told her the commission would be $2,250.

In this conversation the defendant Mrs. Colby told plaintiff that she "only wanted the plaintiff to handle the property," and for it not to be put in listing bureau but if plaintiff desired to call in two or three real estate brokers it would be all right with her. And when plaintiff left the house on this occasion he asked Mrs. Colby to give consideration to putting the property in the Multiple Listing Bureau, and she told him she would and would call him at a later date. She did call him on or about April 8 and told him that she had discussed the matter with her husband and that they had decided to go ahead and put the property in the Multiple Listing Bureau.

During the conversation on April 8 plaintiff told Mrs. Colby of a lengthy conversation he had had with a client on that date with whom he had gone into full details about the house and that she had decided that she wanted to see the house, especially because of its location; and that this lady's name was Mrs. Mears, and she is one of the persons to whom the property was conveyed. Plaintiff told Mrs. Colby that he had an appointment to show the property to Mrs. Mears the next day. And while these negotiations were going on, and before plaintiff had an opportunity to show the property to Mrs. Mears, the defendant sold the property to Mrs. Mears at the price of $45,000.

Plaintiff, on 12 April, 1957, addressed a letter to defendant Willard A. Colby, Jr., as appears in the record, page 13, in which the plaintiff recited certain of the facts of this transaction. The letter was mailed at approximately 12 o'clock noon, same day, and about 3 o'clock that afternoon the defendant Willard A. Colby, Jr., and plaintiff had discussed the matter at length, Colby having stated that he

had received the letter and further stated to the plaintiff "I am quite sure you have earned the commission and have gotten the run-around but I am not going to make any effort to pay your commission because I was offended at this letter I have just received."

At the close of plaintiff's evidence defendants moved for judgment as of nonsuit. And to judgment in accordance therewith, plaintiff excepts and appeals to Supreme Court and assigns error.

James B. Ledford, J. F. Flowers for plaintiff, appellant.

McDougle, Ervin, Horack & Snepp, C. Eugene McCartha for defendants, appellees.

WINBORNE, C. J. Taking the evidence in the instant case offered upon the trial in Superior Court in the light most favorable to the plaintiff, and giving to him the benefit of all reasonable inferences to be drawn therefrom, this Court holds that it is sufficient to make a case for the jury in accordance with the facts alleged in the complaint.

It is enough to refer to what is said in *Trust Co. v. Goode,* 164 N.C. 19, 80 S.E. 62. The headnote there epitomizes the principle there set forth in this manner: "While real property remains in the hands of a broker for the purpose of sale, the owner may not consummate the sale with one who had become interested as a proposed purchaser through the efforts of the broker, and escape liability to the latter for the payment of the commissions agreed upon; and where in an action by the broker to recover his commissions, there is conflicting evidence, but the evidence viewed in the light most favorable to the plaintiff's contentions tends to establish a transaction of this character, a judgment as of nonsuit upon the evidence should not be granted." Such seems to be the case in hand.

And as the case must be returned to the Superior Court for a new trial, the Court refrains from discussing the evidence.

Hence for reasons stated, the judgment as of nonsuit entered below is hereby

Reversed.

LEALER JONES, ADMINISTRATRIX OF THE ESTATE OF WILEY JONES, DECEASED v. S. T. HODGE.

(Filed 29 April, 1959.)

1. Automobiles § 47: Death § 3— Evidence held insufficient to show that passenger's fall from truck was caused by negligent operation of the truck.

Evidence tending to show that defendant permitted intestate to ride on the back of his truck, that defendant, realizing he was passing the place intestate wanted to get off, jammed on his brakes, and just as the truck was slowing down, saw, through the rear view mirror, intestate falling from the truck, *is held* insufficient to be submitted to the jury in this action for wrongful death, since, even conceding there was evidence sufficient to support a finding that intestate's fall from the truck was the proximate cause of death, the sudden deceleration of the truck would tend to throw a passenger in the body against the back of the cab rather than throw him from the truck, and whether defendant's actions caused intestate to fall, or whether intestate attempted to jump from the truck as he saw he was passing his stopping place, or what actually caused his fall, is left in conjecture and speculation.

2. Same: Automobiles § 40: Evidence § 29—

A statement by defendant to the injured man's wife at the hospital, after the accident in suit, to the effect that he would take care of the matter because he was at fault, is not an admission of negligence, but amounts to nothing more than a conclusion, and is insufficient to take the issue of negligence to the jury when such conclusion is not actually borne out by the facts in evidence.

APPEAL by plaintiff from *Nimocks, J.*, December, 1958, Special A Term, WAKE Superior Court.

Civil action by the Administratrix, Lealer Jones, to recover for the alleged wrongful death of her husband, Wiley Jones. At the conclusion of all the evidence, judgment of involuntary nonsuit was entered, to which the plaintiff excepted and from which she appealed.

Taylor & Mitchell for plaintiff, appellant.
Smith, Leach, Anderson & Dorsett for defendant, appellee.

HIGGINS, J. The defendant, driving his pickup truck south on Strickland Road in Wake County, at about nine o'clock in the morning of November 5, 1957, overtook plaintiff's intestate, Wiley Jones, walking south along the highway. The defendant recognized Jones, stopped his truck, and invited him to ride. Jones accepted the invitation, climbed into the body of the truck which contained 700 to 800 pounds of cotton tied in sheets. The defendant's wife and three small children were riding in the cab. When Jones got in the back of the

truck, he said, "Go ahead." The defendant knew Jones wanted to stop at the home of his brother who lived a short distance down the road.

The further evidence most favorable to the plaintiff permits the inference the defendant realized he was passing the place where Jones wanted to get off, jammed on his brakes, and just as the truck was slowing down, the defendant, through his rear view mirror, saw something like a coat fly through the air. The inference is permissible the defendant saw Jones falling from the truck. Jones was picked up, taken to the hospital immediately after the accident, remained in the hospital without regaining consciousness until his death on December 11, 1957.

The attending physician testified as to the facial injuries, broken nose, broken and loosened teeth, injured mouth and gums, contusions about the head and face, a broken finger, and partial paralysis indicating injury to the brain. He testified that Jones had suffered previously from high blood pressure and deterioration of the arteries. The physician expressed the opinion the injuries were sufficient to have caused unconsciousness; but his somewhat timid opinion was that Jones had had a stroke. Whether the stroke caused the fall or the fall and injury caused the stroke, the doctor did not express opinion.

Applying the rule that all legitimate inferences from the evidence must be drawn in favor of the plaintiff on motion to nonsuit, we conclude the evidence was sufficient to go to the jury and to support a finding that the fall from the truck was the proximate cause of the injury. But the serious question is what caused the fall. The administratrix, wife of the intestate, testified to a conversation with the defendant at the hospital after the accident, and that the defendant stated: "Don't worry, I will take care of it, because I know I am in fault." The evidence with respect to the intestate's becoming a passenger in the truck and his fall from it came from the sons of the deceased who testified on the basis of the defendant's statements to them after the accident.

The plaintiff contends the evidence, and especially the defendant's statement, "I know I am in fault," was sufficient to go to the jury on the question of defendant's actionable negligence. She cites in support, *Hobbs v. Queen City Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; and *Wells v. Burton Lines, Inc.*, 228 N.C. 422, 45 S.E. 2d 569. However, the only negligent act charged against the defendant is that he slammed on his brakes and stopped too suddenly, causing the plaintiff's intestate to fall from the truck. The truck had a metal body with

wooden side boards as high as the top of the cab, with a small hole through which the rear view mirror permitted the driver limited vision in that direction.

A truck, rapidly reducing speed by sudden pressure on the brakes, might throw a passenger in the cab against the instrument board, or a passenger in the body against the back of the cab. But it is simply against the law of physics for the sudden slowing down of forward movement to carry rearward thrust. The tendency is for a moving body to continue the movement substantially in the same direction unless acted upon by some other force. For all we know, Jones saw the truck passing his stopping place, miscalculated the speed, and tried to get out. This is only supposition. What actually caused his fall is left in that category.

Do the defendant's admissions, "I know I am in fault," change the picture? The evidence is that after Jones got in the body of the truck the defendant never saw him again until he saw, in his rear view mirror, a coat or something fly up as he was applying his brakes. In view of the evidence as to what the defendant said, which we must take as true, although he denied it, his statement, "Don't worry, I will take care of it, because I know I am in fault," made to the injured man's wife at the hospital, is nothing more than his conclusion. But the conclusion is not borne out by the actual facts in evidence. Facts and statements, similar to those in evidence here, were held insufficient to make out a case. *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387; *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887; see also, *State v. Tingen*, 247 N.C. 384, 100 S.E. 2d 874; *Lane v. Bryan*, 246 N.C. 108, 97 S.E. 2d 411.

We hold that the facts in this case are insufficient to support a finding of actionable negligence. The judgment of nonsuit is

Affirmed.

STATE v. TILLMAN LAVON HONEYCUTT.

(Filed 29 April, 1959.)

1. Homicide § 6—

Involuntary manslaughter is the unintentional killing of a human being resulting from the performance of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the performance of a lawful act in a culpably negligent way, or from the culpably negligent omission to perform a legal duty.

2. Homicide § 20—

Evidence tending to show that defendant, after inspecting his gun to see if it needed cleaning, reloaded it and aimed it at a tree, and then turned to his left to go toward the front steps, when the gun hit a porch post and discharged, fatally wounding deceased, who was standing on the porch, with no evidence that defendant intentionally pointed the gun at any person and with evidence negating malice, *is held* insufficient to be submitted to the jury in a prosecution for involuntary manslaughter.

APPEAL by defendant from *Johnston, J.*, 8 September Term 1958 of ROWAN.

This defendant was tried upon a bill of indictment charging him with unlawfully and feloniously slaying one Betty Jean Harkey on 5 July 1958.

The evidence discloses that the defendant, a 17-year-old boy, was at home on leave from the Army; that he had been in the service for about six weeks. On Friday, 4 July 1958, Betty Jean Harkey, whom the defendant planned to marry, went to the Honeycutt home and remained there overnight. She had spent practically every weekend with the Honeycutts after the defendant entered the Army. The defendant's father and mother were present in the home on the occasion involved herein.

After the noon meal was finished on 5 July 1958, Betty Jean Harkey went back to the kitchen to help wash the dishes. The defendant's mother told her to go and be with Lavon because they were going to take him back to camp soon. The defendant went to his bedroom, following the noon meal, and picked up his shotgun to see if it needed cleaning, and since the light was bad in the room he carried the gun out to the front porch and was looking at it for rust spots. He checked the gun and ejected a shell. He then picked up the shell and reloaded the gun. Meanwhile, Betty Jean Harkey and the defendant's 9-year-old sister walked out on the porch and were standing near the steps. After looking for a bird and aiming at a pear in a pear tree from the edge of the porch, the defendant " went to lower the gun," turned to his left to go to the steps and hit a porch post with the end of the gun barrel. The gun discharged and Betty Jean Harkey was fatally wounded. The defendant and his mother and father took Betty Jean to the hospital, but she was dead on arrival.

While there is some variance in the statements made to the officers by the defendant to the effect that he did not know the gun was loaded, and that he turned because he heard a noise and as he turned he hit the porch post, the officers testified that when he made these statements it was immediately after the girl's death; that he was upset and later told them just what he testified to on the trial.

All of the testimony tends to show that the deceased and the members of the Honeycutt family were on the best of terms. The officers testified that the defendant was not drinking. The defendant offered evidence of his good character and reputation. Evidence was also offered to the effect that the defendant had never been convicted of any offense, and that he and Betty Jean Harkey were in love and had planned to be married.

The jury returned a verdict of involuntary manslaughter, and from the judgment imposed the defendant appeals, assigning error.

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

Robert M. Davis, George R. Uzzell for the defendant.

DENNY, J. The defendant's sole assignment of error is to the refusal of the court below to sustain his motion for judgment as of nonsuit at the close of all the evidence.

There is no evidence on this record that tends to show the defendant intentionally pointed the gun in the direction of the deceased, as was the case in *S. v. Head,* 214 N.C. 700, 200 S.E. 415.

In the case of *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155, in speaking of involuntary manslaughter, this Court said: "This offense consists in the unintentional killing of one person by another without malice (1) by doing some unlawful act not amounting to a felony or naturally dangerous to human life; or (2) by negligently doing some act which in itself is lawful; or (3) by negligently failing or omitting to perform a duty imposed by law. These elements are embraced in the offense as defined at common law. Wharton, Homicide, 7; 1 Crim. Law (11 ed.), 622; 1 McClain on Crim. Law, 303, sec. 335; Clark's Crim. Law, 204. The definition includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent way, and from the negligent omission to perform a legal duty."

In our opinion, the evidence adduced in the trial below tends to show an accidental shooting; there is no evidence that the gun was intentionally discharged or that it was handled so recklessly as to constitute culpable negligence. *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740; *S. v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201; *S. v. Becker,* 241 N.C. 321, 85 S.E. 2d 327; *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491.

The defendant is entitled to his discharge, and to that end the judgment below is

Reversed.

J. FURMAN BROADWAY, ANNIE B. BROADWAY, BOYD L. CHEEK, GERALDINE CHEEK, LEON BRAMMER AND CLAUDIA B. BRAMMER v. THE TOWN OF ASHEBORO.

(Filed 29 April, 1959.)

1. Municipal Corporations § 33—

In an action to have paving assessments levied against plaintiffs' property declared invalid, a complaint alleging that only one of the signatures of abutting property owners to the petition for improvements was valid, without alleging that the assessment was based on the petition, what other signatures appeared on the petition or facts supporting the conclusion that the other signatures were invalid, is insufficient to state a cause of action, and demurrer to the complaint was properly sustained. G.S. 160-78, et seq.

2. Pleadings § 3a—

Where a complaint merely alleges conclusions and not the facts supporting the asserted conclusions, it fails to state a cause of action and is demurrable. G.S. 1-127(6).

3. Municipal Corporations § 33—

Assessments for public improvements are presumed valid.

APPEAL by plaintiffs from *Johnston, J.*, November 1958 Term of RANDOLPH.

Ottway Burton and Don Davis for plaintiff, appellants.
Archie L. Smith for defendant, appellee.

RODMAN, J. Plaintiffs appeal from an order sustaining a demurrer *ore tenus* for that the complaint fails to state a cause of action. Plaintiffs pray that street paving assessments levied against their properties be declared invalid. As the basis for the relief sought they allege: the City Clerk of Asheboro, on 13 October 1953, delivered to one Lamphere a blank petition asking for the paving of East Presnell Street from North Elm Street to Vance Street, a copy of which petition, marked Exhibit A, is annexed to the complaint; the frontage on Presnell Street between Elm and Vance is 3196.82 feet and is owned by more than thirty property owners; when this petition was lodged with the Commissioners of the town it had "only one valid signature" and that property owner owned only 636.99 feet fronting on Presnell

Street; on 17 January 1957 plaintiffs were notified paving assessments had been made against their property; in response to the notice, plaintiffs appeared before the Commissioners and "presented a protest of said illegal assessment on the grounds that the petition was invalid on its face and void from the beginning"; notwithstanding the protests, the assessments were approved and confirmed.

Exhibit A attached to the complaint is a form of petition asking the Commissioners of Asheboro to pave East Presnell Street from North Elm to Vance and assess 100% of the cost of the work against abutting property owners pursuant to c. 56, P.L. 1915 (G.S. 160-78 et seq.) It does not purport to contain any signatures or to show any frontage.

Street improvement proceedings, dependent on the assessment of abutting properties, are initiated by property owners. A majority of the owners, owning a majority of the front footage, must file a petition with city officials requesting the improvement. Upon the filing of such petition it becomes the duty of the City Clerk to investigate the facts and report the result of his investigation to the Commissioners. The determination of the governing body is final and conclusive. G.S. 160-82. A property owner is entitled to a hearing, G.S. 160-88 and to appeal the action of the Commissioners approving the assessment, G.S. 160-89.

Here the complaint does not allege that the assessment was based on the petition bearing the signature of G. P. Pritchard. If it be asserted that is a fair inference to be drawn from the allegation of the complaint, it is equally apparent from the allegations that the petition bore other signatures since the allegation is that Pritchard's was the "only valid" signature. What other signatures appeared and what frontage they owned is not alleged. Whether these other signatures were valid or invalid depends on facts not alleged. The asserted invalidity is a mere conclusion of the pleader.

By statute, G.S. 1-122, the complaint must contain "a plain and concise statement of the facts constituting a cause of action . . ." Where the complaint merely alleges conclusions and not facts, it fails to state a cause of action and is demurrable. G.S. 1-127(6). *Little v. Oil Corp.*, 249 N.C. 773; *Skipper v. Cheatham*, 249 N.C. 706; *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193.

The assessment is presumed valid. *Asheboro v. Miller*, 220 N.C. 298, 17 S.E. 2d 105; *Gallimore v. Thomasville*, 191 N.C. 648, 132 S.E. 657; *Anderson v. Albemarle*, 182 N.C. 434, 109 S.E. 262.

The demurrer was sustained. The action was not dismissed. Plain-

tiffs may now move to amend and state facts rather than conclusions G.S. 1-131.

Affirmed.

STATE v. ALVIE M. COBB.

(Filed 29 April, 1959.)

1. Criminal Law § 103—

The act of the court in submitting to the jury only one count in the bill of indictment has the effect of a directed verdict of not guilty on the other count contained therein.

2. Criminal Law § 79—

Where defendant aptly moves to suppress evidence on the ground that it was illegally procured, and the State is permitted to introduce in evidence, over defendant's objection, whisky found during a search of defendant's home, and the State does not introduce the search warrant in evidence, or any evidence that the warrant was lost, or as to its contents, or that it was duly issued, a new trial must be awarded.

APPEAL by defendant from *Johnston, J.*, December Term 1958 of RANDOLPH.

Criminal prosecution upon a bill of indictment with two counts. The first count charges the unlawful possession of alcoholic beverages upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State have not been paid, a violation of G.S. 18-48. The second count charges the unlawful possession of illicit liquors for sale, a violation of G.S. 18-50.

Plea: Not Guilty. Verdict: Guilty as to the first count — no mention in verdict as to second count.

From a sentence of imprisonment, defendant appeals.

Malcolm B. Seawell, Attorney General and T. W. Bruton, Assistant Attorney General, for the State.

Hammond & Walker and Coltrane & Gavin for defendant, appellant.

PER CURIAM. It appears from the Judge's charge to the jury that defendant's wife was charged in a separate bill of indictment with a violation of G.S. 18-48 — it does not appear as to whether or not she was charged with a violation of G.S. 18-50 —, and that the two bills of indictment were consolidated for trial. It clearly appears from the

Judge's charge that he submitted only the first count in defendant's bill of indictment to the jury. This had the effect of a directed verdict of Not Guilty on the second count in the defendant's bill of indictment. *S. v. Love,* 236 N.C. 344, 72 S.E. 2d 737. The Record does not show the jury's verdict as to defendant's wife.

Before pleading to the bill of indictment, the defendant moved to suppress the evidence on the ground that it was illegally procured. The court denied the motion, and defendant excepted. Defendant then pleaded Not Guilty. The search warrant was not introduced in evidence, nor was any evidence introduced that it was lost. There was no evidence as to its contents. There was no evidence that it was duly issued. There was no evidence as to who issued it. The Court permitted the State, over the defendant's objection and exception, to introduce in evidence a jar containing whisky, which whisky was found during the search of defendant's home. Defendant assigns this as error. The Attorney General, with his usual frankness, concedes error.

The verdict and judgment are vacated, and a new trial on the first count in the bill of indictment is awarded, on authority of *S. v. McMilliam,* 243 N.C. 771, 92 S.E. 2d 202.

New Trial.

COVA ELLEN HOOVER v. MARY BETTY THOMAS ODOM.

(Filed 29 April, 1959.)

Trial § 25—

In a civil action, the plaintiff against whom no counterclaim is asserted and no affirmative relief demanded may take a voluntary nonsuit and get out of court at any time before verdict, and it is error for the court to refuse to permit him to take a voluntary nonsuit and to enter a judgment of involuntary nonsuit.

APPEAL by plaintiff from *Johnston, J.,* November, 1958 Term, RANDOLPH Superior Court.

Civil action to recover for personal injuries alleged to have been caused by the actionable negligence of the defendant while plaintiff was riding in an automobile owned and driven by the defendant. The defendant, by answer, denied negligence and pleaded contributory negligence as a bar to the plaintiff's action.

At the close of the plaintiff's evidence the defendant made a motion for judgment of nonsuit. During the argument on the motion and

"while counsel for the plaintiff had the floor, he abruptly stated that he would take a voluntary nonsuit." The trial judge, however, refused to permit the plaintiff to take a voluntary nonsuit and entered a judgment of involuntary nonsuit. From the judgment, the plaintiff appealed.

Don Davis, Ottway Burton for plaintiff, appellant.
Smith, Moore, Smith, Schell & Hunter, By: Bynum M. Hunter for defendant, appellee.

PER CURIAM. The rule is uniformly observed in this State that a plaintiff, in an ordinary civil action, against whom no counterclaim is asserted and no affirmative relief is demanded, may take a voluntary nonsuit and get out of court at any time before verdict. *Everett v. Yopp*, 247 N.C. 38, 100 S.E. 2d 221. The judgment of involuntary nonsuit is, therefore, set aside. The cause is remanded to the Superior Court of Randolph County where judgment of voluntary nonsuit will be entered.

Reversed and Remanded.

OTTWAY BURTON v. DANIEL LEWIS MATTHEWS, AND WIFE ETTA MATTHEWS, AND LEE BROWN.

(Filed 29 April, 1959.)

APPEAL by plaintiff from *Johnston, J.*, November Term, 1958, of RANDOLPH.

Civil action to recover compensation for services.

Prior to trial, demurrers by defendants Etta Matthews and Lee Brown were sustained; and, as to them, the action was dismissed. Plaintiff did not except to or appeal from these rulings.

At trial, the jury, answering the one issue submitted, found that plaintiff was entitled to recover from defendant Daniel Lewis Matthews the sum of $100.00. Judgment, in accordance with verdict, was entered. Plaintiff excepted and appealed, assigning errors.

Don Davis for plaintiff, appellant.
No counsel contra.

PER CURIAM. While each of plaintiff's assignments has been care-

fully considered, none discloses prejudicial error or merits particular discussion. Hence, the verdict and judgment will not be disturbed.

No error.

JULIUS EDWARD NELMS v. MABEL BLACKWELL NELMS.

(Filed 6 May, 1959.)

1. Courts § 14—

The General County Court of Wilson County is given statutory jurisdiction of actions for divorce and alimony concurrent with that of the Superior Court. G.S. 7-279(6).

2. Divorce and Alimony § 6—

The statutory provision that in an action for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, relates to venue and is not jurisdictional. G.S. 50-3.

3. Same: Courts § 14: Venue § 3—

Motion for change of venue as a matter of right must be made in writing within thirty days after service of summons, G.S. 1-125, and where, in an action for divorce instituted in a general county court of a county of which neither of the parties is a resident, defendant demurs to the complaint on the ground of want of jurisdiction but does not move for change of venue until after the expiration of thirty days from the service of summons, change of venue as a matter of right is waived. G.S. 1-83.

BOBBITT, J., concurring.

PARKER, J., dissenting.

HIGGINS AND MOORE, JJ., concur in dissent.

APPEAL by defendant from *Fountain, S. J.*, at September-October 1958 Civil Term of WILSON.

Civil action to dissolve absolutely the bonds of matrimony existing between the plaintiff and the defendant, on the grounds of two years' separation.

These facts are not controverted:

(I) That on 13 March, 1958, plaintiff, a resident of Pitt County, instituted this action and filed complaint therein in the General County Court of Wilson County against defendant, a resident of Nash County, all in North Carolina;

(II) That summons and complaint were served on defendant on 14 March, 1958;

(III) That on 11 April, 1958, in said General County Court, defendant demurred to the complaint filed in this action, and "moves for a dismissal" for that (1) Dissolution by divorce of the marriage between plaintiff and defendant is the subject of this action; (2) It appears upon the face of the complaint that plaintiff is a resident of Pitt County and defendant a resident of Nash County, and that neither is a resident of Wilson County; and (3) This court has no jurisdiction of the subject matter of this action.

(IV) That on 9 May, 1958, the Judge of said General County Court, after hearing thereon, overruled the demurrer so filed by defendant and so adjudged. And, on same day, defendant excepted thereto and appealed to Superior Court of Wilson County, and on such appeal defendant assigned as error the rendering of the judgment set out in the record, and the court, being of opinion that the demurrer should be overruled, so adjudged, and remanded the cause to the General County Court of Wilson County for further orders. Defendant objected and excepted.

(V) Thereafter on 21 June, 1958, in the said General County Court defendant moved the court that the cause be removed to Nash County for trial for the reason that Wilson County is not the proper county for the trial of this action, and Nash County is a proper county, and in support of such motion showed to the court:

"1. That plaintiff is not a resident of Wilson County, North Carolina, and alleges in his verified complaint that he is a resident of Pitt County, North Carolina.

"2. That the defendant is a resident of Nash County, North Carolina, as alleged in the complaint.

"3. That this action seeks to dissolve by divorce the marriage of plaintiff and defendant and such marriage is the subject of this action. That Wilson County is not the proper county for the institution and prosecution of this action, that Nash County is a proper one and the defendant demands that this action be transferred to Nash County for trial as provided by law in such cases."

(VI) That the clerk of the said General County Court, upon hearing thereon, being of opinion that the motion to remove should be denied, entered order on 21 August, 1958, that the motion be denied.

(VII) That on appeal from the order of the clerk, the Judge of said General County Court found facts substantially as hereinabove related, and further that defendant has filed no answer and, thereupon concluded (paragraph 7) that the time for answering for the purposes of the motion for change of venue had expired; and being of opinion that defendant had waived her right to have the cause removed to

Nash County, entered an order dated 15 September, 1958, affirming the said order of the clerk, and denying defendant's motion.

Defendant excepted thereto and appealed to Superior Court of Wilson County, assigning as error the following:

"1. The court erred in its findings and conclusions of law as set forth in paragraph 7, 'the time for answering for the purpose of the motion for change of venue has expired.'

"2. That the court erred in its conclusions of law as set forth in paragraph 7 that 'the court is of the opinion that the defendant has waived her right to have this cause moved to Nash County.'

"3. The court erred in rendering the judgment set out in the record."

(VIII) The cause thereafter coming on for hearing and being heard in Superior Court on the appeal from General County Court as aforesaid, Fountain, S. J., being of opinion that the first exception of the defendant should be allowed for that the time for answering has not expired, and further being of opinion that the second and third exceptions should be denied for that, in the opinion of the court, defendant has waived her right to remove the cause to Nash County, ordered and decreed that the order of the Judge of the General County Court of Wilson County dated 15 September, 1958, be affirmed.

Defendant excepts thereto, and appeals to Supreme Court and assigns error.

Finch & Narron for plaintiff, appellee.
Hooks & Britt for defendant, appellant.

WINBORNE, C. J. The General Assembly of North Carolina has declared (1) specifically —that the General County Court in Wilson County shall have jurisdiction to try actions for divorce, according to the course and practice of the Superior Court in such action. P. L. 1931, Chap. 61, Sec. 1 (h); (2) expressly—that the jurisdiction of the General County Court in civil actions shall be concurrent with the Superior Court in all actions and proceedings for divorce and alimony, or either, G.S. 7-279 (6); (3) that in all proceedings for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, G.S. 50-3 Venue; and (4) that if the county designated for the purpose of summons and complaint is not the proper one, the action may be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties, or by order of the court. G.S. 1-83.

And in respect to the statute G.S. 50-3, decisions of this Court hold that its provisions are not jurisdictional, but relate to venue, *McLean v. McLean*, 233 N.C. 139, 63 S.E. 2d 138, and may be waived.

Furthermore, it is provided in G.S. 1-125 that "the defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right * * *." In the light of the provisions of this statute, it would seem that in a case where defendant claims right of removal as a matter of right the first move of defendant is motion for change of venue— and that upon failure to so move the right is waived.

And if an action for divorce be instituted in any other county in the State the action may be tried therein unless the defendant demands in writing that the trial be had in the proper county. *Smith v. Smith*, 226 N.C. 506, 39 S.E. 2d 391, citing *Davis v. Davis*, 179 N.C. 185, 102 S.E. 270.

Indeed in *McLean v. McLean, supra*, this Court in opinion by *Devin, J.*, later C. J., had this to say: "The mere fact of instituting suit for divorce in a county other than that of plaintiff's residence would not be regarded as affecting the jurisdiction of the court over the action on proper service, but rather as affecting the question of venue."

Moreover, in *Waters v. McBee*, 244 N.C. 540, 94 S.E. 2d 640, *Rodman, J.*, interpreting for the Court the phrase "shall have jurisdiction over the entire county in which said court may be established" appearing in G.S. 7-265, made this pertinent observation: "Had it been the intention of the Legislature to limit the jurisdiction of the General County Court to causes of action arising in the county, it would have been simple and appropriate for it to have inserted such a provision in S. 14 of the Act, prescribing the jurisdiction of the court. G. S. 7-279. No such limitation appears." To the contrary the General Assembly has made express provisions for change of venue in appropriate cases. G.S. 7-286.

In the light of the provisions of these statutes applied to the facts appearing upon the face of the record on this appeal, the Court is of opinion and holds that the judgment from which appeal is taken is proper, and should be affirmed.

Affirmed.

BOBBITT, J., concurring. Plaintiff and defendant are domiciled in North Carolina. Hence, North Carolina has jurisdiction of an action brought by either for absolute divorce. Whether the General Assembly,

which certainly had the power to do so, has conferred jurisdiction upon the General County Court of Wilson County to entertain and try such action is the only question presented. For the reasons stated in the Court's opinion, I think this question must be answered in the affirmative.

G.S. 7-286, second paragraph, provides: "Motions for the change of venue or removal of cases from the general county courts to the superior courts of counties other than the one in which the said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the superior courts."

In *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723, the action, brought in the Recorder's Court of Nash County, was removed by order of the clerk of that court to the Recorder's Court of Edgecombe County. No statutory provision conferred authority for such order. Hence, subsequent proceedings *in the Recorder's Court of Edgecombe County* were declared invalid because *it* had no jurisdiction. *Barnhill, J.* (later C.J.), stated: "It follows that this cause is still pending in the recorder's court of Nash County." He noted that a remedy as to change of venue was available to the defendant. As I read the opinion, the clear implication is that the defendant had the right to have the cause removed to the Superior Court of Edgecombe County for trial. There was no holding, express or implied, that the Recorder's Court of Nash County lacked jurisdiction.

A motion by defendant that the court, in its discretion, remove the cause to the Superior Court of Nash County for trial, on the ground the convenience of witnesses and the ends of justice will be promoted thereby, is not precluded by the present decision.

PARKER, J., dissenting. At the very beginning of a consideration of this appeal we are met by a question of jurisdiction of which we must take judicial notice *ex mero motu. Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723; *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445.

According to the complaint, plaintiff resides in Pitt County, and the defendant resides in Nash County. They were married in Johnston County. There is no averment in the complaint that either party ever resided in Wilson County, or ever had a domicil in Wilson County. The subject of the action — the marital status of the parties — is not located in Wilson County.

With regard to the matter of jurisdiction over a divorce action, it is now the generally settled rule, that the right to decree a divorce is

founded on domicil, which alone gives jurisdiction. Note in 76 Am. Dec. 672. "Under our system of law, judicial power to grant a divorce — jurisdiction, strictly speaking — is founded on domicil. *Bell v. Bell,* 181 U.S. 175, 45 L. Ed 804, 21 S. Ct. 551; *Andrews v. Andrews,* 188 U.S. 14, 47 L. Ed 366, 23 S. Ct. 237. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it." *Williams v. State of North Carolina,* 325 U.S. 226, 89 L. Ed. 1577, 157 A.L.R. 1366, reh. den. 325 U.S. 895, 89 L. Ed. 2006.

Plaintiff instituted his action for divorce in the General County Court of Wilson County. The statute providing for the establishment of General County Courts was enacted by the General Assembly of 1923, Public Laws 1923, Chapter 216, of which a part is now G.S. 7-265. Section 1 of this statute provides that the General County Court "shall have jurisdiction over the entire county in which said court may be established." Section 13 of this statute provides that the General County Court shall have "jurisdiction in criminal actions within the county" in a limited class of cases. Section 14 of the act reads:

> "The jurisdiction of the General County Court in civil actions shall be as follows:
>
> "1. Jurisdiction concurrent with that of the justices of the peace of the county;
>
> "2. Jurisdiction concurrent with the Superior Court in all actions founded on contract;
>
> "3. Jurisdiction concurrent with the Superior Court in all actions not founded upon contract;
>
> "4. Jurisdiction concurrent with the Superior Court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;
>
> "5. Jurisdiction concurrent with the Superior Court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions."

It will be noted that jurisdiction was not given over divorce actions.

The General County Court of Wilson County, established for Wilson County by virtue of this statute, is a statutory court inferior to the Superior Court, with limited jurisdiction in Wilson County, and has no extra-territorial jurisdiction, except what is expressly given it in the statute creating it, and then subject to constitutional limitations. *Investment Co. v. Pickelsimer,* 210 N.C. 541, 187 S.E. 813.

This Court said in *Waters v. McBee,* 244 N.C. 540, 94 S.E. 2d 640:

"The phrase 'shall have jurisdiction over the entire county in which said court may be established' (G.S. 7-265) does not have reference to the kind or character of action of which the court may take jurisdiction nor of the parties who may be subject to its jurisdiction. It merely fixes the territorial limits within which the court may act. A court has no power or authority to hear and determine matters in controversy beyond its territorial limits." In the *Waters* case instituted in the General County Court of Buncombe County, plaintiff resided in Buncombe County. In the instant case neither party resides, or ever has resided, in Wilson County.

The General Assembly of 1931, Public Laws 1931, Chapter 61, amended Chapter 216 of the Public Laws of 1923 as it relates to the General County Court of Wilson County, and in Section 1(h) of Chapter 61 provided that the General County Court in Wilson County "shall have jurisdiction to try actions for divorces, according to the course of practice of the Superior Court in such actions."

The General Assembly of 1935, Public Laws 1935, Chapter 171, amended the statute as to General County Courts as follows: "6. Jurisdiction concurrent with the Superior Court of all actions and proceedings for divorce and alimony, or either." This now appears in G.S. 7-279.

A Preliminary Report on the Structure and Jurisdiction of the Courts of North Carolina Prepared in 1957 by the Institute of Government for a Subcommittee of the North Carolina Bar Association Committee on Improving and Expediting the Administration of Justice in North Carolina, page 11, states that of the 100 counties in North Carolina 5 counties have General County Courts.

"The powers of a court of limited jurisdiction cannot be enlarged by implication. *Thompson v. Cox*, 53 N.C. 311; *Evans v. Singletary*, 63 N.C. 205." *Greensboro v. Black*, 232 N.C. 154, 59 S.E. 2d 621.

This Court said in *In re Hickerson*, 235 N.C. 716, 71 S.E. 2d 129: "If the meaning of a statute be in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act."

Lovegrove v. Lovegrove, supra, was a divorce action. Both plaintiff and defendant resided in Edgecombe County. Plaintiff instituted the action in the Recorder's Court of Nash County. Chapter 768, Section 1(e), of 1943 Session Laws of North Carolina provides that the Recorder's Court of Nash shall have "concurrent, original and final jurisdiction with the Superior Courts of all actions for divorce." On motion of defendant, and with the consent of the plaintiff, the action was removed from the Recorder's Court of Nash County to the Recorder's Court of Edgecombe County. Defendant in her answer

pleads a cross-action for divorce *a mensa,* and prays an allowance of alimony and counsel fees *pendente lite.* At the trial in the Recorder's Court of Edgecombe County the jury answered the issues both on plaintiff's cause of action and defendant's cross-action in favor of defendant. The Recorder had theretofore allowed alimony *pendente lite* from which defendant had appealed. At the October Term 1952 Edgecombe Superior Court, on motion of defendant for alimony and counsel fees *pendente lite,* the court found the essential facts and entered an order allowing alimony, etc. Plaintiff appealed. This Court held that the Recorder's Court of Nash County had no jurisdiction to order the action transferred to the Recorder's Court of Edgecombe County for trial, that the proceedings had and the orders entered in the Recorder's Court and in the Superior Court of Edgecombe County are without force or effect, and that the action is still pending in the Recorder's Court of Nash County. The Court said: "The parties live in Edgecombe County. The subject of the action — the marital status of the parties — is of necessity located in that county. Therefore we do not mean to say that defendant may be compelled to defend the action pending in the recorder's court of Nash. She has a remedy, but it is not our custom to chart future proceedings in a cause not finally disposed of by us on appeal."

The jurisdiction of a court is a matter of substance and not of form, a limitation which is fundamental and not merely theoretical. It is manifest from a study of the statute of 1923 creating General County Courts, and the subsequent amendments thereto, that a General County Court created by virtue of that Act has concurrent jurisdiction with the Superior Court over divorce actions, when one or both of the parties to the divorce action is or are domiciled in the county where the General County Court sits. When both parties are not domiciled in the county where the General County Court sits, such court has no jurisdiction of a divorce action between them. In other words, a person domiciled in North Carolina for the requisite time has the choice of bringing an action for divorce in the General County Court of his domicile, if there is one, or in the General County Court of his wife's domicile, if there is one, or in the Superior Court. Anything said to the contrary in *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138, I would overrule.

The majority opinion quotes from the *McLean* case as follows: "The mere fact of instituting suit for divorce in a county other than that of plaintiff's residence would not be regarded as affecting the jurisdiction of the court over the action on proper service, but rather as affecting only the question of venue." That statement is correct

when the divorce action is instituted in the Superior Court, because the Superior Court, different from General County Courts, is one court having statewide jurisdiction. Article IV, Sec. 2, North Carolina Constitution; *S. v. Pender*, 66 N.C. 313; *Rhyne v. Lipscombe*, 122 N.C. 650, 29 S.E. 57; *Lovegrove v. Lovegrove, supra.* Both cases cited in the *McLean* case to sustain the above quoted statement are divorce actions instituted in the Superior Court.

It is elementary learning that a court cannot obtain jurisdiction by consent of the parties, waiver or estoppel. *Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673.

The jurisdiction of the Superior Court on appeal in this case is derivative only. *Barham v. Perry*, 205 N.C. 428, 171 S.E. 614; *S. v. White*, 246 N.C. 587, 99 S.E. 2d 772.

"There is a general rule, frequently approved in our decisions, that if an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction upon the appellate court." *Hall v. Artis*, 186 N.C. 105, 118 S.E. 901.

The jurisdiction of this Court is derivative. Since the court below had no authority to enter the order from which defendant appealed, we have no jurisdiction to entertain the appeal on its merits. *Lovegrove v. Lovegrove, supra; Stafford v. Wood*, 234 N.C. 622, 68 S.E. 2d 268.

The instant that a court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay or dismiss a legal proceeding of its own motion; and, if it does not, such action is, in law, a nullity. *Stafford v. Wood, supra; Shepard v. Leonard, supra; Henderson County v. Smyth*, 216 N.C. 421, 5 S.E. 2d 136; *Miller v. Roberts*, 212 N.C. 126, 193 S.E. 286; *Nelson v. Relief Department*, 147 N.C. 103, 60 S.E. 724; *Burroughs v. McNeill*, 22 N.C. 297.

Any act by the General County Court of Wilson County to exercise, or to attempt to exercise, jurisdiction over the divorce action here, when plaintiff is domiciled in Pitt County and defendant is domiciled in Nash County, is, in my opinion, a usurpation of authority, and all judicial proceedings in virtue thereof in this case by such General County Court, and by the Superior Court on appeal, are utterly void for lack of jurisdiction.

I vote to remand the action to the Superior Court with a direction that it issue an order commanding the General County Court of Wilson County to dismiss the case from its docket for lack of jurisdiction.

I am authorized to state that *Higgins* and *Moore, JJ.*, join in this dissenting opinion.

J. S. DEAN v. TOM MATTOX.

(Filed 6 May, 1959.)

1. Money Received § 1: Vendor and Purchaser § 26—

Where it is established by the verdict upon supporting evidence that the seller's agent pointed out certain timber as standing upon the seller's land, and that the purchase price was based upon the timber so shown, but that, by mistake, a part of the timber shown was on the land of an adjacent owner and therefore was not conveyed by seller's timber deed, the purchaser, irrespective of fraud, is entitled to recover that proportion of the purchase price represented by the timber standing on the adjacent land on the basis of money had and received.

2. Same—

Where, in negotiations for the purchase of timber, defendant's agent points out certain timber as standing on defendant's land, but, by mistake, a part of the timber shown is on the land of an adjacent owner, and after the timber shown is cut, plaintiff is required to pay a sum to reimburse the owner of the adjacent land for the timber cut therefrom, plaintiff's recovery from defendant is limited to the amount paid to the owner of the adjacent land.

3. Same: Estoppel § 4—

Where, in the negotiations for the purchase of timber, the seller's agent points out certain timber as standing on defendant's land, but, by mistake, a part of the timber shown is actually on land of an adjacent tract, the fact that the purchaser, in reliance upon the representation that all of the timber stood upon the seller's land, has his own attorney prepare the timber deed from the description of the land owned by the seller does not estop the purchaser from suing for the deficiency as money had and received, since nothing in the deed indicated that the timber in controversy was not in fact on the seller's land, and the doctrine of *caveat emptor* is not applicable.

4. Judgments § 17d—

Where the jury renders verdict in a stipulated sum for the amount plaintiff was forced to pay in reimbursement for timber cut from the lands of an adjacent owner, which, through mutual mistake, the parties thought was included in the timber purchased by plaintiff from defendant, judgment awarding interest on the verdict from the date of the payment by plaintiff is proper under the circumstances.

APPEAL by defendant from *Olive, J.*, October-November Term, 1958, of UNION.

Civil action to recover money paid by plaintiff to defendant under alleged mutual mistake of fact.

By deed dated December 4, 1956, defendant conveyed to plaintiff, his heirs and assigns, "all pine and poplar saw timber" on a 176.1-acre tract of land in Paw Creek Township, Mecklenburg County, "shown by a survey prepared by I. B. Faires, R.S., October, 1949,"

bounded on the west by the Catawba River, on the north by the land of Duke Power Company and others, etc. The deed recites a consideration of "Ten Dollars and other good and valuable considerations."

Plaintiff paid to defendant the sum of $12,000.00.

The controversy relates to timber in the area where the north line of the 176.1-acre tract adjoins land owned by Duke Power Company.

Plaintiff alleged that the timber in controversy was specifically pointed out by defendant's agent as standing on the 176.1-acre tract and as included in defendant's proposed sale to plaintiff; that plaintiff and defendant agreed upon the price of $12,000.00 in the mistaken belief that this was true; that the timber in controversy was not on the 176.1-acre tract but on land owned by the Duke Power Company; that on or about January 2, 1957, plaintiff sold, or attempted to sell, the timber he had purchased from defendant, including that on the Duke Power Company's land, to the Rocky River Lumber Company, which cut and removed all of said timber; and that plaintiff had paid the Rocky River Lumber Company $2,250.00 to indemnify it on account of its payment of damages in that amount to Duke Power Company for the wrongful cutting and removal of timber from the Duke Power Company land. Plaintiff prayed that he recover of defendant the sum of $2,250.00, the alleged value of the timber he paid for but did not get, with interest from July 29, 1957, and costs.

Answering, defendant denied that his agent had pointed out the timber on the Duke Power Company's land as timber included in the proposed sale to plaintiff and defendant denied all allegations as to mutual mistake. For a further defense, based on facts referred to in the opinion, defendant alleged that plaintiff was estopped to recover herein on the ground of alleged mutual mistake or otherwise.

The court submitted, and the jury answered, these issues: "1. Was timber growing on the property of the Duke Power Company by mutual mistake of the parties included in the purchase price paid by plaintiff to the defendant in the purchase of the timber on the 176-acre tract of land described in the Complaint? ANSWER: Yes. 2. What amount, if any, is the plaintiff entitled to recover of the defendant? ANSWER: $2,250.00."

Thereupon, the court adjudged that plaintiff have and recover of defendant the sum of $2,250.00 with interest thereon from July 29, 1957, and that defendant pay the costs.

Defendant excepted and appealed, assigning errors.

Smith & Griffin for plaintiff, appellee.
Coble Funderburk for defendant, appellant.

BOBBITT, J. Appellant, in his brief, presents three questions, viz.: 1. "Was the plaintiff estopped to rely upon an oral description and to deny a description by metes and bounds, as shown in a plat of the 176.1 acres of land, upon which the timber conveyed to him lay, when he had the plat and carried it, with the defendant's Option to Purchase said lands, to his own attorneys who drew the timber deed, which timber deed referred to the plat?" 2. If not, did the court err "in refusing to submit the question of estoppel to the jury?" 3. Did the court err "in adding interest to the amount to be recovered under the judgment . . . when the jury did not add interest in its verdict?"

While defendant offered evidence in conflict therewith, there was ample evidence to identify the timber in controversy and to support the jury's affirmative answer to the first issue.

This is not an action to reform the timber deed on the ground of mutual mistake. The timber in controversy was on the Duke Power Company's land, not on defendant's land. Plaintiff does not challenge the validity of the timber deed or attack any of its provisions. Nor does he undertake, by parol evidence, to alter the description therein. All agree that the timber on the 176.1-acre tract was included in the sale by defendant to plaintiff.

In *Lumber Co. v. Boushall,* 168 N.C. 501, 84 S.E. 800, under similar circumstances, it was held that, on account of their mutual mistake, "the agreement or attempted agreement should be set aside and the parties placed *in statu quo.*" It was held that plaintiff was entitled to recover from defendant the amount of the *down payment* it had made for the timber; and that defendant was entitled, as an offset, "to the value of the timber as it stood on the ground," that is, timber cut and removed by plaintiff from land admittedly owned by defendant. There, the plaintiff had cut and removed only a part of the timber on the land admittedly owned by the defendant and had been forbidden and prevented altogether from cutting the timber on land of the adjoining owner which, through mutual mistake, was included in defendant's sale to plaintiff.

Here, the remedy of rescission was not available to plaintiff. The parties could not be placed *in statu quo.* All of the timber on the 176.1-acre tract and on the adjoining land of Duke Power Company had been cut and removed by Rocky River Lumber Company. The rights of plaintiff and defendant must be considered in relation to this fact.

Whether, upon the facts alleged by plaintiff, Duke Power Company could have recovered from defendant, is not presented. In this connection, see *McBryde v. Lumber Co.*, 246 N.C. 415, 98 S.E. 2d 663.

The fact that plaintiff paid $2,250.00 to the Rocky River Lumber Company to reimburse it for its payment of $2,250.00 to the Duke Power Company for the wrongful cutting and removal of its timber was relevant as to whether plaintiff suffered loss on account of his payment of $12,000.00 to defendant under mutual mistake. Plaintiff would not be entitled to recover from defendant *more* than the amount paid to satisfy the Rocky River Lumber Company and Duke Power Company.

The gist of plaintiff's action is that, when he traded with defendant, *both* understood that the timber in controversy was on defendant's 176.1-acre tract; that this timber, which defendant did not and could not convey to him, was a part of the timber for which plaintiff paid $12,000.00; and that, to the extent the $12,000.00 represented the purchase price for this timber, plaintiff received nothing therefor.

Plaintiff's action is to recover money paid by him and received by defendant under mutual mistake of fact, that is, an action for money had and received. *Johnson, J.*, in *Allgood v. Trust Co.*, 242 N.C. 506, 512, 88 S.E. 2d 825, states the legal principles applicable to such action as follows: "Recovery is allowed upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? The right of recovery does not presuppose a wrong by the person who received the money, and the presence of actual fraud is not essential to the right of recovery. The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it. In short, 'the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the test of natural justice and equity to refund the money.' *Moses v. MacFerlan*, 2 Burrow 1005, 97 Eng. Reprints 676."

In *Simms v. Vick*, 151 N.C. 78, 65 S.E. 621, the plaintiff, having forgotten a prior payment, overpaid, through mistake of fact, his note to defendant. It was held that he was entitled to recover the amount of his overpayment notwithstanding the means of ascertaining what he had previously paid were available to him. The opinion of *Manning, J.*, based on precedents cited, states: "A voluntary pay-

ment, with a knowledge of all the facts, cannot be recovered back, although there was no debt. But a payment under a mistake of fact may be."

In *Queen v. Sisk,* 238 N.C. 389, 78 S.E. 2d 152, the action was to recover the excess amount paid for land purchased on a per-acre basis. Plaintiffs alleged they purchased 23.1 acres (of a tract of 45.24 acres) at a stipulated price per acre; that defendant's deed to plaintiffs, after a description by metes and bounds, referred to the land conveyed as containing 23.1 acres; that plaintiffs paid defendant on a per-acre basis for 23.1 acres; and that it was discovered thereafter that the land described in and conveyed by said deed, due to an error in calculation, actually contained only 13.7 acres. The ruling of the court below, which sustained defendant's demurrer to complaint, was reversed by this Court. The basis of decision, as stated by *Barnhill, J.* (later C.J.), was as follows: "Where the purchase and sale is upon an acreage basis and the purchaser sues to recover on account of an alleged deficiency in the acreage and a consequent overpayment, he is not required to allege or prove fraud. The action to recover the excess payment is an action in *assumpsit* for money had and received to the use of the plaintiff, under the doctrine of unjust enrichment. *(Citations)*"

Whatever plaintiff's rights, if any, if the mistake were that of plaintiff alone, we are of opinion, and so hold, that when, as established by the verdict, defendant as well as plaintiff acted in the mistaken belief that the timber in controversy was on the 176.1-acre tract, plaintiff, in equity and good conscience, is entitled to recover the portion of the $12,000.00 purchase price represented by the timber he paid for but did not get. This was determinable, as of the date of purchase, by the relation of the reasonable market value of the timber in controversy to the reasonable market value of all the timber included in defendant's sale to plaintiff. The court, in substance, so charged the jury. Plaintiff offered evidence tending to show that the timber in controversy represented one-fifth in value of all timber included in defendant's sale to plaintiff. However, he was not entitled in any event to recover more than $2,250.00.

Defendant's contention is that plaintiff had ample opportunity to ascertain the exact boundaries of the 176.1-acre tract and the timber standing thereon; and that, having failed to avail himself of such opportunity, he is precluded by the doctrine of *caveat emptor.* The doctrine of *caveat emptor* is not applicable here. Cases cited by appellant relate to different factual situations. If, as established by the verdict, defendant, through his agent, specifically pointed out the

timber in controversy as included in the sale, and both plaintiff and defendant so understood when plaintiff paid $12,000.00 to defendant, equity and good conscience will not permit defendant to say that *plaintiff* should have discovered *their* error, induced by the erroneous representations of defendant's agent, and retain money received by him, without consideration, under their mutual mistake.

The determinative issue, whether defendant's agent specifically pointed out the timber in controversy as being on the 176.1-acre tract and included in the sale, was, upon conflicting evidence, resolved in plaintiff's favor. The evidence tends to show that, when plaintiff and defendant's agent went upon the land, they had with them the I. B. Faires plat. This circumstance was fully considered, under appropriate instructions, in relation to the first issue.

True, there was evidence tending to show that plaintiff took the plat, or defendant's option to purchase the tract of land shown thereon, or both, to his own attorneys. But the plat and option simply provided a description of the 176.1-acre tract for use in drafting the timber deed. Nothing therein indicated whether the timber in controversy was in fact on the 176.1-acre tract.

Under the circumstances disclosed, plaintiff was not estopped to show that the timber in controversy was included in the purchase price of $12,000.00 by mutual mistake nor did the evidence warrant the submission of an issue as to estoppel.

Appellant cites no authority in support of his contention that the court erred in rendering judgment for $2,250.00 *with interest from July 29, 1957*. Relevant to his general contention to this effect, it is noted that an action to recover for money had and received, under the doctrine of unjust enrichment, is an action on implied contract. Decisions in other jurisdictions differ as to whether, and if so as of what date, interest is allowable in such action. See 58 C.J.S., Money Received § 33(b), where the author states that "the better view seems to be that whether interest shall be recovered must depend on the justice and equity of the case."

Without undertaking presently to adopt a rule of general application, we think the allowance of interest from July 29, 1957, the date plaintiff paid $2,250.00 to Rocky River Lumber Company, was proper under the circumstances of this case. The only reasonable conclusion to be drawn from the testimony of both plaintiff and defendant is that prior to July 29, 1957, defendant was fully advised that demand had been made on plaintiff for the $2,250.00 and that plaintiff was insisting that defendant provide the $2,250.00 to meet such demand.

While each assignment of error has been carefully considered, further discussion of particular assignments would serve no useful purpose. Suffice to say, none discloses prejudicial error.

No error.

STATE v. JOHN BANGLE CORL.

(Filed 6, May, 1959.)

1. Automobiles § 3—

In a prosecution of defendant for operating an automobile on the public highways, after his operator's license had been revoked or during a period it had been suspended, the State may introduce the certified record of the Department of Motor Vehicles for the purpose of showing the *status* of defendant's operator's license at the time of the offense charged, G.S. 20-42(b), and further, objections to preliminary statements of the witness to the effect that the witness had written to the Department of Motor Vehicles for the official record and had received such record from the Department, are feckless.

2. Same: Criminal Law § 90—

Even though the certified record of the Department of Motor Vehicles is competent solely for the purpose of establishing the *status* of defendant's driver's license at the time he is charged with driving after revocation of license or during the period of suspension of his license, the admission of the entire record, showing numerous convictions for speeding and reckless driving, driving after revocation of license, etc., cannot be held for error when defendant, at the time, does not request that the admission of the record be restricted to the purpose of showing the *status* of his driver's license.

3. Criminal Law § 99—

On defendant's motion to nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom.

4. Automobiles §§ 3, 63—

Testimony of officers to the effect that they flashed a light on an automobile in a field, recognized defendant behind the wheel, saw no other person in the car, that this car pulled around the officers' car, that the officers backed up and followed the car along a private road and into a public highway, that the car did not stop and no car entered the highway between that car and the officers' car, and that the officers followed the car for a distance along the public highway at speeds up to 120 miles per hour, *is held* sufficient identification of defendant as the driver of the car on the public highway.

5. Criminal Law § 133—

Where cumulative sentences are imposed upon convictions for separate offenses, the judgment in the second sentence should provide that it should begin at the expiration of the first sentence, and when the judgment merely provides that the sentence in each case should run consecutively and not concurrently with the other, without specifying the order in which the sentences should be served, the cause must be remanded for proper sentences.

6. Criminal Law §§ 139, 169—

Where the record discloses that judgment imposing sentences for two separate offenses each provided that the sentences should be cumulative and should not run concurrently, the Supreme Court will take notice *ex mero motu* of the want of definite provision as to when each sentence should begin, and remand the cause for proper sentences.

APPEAL by defendant from *Johnston, J.*, October Term 1958 of CABARRUS.

The defendant was charged in a warrant returnable to the Recorder's Court of Cabarrus County with operating a motor vehicle, on or about 12 April 1957, upon the public highways of North Carolina, after his operator's license had been revoked or suspended by the Highway Safety Division of the Department of Motor Vehicles, the revocation being in force at the time he operated said motor vehicle.

The defendant was also charged in another warrant, returnable to the same court, with the wilful and unlawful operation of an automobile upon the public highways of the State, on 12 April 1957, at a speed of 100 miles per hour where the speed limit is 55 miles per hour, in violation of G.S. 20-141.

The defendant was tried and convicted in the Recorder's Court of Cabarrus County on 22 May 1958 on both charges. He appealed to the Superior Court.

In the Superior Court the cases were consolidated and tried on the original warrants. The defendant entered a plea of not guilty to each charge, and a jury was empaneled to try the cases.

Ray Atwood, a witness for the State, testified: "I am a deputy sheriff of Cabarrus County. On the 12th day of April, 1957, I saw the defendant in an automobile; it was approximately 1:00 or 1:30 A.M.; * * * we were on a private road * * *. A two-tone Ford pulled in a dirt road. He backed into an open field * * * we followed the Ford in * * * it was J. B. Corl. * * * The weather was fair and dry. Officer Allen got out, went up to the car, he was in the car with me, and shined a flashlight in it. At this time the car was pulled in gear, going around in front of us. We backed up, took off after him * * *.

We came back out the Crisco Road * * * the Crisco Road is a * * * public highway. When we got to the Crisco Road we * * * saw the same car. We were 100 yards behind it. We turned left on Crisco Road out to (highway 73) (which) leads to Davidson and Concord * * *. When we got to 73, we saw the same car that was in the field. * * * We followed that same car on the Davidson Highway * * *. My headlights were shining on the back of the car. * * * We traveled up to 120 miles an hour. We did not overtake the car we were following, the two-tone Ford. We weren't gaining or losing till we got to Mecklenburg County and I didn't know the road and let up on him. * * * "

Paul Allen, also a deputy sheriff of Cabarrus County and who accompanied Ray Atwood on the occasion involved, testified: "I saw the defendant on the 12th of April * * *. I knew him. * * * We pulled behind this car, a two-tone 1957 Ford. * * * I got out of the car, had a flashlight, shined it on the man operating the car, which was J. B. Corl. My light hit him in the face. * * * "

The evidence further tends to show that J. B. Corl was driving the car when it left on the private road, and that the officers saw no one else in the car at the time; that they followed the car and kept in sight of it at all times until it entered Mecklenburg County. The car never stopped at any time, and no car entered the highways between the Ford car and the officers' car. The officers did not get close enough to the Ford car after it left the private road to again identify J. B. Corl as the driver thereof.

The State offered Ira Padgett who testified that he was a deputy sheriff; that he wrote to the Drivers License Division of the North Carolina Department of Motor Vehicles for an official record of the status of the driver's license of defendant J. B. Corl and that he had a certified copy thereof from the Drivers License Division of said Department, signed by Elton R. Peele, Director. The driver's license record was admitted in evidence and read to the jury over the objection of the defendant. The certified record is set out in full in the case on appeal.

The jury returned a verdict of guilty as charged in each case.

The warrant charging the defendant with driving after his driver's license had been revoked is Case No. 6711, while the warrant in which he was charged with speeding is Case No. 6712.

In Case No. 6711 the court entered the following judgment: "The judgment of the court is that the defendant be confined in the common jail of Cabarrus County for a period of eight (8) months and be assigned to work under the supervision of the State Prison De-

partment. This prison sentence is to run consecutive with and not concurrent with the prison sentences pronounced this day by this court in Cases 6712, 7069, 7070, 7268, and 7270."

In Case No. 6712 the court entered the following judgment: "The judgment of the court is that the defendant be confined in the common jail of Cabarrus County for a period of sixty (60) days and be assigned to work under the supervision of the State Prison Department. This prison sentence is to run consecutive with and not concurrent with prison sentences pronounced this day by this court in cases Nos. 6711, 7069, 7070, 7268 and 7270."

The defendant appeals, assigning error.

Attorney General Seawell, Assistant Attorney General Pullen for the State.

Robert L. Warren for defendant.

DENNY, J. The defendant's first assignment of error is to the admission of testimony of Ira Padgett as follows: "I wrote to the Drivers License Division of the North Carolina Department of Motor Vehicles for an official record of the status of the driver's license of the defendant, J. B. Corl." The second assignment of error is directed to the admission of this additional testimony of the same witness: "I have an official record from the Drivers License Division from the North Carolina Department of Motor Vehicles signed by Elton R. Peele, Director, and a certified copy of the official record." The third assignment of error is directed to the admission in evidence by the State of the certified copy of the official record of the status of the driver's license of the defendant J. B. Corl. Assignments of error Nos. 1 and 2 are without merit and are overruled.

As to assignment of error No. 3, the certified copy of convictions for violations of motor vehicle laws and the departmental action with respect thereto relating to J. B. Corl was certified under the seal of the Department as authorized by G.S. 20-42 (b) and such certified record is "admissible in any court in like manner as the original thereof, without further certification." *S. v. Moore,* 247 N.C. 368, 101 S.E. 2d 26.

The certified record from the Department of Motor Vehicles, to which the defendant objected and assigns as error its admission in evidence, shows that the defendant has been convicted of twelve separate violations of the motor vehicle laws since 31 October 1946: twice for reckless driving; once for speeding 75 miles per hour, and on another occasion for speeding 110 miles per hour; once for pre-

senting another person's driver's license as his own; and seven times for driving after his license had been revoked and while such license was revoked.

The defendant contends that since he did not go on the stand or put his character in evidence, the State was not entitled to show his bad character for any purpose whatever. He further contends that his record as a driver was prejudicial in this respect and that the State had no right to introduce such record in evidence, citing *S. v. Mercer,* 249 N.C. 371, 106 S.E. 2d 866.

In the last cited case, *Winborne, C. J.,* in speaking for the Court with respect to the introduction of a similar document over the objection of the defendant, said: "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 the defendant was indicted. Hence the requirements of G.S. 8-35 are complied with, and is of no avail to defendant."

In our opinion the defendant was entitled to have the contents of the official record of the status of his driver's license limited, if he had so requested, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offenses for which he was being tried.

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558; General Statutes, Volume 4A, page 175, et seq; *Brewer v. Brewer,* 238 N.C. 607, 78 S.E. 2d 719; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557.

In the instant case, the defendant made no request that the contents of the certified record of the status of his driver's license be limited to the portion or portions thereof relating to the status of his driver's license on the date he was charged with committing the offenses for which he was being tried. Hence, this assignment of error is overruled.

The defendant's fourth and fifth assignments of error are direct-

ed to the failure of the court below to allow his motion for judgment as of nonsuit at the close of the State's evidence and renewed when the defendant rested without offering any evidence.

On a motion for judgment as of nonsuit the evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *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. Simpson*, 244 N.C. 325, 93 S.E. 2d 425; *S. v. McKinnon*, *supra*.

In our opinion, when the State's evidence in this case is so considered, it was sufficient to take the case to the jury, and we so hold. The evidence with respect to the identity of the defendant as the driver of the Ford car, described by the officers who testified on behalf of the State, was not only sufficient to identify the defendant as the driver of the car on the private road, but also sufficient to support a finding by the jury that he continued to drive the car after entering the Crisco Road and highway 73. *S. v. Dooley*, 232 N.C. 311, 59 S.E. 2d 808; *S. v. Newton*, 207 N.C. 323, 177 S.E. 184. This assignment of error is without merit and is, therefore, overruled.

The court below after imposing sentence in Case No. 6711, as hereinabove set out, then stated: "This prison sentence is to run consecutive with and not concurrent with the prison sentences pronounced this day by this court in Cases 6712, 7069, 7070, 7268, and 7270." The court then proceeded to impose sentence in Case No. 6712, and added: "This prison sentence is to run consecutive with and not concurrent with the prison sentences pronounced this day by this court in Cases Nos. 6711, 7069, 7070, 7268 and 7270."

Appeals in all these cases are now pending in this Court. In none of the judgments was it specified in what order the respective sentences were to be served.

The general rule with respect to consecutive sentences is well stated in 15 Am. Jur., Criminal Law, section 467, page 125, as follows: "The specification of the order in which cumulative sentences are to be served must be of such certainty that the commencement and termination of the respective sentences may be determined from the record. This does not mean that the judgment should fix the day on which each successive term of imprisonment should commence, but merely that it should direct that each successive term should begin at the expiration of the previous one, for the obvious reason that the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of

the judgment, in which event the succeeding sentence would then take effect in case it provided that the term of imprisonment should commence at the termination of the previous one."

There is no exception or assignment of error with respect to the ambiguity involved in these sentences. Even so, "where error is manifest on the face of the record, it is the duty of the Court to correct it, and it may do so of its own motion, that is, *ex mero motu.*" *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320. Or, where there is a void or erroneous sentence, the case will be remanded for a proper sentence. *S. v. Doughtie,* 237 N.C. 368, 74 S.E. 2d 922; *S. v. Satterwhite,* 182 N.C. 892, 109 S.E. 862. Moreover, an appeal will be taken as an exception to the judgment and raises the question as to whether error in law appears upon the face of the record. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *Gibson v. Insurance Co., supra; Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579.

Although the judgments in these cases do not specify in what order the sentences are to be served, it is amply clear that his Honor intended that they should run consecutively and not concurrently.

When the trial judge sentenced the defendant in the court below in Case No. 6711 to be confined in the common jail of Cabarrus County for a period of eight (8) months and be assigned to work under the supervision of the State Prison Department, if he had stopped there and proceeded to impose sentence in Case No. 6712, and then had added, the sentence in Case No. 6712 is to begin at the expiration of the sentence imposed this day in Case No. 6711, the sentences in Cases Nos. 6711 and 6712 would be definite as to when they would begin. *In re Swink,* 243 N.C. 86, 89 S.E. 2d 792; *In re Smith,* 235 N.C. 169, 69 S.E. 2d 174; *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169.

It is ordered that this case be remanded to the Superior Court of Cabarrus County for proper sentences.

Remanded.

STATE v. JOHN BANGLE CORL.

(Filed 6 May, 1959.)

1. Jury § 3—

A challenge to the array must go to the whole array or panel and will

not lie on the ground that eleven of the jurors in the panel were present in court and heard testimony against the defendant in a prior prosecution.

2. Same—

A challenge to the array must be made before plea.

3. Same—

Upon defendant's challenge to the array, the burden is upon him to introduce evidence in support of his motion.

4. Jury § 1—

A defendant may not object to the acceptance of a juror when he has not exhausted his peremptory challenges before the panel is completed. G.S. 15-163.

5. Automobiles § 3—

In a prosecution of defendant for operating a motor vehicle on the public highways after his operator's license had been revoked or during a period it had been suspended, the State may introduce that part of the certified record of the Department of Motor Vehicles showing that defendant's operator's license had been revoked and that such revocation was in effect at the time the alleged offense was committed.

6. Criminal Law § 156—

An assignment of error that the court failed to instruct the jury in accordance with the provisions of G.S. 1-180, is ineffectual as a broadside assignment of error.

7. Criminal Law § 159—

An assignment of error not discussed in appellant's brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

8. Criminal Law §§ 133, 169—

Where cumulative sentences are imposed upon conviction for separate offenses, the judgment should specify in what order the respective sentences are to be served, and when the judgment provides only that each sentence should run consecutively and not concurrently with the other sentences, the cause must be remanded for proper sentences.

APPEAL by defendant from *Johnston, J.*, October Term, 1958 of CABARRUS.

These are three cases against the defendant that came to the Superior Court by appeal of the defendant from the county recorder's court of Cabarrus County. The warrant in each case charges the defendant on 27 October 1958 with a violation of a statute regulating the operation of automobiles on the public highways of North Carolina, all misdemeanors. The warrant, Number 7270, charges the unlawful operation of an automobile upon the public highways of the State while defendant's operator's license to operate an automobile

was revoked, a violation of G.S. 20-28. The warrant, Number 7268, charges the reckless driving of an automobile on the public highways of the State, a violation of G.S. 20-140. The third warrant charges the unlawful driving of an automobile upon the public highways of the State at a speed of 60 miles an hour, where the speed limit is 55 miles an hour, a violation of G.S. 20-141.

In the Superior Court the three cases were consolidated for trial. *S. v. Waters*, 208 N.C. 769, 182 S.E. 483. Defendant pleaded Not Guilty. Verdict: Guilty of driving after license revoked; guilty of reckless driving; not guilty of speeding.

From a judgment of imprisonment in Case Number 7268 and Case Number 7270, defendant appeals.

Malcolm B. Seawell, Attorney General and Lucius W. Pullen, Assistant Attorney General, for the State.

Robert L. Warren for defendant, appellant.

PARKER, J. After the jury was impaneled to try these cases, defendant challenged "the array on the grounds that eleven of the jurors at present in the panel were present in court on the morning of this date, at which time the defendant now on trial was being tried on two charges, one of speeding and one of driving after his license was revoked, and that such jurors heard the testimony in these cases and also heard read a record of the Department of Motor Vehicles which was admitted in evidence." To the denial of the challenge, defendant excepted, and assigns this as his assignment of error Number One.

To constitute a ground for challenge to the array, the objection must go to the whole array or panel, and not merely to individuals upon it. No objection lies to the array or panel because some persons are wrongfully on it, since they may be excluded upon their examination on the *voir dire*. *S. v. Kirksey*, 227 N.C. 445, 42 S.E. 2d 613; *S. v. Dixon*, 215 N.C. 438, 2 S.E. 2d 371; *S. v. Levy*, 187 N.C. 581, 122 S.E. 386; 50 C.J.S., Juries, Sec. 262; 31 Am. Jur., Jury, Sections 105 and 106.

The challenge to the array came after defendant had pleaded Not Guilty, and after the jury was impaneled. This Court said in *S. v. Banner*, 149 N.C. 519, 63 S.E. 84; "The motion to quash and the challenge to the array came too late, after entry of plea of 'not guilty.'" "Challenges to the array or panel should be made before challenges to the polls, and, as a general rule, before the jury is sworn." 31 Am. Jur., Jury, Section 109. See 50 C.J.S., Juries, Section 263.

In *S. v. Levy, supra*, it is said: "In *S. v. Speaks*, 94 N.C., p. 873,

it was said that 'A challenge to the array can only be taken when there is partiality or misconduct in the sheriff, or some irregularity in making out the list.' "

This is said in 50 C.J.S., Juries, p. 1022: "The existence of various facts and circumstances, or the happening of various occurrences, have been held not to constitute grounds for challenge to the array or motion to quash the venire, such as . . . presence of jurors at other trials, previous service of jurors in other cases . . . ."

Defendant challenged the array, but offered no evidence. In *Frazier v. U. S.*, 335 U.S. 497, 93 L. Ed. 187, reh. den. 336 U.S. 907, 93 L. Ed. 1072, there was a challenge to the array, and in respect thereto the Court said: "I. The method of selecting the panel. — Apart from the objection that this challenge came too late, cf. *Agnew v. United States,* 165 U.S. 36, 41 L. Ed. 624, 17 S. Ct. 235, it is without merit. It consists exclusively of counsel's statements, unsworn and unsupported by any proof or offer of proof. The Government did not explicitly deny those statements. But it was under no necessity to do so. The burden was upon the petitioner as moving party 'to introduce, or to offer, distinct evidence in support of the motion.' Citing authorities."

By virtue of G.S. 15-163, defendant had the right to challenge peremptorily, and without showing cause, six jurors. There is nothing in the Record to indicate that defendant excused any juror under the provisions of this statute. For all the Record shows, defendant may have had unused six peremptory challenges, when he accepted the jury, and it was impaneled. "It is well settled that the defendant cannot object to the acceptance of a juror, so long as he has not exhausted his peremptory challenges before the panel is completed." *S. v. Dixon, supra.*

There is nothing in the Record to indicate that defendant challenged any juror for cause, e. g., that he had formed and expressed an opinion unfavorable to defendant, and that the court improperly refused his challenge to a juror for cause.

The court properly denied defendant's challenge to the array.

The assignments of error in respect to the court permitting the State to offer in evidence that part, and only that part, of a certified copy under seal of the official record of the Drivers License Division of the North Carolina Department of Motor Vehicles, showing that defendant's operator's license to operate an automobile was revoked, and such revocation was in effect on 27 September 1958, are overruled on authority of the opinion written for the Court by *Denny, J.*, in *S. v. Corl,* filed this day, *ante* p. 252, 108 S.E. 2d. 608.

The assignments of error to the denial of defendant's motions for judgment of nonsuit are overruled. Defendant states in his brief: "This appellant recognizes that the evidence as admitted would not justify granting a motion of nonsuit."

Defendant's last assignment of error is that the court failed to instruct the jury in accordance with the provisions of G.S. 1-180. This assignment of error is overruled for two reasons: One, it is broadside. *S. v. Webster,* 218 N.C. 692, 12 S.E. 2d 272; *Tillman v. Talbert,* 244 N.C. 270, 93 S.E. 2d 101. Second, it is not brought forward, and discussed in defendant's brief. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563; *S. v. Hart,* 226 N.C. 200, 37 S.E. 2d 487.

All defendant's assignments of error are overruled. However, the cases must go back for proper sentences.

The sentence in Case Number 7268 is imprisonment for six months, to run consecutive with, and not concurrent with, prison sentences pronounced this day by this court in Cases numbered 6711, 6712, 7069, 7070 and 7270. The sentence in Case Number 7270 is imprisonment for eighteen months, to run consecutive with, and not concurrent with, prison sentences pronounced this day by this court in Cases numbered 6711, 6712, 7069, 7070 and 7268.

Appeals in all these cases are now pending in this Court. In reference to all of these cases, *Denny, J.,* said in *S. v. Corl, supra,* in which cases numbered 6711 and 6712 were consolidated for trial: "In none of the judgments was it specified in what order the respective sentences were to be served." Upon authority of the Court's opinion written by *Denny, J.,* in that case, it is ordered that the sentence in each case here be vacated, and that each case be remanded to the Superior Court of Cabarrus County for proper sentences upon the jury's verdict.

Remanded for Proper Sentences.

STATE v. JOHN BANGLE CORL.

(Filed 6 May, 1959.)

1. Criminal Law § 154—

An assignment of error to the action of the court in discharging certain jurors cannot be considered when the record fails to show any exception to the action of the court, since an assignment of error must be supported by an exception duly noted.

2. Criminal Law § 159

An assignment of error not discussed in defendant's brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Jury § 11—

An objection to the action of the court in summarily discharging seven jurors who had been excused by the State and defendant, is untenable, it not appearing that defendant was prejudiced thereby.

4. Automobiles § 8—

In a prosecution of defendant for operating a motor vehicle on the public highways after his operator's license had been revoked or during a period it had been suspended, the State may introduce that part of the certified record of the Department of Motor Vehicles showing that defendant's operator's license had been revoked and that such revocation was in effect at the time the alleged offense was committed, and further, an exception to the testimony of a patrolman that he had the certified copy of the official record under seal, is feckless.

5. Criminal Law § 156—

An assignment of error that the court failed to instruct the jury in accordance with the provisions of G.S. 1-180, is ineffectual as a broadside assignment of error.

6. Criminal Law §§ 133, 169—

Where cumulative sentences are imposed upon conviction for separate offenses, the judgment should specify in what order the respective sentences are to be served, and when the judgment provides only that each sentence should run consecutively and not concurrently with the other sentences, the cause must be remanded for proper sentences.

APPEAL by defendant from *Johnston, J.*, October Term, 1958, of CABARRUS.

These are two cases against the defendant that came to the Superior Court by appeal of the defendant from the county recorder's court of Cabarrus County. The warrant in each case charges the defendant on 1 April 1958 with a violation of a statute regulating the operation of automobiles on the public highways of the State, both misdemeanors, to wit: one, the unlawful operation of an automobile upon the public highways of the State at a rate of speed of over 100 miles an hour, a violation of G.S. 20-141, and the other with unlawfully operating an automobile upon the public highways of the State while his operator's license to operate a motor vehicle was revoked, a violation of G.S. 20-28.

In the Superior Court the two cases were consolidated for trial. *S. v. Waters*, 208 N.C. 769, 182 S.E. 483. Defendant pleaded Not Guilty. Verdict of the jury: Guilty as charged in each case.

From a judgment of imprisonment in each case, defendant appeals.

Malcolm B. Seawell, Attorney General, and Lucius W. Pullen, Assistant Attorney General, for the State.

Robert L. Warren for defendant, appellant.

PARKER, J. The State offered evidence: the defendant none. The State's evidence was amply sufficient to carry the case to the jury in both cases, and to uphold the jury's verdict of guilty as charged in each case. Defendant states in his brief: "This appellant in good conscience cannot argue that there was not sufficient evidence to make a case for the jury, therefore, Exceptions 6 and 7 (motions for judgment of nonsuit) are abandoned."

This appears in the Record: "When the jury was impaneled the Judge summarily discharged seven jurors who had been excused by the State and defendant." To this the defendant did not except. Nothing else in respect to this appears in the Record, except that the defendant in his assignments of error assigns this discharge of seven jurors as error, and states this is his Exception Number 1. In the first headnote in our Reports in *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223, this is said: "Exceptions which appear nowhere in the record except under the assignments of error are ineffectual, since an assignment of error must be supported by exception duly noted." Further, in defendant's brief no reason or argument is stated, or authority cited in support of this assignment of error, as is required by Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 544, 563; *S. v. Hart*, 226 N.C. 200, 37 S.E. 2d 487. Black's Law Dictionary, 4th Ed., defines summarily thus: "Without ceremony or delay, short or concise." In addition, it does not appear that defendant was prejudiced by the court's action. This assignment of error is without merit.

Defendant's assignment of error Number 2 is to the court permitting a State Highway Patrolman to testify that he had a certified copy of the official record of the Drivers License Division of the North Carolina Department of Motor Vehicles, and that it was certified and under seal. This assignment of error is overruled.

Defendant's assignment of error Number 3 is to the court's ruling permitting the State to introduce in evidence "that part of the certified copy which states that the driver's license of John Bangle Corl, Route I, Concord, was revoked by the State Department of Motor Vehicles two additional years to prior revocation, from October 31, 1957, to October 31, 1959. Patrolman C. L. Creech. Served on May 30, 1954." This assignment of error is overruled on authority of the opinion written for the Court by *Denny, J.*, in *S. v. Corl*, filed this day, *ante* p. 252, 108 S.E. 2d 608.

Defendant's assignment of error Number 7 is to the court's failing to instruct the jury in accordance with the requirements of G.S. 1-180. This assignment of error is untenable. It is a broadside exception. *S. v. Webster,* 218 N.C. 692, 12 S.E. 2d 272; *S. v. Triplett,* 237 N.C. 604, 75 S.E. 2d 517; *Tillman v. Talbert,* 244 N.C. 270, 93 S.E. 2d 101.

All defendant's assignments of error are overruled. However, the cases must go back for proper sentences.

In the Record, the speeding case appears as Number 7069, and the driving after revocation of license case appears as Number 7070.

The sentence in Case Number 7069 is imprisonment for 60 days, to run consecutive with, and not concurrent with, prison sentences pronounced this day in cases numbered 6711, 6712, 7070, 7268 and 7270. The sentence in Case Number 7070 is imprisonment for 15 months, to run consecutive with, and not concurrent with, prison sentences pronounced this day in cases numbered 6711, 6712, 7069, 7268 and 7270.

Appeals in all of these cases are now pending in this Court. In reference to all these cases, *Denny, J.,* said in *S. v. Corl, supra,* in which cases numbered 6711 and 6712 were consolidated for trial: "In none of the judgments was it specified in what order the respective sentences were to be served." Upon authority of the Court's opinion written by *Denny, J.,* in that case, it is ordered that the sentence in each case here be vacated, and that each case be remanded to the Superior Court of Cabarrus County for proper sentences upon the jury's verdict.

Remanded for Proper Sentences.

RUTH E. SLAUGHTER v. STATE CAPITAL LIFE INSURANCE COMPANY.

(Filed 6 May, 1959.)

1. Insurance § 46—

In an action on a policy to recover for death by external, violent and accidental means, the burden is on plaintiff to prove not only that the death resulted through external and violent means, but also that it resulted from accidental means, so as to bring his claim within the coverage of the policy, and, upon a *prima facie* showing by plaintiff, the burden is on insurer to relieve itself of liability by showing that insured's death was caused directly or indirectly by the intentional act of insured or any other person within the exclusion clause of the policy.

2. Same: Insurance § 34—

Plaintiff's evidence tending to show that insured was a taxicab operator, that he picked up a passenger, that several hours thereafter in-

sured was found at a lonely place with a pistol wound in his back and above his left ear, his money, his pistol and his taxicab gone, that tire marks near the body showed that a vehicle had spun its wheels as it left the scene, and that the cab was later found some 22 miles away, *is held* insufficient to show that the death was the result of an accident within the coverage of the policy and does show an intentional and not an accidental killing within the exclusion clause of the policy, and nonsuit was proper.

3. Insurance § 46—

Where plaintiff, in a suit on an accident policy, fails to make out a case of coverage, nonsuit is proper, and if plaintiff's evidence establishes a defense in that the death resulted from a cause within the exclusion clause of the policy, nonsuit is also proper; if insurer's evidence not in conflict with that of plaintiff shows that plaintiff does not have a case or that insurer does have a complete defense, insurer's remedy is by motion for a peremptory instruction.

APPEAL by plaintiff from *Mallard, J.*, November, 1958 Civil Term, JOHNSTON Superior Court.

Civil action by the plaintiff, beneficiary, to recover on a preferred accident policy issued by defendant in which it contracted to pay $2,500.00 for the loss of life by the insured, William B. Slaughter, "resulting directly and independently of all other causes from bodily injury sustained by the insured solely through external, violent, and accidental means." The policy contained an exclusion clause, in material part as follows: "The insurance under this policy shall not cover death . . . caused directly or indirectly, wholly or partly, (1) by the intentional act of the Insured or any other person, whether sane or insane . . ." The policy was in force at the time of the insured's death on April 5, 1956.

The evidence presented at the trial disclosed the following: The insured was 36 years old. He operated a taxicab in Selma. He had a permit to carry and was in the habit of carrying a pistol. Some time in the late afternoon or early evening of April 5, 1956, some unidentified man "asked him to take him to Smithfield and he said, 'O.K.' " At 9:15 that night the dead body of the insured was found "in a desolate place" at the city dump about three miles from Smithfield. The deceased was lying face down in a little ditch "that was 'piled' up by the road scraper." His left shoe was off. His belt was found four or five yards from his body. His money pouch, usually attached to his belt, was found nearby, empty. His pistol, money, and cab were gone. His watch and keys to his wife's car were in his pockets. His rings and pins were not taken. The insured had a pistol wound in the back under the right shoulder blade and another about one inch above his

left ear. A .38 calibre pistol bullet passed through the head and was recovered from the side opposite the point of entry. Tire marks near the dead man's body "took off" toward Highway 301, "spinning, . . . up dirt." The deceased's cab was found in a parking lot at Dunn, North Carolina, at about four o'clock on the morning of April 6. The distance between Selma and Smithfield is approximately three miles and between Smithfield and Dunn is approximately 22 miles.

The coroner made an investigation and report, though he did not impanel a jury or hold a formal inquest. The plaintiff offered the report, which was excluded on defendant's objection. The plaintiff excepted. The plaintiff signed and filed proof of claim which was prepared by the defendant's agent. The evidence was in conflict as to whether the plaintiff knew the contents of the claim relating to the cause of death.

At the close of the plaintiff's evidence, the trial judge entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Joseph H. Levinson, William I Godwin for plaintiff, appellant.
Allen & Hipp, Wellons & Wellons for defendant, appellee.

HIGGINS, J. The plaintiff has abandoned all assignments of error except those relating to the judgment of nonsuit. The policy here involved provided coverage for death "resulting directly and independently of all other causes from bodily injury sustained by the insured solely through external, violent, and accidental means." In order to prevail in her suit on the policy, the plaintiff must bring the insured's death within the coverage provision. If coverage is established, the defendant may relieve itself of liability by showing the insured's death was caused "directly or indirectly, wholly or partly, by the intentional act of the insured or any other person, whether sane or insane." *Goldberg v. Ins. Co.*, 248 N.C. 86, 102 S.E. 2d 521; *Fallins v. Ins. Co.*, 247 N.C. 72, 100 S.E. 2d 214; *Patrick v. Ins. Co.*, 241 N.C. 614, 86 S.E. 2d 201; *Gorham v. Ins. Co.*, 214 N.C. 526, 200 S.E. 5; *Whitaker v. Ins. Co.*, 213 N.C. 376, 196 S.E. 328; *Warren v. Ins. Co.*, 212 N.C. 354, 193 S.E. 293; 215 N.C. 402, 2 S.E. 2d 17; 217 N.C. 705, 9 S.E. 2d 479; 219 N.C. 368, 13 S.E. 2d 609.

Unless the plaintiff's evidence in this case permits the legitimate inference that the insured met his death solely through external, violent, and accidental means, nonsuit is proper. It is not enough to show death by external means. It is not enough to show death by violent means. We think the proper rule requires the plaintiff to offer evidence sufficient to permit the inference that death was caused also by acci-

dental means. The plaintiff has recognized her responsibility in this particular by the following in her brief: "Thus, there is no question that the plaintiff in an action on an accidental policy must prove that the death for which the action was brought was caused by accidental means within the terms of the policy."

The evidence in this case may be deemed conclusive that the death of the insured resulted solely from external and violent means. The body was found in a lonely place at the city dump, within about three hours from the time he left Selma to carry a passenger to Smithfield. The insured had been shot in the back and above the left ear with a pistol. His money, his pistol, and his taxicab were gone. His belt and empty purse were found near the body. His taxicab was found in a parking lot 22 miles away. The tire marks near the body showed a vehicle had spun its wheels as it left the scene. All the evidence points to an intentional killing with robbery as the motive. This evidence, viewed in the light of reason and common sense, leaves no basis for a finding of death as the result of accident as the term "accident" is generally understood. The evidence, circumstantial, of course, offered nothing which even remotely tended to suggest, much less to support a finding, that death resulted through accidental means.

The plaintiff cites a number of cases, some our own, to the effect that when a *prima facie* case of coverage under a policy is made out that death resulted solely from external, violent, and accidental means, then in considering whether the insurer has relieved itself of liability under the exclusion clause in the policy, a presumption against suicide or against intentional killing by another arises where nothing appears except death by shooting. The presumption, if it is proper so to designate it, is little if anything more than another statement of the fact that the burden under the exclusion clause is upon the insurance company.

No attempt is here made to reconcile what this Court and others have said with respect to accidental death or death by accidental means. The definitions and holdings have arisen under different policy provisions and different factual situations. The cases have involved double indemnity provisions in life policies. They have arisen with respect to coverage provisions in accident policies, some of which insure against injury by accident, injury or death by external, violent, *or* accidental means, and injury or death by external, violent, *and* accidental means. The latter is the provision in this case. They have arisen under exclusion clauses in policies where the burden of proof is upon the insurance carrier. Each opinion must be interpreted in the light of the facts in the case. Taking our own advice, we hold the

plaintiff's evidence in this case, under the policy provision here involved, shows an intentional, not an accidental killing. The plaintiff's evidence not only shows lack of coverage, but it also establishes the defense set up in the answer that the death of the insured was caused by the intentional act of another.

When the plaintiff fails to show coverage under the insuring clause of a policy, nonsuit is proper. If the plaintiff's evidence makes out a case of coverage and at the same time establishes the defense that the particular injury is excluded from coverage, nonsuit is likewise proper. Such are the rules when the plaintiff's evidence does not make out a case, or does make out a defense. However, when the defendant's evidence, not in conflict with the plaintiff's, shows the plaintiff does not have a case, or that the defendant does have a complete defense, the defendant's remedy is by motion for a peremptory instruction to the jury. In the *Warren* cases, *supra*, the defendant, at the beginning of the trial, assumed the burden of proof. The plaintiff did not offer evidence. Consequently the defendant's remedy, when its evidence showed lack of coverage, was by prayer for a peremptory instruction rather than by motion for nonsuit. In the *Warren* cases the prayer was allowed. The Court directed the jury to answer the issue against the plaintiff on the ground that all the evidence showed the insured was intentionally shot and killed.

In this case the plaintiff's own evidence showed an intentional killing. That showing established lack of coverage. It showed also a bar under the exclusion clause. Either was fatal to plaintiff's cause, requiring nonsuit.

The judgment of the Superior Court of Johnston County is

Affirmed.

J. M. SPELL v. SMITH-DOUGLAS CO., INC.

1. Negligence § 4f(2)—

The proprietor of a business establishment is not an insurer of the safety of his invitees, but is under duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.

2. Same—

Plaintiff's evidence tended to show that he was an invitee and fell to his injury, while standing on the platform of defendant's warehouse, when his heel crushed through a rotten board, but plaintiff's evidence

further tended to show that there was nothing in the appearance of the board to show that it was defective but that it looked sound from both the bottom and top. *Held:* Nonsuit was proper, since the evidence fails to show that a reasonable inspection on the part of the proprietor would have disclosed the hidden defect which caused the injury.

APPEAL by plaintiff from *Thompson, S. J.*, September, 1958 Term, HARNETT Superior Court.

Civil action to recover damages for personal injury. The plaintiff alleged in substance that he, as an invitee, entered a warehouse owned by Durham & Southern Railroad Company, but leased to and maintained by the defendant for purposes of storage, sale, and delivery of fertilizer. Attached to the warehouse was a loading platform approximately seven feet long, three feet wide, and 40 inches above the ground. The floor of the platform consisted of cypress boards six or more inches wide and two and one-half to three inches thick. The plaintiff purchased 1,500 pounds of fertilizer in 100-lb. bags, backed his truck up to the loading platform, and while he and one of the defendant's employees were loading his truck, the plaintiff fell from the platform and was injured.

The plaintiff alleged: "The board which was approximately twelve inches wide and two to three inches thick had decayed and rottened between the top surface and bottom of said board; that when the plaintiff stepped on said board with the weight of his heel, the board crushed in and gave way, causing the plaintiff's heel to drop approximately one and one-half inches and further causing the plaintiff to lose balance and to fall, . . ."

The plaintiff testified: "The platform is made out of cypress lumber and the board has a sap edge on it — something like about two inches on the edge of the board was sap and the rest of the board was solid heart. This sap had decayed. He could not tell that when he went upon the platform. That his heel bursted through about something like an inch. It was about one and one-half or two inches across."

The plaintiff introduced, as an adverse witness, Mr. Dalrymple, an employee of the defendant, who testified the defendant, through its agents, occupied the warehouse and paid the rent to the Durham & Southern. There was a hole approximately one and one-half inches deep where a knot came out. He made an examination of the building and platform during the Summer of 1956. "I found the boards to be sound . . . there was also a hole in the very approximate center of the platform that was very small. I would say it was not over half an inch, all the way through the board. . . . The knothole . . . at the end of the planks was also in the approximate center board . . . I found no evidence of decay in the Summer of 1956 and I found no evidence of

decay on February 4, 1957," the date of the plaintiff's fall and injury.

The plaintiff, recalled for further cross-examination, testified: "I was well acquainted with the warehouse. I had stood on the platform . . . quite a few times." With references to holes described by Mr. Dalrymple, the plaintiff said: "I saw all of that when I 'interviewed' the platform." The knothole was on the east side of the platform. The other hole was in the center. "I fell off the west side. I did not see anything at that time . . . I stepped back there and my heel crushed in. I looked at the platform and I saw where I was stepping and I saw nothing wrong."

The defendant, by answer, denied negligence and alleged plaintiff carelessly stepped off the board, causing his injury.

At the close of the plaintiff's evidence, the court, on defendant's motion, entered a judgment of compulsory nonsuit from which the plaintiff appealed.

Doffermyre, Stewart & Johnson By: D. K. Stewart for plaintiff, appellant.

Taylor & Morgan, Fletcher & Lake, By: I. Beverly Lake for defendant, appellee.

HIGGINS, J. Few, if any, questions of law are presented to this Court with more frequency than the sufficiency of evidence in a civil case to survive a motion for nonsuit. *Wall v. Trogdon,* 249 N.C. 747; *Hood v. Coach Co.,* 249 N.C. 534, 107 S.E. 2d 154; *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297; *Griffin v. Blankenship,* 248 N.C. 81, 102 S.E. 2d 451.

The evidence in this case establishes the fact that plaintiff was an invitee upon the premises under the control of the defendant. Ordinarily, a proprietor of a store or business establishment is not an insurer of the safety of his invitees. He owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning or notice of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision. *Hood v. Coach Co., supra; Thompson v. DeVonde,* 235 N.C. 520, 70 S.E. 2d 424; *Coston v. Hotel,* 231 N.C. 546, 57 S.E. 2d 793; *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64; *Griggs v. Sears, Roebuck & Co.,* 218 N.C. 166, 10 S.E. 2d 623; *Bohannon v. Stores Co.,* 197 N.C. 755, 150 S.E. 356.

The plaintiff's evidence in the case showed two small holes in the platform prior to his injury. One was a knothole at the east end of the platform; the other was in the center. It was not over half an inch

and went all the way through the board. He was familiar with the platform and knew of these defects. They did not cause his fall. He fell off the west side where his heel broke partially through one of the cypress boards. Before his fall he saw where he was stepping and saw nothing wrong. His witness, an adverse one to be sure, but nevertheless *his* witness, testified that in the Summer he had inspected the platform from the bottom and the boards appeared sound. This witness saw no holes in the platform except the two — one in the middle and the knothole on the east end. However, for the purpose of a nonsuit, we must assume the plaintiff's evidence to be correct, and that his fall was caused by his heel crushing into a board at the west side. This board looked sound to him at the time he stepped on it on February 4. It had looked sound from the bottom when his witness inspected it the previous Summer. The unsound condition was in the center of the board and did not show on either the upper or lower surface. The evidence is insufficient to show that a reasonable inspection would have disclosed the hidden defect which caused plaintiff's fall. Consequently the evidence was insufficient to make out a case. The judgment of involuntary nonsuit is

Affirmed.

STATE v. SUDIE SMITH BOOKER.

(Filed 6 May, 1959.)

1. Criminal Law § 164—

Where concurrent sentences are imposed upon each of two counts contained in a bill of indictment, if no error is found in respect to the trial of one of the counts, exceptions relating to the other count need not be considered.

2. Larceny § 1—

Larceny is the felonious taking and carrying away from any place at any time the personal property of another without the consent of the owner and with the felonious intent to deprive the owner of his property permanently and to convert it to the use of the taker or to some person other than the owner, and an instruction to this effect is without error.

3. Same: Larceny § 7—

Evidence tending to show that the hogs of another were on defendant's land and that defendant took the hogs and sold them to get them off of her property, *is held* sufficient to be submitted to the jury in a prosecution for larceny of the hogs, there being no question raised as to defendant's right to impound the hogs. G.S. 79-3.

4. Same—

The felonious intent of a person in converting to his own use the property of another at the time of the taking must necessarily be determined by the jury from the statements and conduct of the witnesses and the surrounding circumstances.

APPEAL by defendant from *Thompson, S. J.,* November 1958 Criminal Term of HARNETT.

Defendant was put on trial on a bill of indictment containing two counts. The first count charged a felonious breaking and entering in violation of G.S. 14-54; the second count charged larceny of swine and other personal property having a value in excess of $100, a common law felony.

The jury found defendant guilty of a nonfelonious breaking and of larceny. A prison sentence of twelve months was imposed on each count. The judgment provides that the sentences shall run concurrently.

Attorney General Seawell, Assistant Attorney General Bruton, and Bernard A. Harrell of Staff, for the State.

Taylor & Mitchell for defendant, appellant.

RODMAN, J. Unless error was committed in the trial as it relates to the charge of larceny, a felony, defendant does not seek another trial on the charge of breaking and entering. If error existed with respect to that count, it would be harmless, and another trial on that count might result in a consecutive sentence and hence be prejudicial to defendant. *S. v. Riddler,* 244 N.C. 78, 92 S.E. 2d 435; *S. v. Stonestreet,* 243 N.C. 28, 89 S.E 2d 734; *S. v. Cephus,* 241 N.C. 562, 86 S. E. 2d 70.

The trial judge, in charging the jury, defined larceny as: "the felonious taking and carrying away from any place at any time of the personal property of another, without the consent of the owner, with the felonious intent to deprive the owner of his property permanently and to convert it to the use of the taker or to some other person than the owner." Defendant excepted to this portion of the charge. The definition given contains all the elements necessary to constitute and accurately describe the crime. *S. v. Griffin,* 239 N.C. 41, 79 S.E. 2d 230; *Auto Co. v. Ins. Co.,* 239 N.C. 416, 80 S.E. 2d 35; *S. v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81; *S. v. Holder,* 188 N.C. 561, 125 S.E. 113.

As we understand defendant's position, her exception to the definition and her exceptions to other portions of the charge as they relate to the second count are intended to emphasize her exceptions to the refusal of the court to allow her motion to nonsuit for that (a) there

was no evidence of a wrongful taking, and (b) there was no evidence of a fraudulent intent.

The prosecuting witness testified that he owned five hogs worth $250. He left them in a field which he had planted in peas and beans while he made a trip to Tennessee to attend a church meeting. The land he occupied had, about three months prior, been adjudged the property of, with the right to possession by, his sister, the defendant. The day before he left for Tennessee he received a letter from defendant telling him to vacate the property. He made no effort to do so before making his trip. When he returned, after an absence of eight days, his hogs were gone. On a search he found four in the possession of Henry McCoy.

McCoy testified that he purchased five hogs from defendant and paid her the price she demanded, $100. He slaughtered one of the five; the other four were identified by prosecuting witness as his hogs.

Defendant, as a witness in her own behalf, testified she had notified her brother, the prosecuting witness, to vacate the land which had been adjudged to belong to her. That litigation did not relate to the hogs or other chattels. She testified: "I sold the hogs to get them off my property because I had told him before to get them off and for him to move."

We are not concerned with any question relating to defendant's right to impound the hogs. She neither asserted any such right or attempted to comply with the statute affording property owners protection against estrays, G.S. 79-3. The taking and sale of the hogs was not rightful; it was wrongful. *S. v. Epps,* 223 N.C. 741, 28 S.E. 2d 219; *S. v. Butts,* 92 N.C. 784; G.S 79-4.

Defendant insists that a mere wrongful taking does not suffice to establish the necessary felonious intent, and because of the failure to establish felonious intent, her motion to nonsuit should have been allowed. To be guilty of larceny, the taking must be accompanied by a felonious intent, that is, an intent to convert to her own use, thereby depriving the owner of the use and possession of his chattels. This intent must exist at the moment the property is taken. But intent is a mere mental state. It is not determined by physical examination. The jury must necessarily determine intent from the statements and conduct of the party who wrongfully takes. *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514; *S. v. Delk,* 212 N.C. 631, 194 S.E. 94; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Powell,* 103 N.C. 424.

There is plenary evidence on which a jury could find a felonious intent existing at the moment the hogs were taken by defendant. The

court charged the jury it must so find before a verdict of guilty could be rendered.

No Error.

LILLIE CASH HALL v. HARVEY A. HALL.

(Filed 6 May, 1959.)

1. Marriage § 3—

The failure of parties contracting a marriage to file the health certificate with the register of deeds as required by G.S. 51-14, does not invalidate the marriage, but only subjects the parties to the risk of the statutory penalty.

2. Divorce and Alimony § 18—

Findings of the court to the effect that the parties had been legally married, that defendant for the six months prior to the institution of the action had been an habitual drunkard and had wilfully failed to provide adequate support and maintenance for the plaintiff, and that defendant had wilfully abandoned plaintiff, *held* supported by competent evidence and sufficient predicate for the award of alimony *pendente lite*.

3. Same—

The findings of the court, upon the hearing of a motion for alimony *pendente lite*, are not binding upon the trial of the cause upon the merits and are not competent in evidence thereat.

4. Same—

The amounts allowed for subsistence *pendente lite* and counsel fees are determinable by the trial court in its discretion and are not reviewable in the absence of abuse of discretion.

APPEAL by defendant from *Hobgood, J.*, in Chambers at the Courthouse in Louisburg, North Carolina, 27 September 1958. From FRANKLIN.

This is an action instituted on 22 August 1958 in the Superior Court of Franklin County, North Carolina, for divorce *a mensa et thoro*.

This cause came on for hearing on 30 August 1958 upon a motion for alimony and counsel fees *pendente lite*, after the defendant had been given due notice thereof as provided by law. Upon the call of the case it was continued to 13 September 1958 on motion of plaintiff to allow time in which to reply to the defendant's answer filed on said date. Upon the call of the case on 13 September 1958, the matter was continued to 20 September 1958 on motion of the defendant to allow

him time to file affidavits or further pleadings. On 20 September 1958, the plaintiff's attorney being present and the defendant and his attorney being present, the plaintiff having offered the complaint as an affidavit, reply to the defendant's answer, and additional affidavits; and the defendant having offered his answer and affidavits, as they appear in the record, and the court having considered the pleadings and affidavits filed in the matter and having heard the arguments of counsel, took the case under advisement and found the following facts:

"That the plaintiff Lillie Cash Hall and the defendant Harvey A. Hall were lawfully married on the 7th day of July, 1957; that no children have been born of said marriage, but plaintiff became pregnant by defendant during the time she was living with him as husband and wife.

"2. That the plaintiff has insufficient funds or estate on which to subsist pending the trial of this action, or to pay counsel.

"3. That the plaintiff has been a resident of Franklin County, North Carolina, for more than six months next preceding the institution of this action."

The court further found as a fact "that the defendant for more than six months prior to the institution of this action has been an habitual drunkard, that the defendant has wilfully failed to provide adequate support and maintenance for the plaintiff, and that the defendant, without adequate cause or provocation on the part of the plaintiff, wilfully abandoned the plaintiff and left the residence occupied by himself and his family; and that the defendant is able-bodied, and presently employed as a weaver at the Burlington Mills Corporation at Franklinton, North Carolina, and is earning at least $51.02 per week."

The court allowed alimony *pendente lite* and counsel fees. Judgment was entered accordingly on 27 September 1958, and the defendant appeals, assigning error.

Hubert H. Senter for plaintiff, appellee.
John F. Matthews for defendant, appellant.

PER CURIAM. The findings of fact were sufficient to support the award of alimony *pendente lite* and counsel fees. Furthermore, in our opinion, the facts found were supported by competent evidence.

The contention of the defendant that the alleged marriage between the plaintiff and the defendant is null and void because of their failure to file a health certificate with the Register of Deeds of Franklin County, as required by G.S. 51-14, is without merit. Failure to file a

health certificate as required by law does not invalidate an otherwise legal marriage; but such failure to comply with the statute in this respect, if true, does make the plaintiff and the defendant herein subject to indictment, and, if convicted, to the infliction of the penalty or penalties provided for the violation of G.S. 51-14.

The findings of the court below are not binding on the parties nor receivable in evidence in the trial of the case on its merits. *Bumgarner v. Bumgarner,* 231 N.C. 600, 58 S.E. 2d 360; *Barwick v. Barwick,* 228 N.C. 109, 44 S.E. 2d 597.

Moreover, the amounts allowed to a plaintiff for subsistence *pendente lite* and for counsel fees are determined by the trial judge in his discretion and are not reviewable on appeal unless there has been an abuse of discretion. *Cunningham v. Cunningham,* 234 N.C. 1, 65 S.E. 2d 375; *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226. No abuse of discretion is made to appear.

The order of the court below allowing alimony *pendente lite* and awarding counsel fees will be upheld.

Affirmed.

NOLAND COMPANY, INCORPORATED v. MARSH FURNITURE COMPANY, A CORPORATION.

(Filed 6 May, 1959.)

APPEAL by defendant from *Phillips, J.,* at October 20, 1958, Civil Term of GUILFORD— Greensboro Division.

Civil action to recover $1,905.10 on alleged breach of contract as set forth in complaint. Defendant answering, denies allegations of complaint, and averred matter in affirmative defense and for counterclaim.

The parties waived jury trial and agreed that the court sitting without a jury should hear and determine the controversy, and make its findings of fact and answer the issues arising herein. And the parties stipulated and agreed upon a statement of facts.

After hearing, the court having answered the issues in favor of the plaintiff, as appears of record, ordered, adjudged and decreed that the plaintiff have and recover of defendant the sum for which judgment is prayed in the complaint. To the judgment and the signing thereof defendant excepts and appeals to Supreme Court, and assigns error.

Wharton & Wharton, A. L. Purrington, Jr., for plaintiff, appellee.
Roberson, Haworth & Reese for defendant, appellant.

PER CURIAM. After careful consideration of the matters to which assignments of error relate, error is not made to appear. Hence the judgment from which appeal is taken is

Affirmed.

STATE v. CLARENCE PUGH.

(Filed 20 May, 1959.)

Criminal Law § 114: Homicide § 29—

In a prosecution for murder in the first degree it is prejudicial error for the court, after giving correct instructions on the discretionary right of the jury to recommend life imprisonment, to charge further on the contentions of the State that in view of the manner in which the offense was committed the jury should not recommend life imprisonment. G.S. 14-17.

DENNY, J., concurring.

HIGGINS, J., dissenting.

PARKER, J., concurs in dissent.

APPEAL by defendant from *Mallard, J.*, at September 1958 Term of LEE.

Criminal prosecution upon a bill of indictment charging defendant Clarence Pugh with murder in the first degree of one Charles Otis Nodine.

Plea: Not guilty.

Upon the trial in Superior Court the State offered evidence—the defendant offering none— and the case was submitted to the jury under the charge of the court.

Verdict: The Jurors, upon their oath say that the said Clarence Pugh is guilty of the felony and murder in the manner and form as charged in the bill of indictment.

Judgment: Death by inhalation of lethal gas as provided by law.

Defendant objects and excepts and gives notice of appeal, and appeals to the Supreme Court, and assigns error, and is permitted to appeal without making bond, that is, *in forma pauperis.*

Attorney General Seawell, Assistant Attorney General Claude L. Love for the State.

J. Allen Harrington, E. L. Gavin, H. W. Gavin for defendant, appellant.

WINBORNE, C. J. The record of case on appeal here presented reveals error in the charge of the court for which, under authority of *S. v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206, a new trial must be had. See also *S. v. Denny*, 249 N.C. 113, 105 S.E. 2d 446, and cases cited.

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.

And as in *S. v. Oakes, supra*, the error of which complaint is made arises in this manner. It seems that the trial judge charged in substantial accord 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 Section 1 of Chapter 299 of 1949 Session Laws of North Carolina. See *S. v. Denny, supra*, and cases 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." Contrary to this, in the instant case the trial judge inadvertently, no doubt, in stating contentions of the State declared to the jury that: "The State con-

tends that this defendant killed Mr. Nodine in robbing him, and that your verdict should be guilty of murder in the first degree without any recommendation, that is, punishment be imprisonment for life." And the "State contends that this crime denotes a mind fatally bent on mischief, that a man who would kill a man in this fashion, in the fashion in which Mr. Charles Otis Nodine was killed, and who was then able to continue riding around the country in his automobile, and sleeping in his automobile as though nothing had happened, is a very cool calculated person. And the State contends that there are no circumstances in this case which would justify you in exercising your discretion in favor of a life sentence for this defendant. The State contends that your verdict should be guilty of murder in the first degree." Defendant properly excepts to the quoted language.

And the Attorney General in brief filed concedes that the State is unable to distinguish the foregoing portion of the charge from that condemned by this Court in the case of *S. v. Oakes, supra,*— an error in the charge of which the Court will take note *ex mero motu,* citing *S. v. Oakes, supra,* and *S. v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921.

Furthermore, considering the evidence offered by the State in the light most favorable to the State, it appears sufficient to withstand motion for judgment as of nonsuit— to the denial of which defendant excepts.

Since there is to be a retrial other assignments of error need no express consideration.

For error pointed out, there will be a

New Trial.

DENNY, J., Concurring: Prior to 1941 a verdict of guilty of any of the four capital crimes — murder, rape, burglary or arson — meant a mandatory death sentence, except in first degree burglary.

Chapter 434, Laws of North Carolina, Session of 1889, section 3 thereof, codified later as CS 4641, now G.S. 15-171, provided: "That when the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do."

In the case of *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278, decided at the Fall Term 1940 and filed 20 December 1940, this Court held that CS 4641 did not authorize an instruction that the jury might render a verdict of burglary in the second degree in its discretion, irrespective of the evidence. *Stacy, C. J., Barnhill, J.,* later C. J., and *Winborne, J.,* now C. J., each wrote vigorous dissenting opinions.

Stacy, C. J., said: "Our previous decisions are to the effect, that on an indictment for burglary in the first degree, the *defendant* is not entitled as a matter of right to have the case submitted to the jury on the charge of burglary in the second degree unless there is evidence to support the milder verdict. CS 4640. *S. v. Johnston,* 119 N.C. 883, 26 S.E. 163; *S. v. Cox,* 201 N.C. 357, 160 S.E. 358; *S. v. Morris,* 215 N.C. 552, 2 S.E. 2d 554. This is far from saying, however, that in such a case, the jury may not render a verdict of burglary in the second degree 'if they deem it proper so to do.' Both the legislative will as expressed in the statute, CS 4641, and the pertinent decisions on the subject are to the contrary. *S. v. Alston,* 113 N.C. 666, 18 S.E. 692; *S. v. Fleming,* 107 N.C. 905, 12 S.E. 131."

The General Assembly of North Carolina at its very first opportunity enacted Chapter 215 of the Public Laws of 1941. This act added the following provisos to CS 4233, the burglary statute, and CS 4238, the arson statute: "Provided, if the jury shall so recommend. the punishment shall be imprisonment for life in the State's Prison."

At the same session, the General Assembly enacted Chapter 7 of the Public Laws of 1941, amending CS 4641 to read as follows: "When the crime charged in the bill of indictment is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. The judge in his charge shall so instruct the jury."

In 1943, CS 4233 became G.S. 14-52, and CS 4238 became G.S. 14-58, the language including the provisos remaining the same, and CS 4641 became G.S. 15-171.

At the Spring Term 1949 of this Court *S. v. Mathis,* 230 N.C. 508, 53 S.E. 2d 666, was decided. The defendant had been convicted of first degree burglary and sentenced to death. On appeal, the defendant contended that the trial judge erred in not instructing the jury in respect to the right of the jury under G.S. 14-52 to return a verdict of guilty of burglary in the first degree and to recommend in connection therewith that punishment therefor shall be imprisonment for life in the State's Prison. *Winborne, J.*, now C.J., in speaking for the Court said: "The proviso in the statute was added by the General Assembly of 1941 (P.L. 1941, Ch. 215). Before the enactment of it, a verdict of guilty of burglary in the first degree made death sentence mandatory. But since the enactment of it, when a jury in returning a verdict of guilty of burglary in the first degree recommends imprisonment for life, the death penalty is thereby eliminated, and sentence of life imprisonment is mandatory. Thus a substantial right

is created by the proviso in G.S. 14-52 in favor of one charged with burglary in the first degree. And in such case, it is the duty of the trial judge under the provisions of G.S. 1-180 'to declare and explain the law arising thereon.'

"Moreover, G.S. 15-171 provides that 'where the crime charged in the bill of indictment is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do,' and 'the judge in his charge shall so instruct the jury.' See *S. v. Surles, ante,* 272.

"Therefore, taking the two statutes together, G.S. 14-52 and G.S. 15-171, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned. (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) Guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury 'deem it proper so to do,' Guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge, all in accordance with the statutes."

In 1947 the General Assembly of North Carolina created a study commission for the purpose of making a study and submitting recommendations to the 1949 Session of the General Assembly for the improvement of the administration of justice in the State of North Carolina. Among the recommendations made pursuant to this study was the following: "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes." Popular Government, published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina, January issue 1949.

The General Assembly in 1949, following the recommendation of the study commission, enacted Chapter 299 of the Session Laws of

1949, providing that in all capital cases it should be in the discretion of the jury to recommend life imprisonment. The proviso reads as follows: "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."

The identical proviso was enacted as a part of G.S. 14-17, relating to murder in the first degree; of G.S. 14-21, relating to rape or the carnal knowledge of any female child under the age of twelve years; of G.S. 14-52, relating to burglary in the first degree; and of G.S. 14-58, relating to arson. G.S. 15-171 was repealed by Ch. 100, Session Laws of 1953.

Consequently, at the present time, in any capital case the jury has the "unbridled discretion" to recommend that the punishment be imprisonment for life in the State's Prison, "and the court shall so instruct the jury."

The 1949 proviso has been construed in the following cases in the manner hereinafter indicated.

In *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212, the trial judge instructed the jury to the effect that they might recommend life imprisonment if the jury felt "under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation." *Winborne, J.*, now C.J., in speaking for the Court said: "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. (Compare *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825.) 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."

In the case of *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684, among other things, the court below charged: "You may, for any reason and within your discretion add to that the recommendation, if you desire to do so, that he be imprisoned for life, in which event that disposition will be made of the case." This Court upheld the charge.

In *S. v. Simmons,* 234 N.C. 290, 66 S.E. 2d 897, the court instructed

the jury: " * * * if you should return a verdict of guilty of murder in the first degree, it would be your duty to consider whether or not under the statute, you desire and feel that it is your duty to recommend that the punishment of the defendant shall be imprisonment for life in the State's prison." A new trial was granted. In the same case, 236 N.C. 340, 72 S.E. 2d 743, the charge with respect to life imprisonment was again held to be erroneous.

In the case of *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664, a private prosecutor, in making his argument to the jury, said: "There is no such thing as life imprisonment in North Carolina." This argument was made as a part of counsel's plea for a verdict of guilty of murder in the first degree without recommendation that punishment be life imprisonment. The reason advanced by counsel in support of this argument was that, in cases where sentences are for life imprisonment, petitions are filed for commutation; that the commutations are allowed and persons thus sentenced to life imprisonment are finally paroled and allowed to go free. This Court ordered a new trial.

This Court has consistently and without exception adhered to its decisions with respect to the "unbridled discretion" of the jury to make recommendations for life imprisonment in the State's Prison in cases where a defendant was found guilty of a capital offense, as laid down in *S. v. McMillan, supra.* See *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; *S. v. McAfee,* 247 N.C. 98, 100 S.E. 2d 249; *S. v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454; *S. v. Denny,* 249 N.C. 113, 105 S.E. 2d 446; *S. v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206.

As this question has been involved in twelve previous appeals since the statute was enacted in 1949, it has been my impression that it has been the consensus of the members of the Court that neither a solicitor nor a private prosecutor has any right to argue or contend that a jury should not, under the facts and circumstances in a capital case, withhold and refuse to exercise that "unbridled discretion" expressly granted to them by the General Assembly. In the exercise of such discretion they may recommend life imprisonment for any reason or for no reason at all. It follows, therefore, that it is error for the trial judge to give as a contention of the State that the verdict of the jury should be guilty of murder in the first degree without any recommendation that the punishment shall be life imprisonment in the State's Prison. Why is this so? It must be conceded that in any capital case if the evidence is sufficient to justify the jury in finding

beyond a reasonable doubt that the defendant is guilty of the crime charged, and the jury so finds, then he must suffer death unless in the discretion of the jury it makes the recommendation for life imprisonment as authorized by law. From the defendant's standpoint, such recommendation is not a matter of right in any sense, but an exercise of grace, placed exclusively and unconditionally within the discretion of the jury and no one else.

A solicitor or a private prosecutor has as much latitude as he has ever had in making a legitimate argument for a conviction in a capital case, but when he has tried his case and made his argument to the jury, and properly developed his evidence, tending to show the guilt of the defendant beyond a reasonable doubt of the capital offense charged, it is no official concern or responsibility of his whether or not the jury exercises the right of discretion to recommend life imprisonment in the State's Prison.

In view of the history of the legislation involved and the recommendations of the study commission in 1949, it is apparent that juries were bringing in verdicts of murder in the second degree in too many cases in which the evidence warranted a conviction of first degree. In an effort to improve the administration of justice in that respect, the unconditional right to recommend life imprisonment in the State's Prison was granted to the jury, although the evidence warranted a conviction that had theretofore carried a mandatory sentence of death. In fact, it all comes to this: The jury in such cases has been entrusted with the State's conscience or power to extend grace with respect to the punishment to be meted out as between life and death in capital cases — not the judge nor the solicitor.

There are other reasons why this Court should adhere to its former decisions on the questions now before us. It is said in 14 Am. Jur., Courts, section 66, page 287, *et seq.*: " * * * It has been said that the court of last resort of a state will not overrule one of its prior decisions construing a statute where the legislature has held several sessions since such decision without modifying or amending the statute because it may be claimed justly that the legislature has acquiesced in the decision, and therefore a fair case is presented for the application of the doctrine of *stare decisis.*"

In *Gill v. Commissioners*, 160 N.C. 176, 76 S.E. 203, 43 L.R.A. (N.S.) 293, the question before the Court was whether or not the statutory phrase "freeholders within the proposed special school district" embraced female as well as male freeholders in voting for a proposed school tax. The lower court held that it did. On appeal this Court reversed and said: "The Legislature has never, as yet, en-

dowed women with the right to participate in governmental affairs, for reasons satisfactory to itself. * * * We must accept it and enforce it as we find it, and not as we may think it should be, as we do not make the law, but merely declare what it is. * * * (A)ny such * * * change * * * should originate in the Legislature. * * *

"It is inconceivable that a consistent and persistent construction given to similar statutes by the Superintendent of Public Instruction and his legal adviser, the Attorney General, for so long a time, should have escaped the attention of the Legislature, and its silence may be safely construed as an assent to their interpretation of the word. * * * It is easy for the Legislature to change that meaning if, in its wisdom, a different policy should be inaugurated. Until that is done, we will stand by the ancient and settled rule of interpretation. 'A contemporary exposition, practiced and acquiesced in for a period of years, fixes the construction, unless contrary to the obvious meaning of the words.' "

In *Williamson v. Rabon*, 177 N. C. 302, 98 S. E. 820, we find: "The doctrine of *stare decisis* or the principle of adherence to judicial precedents is fully established in this State, and in proper instances will continue to be steadfastly upheld. * * * While a single decision may become a precedent sufficiently authoritative to protect rights acquired during its continuance, such a case more frequently occurs in the construction of statutes applicable, in which case an authoritative interpretation, formally made by a court of last resort, is thereafter considered a part of the law itself * * *."

In 21 C.J.S., Courts, section 214, page 388, et seq., we find this statement: "The doctrine of *stare decisis* applies with full force to decisions construing statutes or ordinances. In fact, when a statute has been judicially construed by the highest court having jurisdiction to pass on it, such construction is as much a part of the statute as if plainly written into it originally."

It would seem, therefore, that a uniform interpretation placed upon a proviso in a statute in a dozen cases over a period of approximately eight years is sufficient to establish the doctrine of *stare decisis*, and if the meaning of the statute has been misinterpreted by the Court, the Legislature ought to say so and not the Court.

I vote for a new trial.

HIGGINS, J., dissenting: To dissent from an opinion awarding a new trial to an unfortunate human being under sentence of death is not easy. Added to the difficulty in this case is the fact the Attorney General confesses he is unable to distinguish between the charge here

challenged and similar charges which have been held as error in past decisions of this Court. Only the firm and settled conviction the former decisions are erroneous in the particular here involved induces me to record my objection.

The amendment in question was added to a section of the statute entitled: "MURDER IN THE FIRST AND SECOND DEGREE DEFINED; PUNISHMENT." Before the amendment, the statute provided that murder in the first degree "shall be punished with death." The amendment added, "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."

The recommendation must be made at the time, and as a part of the verdict. By authorizing and empowering the jury to determine whether the punishment shall be death or life imprisonment, I think it was contemplated the determination would be made upon the basis of the evidence in the case and after its full consideration. In passing on the question of guilt and of the degree thereof, decision must be made upon the evidence and applicable law. The amendment makes no provision for the court or the jury to restrict or to enlarge the scope of the inquiry. Certainly the amendment fails to make provision for hearing of the evidence not otherwise competent on the general issue of guilt or innocence. This failure lends support to the view that the jury must base its recommendation on the evidence, for surely it was intended that the recommendation should be based on something other than whim. The jury has discretion, of course, but the manner of its exercise surely should be governed by the evidence. Pertinent here is a quotation from Vol. 32, N. C. L. Review, p. 439: "The 1949 amendment, making capital punishment in first degree murder cases discretionary has been construed to give the jury an 'unbridled discretion.' The jurors' power of mitigation is absolute; it may apparently proceed from any assumption which the jurors wish to make; and any doubt as to the procedural implications of this will be dispelled by a glance at *State v. McMillan* and *State v. Simmons*, two recent cases in which the Court reversed trial judges who suggested — by even the faintest inference — that the jurors should look to the 'facts and circumstances' of a case in deciding the defendant's punishment. Thus, the trial judge is totally confined, and the jury perforce is totally unconfined; it may roam at will in selecting reasons for or against death."

A proviso in the same words as here involved was made applicable to a conviction for rape. In the case of *State v. Shackleford*, 232 N.C.

299, 59 S.E. 2d 825, the present Chief Justice I think correctly interpreted the meaning of the Statute: "However, it is clear from a reading of the amendment that the General Assembly did not attempt to make any change in the elements constituting the crime of rape, or in the rules of evidence applicable in the trial on a charge of rape. Rather, it is patent that the sole purpose of the act is to give to the jury the right *on the evidence in the case* to render a verdict of guilty of rape, with recommendation of life imprisonment, even though the jury may find facts sufficient to constitute rape as defined by the statute." (emphasis added)

In the case of *State v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212, the trial court had charged that the jury had the right and the power, in its discretion, to accompany the verdict (murder in the first degree) with a recommendation of life imprisonment if the jury felt that the facts and circumstances warranted the recommendation. "That is a matter to be exercised by you gentlemen, in your own discretion." This Court held the instruction erroneous and said: "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." In the *Shackleford* case the Court held the jury had the right on the evidence in the case to render a verdict of rape with recommendation of life imprisonment. In the *McMillan* case the Court held that any instruction, charge or suggestion as to causes for which the jury ought to recommend life imprisonment is error.

In the case of *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664, counsel for the private prosecution in the argument against a recommendation of life imprisonment, said: " . . . in cases where sentences are for life imprisonment, petitions are filed for commutation; that the commutations are allowed and persons thus sentenced to life imprisonment are finally paroled and allowed to go free." The argument was held to be improper because based on matters *dehors* the record. This Court, however, correctly stated the applicable rule: "It is generally recognized that wide latitude should be given to counsel in making their arguments to the jury. *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466; *State v. Little*, 228 N.C. 417, 45 S.E. 2d 542. Even so, counsel may not go outside the record and inject into their arguments facts not included in the evidence." The inference is plain that argument on the question of recommendation is proper if based on the evidence.

In the case of *State v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206, this Court for the first time has said, inferentially, that it is error for the

State to argue in a capital case that the evidence does not warrant a recommendation of life imprisonment. In that case the trial court charged: "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." If it is error for the judge to state the contention, it must be error for the solicitor to make it. If the State cannot argue the question, the defense should not. The concurring opinion in this case agrees with this view. I have no complaint with the statement that the proviso gives the jury discretion. But the jury should hear the evidence and the argument on the evidence, and the court's charge before exercising the discretion. Discretion is not license. The Court is now holding in effect that counsel must not contaminate the jury with any argument as to the bearing the evidence should have on the recommendation. The Court is thus building around the right and duty of passing on the question of life imprisonment a barricade and has in effect put up a sign, "Under quarantine. Discussion forbidden."

My view differs from the Court in this respect. I think the jury should hear the evidence, proper argument based thereon, and the charge of the court fairly reviewing the contentions upon the evidence, and then exercise its discretion. It seems to be the majority view that the jury should hear the evidence but should not hear argument or analysis of the evidence and the trial court must not state the contentions of counsel arising on the evidence. The trouble has arisen, I think, because of a picturesque and catchy, but inaccurate and unfortunate statement that the jury has unbridled discretion. Discretion involves the exercise of judgment based on facts. Unbridled conduct is based on whim or fancy.

From a comparison of the foregoing quotations from *State v. Shackleford* and *State v. McMillan* as to the meaning of the proviso, and from *State v. Dockery* and the present concurring opinion as to the scope of the argument, it appears there is not much upon which to call for the application of *stare decisis*. The decisions in material aspects are conflicting. "Much was said on the argument in favor of adhering to this recent decision, but the doctrine of *stare decisis* is not to be observed with inflexible strictness, especially where no rule of property is involved, and it should never be employed to perpetuate an error." *Spitzer v. Commissioners*, 188 N.C. 30, 123 S.E. 636.

In the case of *State v. Oakes, supra*, I agree that a new trial was required because of the admission over defendant's objection of the affidavit made by the deceased in a prior case. I also agree a new trial was required in *State v. Denny*, 249 N.C. 113, 105 S.E. 2d 446,

because of the announcement of the solicitor at the beginning of the trial and the form of the verdict.

For the reasons herein stated, I think the decision in *State v. McMillan, supra,* was erroneous and that the error should not be perpetuated. In this case, I vote no error.

Parker, J., has authorized me to say that he joins in this dissenting opinion.

RACHEL C. BOLTON AND HUSBAND, RICHARD BOLTON; MARTHA C. DAVIS AND HUSBAND, SIDNEY DAVIS; CARRIE C. MURPHREY AND HUSBAND, W. R. MURPHREY; ESTELLE G. LANE AND HUSBAND, GEORGE LANE; DOROTHY ROBERTS AND HUSBAND, JOHN MILTON ROBERTS; MIGNON C. SULLIVAN AND HUSBAND, CLYDE SULLIVAN; J. W. COLEY, JR. AND WIFE, FAYE COLEY; AND FRANK COLEY, MINOR, BY HIS NEXT FRIEND, MRS. BETTIE COLEY, v. MRS. G. A. (DORIS) HARRISON, WIDOW; ALFORD HARRISON AND WIFE, LYDIA HARRISON; FRANK HARRISON AND WIFE, MILDRED HARRISON; BERNARD HARRISON AND WIFE, DORIS HARRISON; DAVID LEE HARRISON, MINOR; LEROY HARRISON AND WIFE, JOYCE HARRISON; DOUGLAS HARRISON, A MINOR; FAYE HARRISON, A MINOR; MARGARET H. HUX AND HUSBAND, CLIFTON HUX; ELIZABETH H. VAN LANDINGHAM AND HUSBAND, PAUL VAN LANDINGHAM, RUTH LOVEGROVE AND HUSBAND, JOE LOVEGROVE.

(Filed 20 May, 1959.)

1. Judgments § 18—

The sheriff's return showing service raises a legal presumption of valid service, and stands unless such legal presumption is rebutted by evidence upon motion in the cause.

2. Judgments § 27b—

Where the record shows service, the remedy to set the judgment aside for want of service is by motion in the cause.

3. Mortgages § 31h: Parties § 4½: Wills § 46—

A decree of foreclosure of a mortgage executed by testator, entered in an action in which all heirs are made parties, including the life tenant of the *locus in quo* and the remaindermen *in esse* and *in posse*, who are represented by a guardian *ad litem*, and the decree of confirmation duly entered, are binding on the parties, including a later born remainderman represented by members of his class, and the purchaser at such sale takes title under foreclosure of the instrument executed by testator free of claims asserted under the provisions of the will.

4. Executors and Administrators § 12: Mortgages § 39e: Trusts § 4b—Decree of confirmation of foreclosure will not be set aside for fraud merely on evidence of inadequacy of purchase price.

A mortgage executed by testator was foreclosed by action in which

the executors and heirs were made parties. The sale was had after the executors had completed the settlement of the estate in all matters with the exception of the mortgage. The executors purchased at the sale, and the sale was duly confirmed by the court which had all facts before it, including the will showing that the purchasers were the executors. Thereafter, there were successive mortgages and foreclosures, and the land was purchased at the last foreclosure by the life tenant under the will and transferred by *mesne* conveyances to defendants' ancestor. The remaindermen under the will instituted this suit to have a trust declared in their favor, but failed to allege or prove any defense to foreclosure or introduce any evidence of fraud, except the testimony of two witnesses as to the inadequacy of the purchase price at the foreclosure sale of the mortgage, such witnesses giving their opinion some 28 years thereafter as to the value of the land at the time of the foreclosure. *Held:* Nonsuit was correctly entered.

APPEAL by both plaintiffs and defendants from *Carr, J.*, December, 1958 Term, WAYNE Superior Court.

This civil action was instituted on August 5, 1957, by the seven daughters of J. W. Coley and by his minor son, Frank Coley, by Next Friend. The purpose of the proceeding as stated in the plaintiffs' brief is: "To quiet title to the remainder interest of the plaintiffs, to declare a trust in favor of the plaintiffs, who, as devisees under the Will of J. Frank Coley, and who are the remaindermen taking a 63.7 acre tract of land, subject to the life estate of J. W. Coley, their father." The plaintiffs claim title to the remainder after a life estate under Item 5 of J. Frank Coley's will: "To my son, J. W. Coley, I give and devise, for life, and during his natural life, and at his death to his children the 63.7 acre tract of land which I purchased from J. P. Coley, and which he heired in the division of his father's land which adjoined the lands of C. P. Farmer, J. P. Thigpen and Minnie Johnson and Lide Carter."

By other items of the will, J. Frank Coley devised approximately 500 acres of land to other children, including 210 acres to his son Luther (E. L.) Coley, subject to a charge of $2,000.00, and 182 acres to another son, Paul (N. P.) Coley. The will was executed on July 14, 1926. The testator died November 11, 1926. The sons, Paul (N. P.) Coley and Luther (E. L.) Coley, were appointed executors, qualified and acted as such in settling the estate.

At the time of his death, the testator, J. Frank Coley, left outstanding a mortgage on all his lands to secure the payment of $18,000.00 due in 40 installments to the Atlantic Joint Stock Land Bank of Raleigh. The executors paid off and discharged all debts due by the estate except the Land Bank mortgage on which there was a balance due of $15,877.49 on December 1, 1928. Luther Coley had paid

off and discharged his proportionate part of the mortgage to the Land Bank. The executors and other devisees entered into an agreement by which they endeavored unsuccessfully to pay off the mortgage from the rents and profits of the lands covered by the mortgage.

The executors' account as filed shows the last item of receipts and disbursements to have been entered on January 25, 1929. And it appears that on that date the matter of handling the estate, except as to the mortgage, was completed. However, the final account was not filed until September 11, 1936, and then by N. P. Coley, surviving executor. On that date he was ordered discharged.

Upon failure to meet the payments on the Land Bank mortgage, the full amount became due under the acceleration clause. On May 2, 1930, the Land Bank instituted a foreclosure proceeding in the Superior Court of Wayne County against all the heirs and devisees under the will, including the executors, all unborn persons who have or may have any right in the lands devised under the will of Frank Coley. Answers were filed for all defendants and by guardian *ad litem* for the infants and unborn children of J. W. Coley. The sheriff's return shows service of process "by leaving a copy of the summons and complaint with all parties named within the complaint." In the present action two of the defendants denied service, but neither offered corroboration.

In the foreclosure proceeding the court rendered judgment for the amount due to the Land Bank, ordered foreclosure of the mortgage by a sale of all lands, including the 63.7 acres here involved. The court appointed two eminent lawyers as commissioners and ordered them to make the sale after due and proper advertisement. At the sale Paul Coley and Luther Coley became the last and highest bidders and were declared the purchasers at the price of $12,860.41, subject to taxes. The commissioners reported the sale and recommended its confirmation. The court in due course entered an order confirming the sale and directing title be made to Paul Coley and Luther Coley. They and their wives, by deed of trust, conveyed the lands to a trustee to secure a loan from Prudential Insurance Company of America with which to pay the commissioners for the lands purchased at the sale. The commissioners used the money to satisfy the judgment of the Land Bank.

Thereafter, upon default in the payment of the deed of trust to Prudential, the lands were sold by the trustee at public auction, the Prudential became the purchaser and took deed from the trustee. The Prudential then resold the lands to Luther Coley and wife and took another deed of trust for the purchase money. This deed of trust,

upon default, was also foreclosed and the land again purchased by Prudential. On November 1, 1934, Prudential, for a consideration of $3,000.00, conveyed the 63.7 acre tract of land in which the plaintiffs claimed the remainder to J. W. Coley and wife. J. W. Coley was the life tenant and was the father of the plaintiffs. Hereafter only the one tract of land containing the 63.7 acres is involved.

On November 14, 1935, J. W. Coley and wife executed a deed to C. D. Owens and wife, Lizzie Owens, for the 63.7 acres of land for a consideration of $500.00 cash and the assumption of an encumbrance of $2,700.00. On December 29, 1939, C. D. Owens and wife, for a consideration of $5,000.00, conveyed the land by deed to G. A. Harrison. The children of J. W. Coley and their spouses are plaintiffs in this action. The heirs at law of G. A. Harrison are the defendants.

The plaintiffs ask in this action that the title to the 63.7 acre tract of land be confirmed in them pursuant to this "Bill of Peace," or "Bill of *Qui Timet*," as provided by G.S. 40-10. They allege that Paul Coley, Luther Coley, and J. W. Coley engaged in a fraudulent scheme to divest these plaintiffs of their remainder in the lands after the termination of their father's life estate under Item 5 of their grandfather's will. The plaintiffs allege that because of the fraud, negligence, carelessness, and default on the part of Paul and Luther Coley, the executors, the mortgage to the Land Bank was not paid. They allege that in the foreclosure proceeding and in subsequent transfers, J. W. Coley was permitted to take a deed in fee and thus defeat the plaintiffs' remainder interest. Because of their fraudulent scheme, and their fiduciary relationship, Paul Coley, Luther Coley, and J. W. Coley took title as trustees for the benefit of the plaintiffs. The plaintiffs further allege the records of the various proceedings, and the relationships of the parties charged the defendants with notice of the fraudulent schemes by which their predecessors had acquired title which came to the defendants impressed with the trust; and that in equity the plaintiffs are entitled to have the defendants' claims of title and interest in the tract of land removed.

The defendants deny any fraud in connection with their title or any defect therein, or any knowledge of any fraud or breach of trust on the part of Paul Coley, Luther Coley, or of J. W. Coley, the plaintiffs' father. They rely upon the validity of solemn court proceedings, duly executed and recorded conveyances, and the lapse of time (statute of limitations) to protect them in their ownership and peaceful enjoyment of the property which was purchased by their ancestor from J. W. Coley and wife who held a record title which they assumed and had a right to assume was good.

The plaintiffs introduced evidence as to the value of the lands of J. Frank Coley at the time of the foreclosure under the Land Bank mortgage. Two witnesses as of the date of the hearing, December, 1958, were permitted to testify that the J. W. Coley lands as of the date of foreclosure were reasonably worth $70,000.00. The parties introduced the various records referred to herein.

At the close of all the evidence the court sustained the motion for involuntary nonsuit as to all plaintiffs except Frank Coley, minor. As to him the court submitted issues with respect to (1) the fair market value of the 63.7 acres of land at the time of sale under the Land Bank foreclosure proceeding; (2) whether the executors who bought at the sale acquired title as trustees; and (3) whether G. A. Harrison took with notice of the defects in his title. These issues were answered in favor of Frank Coley. From the judgment dismissing the action as to all plaintiffs except Frank Coley, the plaintiffs appealed, and from the judgment on the verdict in his favor, the defendants appealed.

Paul B. Edmundson, Jr., Henry C. Bourne for defendants, appellants.

Henry C. Bourne, Paul B. Edmundson, Jr., for defendants, appellees.

J. Faison Thomson & Son, By: J. Faison Thomson for plaintiffs, appellants, and for J. Frank Coley, Jr., plaintiff, appellee.

HIGGINS, J. The plaintiffs' appeal challenges the nonsuit as to all plaintiffs except Frank Coley upon the grounds (1) the Land Bank foreclosure sale was void for fraud, collusion, and the breach of trust, and for want of service of process; and (2) Paul Coley, Luther Coley, and J. W. Coley acquired title to the tract of land described in Item 5 of the Will under such circumstances as in equity made them trustees for the plaintiffs' interests as remaindermen.

Two of the plaintiffs now contend they were not served with process in the foreclosure proceeding in 1930. Neither could corroborate the other's claim. The return of the sheriff shows service. The court found that all parties were represented. "When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based." *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239. Any other rule would place solemn judicial proceedings in jeopardy upon the flimsy foundation that one or

more of the parties may have forgotten that process was served. Where the record shows service, as here, the remedy must be by motion in the cause. *Jordan v. McKenzie,* 199 N.C. 750, 155 S.E. 868; *Caviness v. Hunt,* 180 N.C. 384, 104 S.E. 763.

There is no question but that J. W. Coley was properly before the court. He was the father of the plaintiffs, two of whom claim they were not served. He was the life tenant. It is seriously debatable whether service on him as life tenant would not be sufficient even if the remaindermen, his children, were not served in a foreclosure proceeding. *Yarborough v. Moore,* 151 N.C. 116, 65 S.E. 763; *Carraway v. Lassiter,* 139 N.C. 145, 51 S.E. 968.

The plaintiffs allege fraud, collusion, and carelessness in permitting the Land Bank to foreclose the mortgage which the testator placed upon all his real estate and which was unsatisfied at his death. They fail to allege or prove any defense to the foreclosure proceedings. While they allege, they fail to offer proof of actual fraud. Conceding this failure, they contend the inadequate price and the purchase at the sale by the executors, and later by their father, furnish proof sufficient to establish a trust in their favor. In support, they offer two witnesses who looked back from 1958 to 1930 and testified the land was worth seventy thousand dollars 28 years ago. On the contrary, one sale after another, under order of the court, under the power of sale, in deeds of trust and mortgages, fail utterly to disclose any such value. The value now fixed by the witnesses as of 28 years ago shows only too well how much had been forgotten in 1958 about the value of property in 1930. The testimony of value was the result of a backward look after 28 years. "To grant to one whose property is sold by decree of court the right, five years after the sale and confirmation, to attack the sale because of asserted inadequate price would destroy all respect for judicial sales. Decrees of confirmation entered into by courts of competent jurisdiction are entitled to greater respect." *Franklin County v. Jones,* 245 N.C. 272, 95 S.E. 2d 863.

The plaintiffs contend the fraud originated by reason of the purchase of the executors at the foreclosure sale in 1930. Prior to the sale, however, on January 25, 1929, the executors had completed the settlement of the estate in all matters with the exception of the outstanding mortgage to the Land Bank. The will gave the executors discretionary authority to rent all lands, and to suspend the effective date of all devises accordingly until the rents discharged all debts of the estate. On February 14, 1929, all the children of the testator entered into a contract to pay a named trustee semiannual payments which, if carried out, would liquidate the mortgage to the Land Bank

within a period of ten years. Paul Coley made immediate payment of his share in cash. The others agreed among themselves as to the amount each should pay. J. W. Coley agreed to make semiannual payments of $311.30 for the 10-year period as his share. Failure of the parties to make the payments as agreed resulted in a default in the mortgage to the Land Bank.

On May 2, 1930, the Land Bank instituted an action in the Superior Court of Wayne County to foreclose the mortgage, the full amount having become due under the acceleration clause. All devisees were made parties. The court appointed a guardian *ad litem* for the children, born and unborn, of J. W. Coley because of their interest under Item 5 of the will. (The record in this case recites that Paragraph 9 of the complaint in the foreclosure proceeding "Alleges that J. Frank Coley died in 1926, and alleges the terms of the Will." Paragraph 11 "Alleges the names and ages of the children then living of J. W. Coley.") All were made parties to the foreclosure proceeding except Frank Coley who was not born until years later. The judgment of foreclosure recites that "the minor defendants, naming them . . . and unborn persons who may have right in the land (by guardian *ad litem*) have filed answers." The court then rendered judgment for the balance due on the mortgage, decreed foreclosure, and appointed two eminent lawyers commissioners to sell the land, including the 63.7 acre tract here involved.

After due advertisement the commissioners offered the land for sale. Paul Coley and Luther E. Coley became the purchasers for $12,860.41, subject to accrued taxes. After 20 days the court confirmed the sale and ordered the commissioners to execute deed to the purchasers. The deed was executed and recorded on October 8, 1930. On the same day Paul Coley and L. E. Coley, and their wives, executed a deed of trust to Chickamauga Trust Company to secure a loan of $13,000.00 advanced by Prudential Insurance Company of America. The money thus advanced became the purchase price paid to the commissioners and the Land Bank's lien was thus discharged. Later, upon default, the substitute trustee sold under the deed of trust and Prudential purchased and took the substitute trustee's deed. Prudential then sold 172.5 acres of land, including the 63.7 acre tract, to L. E. Coley and wife who executed a deed of trust to secure the purchase price. Another default and another sale placed the title back in Prudential. Prudential then sold the 63.7 acre tract to J. W. Coley and wife. The deed was executed November 1, 1934. (J. W. Coley was the beneficiary under Item 5 of the will and the father of the plaintiffs.) On November 14, 1935, J. W. Coley and wife sold

and conveyed the land to C. D. Owens and wife, Lizzie Pearl Owens, for $500.00 cash and the assumption of a $2,700.00 lien. Mrs. Owens is a sister of J. W. Coley and one of the beneficiaries under the will. On December 29, 1939, C. D. Owens and wife conveyed the land to G. A. Harrison for a consideration of $5,000.00.

G. A. Harrison was a stranger to the Coley family. The transfer from Owens and wife was the first time the land had been free of the encumbrance since the testator put it under mortgage to the Land Bank in 1924. The title to Harrison thus goes back to the mortgage given by the testator to the Land Bank. The legal title has passed by successive steps through foreclosure by order of a court which had jurisdiction of the subject-matter and of the parties. The duly appointed guardian *ad litem* represented the interest of the plaintiffs, including Frank Coley, then unborn.

The record in the foreclosure action showed no defense to a foreclosure sale. All the facts were before the court. The court had before it the will which showed that Paul Coley and Luther Coley were executors. With this knowledge the court ordered its commissioners to approve their purchase at the sale and to convey title to them. For a full discussion of judicial sales and duties of a guardian *ad litem,* see *Franklin County v. Jones, supra,* and the many cases there cited.

The Land Bank mortgage, its foreclosure, and subsequent deeds of trust, foreclosures, and other *mesne* conveyances places the legal title in G. A. Harrison and from him by descent to the defendants. Nowhere along the chain does the record disclose a break or flaw in the legal title. Both parties claim through Frank Coley, the plaintiffs under the will, the defendants under his mortgage and its foreclosure. The foreclosure sale left nothing to pass to the plaintiffs under the will.

The plaintiffs, as an alternate prayer for relief, ask "that this action be considered as a motion in the cause in the foreclosure proceeding." The evidence does not show the court was misled or was not in possession of all the pertinent facts necessary to decision, or that any defense to foreclosure existed, either in law or in fact, save and except two witnesses were found in 1958 who thought the land was worth $70,000.00 in 1930. Otherwise, time has added nothing new.

The plaintiffs make out a defense to their own claim. They allege the execution of the mortgage to the Land Bank. They introduced the judgment roll in the foreclosure proceeding and all the *mesne* conveyances to G. A. Harrison. The record fails to show these documents were introduced for the purpose of attack; but assuming otherwise, the attack fails for want of proof.

The parties have assumed that the minor plaintiff, born 25 years after the testator's death but during the term of the life tenant, could qualify for benefits under Item 5 of the will. The parties likewise have assumed that a guardian *ad litem* could have been appointed to represent his interest. However, in this type of case, under the doctrine of virtual or class representation, the living persons (sisters) in his same classification and with identical interests under the will represented and bound his interest. *McPherson v. Bank,* 240 N.C. 1, 81 S.E. 2d 386. "Without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse,* when one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.*" *Lumber Co. v. Herrington,* 183 N.C. 85, 110 S.E. 656.

Necessarily, purchasers of property, especially land, must have faith in and place reliance on the validity of judicial proceedings. *Franklin County v. Jones, supra; Cherry v. Woolard,* 244 N.C. 603, 94 S.E. 2d 562; *Park, Inc. v. Brinn,* 223 N.C. 502, 27 S.E. 2d 548; *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873; *Morris v. Gentry,* 89 N.C. 248; *Sutton v. Schonwald,* 86 N.C. 198.

For the reasons herein assigned, we hold the judgment of nonsuit was required as to all plaintiffs, including the minor, Frank Coley.

On plaintiffs' appeal, the judgment is

Affirmed.

On defendants' appeal, the judgment in favor of Frank Coley, minor, is

Reversed.

ROY TARLTON AND DEWEY SMITH v. H. M. KEITH AND GRADY EARP.

(Filed 20 May, 1959.)

1. Fraud § 4—

Evidence tending to show that brokers, in pointing out the land on which they had a timber option, through mistake, included timber growing on the land of another, but that the brokers stated there was some controversy as to one of the lines which would be cleared by a survey, *is held* insufficient to make out a cause of action against the brokers for fraud in inducing the purchase of the timber by plaintiffs, there

being no evidence that the brokers acted in bad faith or knew that the boundaries pointed out by them were incorrect, or that the brokers represented the location of the boundaries as a positive assertion.

2. Same—

Scienter and intent to deceive are essential elements of an action for fraud.

3. Cancellation and Rescission of Instrument § 4—

Unilateral mistake, unaccompanied by fraud, imposition, undue influence, or other equity, is insufficient to avoid a contract.

4. Cancellation and Rescission of Instruments § 1—

Where the purchasers of timber have in turn sold the timber to a third party, the remedy of rescission is not available to them, since they cannot put the parties *in statu quo*.

5. Brokers and Factors § 5: Vendor and Purchaser § 26—

Evidence tending to show that brokers, having an option on certain timber, pointed out the timber to plaintiffs and that in reliance on the representations as to the boundaries, plaintiffs paid the purchase price, including commission, and the owner executed timber deed to them, but that through mistake of plaintiffs and defendant brokers a part of the timber pointed out was on the land of another and was not conveyed by the timber deed, without the joinder of the makers of the timber deed or evidence of mistake on their part, is insufficient to make out a cause of action in favor of plaintiffs against the brokers to recover for the shortage.

6. Money Received § 1—

The general rule that money paid under a mistake of fact may be recovered ordinarily as money had and received, does not apply if the person receiving the payment is entitled in equity and good conscience to retain it.

7. Same: Brokers and Factors § 5—

Where brokers, having an option on certain timber, point out the boundaries of the timber to the purchasers but through mistake of fact part of the timber pointed out is on the land of an adjacent owner, the purchasers, upon the later discovery of the mistake, are not entitled to recover of the brokers for the commission paid when the purchasers have sold the timber actually conveyed for more than they paid therefor, since the brokers in equity and good conscience are entitled to retain the commission for their services.

8. Pleadings § 24—

To establish a cause of action there must be *allegata* and *probata*, and the two must correspond.

APPEAL by defendants from *Olive, J.*, October Mixed Term 1958 of UNION.

Civil action to recover the sum of $3,000.00.

Plaintiffs' complaint alleges in substance: On 6 June 1957 defendants contacted Roy Tarlton, one of plaintiffs, and proposed to sell him a tract of timber in Sampson County, North Carolina. Plaintiffs and defendants met on the land, and defendants carried plaintiffs around the tract of timber, and showed them marked lines chopped with an axe, and easily discernible to the naked eye. Defendants represented to plaintiffs that the land they pointed out was the land upon which they were selling the timber; that they had an option to buy the timber for $17,500.00, and would have to have a 5% commission for selling it.

Plaintiffs, after viewing the timber, bought it, and issued their cheque in payment in the sum of $18,375.00. Plaintiffs delivered the cheque to Taylor & Morgan, attorneys at law, of Lillington, with instructions to hold it, until the title to the timber could be checked, and a timber deed made to them, and if the timber deed was good, Taylor & Morgan should turn over the cheque to defendants, and file the timber deed for recordation.

A timber deed was executed and delivered by Luby Denning and wife, the owners, to plaintiffs, conveying all pine timber on the land measuring ten inches or more in diameter, and duly recorded. Whereupon, the cheque was paid.

About a week after the timber deed was executed and delivered, plaintiffs were informed that the timber deed did not cover all the timber pointed out to them by defendants. Thereafter a survey made of the timber conveyed in the deed showed that 45 acres of fine timber pointed out by defendants as being part of the timber they offered for sale was not included in the timber deed, but belonged to the Denning estate.

Defendants knew, or in the exercise of due diligence should have known, that the 45 acres of timber was not on the land, whose timber they were offering for sale, but was on the land of the Denning estate, but they showed plaintiffs this additional 45 acres of timber with the intent and purpose of inducing plaintiffs to buy the timber they had for sale. That plaintiffs relied upon defendants' representations, and were induced thereby to pay more for the timber than they would have paid, if defendants had told them the truth about the timber.

The 45 acres of fine timber was worth $3,000.00. Wherefore, plaintiffs pray to recover that amount from defendants.

Defendants in their answer admit that they told plaintiffs the tract of timber could be bought for $17,500.00 plus a 5% commission to them, and that a survey showed that 45 acres of fine timber pointed out by them as being part of the timber plaintiffs were buying was

not included in the timber deed plaintiffs received, but belonged to the Denning estate. Defendants in their answer allege: "The said defendant Grady Earp advised and informed the plaintiffs that the approximate locations pointed out to the plaintiffs by the said Earp were those that had been represented to him by the owners of the said lands, and did then and there specifically called (sic) to the attention of the plaintiffs that there was a corner or lot of land located on the back line that did not go with the said tract and that the same would be located by the owners when the survey was made, and that at the said time it was understood and agreed between all of the parties that the transaction would not be closed until such time as the owners of the lands had completed an accurate survey of the same."

After the jury had been impaneled, and the pleadings read, defendants demurred *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. In response to an inquiry from the court, counsel for plaintiffs replied that he was proceeding on tort and not on fraud. Whereupon, the court overruled the demurrer.

This is a summary of plaintiffs' evidence: Luby Denning and his wife owned the tract of timber. They sold it to defendants, but they made the deed for it to plaintiffs. Before selling it to defendants Luby Denning went back of his house, and pointed out the approximate location of the land. He did not go with them down the line, because he didn't know where it was. He had the land surveyed on 16 May 1957 and lines clearly cut all around it. When the survey was made, two of the surveying party went 25 or 30 yards beyond his corner. He doesn't know how far they chopped the line beyond his corner, but "it wasn't too long a distance in there." At the time Luby Denning received the cheque for the timber and gave the deed, the lines had been chopped out, and surveyed.

On 6 June 1957 Grady Earp contacted Roy Tarlton in regard to the sale of a tract of timber in Sampson County, North Carolina. The next day plaintiffs and defendants met, and Earp showed plaintiffs the timber.

This is a summary of Roy Tarlton's testimony: *DIRECT EXAMINATION.* "I believe there was 40 or 45 acres in the area that was pointed out to me by the defendant Earp and that not included in my deed." In his opinion, there was 100,000 feet of timber on this 40 or 45 acres, which had a market value at the time on the stump of $30.00 a thousand. *CROSS-EXAMINATION.* The first time he and Earp went to the timber it was raining. They rode along the road in a car. The road is the eastern boundary of the tract of land. Earp

pointed out to him the approximate location of the lines, saying that is where the owner pointed out to him the lines were. The next day plaintiffs and defendants went back to the timber. Plaintiffs and Earp walked around the lines. The lines around all the timber plaintiffs got by deed were cut out. Earp said, "the owner had done had it surveyed. At any rate, he told me that the owner was having it surveyed before he sold the timber." Tarlton testified: "I knew that the reason he was having it surveyed was to locate the lines. I walked all around the lines around the property that I actually got that day, except about 100 yards on the line over on the back where I showed you." Earp walked past a corner. The line was cut past that corner two or three times the width of this courtroom. Earp said the Denning estate had timber on the back line of this timber, beyond the back corner he showed us. He asked Earp if he couldn't buy that timber for him. Tarlton testified: "When Mr. Earp and myself were walking around this timber, he told me that the lines that he was pointing out to me was (sic) the lines that the owner had pointed out to him." After receiving the deed plaintiffs had the timber surveyed, and discovered their deed did not cover the 40 or 45 acres of timber belonging to the Denning estate. Earp told him, after this survey, it had been misrepresented to him, and that he had misrepresented it, and that he would make adjustment on it. A few days after plaintiffs' survey, H. M. Keith told Dewey Smith they were going to make some adjustments on it. In September he (Tarlton) saw Earp, and asked him if they would pay plaintiffs $1,000.00 to help them come out on the deal. We talked it over and decided if they (defendants) were misinformed about the line to pay us $1,000.00, and he agreed to it. He did not tell Earp that they had already sold the timber for $19,000.00, which was more than they paid for it. *REDIRECT EXAMINATION.* They paid for the timber by cheque for $18,375.00. Over defendants' objection and exception, Tarlton testified that he thought he was buying the 40 or 45 acres of timber of the Denning estate at the time he gave the cheque.

This is in substance the testimony of Dewey Smith: Grady Earp carried us around the boundaries, except one little place on the back side. He showed us the lines. The 45 acres of land, that were later discovered to be part of the Denning estate, was pointed out to us by him as being in the land we were buying. Over defendants' objection and exception, he testified that at the time the cheque was left with Taylor & Morgan, attorneys at law, to check the title, he thought the 45 acres was included in the land they were buying. *CROSS-EX-*

AMINATION. He walked around the timber. There was a clear path all around the timber they got under the deed.

On 20 June 1957 L. T. Bryant surveyed the timber for plaintiffs by the deed they received from Luby Denning and wife. There was about 160 acres in the tract of land. He did not survey all around the property. He found a chopped line all around the property that was included in the timber deed.

Grady Earp testified on cross-examination: "The first time I took them through there I was under the impression that this 45 acres was in the tract. . . . I showed them part of the 40-acre tract. . . . Mr. Denning pointed out to me." He also testified on direct examination: "I knew approximately where the lines were. I showed him (Tarlton) as Mr. Denning has shown me, and exactly in the same manner he had shown me. . . . I told Mr. Tarlton at the time there was a disputed area. . . . I told him of a survey being made."

H. M. Keith testified: "Mr. Smith asked me, 'don't you boys think you owe us some adjustment or some refund on this timber transaction of the Denning timber?' I said, 'if it was misrepresented, we do.' There was no further conversation to my recollection. . . . I did not misrepresent any timber to the plaintiffs."

Defendants offered other evidence in support of the allegations of their answer.

The following issues were submitted to the jury:

"1. At the time the purchase price for the timber was paid, did plaintiff reasonably understand that the timber on the Denning Estate tract was included in the acreage of timber purchased?

"2. What amount, if any, are the plaintiffs entitled to recover of the defendants?"

The jury answered the first issue Yes, and the second issue $2,000.00.

From judgment entered on the verdict, defendants appeal.

Coble Funderburk for plaintiffs, appellees.

Taylor & Morgan for defendants, appellants.

PARKER, J. Defendants assign as error the overruling of their motion for judgment of nonsuit renewed at the close of all the evidence. G.S. 1-183.

The timber deed from Luby Denning and wife to plaintiffs is not in the Record. There is no suggestion that the description of the tract of timber in this deed was defective, or did not disclose the correct boundaries of the tract of timber, or did not convey to plaintiffs all the timber owned by Luby Denning and wife on this tract of land.

L. T. Bryant, a surveyor and witness for the plaintiffs, illustrated his testimony by a sketch of the land drawn on a blackboard. We do not have the benefit of such sketch. No copy of it was made, and inserted in the Record.

Defendants admitted in their answer that a survey made by L. T. Bryant after the timber deed was executed and delivered to plaintiffs showed that 45 acres of timber pointed out by them to plaintiffs on 7 June 1957 as being part of the timber plaintiffs were buying was not included in the timber deed, but said 45 acres of timber belonged to the Denning estate. Plaintiffs' evidence is that, when Grady Earp, one of the defendants, was pointing out the boundaries of the tract of timber to them before they purchased it, he said the lines he was pointing out were the lines the owner had pointed out to him.

Luby Denning on 16 May 1957 had his land surveyed, and his lines clearly cut all around it. When this survey was made, two of the surveying party went 25 or 30 yards beyond his corner, and chopped a line, apparently in the tract of timber of the Denning estate. It would seem that this is what caused Grady Earp to point out to plaintiffs on 7 June 1957 that the tract of 45 acres of timber of the Denning estate was part of the Luby Denning timber.

However, there is no evidence that when Grady Earp pointed out the 45 acres of timber belonging to the Denning estate as being part of the Luby Denning timber, he, or his co-defendant H. M. Keith, knew the representation was false, or that he made it recklessly, without any knowledge of its truth, and as a positive assertion. Hence, it would seem as a necessary consequence there was no intent on the part of the defendants to deceive. There is no evidence that defendants resorted to any artifice to induce plaintiffs to forego making inquiry as to the lines of the tract of timber. *Scienter* and intent to deceive are essential elements of actionable fraud. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131; *Ebbs v. Trust Co.*, 199 N.C. 242, 153 S.E. 858. Plaintiffs' counsel acted properly in stating to the trial court that he was not proceeding on the ground of fraud, for the reason that plaintiffs' evidence, and so much of defendants' evidence as is favorable to plaintiffs, considered in the light most favorable to plaintiffs, are not sufficient to make out a case of actionable fraud.

The case was tried on the theory that if at the time the purchase price of the timber was paid, plaintiffs reasonably understood that the 45 acres of timber on the Denning estate was included in the acreage of timber bought, they were entitled to recover from defendants. And on the second issue the court instructed the jury: "The measure of damages would be the value of that timber on the Denning Estate

tract of the approximately 45-acre tract, at the time that the purchase price was paid."

The trial judge instructed the jury on the first issue, in part, substantially as follows: The plaintiffs contend that you should be satisfied by the greater weight of the evidence that the defendant Earp on 7 June 1957 pointed out the timber to them, including the timber on the 45 acres on the Denning estate, which the defendants did not have any option upon, that they paid the purchase price honestly believing that the timber they were buying included the timber on the 45-acre tract, "*that there was a mistake, and that they never did come to any meeting of the minds,*" and that the jury should answer the first issue, Yes.

Defendants had an option to buy the timber for $17,500.00, and were to have a 5% commission for selling it. When plaintiffs agreed to buy the timber, they delivered the cheque in payment for it to Taylor & Morgan, attorneys at law, with instructions to hold it, until title to the timber could be checked, and a timber deed made to them. The owners of the timber deeded it to plaintiffs. Plaintiffs do not assail the timber deed or any of its provisions. The owners of the timber conveyed by them to plaintiffs are not parties, and plaintiffs seek no relief against them. The contract was the purchase and sale of timber, consummated by deed. Certainly the makers of the timber deed are essentially involved in determining as to whether or not there was any meeting of the minds in the purchase and sale of the timber.

The theory of the trial was that if the purchase price of the timber was paid under a mistake of fact on the part of plaintiffs and defendants alone — there is no evidence and no contention that there was any mistake or any false or fraudulent representation on the part of the makers of the timber deed—, there was no meeting of the minds of the parties, and the jury should answer the first issue, Yes, and then proceed to answer the second issue.

This Court has not adopted the doctrine that unilateral mistake, unaccompanied by fraud, imposition, undue influence or like circumstances of oppression is sufficient to avoid a contract. *Cheek v. R. R.*, 214 N.C. 152, 198 S.E. 626. In that case it is said: "The mere mistake of one party alone is not sufficient to avoid the contract. (Citing authority). To have that effect, the mistake must be mutual."

In *Ebbs v. Trust Co., supra*, it is said: "Ordinarily the right to rescind a contract is built upon fraud, mutual mistake or mistake of one party induced by the fraudulent or false representations of the other."

In September 1957, or before, plaintiffs sold for $19,000.00 the tim-

ber purchased by them in June 1957 for $18,375.00. The remedy of rescission is not available to plaintiffs, because the parties cannot be placed *in statu quo. Dean v. Mattox,* 250 N. C. 246, 108 S. E. 2d 541.

Accepting as true for the purpose of considering the motion for judgment of nonsuit, the evidence of plaintiffs that they paid the purchase price for the timber under a mistake of fact on the part of plaintiffs and defendants, but not on the part of the makers of the timber deed, and in the honest belief that the 45 acres of timber belonging to the Denning estate was included in the timber they purchased, and that shortly after the purchase of the timber plaintiffs sold it for more than they paid for it, does not entitle them to avoid the contract, and to recover money from the defendants.

Generally, when money is paid to another under the influence of a mistake of fact, and it would not have been paid had the person making the payment known that the fact was otherwise, the money may be recovered. The basis of such recovery is that money paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it. 4 Am. Jur., Assumpsit, Sec. 24. In such a case the proper remedy is an action for money had and received. 4 Am. Jur., Assumpsit, p. 514. This rule is subject to certain well defined exceptions, among them, that a payment induced by mistake cannot be recovered if the payee, in equity and good conscience, is entitled to retain the money received. 40 Am. Jur., Payment, Sec. 188.

In the case *sub judice,* plaintiffs paid in June 1957 for the timber $18,375.00 — of which amount $17,500.00 was received by Luby Denning and wife, the owners of the timber, and a 5% commission amounting to $875.00 by defendants. In September 1957, or before, plaintiffs sold this timber for $19,000.00. Plaintiffs seek no recovery of the $17,500.00. The defendants by their activities consummated the sale of the timber to plaintiffs. Defendants, in equity and good conscience, are entitled to retain the 5% commission for their services. The evidence is insufficient to support a recovery from defendants for money had and received.

McBryde v. Lumber Co., 246 N.C. 415, 98 S.E. 2d 663, relied upon by plaintiffs as stating the law of this case, is clearly distinguishable. That case holds that where the grantors in a timber deed go upon the land, point out the boundaries, and mark trees as being within their boundaries, both the grantors and the grantee, who cut the timber within the boundaries designated, are liable to the owner of the adjacent land for trespass as joint tort-feasors, if any of the trees so cut stood on land belonging to the adjacent owner.

To establish a cause of action there must be *allegata* and *probata,*

and the two must correspond with each other. *Lumber Co. v. Chair Co.*, 250 N. C. 71, 108 S. E. 2d 70; *Whichard v. Lipe*, 221 N. C. 53, 19 S.E. 2d 14. Plaintiffs evidence, and defendants' evidence favorable to them, considered in the light most favorable to plaintiffs, do not make out a case against defendants, and the trial judge committed error in overruling defendants' motion for judgment of nonsuit made at the close of all the evidence.

Reversed.

MAGGIE C. DARROCH v. HAROLD E. JOHNSON, WINFRED CHALMERS AND BURNETT CHALMERS.

AND

ALICE H. COLVILLE v. HAROLD E. JOHNSON, WINFRED CHALMERS AND BURNETT CHALMERS.

AND

A. K. DARROCH v. HAROLD E. JOHNSON, WINFRED CHALMERS AND BURNETT CHALMERS.

(Filed 20 May, 1959.)

1. Appeal and Error § 38—

Assignments of error not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Trial § 36—

The issues arise upon the pleadings only.

3. Automobiles § 35— Complaint held to allege joint and concurring negligence.

The complaints alleged that plaintiffs were guests in an automobile, traveling westwardly at a lawful speed on its right side of the highway, that two cars traveling easterly, close together, approached on a curve at excessive speed, that the first car was partly to the left of the center of the highway and sideswiped the car in which plaintiffs were riding, and that immediately thereafter it was struck by the second car, which was also partly over its center of the highway. *Held:* The allegations are sufficient to support the averments that plaintiffs were injured by the joint and concurring negligence of the drivers of the east-bound cars and to support the submission of an appropriate issue thereon.

4. Negligence § 6—

An injury may be the result of separate and distinct proximate causes acting independently of each other if they join and concur in producing the result complained of.

5. Automobiles § 43: Negligence § 21—

In an action alleging the joint and concurring negligence of two

drivers as the proximate cause of plaintiffs' injuries, there being no conflict in the evidence as to the negligence of one of the drivers, the submission of an issue as to whether plaintiffs' injuries were the result of the joint and concurring negligence of both defendants enables the other defendant to present his contentions that he was not negligent or that his negligence was not the proximate cause of the injuries, and his objection to the form of the issue cannot be sustained.

6. Automobiles § 46—

The charge of the court in this case on the aspect of joint and concurrent negligence and proximate cause *held* without error.

7. Automobiles § 38—

Testimony of witnesses, who had observed a car approaching for a distance of some 75 to 100 yards, that the car was traveling at a speed of 60 miles per hour or more, is competent, its weight and credibility being for the jury.

APPEAL by defendant Harold E. Johnson from *Thompson, Special Judge,* September Civil Term 1958 of HARNETT.

These actions were instituted individually by Maggie C. Darroch, Alice H. Colville and A. K. Darroch, to recover for personal injuries alleged to have been sustained as the result of motor vehicle collisions by reason of the joint and concurrent negligence of the defendants, which collisions occurred on Highway No. 27, near Pineview School, in Harnett County, North Carolina, on 9 September 1956.

The plaintiffs were passengers in a 1956 Mercury automobile being driven by the owner, James Colville, westwardly along Highway No. 27, near Pineview School. The plaintiff A. K. Darroch was riding in the front seat with the driver; the plaintiffs Maggie C. Darroch and Alice H. Colville were riding in the rear seat. Two children, eight and sixteen years of age, were riding in the middle of the front and rear seats. The plaintiffs Darroch are husband and wife; the plaintiff Colville is the wife and Maggie C. Darroch the sister of the owner and driver of the vehicle.

The complaints of the respective plaintiffs are substantially the same and, by consent of the parties, the cases were consolidated for trial.

About 1:30 p.m. on 9 September 1956 the Mercury automobile in which the plaintiffs were riding was proceeding in a westwardly direction when on a curve in the road it met the vehicles of the defendants, a 1941 Ford automobile owned by the defendant Burnett Chalmers and being operated at the time by the defendant Winfred Chalmers (neither of whom filed answers in these actions), and a 1956 Ford automobile owned and operated by the defendant Johnson. Both of these automobiles were proceeding in an easterly direction.

The evidence of the plaintiffs tends to show that the Mercury automobile was traveling about 40 to 45 miles per hour, on its right side of the road; that the cars of the defendants came around the curve "very close together"; that the 1941 Ford was leading, being followed closely by the 1956 Ford; that as the 1941 Ford came around the curve it crossed over the center line or partly into its left lane and sideswiped the Mercury automobile (the defendant Johnson's evidence is also to this same effect); that the Mercury automobile moved partly onto the shoulder of the road in an attempt to avoid being hit; that after the Mercury was sideswiped by the 1941 Ford, the Mercury and the 1956 Ford collided. The 1941 Ford, after sideswiping the Mercury, proceeded a short distance and overturned.

The plaintiffs' evidence further tends to show that in the collision with the 1941 Ford the plaintiffs were not personally injured; that their personal injuries were inflicted in the collision between the Mercury automobile and the 1956 Ford automobile.

The evidence is sharply conflicting as to where on the road the collision between the Mercury and the 1956 Ford actually occurred. Plaintiffs' evidence tends to show that the Mercury traveled only about two and one-half car lengths after being sideswiped by the 1941 Ford; that the 1956 Ford was also across the center line (its left side of the road) by as much as eighteen inches to two feet when it and the Mercury collided; that the Mercury automobile was moving very slowly at the time; that the collision knocked the Mercury across the road into the lane for eastbound traffic and that the Mercury and the 1956 Ford came to rest facing east; that the front of the Mercury car was resting on the highway, slightly over the center line, in the eastern lane.

The plaintiff A. K. Darroch and the witness James Colville were allowed to testify, over the objection of the defendant Johnson, that the two Ford automobiles were traveling in excess of 60 miles per hour as they were coming around the curve. Plaintiff A. K. Darroch testified: "I was riding with James Colville * * * in the front seat on the right-hand side when we were involved in the collision. * * * the road was practically straight where we were at the time. There was a curve up the road ahead of us approximately 75 yds. The curve was to our left. I viewed two cars coming around this curve at a terrific rate of speed, facing us. Just as they drove around the curve, they went across the line to our side of the road, and the first car sideswiped the left-hand fender and light of our car, went on past us, and turned over. Right after the first car struck us, the second car hit us — ca-bam! * * * This other car hit us right head-on, right directly behind the first

car. When the second car hit our car * * * it knocked it clean around to our left. At the time our car was hit by the second car, our car was to the right of the center line; we were to the right all the time."

The defendant Johnson's evidence tends to show that he was traveling some 75 to 100 yards behind the 1941 Ford; that when he saw the 1941 Ford and the Mercury collide he slowed down; that he was at all times on his right side of the highway; that the Mercury was across the center line at the time of the second collision.

The witness Ward, a State Highway patrolman, testifying for the defendant Johnson, gave a description of the physical facts at the scene of the collision, including a statement that a trail of oil led from the "north lane into the south lane" in a southwesterly direction (that is, from the Mercury's lane of travel to the 1956 Ford's lane of travel). On cross-examination this witness testified that in his interrogation of the defendant Johnson at the hospital after the wreck, Johnson said "he was trying to catch that '41 Ford. He told me how far he had been chasing it. There was a store back up the road — I don't know the distance — they were at the store when the car came by. He told me he had been chasing that car from that store to where the impact was. He was rational, sober, when he talked to me. * * * He came by the store * * * there were two or three colored boys with Johnson. There were two in Johnson's car I know of. * * * The colored boy (said) 'There goes my car. Let's catch it.' They got in the car and they were in the process of catching the car when the wreck happened."

The testimony of the defendant Johnson reveals that the defendant Burnett Chalmers was picked up at the store when Johnson and his companions, Odell Doby and Elbert Hall, left there. Burnett Chalmers was the owner of the 1941 Ford that was being driven by Winfred Chalmers at the time of the wreck.

Elbert Hall, a witness for the defendant Johnson, testified on cross-examination that the 1941 Ford had been gone about five minutes when they left the store; "I next saw the Ford at Johnsonville colored school. * * * Johnson started to stop. The colored boy in the back wanted to get his car * * *. At the time we came up on Chalmers at the school house he was not going as fast as we were going. * * * We came within 150 yards of it * * *. The guy in the back wanted to get his car; that was his intention of wanting to ride that far with us. At Johnsonville school is where he said the boy would probably go to, his brother not having any operator's license; he said he was intoxicated and he would like to get his car before he killed someone or himself."

At the trial the defendant Johnson testified that he was not racing or trying to catch the 1941 Ford; that he did not know who owned the 1941 Ford until after the wreck.

The cases were submitted to the jury against Winfred Chalmers and Harold E. Johnson only, and the jury was instructed not to consider any allegations against Burnett Chalmers.

The defendant Johnson tendered the following issues which were refused: "1. Was the plaintiff injured by the negligence of the defendant Johnson, as alleged in the complaint? 2. What amount of damages is the plaintiff entitled to recover?"

The following issues were submitted in each case: "1. Was the plaintiff injured by the joint and concurrent negligence of the defendants Winfred Chalmers and Harold E. Johnson, as alleged in the complaint? 2. What amount of damages, if any, is the plaintiff entitled to recover?"

The jury answered the issues in favor of the plaintiff in each of the three cases and judgments were entered accordingly.

The defendant Johnson appeals, assigning error.

Edgar R. Bain and Wilson & Johnson for appellees.
Dupree & Weaver and Walter Lee Horton, Jr., for appellant.

DENNY, J. The defendant sets out in the record on this appeal forty-four assignments of error based on forty-five exceptions. However, he has not brought forward in his brief assignments of error Nos. 3, 4, 7 through 14, 39, 41 and 42. Hence, these assignments of error and the exceptions upon which they are based are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562; *Harmon v. Harmon,* 245 N.C. 83, 95 S.E. 2d 355.

Assignments of error Nos. 15 and 16 are directed to the refusal of the court to submit the issues tendered by the appellant and to the issues submitted by the court.

It is well settled that issues arise upon the pleadings only and not upon the evidential facts. G.S. 1-200; *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; *Howard v. Early,* 126 N.C. 170, 35 S.E. 258; *Fortesque v. Crawford,* 105 N.C. 29, 10 S.E. 910; *Wright v. Cain,* 93 N.C. 296; *Miller v. Miller,* 89 N.C. 209; *McElwee v. Blackwell,* 82 N.C. 345.

In the instant cases there can be no doubt about the pleadings in each case being so cast as to allege that the respective injuries sustained by each of the plaintiffs "were due to and were the direct result of the joint and several negligent acts of the defendants which

concurred and combined to proximately cause the injuries sustained by the" respective plaintiffs.

The complaint in each case sets out in detail the acts of the respective defendants Winfred Chalmers and Harold E. Johnson, which each plaintiff alleges "combined and concurred and proximately caused and produced said collision and the injuries therein sustained by this plaintiff, and that by reason of the joint and concurring negligence of said defendants the plaintiff has been seriously and permanently damaged and injured * * *."

In the case of *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690, the plaintiff was a passenger in a car operated by one McHorney, which was being driven southwardly on Highway No. 170, in Currituck County. Another car operated in the opposite direction by W. M. Wooten ran head-on into the McHorney car. This collision, the plaintiff alleged, "set into sequence a chain of events * * * which proximately resulted in injuries to the plaintiff." Immediately following the first collision in which plaintiff suffered some injury, a Dodge truck driven by Adam Layden negligently ran into the rear of the McHorney car and knocked it sidewise on the road, inflicting additional injuries. Shortly after the Layden collision and while McHorney's car was immobile on the right-hand side of the highway, Clyde C. Scaff, driving a 1949 Ford convertible southwardly along the highway, negligently ran into the side of McHorney's car, inflicting additional injuries to plaintiff.

The complaint alleged that all three of the defendants were jointly, concurrently and successively negligent in proximately causing the injuries to the plaintiff. Separate demurrers were filed by the defendants for dual misjoinder of parties and causes of action. The demurrers were overruled and they appealed. The appellants took the position that the negligence of Wooten came to an end before the Layden truck struck the McHorney car and that the negligence of both Wooten and Layden had spent itself before the Scaff car came upon the scene, and that, therefore, the negligence of each defendant was separate and distinct from the negligence of the others, resulting in three separate and distinct causes of action against three separate and disconnected defendants. In speaking for the Court, *Stacy, C. J.,* said: "It will be noted the complaint alleges a sequence of events which successively, concurrently and jointly produced the plaintiff's injuries. The defendants are sought to be held liable as joint tort feasors. *Levins v. Vigne,* 339 Mo. 660, 98 S.W. 2d 737, and 4 Blashfield, Sec. 2552. The plaintiff alleges successive, joint and concurrent torts which in their cumulative effect produced her injuries.

"There may be one or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors. *White v. Carolina Realty Co.*, 182 N.C. 536, 109 S.E. 564."

In light of the facts in the case now before us, it would seem the plaintiffs were justified in alleging that their respective injuries were caused by the joint and concurrent negligence of the defendants. Therefore, they had the right to have the issues as raised by the pleadings submitted to the jury.

In *Potato Co. v. Jeanette,* 174 N.C. 236, 93 S.E. 795, quoting from *Clark v. Guano Co.,* 144 N.C 64, the Court said: " 'The court below need not submit issues in any particular form. If they are framed in such a way as to present the material questions in dispute, and so as to enable each of the parties to have the full benefit of his contention before the jury, and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute is fully met.' "

The appellant herein contends that he was not permitted to present his contentions to the jury under the issues submitted.

In the case of *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814, the plaintiff's intestate was struck by the car of one defendant and carried on the fender thereof for some 50 to 70 feet before rolling off and being struck by the car being operated by the other defendant. The first issue submitted to the jury was: "1. Was the death of plaintiff's intestate caused by the negligence of the defendants, or any of them, as alleged in the complaint, and if so, by which defendant or defendants? Answer: 'Yes, all three.' " Both defendants appealed. The defendant Hunter assigned as error the issues as submitted. The Court said: "This assignment of error cannot be sustained since the issues afforded full opportunity to the appellant to present his theory of the case, namely, the absence of negligence on his part and the presence of contributory negligence on the part of the intestate."

In the instant case the defendant was not in any manner prevented from presenting his contention to the effect that he was not negligent. This he did, but, of course, was compelled to do so in light of the sharply conflicting evidence — conflicting evidence which had to be resolved by the jury. There was, however, no conflicting evidence as

to the negligence of the defendant Winfred Chalmers. These assignments of error are overruled.

Assignments of error Nos. 33, 36, 37 and 38 are to various portions of the charge relating to negligence and joint and concurring negligence, which cover several pages of the record and will not be set out herein. However, in our opinion, the parts of the charge complained of in these assignments of error were not prejudicial to the appellant's rights. It is clear that under the instructions of the court, before the jury could determine whether the joint and concurrent negligence of the defendants proximately caused the injuries to the plaintiffs, the jury was required to determine whether or not the respective defendants were negligent and whether such negligence was the proximate cause or one of the proximate causes that produced the injuries to the plaintiffs. Hence, we hold there is no merit in these assignments of error.

The appellant's assignments of error Nos. 1, 2, 5 and 6 are directed to the admission of the testimony of the witnesses James Colville and A. K. Darroch to the effect that in their opinion the defendant Johnson was operating his car at the time he came around the curve in the highway, just before the collision, at a speed of 60 miles per hour or better, citing *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821.

In the *Fleming* case, the witness, who was sitting in her husband's parked car, testified that she did not see the Twiggs car until she looked back and it was within seven to nine feet of the back of her car and she looked away before the Twiggs car hit her father who had just walked behind her car. This Court held her testimony as to the speed of the Twiggs car was without probative value. This is a far cry from observing a car or cars approaching the witnesses in the instant case for a distance of 75 to 100 yards. The evidence complained of was admissible, its weight and credibility was for the jury. *Lookabill v. Regan,* 247 N.C. 199, 100 S.E. 2d 521, and cited cases. These assignments of error are overruled.

The remaining assignments of error have been carefully examined and in our opinion they present no prejudicial error that would justify a new trial.

In the trial below there was no error in law.

No Error.

ENTWISTLE *v.* COVINGTON.

WILLIAM HARRY ENTWISTLE; GEORGE P. ENTWISTLE; MARY ENTWISTLE THOMPSON; AND JOHN W. C. ENTWISTLE v. JOHN W. COVINGTON, SR., EMMA McCULLEN COVINGTON, AND JOHN W. COVINGTON, SR., EXECUTOR OF THE WILL OF LEAKE S. COVINGTON.

(Filed 20 May, 1959.)

1. Wills § 31—

The intent of testator as gathered from the whole instrument will be given effect as the paramount aim in the interpretation of a will, unless such intent is contrary to some rule of law or at variance with public policy.

2. Same—

In ascertaining the intent of testator, the language will be considered in the light of the conditions and circumstances existing at the time the will was made.

3. Same—

In order to ascertain the intention of testator it is permissible to transpose words, phrases or clauses, or to disregard or supply punctuation, or to supply words, phrases or clauses when the sense of the language used as collected from the context manifestly requires it.

4. Wills § 34b— Will held not to have designated persons who were to take in event of prior deaths of residuary legatees, and testator died intestate in regard thereto.

Testator, unmarried, was living with three unmarried sisters at the homeplace. The three unmarried sisters, who were younger than testator, predeceased testator, and at the time of testator's death he was living at the homeplace with a brother and the brother's wife. The residuary clause provided that the residue of the estate should go to the three unmarried sisters, naming them, ". or to those who reside at our homeplace, Glenwood. at the time of my death." *Held:* The periods after the name of the last sister and the name of the homeplace must be disregarded, and the effect of the clause is to provide for survivorship among the three sisters named, rather than to take the residuary estate to any one living with testator at the homeplace at the time of his death, and therefore testator died intestate as to the property embraced within the residuary clause.

5. Wills § 32—

The presumption against partial intestacy is a rule of construction to ascertain testator's intent and does not authorize the court to make a will or to add to a testamentary disposition something which, by reasonable inference, is not there.

6. Wills § 34b—

In order to provide against the lapse of a legacy by reason of the prior death of the beneficiary, the testator must provide for the substitution or succession of some other recipient, either expressly or in terms from which it can be ascertained with sufficient clearness what person or persons he intends to take by substitution.

ENTWISTLE *v.* COVINGTON.

APPEAL by defendants from *Fountain, Special Judge,* November Special Term 1958 of RICHMOND.

This is an action instituted pursuant to the provisions of G.S. 1-253, *et seq.*, to obtain a declaratory judgment construing the last will and testament of Leake S. Covington, deceased.

Leake S. Covington died testate on 3 January 1958 at the age of 84. He left a will dated 20 March 1940 which was duly admitted to probate in common form in the office of the Clerk of the Superior Court of Richmond County, North Carolina, which provided as follows:

(1) Specific bequests of $1,000 each to the Methodist Church of Rockingham, North Carolina, and the Richmond County Memorial Hospital.

(2) Specific bequests of $5,000 each to his brother, John W. Covington, Sr., and his sisters, May F., Faith L. and Elna G. Covington. He then stated, "Should any of them predecease me, in that event the sum willed them ($5,000.00) shall be added to the residue of my estate."

(3) A specific bequest of one "fifty dollar maturity value U. S. Saving E Bond" to a family servant, Joe Adams.

(4) "The residue of my estate anything and everything of value I will and bequeath — to my sisters May S., Faith L. & Elna G. Covington. or to those who reside at our homeplace, Glenwood. at the time of my death."

(5) John W. Covington, Sr., was appointed executor, to serve without bond.

Leake S. Covington had four sisters — Mrs. Hannah Covington Entwistle, May S. Covington, Faith L. Covington, and Elna G. Covington — all of whom predeceased him, and one brother, John W. Covington, Sr., who survived him and who, with his wife was allegedly living at Glenwood with Leake S. Covington at the time of his death. Both John W. Covington, Sr. and his wife are defendants in this action. Mrs. Hannah Covington Entwistle, whose husband was well-to-do financially and who was not mentioned in the will, left four children surviving her and they are the plaintiffs in this action.

His Honor heard the testimony of witnesses and made the following findings of fact and conclusions of law, among others:

"4. That in 1940 and for many years prior thereto Leake S. Covington and his sisters, May S., Faith L. and Elna G. Covington, lived at their home, Glenwood, as a devoted family unit until the death of May (at the age of 69) in 1944; that thereafter, Faith L. and Elna G. Covington remained in the home with Leake S. Covington until the death of Faith L. (at the age of 70) in 1949, and thereafter, Elna

G. and Leake S. Covington remained in the home until the death of Elna (at the age of 72) in 1953. That neither the testator nor the three named sisters had issue surviving and neither was ever married. * * *

"9. That it was Leake S. Covington's intent as expressed in his will and it was his dominant purpose with respect to the residue of his estate as expressed in the residuary paragraph of his will to bequeath and devise his residuary estate so that it would wholly survive among the three above-named sisters so long as they or any one of them should be living and residing at Glenwood.

"10. That in the residuary paragraph of Leake S. Covington's will, the clause reading: 'or to those who reside at our homeplace, Glenwood, at the time of my death' was intended to be and was a clause referring to and limited to the three sisters, May, Faith and Elna, and was intended to accomplish and effective to accomplish complete survivorship of the residuary estate to the three said sisters so long as they or any one of them should be living and residing at Glenwood, and was not intended to operate and not operative for the benefit of any other persons.

"11. * * * that the bequest of five thousand dollars to May S., Faith L. and Elna G. Covington each is ineffective because of the death of each prior to the death of Leake S. Covington."

From the foregoing findings of fact the court concluded as follows:

"That upon the death of Leake S. Covington, his three sisters, May, Faith and Elna Covington, having predeceased him, the bequest and devises of the residuary paragraph of his will lapsed and the said residuary paragraph became ineffective, and his residuary estate thereupon descended by operation of law to his heirs and next of kin.

"That the plaintiffs and John W. Covington, Sr. are the only surviving heirs at law and next of kin of Leake S. Covington, and as such are entitled to the estate of Leake S. Covington * * *"

Judgment was then entered to the effect that John W. Covington, Sr. is entitled to one-half of the personal property and a one-half undivided interest in all real estate, and that each of the four plaintiffs is entitled to a one-eighth interest in the personal property and an undivided one-eighth interest in all real estate.

The defendants excepted to certain of the findings of fact and conclusions of law, and appeal, assigning error.

Leath & Blount and Blakeney & Alexander for plaintiff appellees.

Jones & Jones, Page & Page and Harvey C. Carroll for defendant appellants.

DENNY, J. All the assignments of error of the appellants involve the same primary question, which is: Where a residuary clause in testator's will provides, "The residue of my estate anything and everything of value I will and bequeath to my sisters May S., Faith L. & Elna G. Covington. or to those who reside at our homeplace, Glenwood. at the time of my death," and the three named sisters predeceased the testator, was it the intention of the testator that the residue of his estate should devolve upon anyone who was residing at Glenwood at the time of his death?

The appellants contend that the words "or to those who reside at our homeplace, Glenwood. at the time of my death," should be construed to mean: or to anyone who resides at our homeplace, Glenwood, at the time of my death. Therefore, they contend that the defendants, John W. Covington, Sr. and his wife, Emma McCullen Covington, were residing at the Leake S. Covington home, Glenwood, at the time of his death and are, therefore, entitled to take the testator's entire estate under the provisions of said residuary clause. They further contend that such residuary clause is sufficient to have included any person or persons residing at the Leake S. Covington home, Glenwood, at the time of the death of Leake S. Covington, even though such persons had been strangers in blood.

The appellees on the other hand contend that the natural and proper construction to be placed on the last part of the residuary clause is this: or to those of my named sisters residing at our homeplace, Glenwood, at the time of my death. Consequently, they contend that the word "those," as used in the above clause, refers only to the named sisters, May S., Faith L. and Elna G. Covington, and to no other person or class of persons, and the court below so held.

The paramount aim in the interpretation of a will is to ascertain if possible the intent of the testator. In our effort to ascertain the testator's intent, we must consider the instrument as a whole and give effect to such intent, unless it is contrary to some rule of law or at variance with public policy. *Trust Co. v. Taliaferro,* 246 N.C. 121, 97 S.E. 2d 776; *Barton v. Campbell,* 245 N.C. 395, 95 S.E. 2d 914; *Mewborn v. Mewborn,* 239 N.C. 284, 79 S.E. 2d 398; *Gatling v. Gatling,* 239 N.C. 215, 79 S.E. 2d 466; *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. To aid in ascertaining the intention of a testator, his will is to be considered in the light of conditions and circumstances existing at the time the will was made. *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246; *Trust Co. v. Green,* 238 N.C. 339, 78

S.E. 2d 174; *Bradford v. Johnson*, 237 N.C. 572, 75 S.E. 2d 632; *Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E. 2d 151; *Trust Co. v. Bd. of National Missions*, 226 N.C. 546, 39 S.E. 2d 621; *Cannon v. Cannon*, 225 N.C. 611, 36 S.E. 2d 17.

It is permissible in order to effectuate or ascertain a testator's intention for the Court to transpose words, phrases, or clauses. *Coppedge v. Coppedge*, 234 N.C. 173, 66 S.E. 2d 777; *Williams v. Rand, supra; Heyer v. Bulluck, supra; Washburn v. Biggerstaff*, 195 N.C. 624, 143 S.E. 210; *Gordon v. Ehringhaus*, 190 N.C. 147, 129 S.E. 187.

Likewise, to effectuate the intention of the testator the Court may disregard, or supply, punctuation. *Coppedge v. Coppedge, supra; Williams v. Rand, supra; Carroll v. Herring*, 180 N.C. 369, 104 S.E. 892. Even words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrase or clause in question as collected from the context manifestly requires it. *Mewborn v. Mewborn, supra; Coppedge v. Coppedge, supra.*

It would seem to be clear that the period in the residuary clause under consideration, between the name of "Elna G. Covington" and the word "or," as well as the period between the word "Glenwood" and the word "at," has no legal significance whatever and was clearly nothing more than typographical errors in punctuation by the writer of the will and will be disregarded.

It is conceded by all parties to this action that the chief objects of Leake S. Covington's affections were his three maiden sisters, May S., Faith L. and Elna G. Covington, who lived with him at their old homeplace, Glenwood. It is likewise conceded that, with respect to his residuary estate, it was Leake S. Covington's dominant desire and purpose so to dispose of his residuary estate that it would go to these three sisters and to the survivor or survivors of them, so long as they or any one of them remained living and residing at Glenwood. It follows, therefore, that if any one of the three sisters named in the residuary clause had been living and residing at Glenwood at the time Leake S. Covington died, she would have taken the entire residuary estate.

The appellants argue and contend that the court below made an erroneous interpretation of the residuary provisions of the will under consideration because it results in partial intestacy and that there is a presumption against intestacy. It is true that as a general rule a will will be so interpreted as to prevent intestacy as to any part of the estate, unless there is an apparent intention to the contrary or the provisions of the will are such that under the conditions and circumstances existing at the time of the death of the testator intestacy must

follow as a matter of law. *Renn v. Williams,* 233 N.C. 490, 64 S.E. 2d 437; *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369.

In *Williard v. Weavil,* 222 N.C. 492, 23 S.E. 2d 890, this Court said: "We are not inadvertent to the presumption against intestacy, called to our attention by the plaintiffs; but this rule, however strong, is but a rule of construction, which must yield to the true intent of the testator when it can be ascertained. • • • It does not authorize the Court to make a will or to add to a testamentary disposition something which, by reasonable inference, is not there, or to make intestacy impossible."

Likewise, in the case of *Van Winkle v. Berger,* 228 N.C. 473, 46 S.E. 2d 305, it was said: "The rule against intestacy, however, is merely one of construction to be applied where the phraseology is ambiguous or the intent is uncertain. A man is not required to visualize all changes and contingencies near or remote, trivial or important, which might come about during a considerable period of time following his demise and meticulously provide against intestacy in order to make a valid will; nor may the Court, by the exercise of a hindsight better than his foresight, improve upon the testamentary disposition."

The appellants contend that the testator, when writing his will, foresaw that his three sisters would probably predecease him and that someone would have to move to Glenwood to live with him and take care of him, and that, if such event happened, he would want those who were living with him and caring for him at the time of his death to have the residue of his estate. The facts as they existed when the will was written in 1940 show the fallacy of this contention. At that time, Leake S. Covington was 66 years old; May S. was 64; Faith L., 61; and Elna G., 59. There is nothing revealed by the record in this case that would indicate that Leake S. Covington had any reason to believe or foresee that all three of his sisters, who were younger than he, would predecease him.

It is quite clear under our decisions that if the residuary clause under consideration had bequeathed and devised the residuary estate to the three sisters of the testator by name and had omitted the clause "or to those who reside at our homeplace, Glenwood, at the time of my death," there would have been no survivorship; and as each one of the sisters died, prior to the death of the testator, the bequest and devise to such deceased sister would have lapsed and her share of the residuary estate would have gone as intestate property. *Winston v. Webb,* 62 N.C. 1, 93 Am. Dec. 599; *Twitty v. Martin,* 90 N.C. 643; *Battle v. Lewis,* 148 N.C. 142, 61 S.E. 634; *Wooten v. Hobbs,* 170 N.C.

211, 86 S.E. 811; *Reid v. Neal*, 182 N.C. 192, 108 S.E. 769; *Daniel v. Bass*, 193 N.C. 294, 136 S.E. 733.

In 96 C.J.S., Wills, section 1216, page 1053, *et seq.*, it is said: "A testator may prevent a testamentary gift from lapsing, because of the death of the donee before his own death by the expression of such intention and a provision for the substitution or succession of some other recipient in case of the intermediate death of the first named donee. It is essential, however, to effect this object that it clearly appear that the testator intended to prevent a lapse, and he must declare, either expressly or in terms from which it can be collected with sufficient clearness, what person or persons he intended to substitute for the legatee dying in his lifetime."

We concur in the interpretation that the court below placed upon the residuary clause of the testator's will, to the effect that, upon the death of Leake S. Covington, his three sisters, May S., Faith L. and Elna G. having predeceased him, the bequests and devises made in the residuary clause of his will lapsed, and said residuary clause became ineffective and his residuary estate thereupon descended by operaton of law to his heirs and next of kin.

In our opinion, the facts found by the court below are supported by competent evidence and such findings are sufficient to support the conclusions of law and the judgment entered pursuant thereto.

All of the appellants' assignments of error are overruled and the judgment is

Affirmed.

LACY DICKEY, EXECUTOR OF THE ESTATE OF L. F. TROXLER, DECEASED; LACY DICKEY, INDIVIDUALLY, AND HIS WIFE, GLADYS K. DICKEY, v. AMANDA T. HERBIN (WIDOW), JOE TROXLER AND HIS WIFE, PEARL TROXLER, PAUL TROXLER AND HIS WIFE, LENORA TROXLER, FLOYD LUCAS TROXLER AND HIS WIFE, ELIZABETH TROXLER AND IRVEN TROXLER AND HIS WIFE, CORNELIA TROXLER, FRANCES T. SMITH AND HER HUSBAND, B. A. SMITH, MYRTLE T. MORGAN AND HER HUSBAND, JACK MORGAN, ROLAND LYMAN TROXLER AND HIS WIFE, LILLIAN WEBSTER TROXLER, VESTA PEARL TROXLER REEL AND HER HUSBAND, EDWIN L. REEL, ROBERT SAMUEL TROXLER, JR. AND HIS WIFE, MILDRED KILGORE TROXLER, WILLIAM FINCH TROXLER AND HIS WIFE, MARION PITTMAN TROXLER, VIRGINIA FRANCES TROXLER CLODFELTER AND HER HUSBAND, JOHN D. CLODFELTER, OLA COLEMAN AND HER HUSBAND, EDWARD COLEMAN, ROSIE ANDERSON AND HER HUSBAND, GROVER ANDERSON, RUTH THOMPSON (WIDOW), ANNIE KIZIAH AND HER HUSBAND, J. F. KIZIAH, ELZORAH WINN AND HER HUSBAND, HUGH WINN, ODELL

BARBER AND HIS WIFE, ORTANEY BARBER, ROBERT BARBER AND HIS WIFE, RUTH BARBER, GEORGE BARBER AND HIS WIFE, GLADYS BARBER, HOYLE BARBER AND HIS WIFE, WILMA BARBER, G. O. DICKEY AND HIS WIFE, WILLARD K. DICKEY, ROSS BRIGGS AND HIS WIFE, LELIA BRIGGS, KATIE SUMMERS (WIDOW), ROBERT L. SUMMERS, JR. (SINGLE), WILLIAM VIRGIL SUMMERS (SINGLE), CLARENCE ERWIN SUMMERS AND WIFE, BOBBY JEAN SUMMERS, DONNIE F. SUMMERS AND WIFE, CELIA SUMMERS, RAYMOND T. SUMMERS AND WIFE, NORMA SUMMERS, VIRGINIA SUMMERS PAYNE AND HUSBAND, JOHN HENRY PAYNE.

(Filed 20 May, 1959.)

1. Appeal and Error §§ 2, 4—

Only the party aggrieved is entitled to appeal, and when appellant is not the party aggrieved the Supreme Court obtains no jurisdiction and will dismiss the appeal *ex mero motu*. G.S. 1-271.

2. Appeal and Error § 4—

An executor who is also a beneficiary under the will is not, in his representative capacity, the party aggrieved by a judgment designating the fund which should bear the costs of administration, and holding that testator died intestate as to certain lapsed legacies, and the executor may not prosecute an appeal from such judgment in his representative capacity for his benefit as a legatee or devisee.

3. Same: Declaratory Judgment Act § 2—

While an executor may maintain an action under the Declaratory Judgment Act for direction in the disposition of the estate, that Act does not empower him to appeal in his representative capacity from a judgment directing the disposition of the estate as between the beneficiaries and distributees, and which, therefore, does not adversely affect the estate. G.S. 1-258.

4. Appeal and Error § 4—

G.S. 1-63, authorizing an executor to sue without joining the person for whose benefit the action is prosecuted, relates to parties and does not authorize an executor to appeal from a judgment entered in an action under the Declaratory Judgment Act when such judgment does not adversely affect the estate.

5. Appeal and Error § 14: Wills § 39—

Upon an appeal by the executor in his representative capacity from a judgment which does not adversely affect the estate, the costs of the appeal, including attorneys' fees, are not proper charges against the estate.

APPEAL by Lacy Dickey, executor of the will of L. F. Troxler, deceased, from *Armstrong, J.*, February 23 Civil Term, 1959, of GUILFORD, Greensboro Division.

The facts necessary to a decision are as follows:

L. F. Troxler died testate on 3 September, 1957, and left no widow

or issue surviving. His heirs at law and next of kin consisted of a sister, a brother and seventeen nieces and nephews, children of deceased sister and brothers, all of whom are of age and *sui juris*. He made no provision for any of them in his will.

The will devised and bequeathed specific lands and personalty to R. L. Summers and Kate Summers, not related to him by blood or marriage. There were specific devises of realty and specific bequests of personalty to Grover O. Dickey and Lacy Dickey, nephews of testator's deceased wife. There was a specific devise of land to Ross Briggs and Lelia Briggs. The residue of the estate was willed to Grover O. Dickey, Lacy Dickey and R. L. Summers. The will appoints Lacy Dickey executor. It provides that the debts and funeral expenses shall be paid "from the first moneys coming into" the hands of the executor.

The will was admitted to probate and Lacy Dickey qualified as executor. The estate consisted of lands, tax value $20,690.00, cash and in banks, $13,908.00, and miscellaneous chattels, estimated value $7,095.00. The debts appear to be considerably less than the cash and personalty.

R. L. Summers died 12 April, 1953, before the death of the testator, and the devises and bequests to him lapsed.

Lacy Dickey, as executor and individually, instituted this action under the Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.*, to have the court interpret and construe the will, give directions for the administration of the estate, and designate the property from which debts and costs of administration are to be paid. All devisees, legatees, heirs at law and next of kin are parties, and have filed pleadings or been served with summons. The complaint asks seven specific questions with respect to the interpretation and construction of the will and the administration of the estate.

The cause came on for hearing before Judge Armstrong without the intervention of a jury. The facts are not in dispute. The judge made findings of fact and conclusions of law and entered judgment unequivocally answering the seven questions set out in the complaint.

The executor excepted to the following portions of the judgment:

"(d). The (specific) devise and bequest . . . to Robert L. (R. L.) Summers having lapsed goes intestate and not through the residuary clause . . . (parentheses ours).

"(e). The lapsed legacy to R. L. Summers in . . . the residuary clause goes intestate and not to the other two residuary beneficiaries, Grover O. Dickey and Lacy Dickey.

"(f). The indebtedness, costs of administration and other expenses

of the estate should be paid out of and from the first moneys coming into the hands of the executor belonging to the testator's estate which was the $13,980.00 in cash and bank accounts."

Lacy Dickey, in his individual capacity, did not except or appeal. Neither did any of the other individual partes to the action. Lacy Dickey, as executor, appealed from the judgment and assigned error.

John D. Xanthos and Rufus W. Reynolds for Lacy Dickey, Executor, appellant.

Thomas C. Carter and John H. Vernon for appellees.

MOORE, J. It is clearly apparent that the rulings of the court below to which the executor excepts are not adverse to the interests of the L. F. Troxler estate, but are adverse to Lacy Dickey, individually, and the other residuary legatee and devisee. In the trial below the executor contended, and contends here, that the lapsed devises and legacies of R. L. Summers should not go intestate, but should go to the surviving residuary legatees and devisees, namely, Lacy Dickey and Grover O. Dickey. He further contends that if they do go intestate, that the debts and costs of administration should be paid from the intestate estate and not from the cash. A reversal of the rulings excepted to would benefit Lacy Dickey, individually, and not the estate he represents as executor. The parties adversely affected by the judgment, Lacy Dickey, individually, and Grover O. Dickey, did not appeal, and we must conclude that they are satisfied with the judgment.

The following question arises: Is the executor a party aggrieved so as to give him the right to appeal in this case? It is true that the appellees have made no motion to dismiss on the ground that the executor is not a party aggrieved. But where it appears that the appellant is not a party aggrieved, the questions raised by the appeal are not in controversy so far as the litigation is concerned, no jurisdiction of any matter to which the action relates is conferred by the appeal, and this Court will *ex mero motu* dismiss the appeal. In *Langley v. Gore*, 242 N.C. 302, 87 S.E. 2d 519, the appellants asserted that they did not claim a fund in the hands of the clerk of the Superior Court but had appealed on the ground that they did not think the appellees were entitled to it. Speaking to the subject, the Court said: "Any party aggrieved may appeal in the cases prescribed in Chapter 1 of General Statutes entitled 'Civil Procedure.' G.S. 1-271. And this Court, in interpreting and applying this statute, has uniformly held that only the party aggrieved may appeal from the Superior Court to the Su-

preme Court. See *Watkins v. Grier,* 224 N.C. 339, 30 S.E. 2d 223, and numerous other cases. Therefore, we are constrained to hold that by this appeal this Court has not acquired jurisdiction of any matter to which the action or proceeding may relate. Such being the case, the Court is impelled *ex mero motu* to dismiss the appeal for want of jurisdiction. See *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136, where prior cases are cited. See also *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757, and cases cited."

It is true that this action was brought under the Uniform Declaratory Judgment Act, General Statutes of North Carolina, Chapter 1, Article 26, sections 1-253 to 1-267, inclusive. The pertinent portion of G.S. 1-255 provides that "Any person interested as . . . an executor . . . in the administration of the estate of a decedent . . . may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings."

There is no doubt that the executor had the right to institute the action and ask for a declaration in the first instance. *Trust Co. v. Henderson,* 226 N.C. 649, 39 S.E. 2d 804. The question is whether he may now appeal from a judgment of a court of competent jurisdiction which has declared his rights and duties and interpreted the will in such manner that the testator's estate is not adversely affected. G.S. 1-258, which is a part of the Uniform Declaratory Judgment Act, provides that "All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees." Obviously the act does not enlarge the right of an executor for a review, but provides for review under the same rules that apply in cases not brought pursuant to the act.

Under the decisions of this Court, interpreting G.S. 1-271, only a party aggrieved may appeal to the Supreme Court. *Langley v. Gore, supra,* and cases there cited; 1 N.C. Index (Strong) page 76. "A party aggrieved is one whose right has been directly and injuriously affected by the action of the court." McIntosh, N. C. Prac. and Proc. in Civil Cases, pp. 767-8; *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434.

"As a general rule, a personal representative can appeal in his representative capacity only when he is aggrieved in that capacity, and not when he is aggrieved in his individual capacity only. In the latter

case he must appeal, if at all, in his individual capacity. He cannot appeal individually if he is aggrieved in his representative capacity only. . . . An executor or administrator may not secure review of a judgment, order or decree merely determining the rights as between the parties entitled to the estate or distributing the estate or a part thereof among heirs, next of kin, devisees, or legatees where the court had jurisdiction, unless there are exceptional circumstances taking the case out of the general rule, . . ." 4 C. J. S., Appeal and Error, Section 193b and e, pp. 583-585.

Where there is a controversy between legatees under a will, in which controversy the executor, as such, has no interest, such executor is not a party aggrieved by a decree of distribution and may not appeal therefrom. *In re* Babb's Estate (Cal. 1927), 252 P. 1039.

In *Surratt v. Knight* (Md. 1932), 158 A. 1, there was a caveat to a will. The will was sustained, but the heirs and the residuary legatees compromised their claims. The executor refused to recognize the agreement, asked the court of equity to construe the will and pass upon the validity of the compromise agreement. The court upheld the agreement and dismissed the action. The executor noted an appeal. The Court of Appeals declared: "An executor is the personal representative of the testator, and, after probate, is charged with the duty to defend and maintain the validity of the instrument with loyalty and fidelity, and to complete the administration of the estate in accordance with the terms of the will, under the law. . . .(A)fter the dismissal by the chancellor, the executor had no personal interest in further litigation. There is no question affecting the proceeds of the testator's estate in his hands for distribution, no doubt of who the residuary legatees are, nor of their identity and of their capacity to take. The executor's commissions and allowances are not involved, and he has no interest in the fund to be divided. Every one but the executor is satisfied, and no one has united in the appeal. It does not appear from the record that the executor has in any capacity such an interest in the subject matter as entitles him to appeal, and therefore this appeal must be dismissed." See also *Hetzell v. Morrison* (Ind. 1945), 60 N.E. 2d 150.

An executor who is also a devisee or legatee may not appeal as executor to protect his personal interest as against other devisees, legatees or claimants when there has been no judgment adverse to the estate.

In an Ohio case, an administrator appealed from an order of distribution. He claimed all of the funds individually. The Court said: "The administrator was not prejudiced by the order of the Probate

Court directing the distribution of the fund, and his whole interest in objecting to the distribution was a personal interest. The record shows all parties are satisfied with the order of distribution, and none of them has appealed. The administrator cannot represent them in the appeal. The administrator seeks by his appeal from the Probate Court to advance his personal interests to the disadvantage of all other parties. This, he cannot do." *In re Hoffman's Estate* (Ohio 1941), 37 N.E. 2d 646.

"An executor of an estate as such cannot appeal from the decision of the trial court refusing to approve his original final report, to which exceptions were filed by other legatees, where the rulings were for the benefit of the estate, and the only relief sought by the appeal was on behalf of the executor as an individual legatee." (Headnote). "It is apparent that by this proceeding Alexander J. Wiley is seeking to advance his individual interests, which directly conflict with the trust which, as executor, it is his duty scrupulously to protect. If he feels that he has suffered any injustice in this matter, it can be only because he has been denied that which he sought for his own personal benefit." *Wiley v. Wiley* (Ind. 1919), 122 N.E. 25.

It is true that G.S. 1-63 provides that "An executor . . . may sue without joining with him the person for whose benefit the action is prosecuted." This section is a part of Article 6, Chapter 1, relating to parties. But it will be observed that the Uniform Declaratory Judgment Act requires all persons to be made parties who have or claim any interest. G.S. 1-260. Therefore, G.S. 1-63 has no application in this case. The administrator or executor must remain impartial as between the conflicting claims of those entitled to the estate. The case of *Finley v. Finley,* 201 N.C. 1, 158 S.E. 549, involved a controversy among the devisees under the will. The holding of this Court is well stated in the second headnote as follows: "The Court will not construe the provisions of a will in an action brought by an executor unless for the purpose of aiding him in the administration of the estate, and where suit is brought by an executor to settle a dispute among the devisees as to the quality of the estate devised, and the lands have already been sold and the proceeds are in the hands of the executor for distribution, the action and the appeal from the judgment of the lower court will be dismissed." See also *Gregg v. Williamson,* 246 N.C. 356, 98 S.E. 2d 481; *Summerlin v. Morrisey,* 168 N.C. 409, 84 S.E. 689; *Strauss v. Loan Assn.,* 118 N.C. 556, 24 S.E. 116.

In the instant case the appellant may not represent the devisees and legatees against the heirs at law and next of kin. He was not a party aggrieved, and the appeal must be dismissed.

The costs of the appeal, including attorneys' fees incident to the appeal, are not proper charges against the estate of L. F. Troxler. *Summerlin v. Morrisey, supra; Surratt v. Knight, supra.*

Appeal dismissed.

J. H. GODWIN v. HOOVER HINNANT.

(Filed 20 May, 1959.)

1. Reference § 14a—

A provision in an order of re-reference that the parties should have twenty days from the referee's report in which to file exceptions cannot have greater force than the statutory limitation, G.S. 1-195, and does not impair the discretionary authority given the court by G.S. 1-152 to extend the time for filing such exceptions.

2. Same—

Defendant may waive his right to trial by jury on appeal in a compulsory reference by failing to comply with the statutory procedure for the preservation of such right, and likewise the plaintiff may waive defendant's failure to follow the statutory procedure by failing to challenge the sufficiency of defendant's exceptions and by failing to object to the submission of the issue to the jury.

3. Same—

An exception to an order of the court extending the time for filing exceptions to the report of the referee is not a challenge to the sufficiency of defendant's exceptions to the findings or to the submission of the issue to the jury.

4. Reference § 9—

The objective of a compulsory reference is to eliminate uncontroverted items so as to simplify the scope of the jury's inquiry, and therefore the exceptions to the findings should be specifically directed to those relating to the particular items controverted, and a party may not take broadside exceptions to the findings.

5. Account § 2—

In an action on an account the burden is upon the creditor to prove the correctness of each controverted charge, and the burden is upon the debtor to establish payments beyond those admitted.

5. Account § 1—

Ordinarily the law imposes no greater burden upon the creditor than on the debtor to keep an accurate record of the debits and credits, and it is error for the court to charge, even as a contention, that the law imposed the duty on the creditor not only to keep the records but to keep them in such manner as to disclose that they were accurate and could be relied on by the parties.

6. Account § 2—

In an action on an account it is error for the court to charge that the burden is on the creditor to establish the allegations of the complaint, without applying the law to the facts in evidence, but the court should charge the jury the law applicable upon the evidence as to each controverted item. The mere statement of the contentions of the parties is insufficient.

7. Trial § 31b—

Under G.S. 1-180 it is mandatory upon the court to charge the jury as to the law applicable to the various factual situations presented by the conflicting evidence, and the failure of the court to so charge the law arising upon the evidence, except in stating the contentions of the parties, must be held for prejudicial error.

APPEAL by plaintiff from *Frizzelle, J.*, January 1959 Civil Term of WILSON.

The complaint alleges balances owing plaintiff for the years 1954 and 1955 for merchandise sold and advances made by plaintiff to defendant pursuant to a contract by which defendant, as tenant, farmed plaintiff's land. The complaint does not set out the contractual provisions for the operation of the farm.

The answer merely denies the allegations of the complaint, specifically denying any debt owing by defendant to plaintiff.

At the January Term 1957 Judge Stevens, finding the taking of an account involving farming operations covering a period of two years was necessary, ordered a reference. Defendant excepted.

In June 1957 the referee, after hearings, filed his report. Summarized, he reported:

(1) Plaintiff and defendant occupied the relation of landlord and tenant in farming operations for several years prior to 1954.

(2) This relationship continued in 1954. Plaintiff, as landlord, was to furnish the land, such equipment as he owned at the beginning of the year, one-half of the fertilizer, curing oil, poison, and tobacco seeds; and supply defendant with groceries and cash necessary for defendant to operate the farm. Defendant was to furnish all labor in connection with the production and harvesting of the crop and the other half of the fertilizer, oil, poison, and seeds. The rental of a tobacco barn was to be paid one-half by each party. The crops were to be divided one-half to plaintiff, the other half to defendant. Defendant performed his part of the contract.

(3) During the year plaintiff sold groceries, made advances in cash and supplies, and furnished one-half of the fertilizer, oil, and poison to the amount of $3,260.84. Defendant paid thereon from the sale of the crops $2,072.76, leaving a balance owing of $1,188.08.

(4) The farming contract was renewed for 1955 with the modification that plaintiff should install an irrigation system, and defendant would pay for the gas and oil for its operation.

(5) Plaintiff performed his part of the 1955 contract.

(6) During 1955 it was agreed that plaintiff would acquire a tobacco harvester which defendant would use and pay plaintiff five cents per stick for tobacco so harvested. Defendant harvested 4,748 sticks with that machine.

(7) Defendant failed to harvest the corn. Plaintiff did so and credited plaintiff's account with his share, to wit, $67.50.

(8) Pursuant to the contract plaintiff made sales and advances to defendant during 1955 aggregating $3,072.79. Defendant paid from the sale of crops $2,745.93. In addition defendant was entitled to a credit of $67.50 for the corn harvested by plaintiff and $58.50 for work done for plaintiff by defendant, leaving a balance owing for that year of $200.86.

(9) No part of the balances for 1954 and 1955 have been paid.

Defendant in apt time filed exceptions to each finding of fact except the first. Except for the reference to the number of findings of fact to which the exception is addressed, they are in identical language as follows: "To the finding of fact # 3, defendant excepts and specifically demands a trial by jury for that said finding of fact is not supported by any competent evidence, and is contrary to the greater weight thereof." Exceptions were noted to the conclusions of law, and, based on his exceptions to the findings of fact, defendant tendered this issue: "What amount, if any, is the defendant Hoover Hinnant indebted to the plaintiff J. H. Godwin?"

At the January 1958 Term, Judge Paul remanded the cause to the referee with directions "to file a report herein which shall contain a statement of account showing items charged against the defendant on one side thereof and credits allowed said defendant on the other side." The order further provided that the report should be filed "not later than February 5, 1958, and that the defendant be allowed 20 days thereafter within which to file exceptions thereto." No exception was taken to this order.

On 5 February 1958 the referee supplemented his report by adding thereto a statement of the account for each year. It shows (a) debits composed of (1) purchases from plaintiff's store, (2) an itemization of expenditures for fertilizer, poison, and seed, and a charge of one-half of these items, (3) "other charges," itemized in amount, composed of cash advances made by plaintiff; and (b) credits showing the date, amount, and source of each credit.

Defendant did not, within the twenty days allowed by Judge Paul's order, file new or additional exceptions.

At the June Term 1958 plaintiff moved for an affirmance of the referee's report of 5 February 1958 for that no exception had been filed thereto. Judge Fountain, who was then presiding, overruled the motion and allowed defendant until 29 September 1958 to file further exceptions to the amended report of the referee. Plaintiff excepted to this order.

On 26 September 1958 defendant filed exceptions to the amended report. The exceptions then filed were identical with the exceptions theretofore filed.

When the cause came to trial in January 1959, the court submitted the case to the jury on these issues:

"1. What amount, if any, is the defendant Hoover Hinnant indebted to the plaintiff J. H. Godwin for the year 1954?

"2. What amount, if any, is the defendant Hoover Hinnant indebted to the plaintiff J. H. Godwin for the year 1955?"

Plaintiff took no exceptions to the submission of the issues to the jury.

After protracted consideration the jury reported they were unable to reach a unanimous verdict. The parties then stipulated they would accept a verdict by a majority. In accord with this stipulation the jury answered each issue "Nothing." Judgment was entered on the verdict and plaintiff appealed.

Lamb, Lamb & Daughtridge and Gardner, Connor & Lee for plaintiff, appellant.

Robert A. Farris for defendant, appellee.

RODMAN, J. Plaintiff assigns as error the order of Judge Fountain overruling his motion for an affirmance of the amended report of the referee for that no exceptions had been filed thereto within the time allowed by Judge Paul.

Judge Fountain had a right, in his discretion, to extend the time for filing the exceptions. The time limited in Judge Paul's order was not intended to have greater force than the statutory provision limiting the time to file exceptions. G.S. 1-195. It did not impair the authority given to Judge Fountain by G.S. 1-152 to extend the time. *White v. Price,* 237 N.C. 347, 75 S.E. 2d 244; *Dunn v. Marks,* 141 N.C. 232; *Timber Co. v. Butler,* 134 N.C. 50; *Kerr v. Hicks,* 131 N.C. 90; *Gilchrist v. Kitchen,* 86 N.C. 20.

The exception to Judge Fountain's order extending the time for de-

fendant to file exceptions is not sufficient to challenge the sufficiency of defendant's exceptions and the issue thereafter filed by him in support of his demand for a jury trial.

Plaintiff might have raised the question of defendant's right to a jury trial by excepting to the submission of any issue to the jury. We find no exception in the record sufficient to present this question. A party, by his failure to comply with prescribed procedure, may waive his right to a jury trial. Likewise, a party may waive his right by failing to object to the submission of an issue to the jury.

The statute providing for a compulsory reference, when it appears an accounting is necessary to determine the rights of the parties, rests on the assumption that this procedure will eliminate items not controverted and will enable the parties, by appropriate exceptions to the referee's findings, to bring into sharp focus the items which are in controversy.

As said by *Davis, J.*, in *Yelverton v. Coley,* 101 N.C. 248: "If this were not so, the tedious delay and confusion attending the investigation and examination of a long account by a jury, which it was the purpose of the reference to avoid, would be as great after the reference as before, thus rendering the reference a mockery."

A dissatisfied party is not permitted to take broadside exceptions to the findings. His exceptions, to be helpful and therefore effective in a just settlement of the controversy—the court's objective, must be both specific and directed to a particular finding of fact. *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; *Gurganus v. McLawhorn,* 212 N.C. 397, 193 S.E. 844; *Cotton Mills v. Maslin,* 200 N.C. 328, 156 S.E. 484; *Booker v. Highlands,* 198 N.C. 282, 151 S.E. 635; *Ziblin v. Long,* 173 N.C. 235, 91 S.E. 837; *Ogden v. Land Co.,* 146 N.C. 443; *Wilson v. Featherstone,* 120 N.C. 446; *Driller Co. v. Worth,* 117 N.C. 515.

That the exceptions filed by defendant lack that definiteness necessary to present clearly defined issues is apparent. Finding No. 3 of the amended report incorporates by reference the itemized statement of account for the year 1954. That account consists of charges segregated in classes (1) for groceries purchased, (2) fertilizers, poisons, and seeds, (3) monies loaned defendant. The account details payments made from sales of cotton and tobacco. The crop sales were made by plaintiff and defendant.

The burden rested on plaintiff to establish the charges. Does defendant challenge the amount charged for groceries? We find no definite statement to that effect in defendant's evidence. To the contrary, there is evidence which may amount to an admission as to the correct-

ness of this item. The burden, of course, rested on plaintiff to prove the correctness of each controverted charge; but the burden rested on defendant to establish payment beyond those admitted by plaintiff. Defendant's evidence contains an inference that full credit has not been given for monies derived from the sales of the 1954 tobacco crop. If defendant's assertion of nonliability rests on his claim of additional payments, he had the burden of establishing those payments, and the court should have so instructed the jury.

The defendant testified that he can read. We find no evidence that he was illiterate. The law imposed no greater burden on one to keep an accurate record of debits and credits than on the other. It is not suggested that any trust relationship existsd. It was error to charge, even as a contention of the defendant, that the law imposed a duty on plaintiff to keep records "not only in an intelligent manner, but in a manner that would disclose and reveal that they were accurate and could be relied upon by the parties involved."

Plaintiff also excepted to the failure of the court to declare and explain the law arising upon the evidence in the case. The court charged the burden was on plaintiff "to satisfy you upon the evidence and by its greater weight that his allegations are true and correct." This statement of the law was followed by a resumé of the contentions of the parties, but nowhere did the court attempt to apply the law to the facts.

The provisions of G.S. 1-180 are mandatory. A failure to comply is prejudicial error. *Brooks v. Honeycutt, ante,* p. 179; *Glenn v. Raleigh,* 246 N.C. 469, 98 2d 913; *Keith v. Lee,* 246 N.C. 188, 97 S.E. 2d 859; *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Watson v. Tanning Co.,* 190 N.C. 840, 130 S.E. 833; *Wilson v. Wilson,* 190 N.C. 819, 130 S.E. 834.

The prejudicial effect of the failure to declare the law as applied to differing factual contentions is well illustrated by defendant's exception to Finding No. 6. Plaintiff testified he agreed to provide defendant with a tobacco harvester for which defendant would pay five cents per stick of tobacco harvested. The referee so found, and, finding defendant harvested 4,748 sticks, fixed the amount owing to plaintiff as rent at $237.40. Defendant excepted to this finding. As a witness he denied an agreement to pay five cents per stick. He asserted that he was only obligated to pay a fair rental value for the machine. What was the contract? The jury necessarily had to determine that question before it could determine the amount of the rent. If the jury found in accordance with plaintiff's testimony, supported as it was by other witnesses, the court should have directed the jury to fix

the rent at $237.40, or five cents per stick. This one item exceeds the amount which the referee found to be owing for the year 1955. Nowhere in the charge did the court advert to this controverted factual situation.

Because the exceptions failed to bring into focus the controverted items, the task imposed on the judge in charging the jury became more difficult; but that fact did not relieve him of the duty to declare and explain the law arising on the evidence.

New Trial.

ELMER BOYD, ADMINISTRATOR OF CHARLES EDWARD BOYD, DECEASED, v. WILLIAM HAROLD HARPER, CLAUDE S. LEWIS AND J. E. FLEMING T/A CAROLINA MERCANTILE CO.

(Filed 20 May, 1959.)

1. Automobiles § 15—

The failure of a motorist to keep his car on his right side of the center of the highway in passing a vehicle traveling in the opposite direction is negligence *per se*, and whether such negligence is a proximate cause of a collision is ordinarily for the jury to determine. G.S. 20-146, G.S. 20-148.

2. Automobiles § 37—

Photographs of the scene of the accident are properly admitted in evidence to explain and illustrate the testimony of the witnesses.

3. Automobiles § 36: Negligence § 17—

Negligence is not presumed from the mere fact of injury.

4. Negligence § 19b(1)—

While it is not necessary that negligence be established by direct evidence and may be established by attendant facts and circumstances which reasonably warrant the inference of negligence, such inference must be more than a mere conjecture or surmise and be a legitimate inference from established facts.

5. Automobiles § 41c—

The testimony of the witnesses, together with photographs admitted in evidence for the purpose of explaining their testimony, as to a "dug" place in the center of the highway, marks on the shoulder, debris, glass and dirt on the highway, and the position of the cars after the accident, *is held* to leave in conjecture and surmise whether defendants' car was partially to the left of its center of the highway when it struck the car driven by plaintiff's intestate, and therefore nonsuit was properly entered in plaintiff's action for wrongful death based on asserted negligence in this respect.

BOYD *v.* HARPER.

APPEAL by plaintiff from *Sharp, S. J.*, September Civil Term, 1958, of ROCKINGHAM.

This action was instituted for the purpose of recovering damages for the alleged wrongful death of plaintiff's intestate, Charles Edward Boyd. The complaint alleges that Boyd died as a result of injuries received when the automobile he was driving collided with a pickup truck being driven by the defendant Harper and owned by the other named defendants. It alleges that Boyd's death was proximately caused by the negligence of the defendants for that Harper: (a) did not keep a reasonable lookout; (b) operated the pickup in a careless and reckless manner in violation of G.S. 20-140; (c) operated the pickup on the left of the center of the highway in violation of G.S. 20-146; and (d) failed to give Boyd at least one-half of the main traveled portion of the highway in violation of G.S. 20-148.

The defendants answered, denied plaintiff's allegations of negligence, pleaded contributory negligence, and set up counterclaims.

The collision occurred about 9:45 a.m. on 8 July, 1955, approximately 6 miles north of Reidsville in Rockingham County on county road No. 541, which runs generally north and south between Leaksville and Reidsville. This road is paved with asphalt and paved portion is 20 feet wide, and there is a 12-foot shoulder on each side. The collision took place on a sharp curve. The curve is to the right to one traveling northwardly. At the curve the west side of the pavement is elevated, that is, the road at the curve slopes to the east. There are curve warning signs at each approach to the curve. On the curve there is a white broken line in the center of the road and solid yellow lines on each side of the white center line. To the east of the road at the curve there is a bank 5 or 6 feet high, and a motorist going north and entering the curve can see only about 200 feet ahead but cannot see around the curve. A motorist going south can see a little more than 200 feet ahead. The land to the west of the road is about level with the road. About 200 feet south of the place of collision a dirt road from the west intersects with the paved road. Near this intersection and about 150 feet from the place of the collision is a tobacco barn. There is a slight side ditch on the west side of the road. At the south end of the curve the road is straight for approximately one-fourth mile. North of the curve is another curve which turns in the opposite direction. On the morning in question the road was dry and the weather was clear.

At the time of the collision Boyd was driving a 1942 Dodge coupe southwardly toward Reidsville. He lived about a mile north of the curve and just before the accident had stopped at a store for gas. He

was 19 years of age. Harper was driving the pickup northwardly toward Leaksville. He was an employee of the other named defendants and the pickup was theirs. There were no eyewitnesses except Boyd and Harper. From injuries received, Boyd died about 10:30 a.m. on the same day. Harper did not testify.

Joe Harrellson, a state highway patrolman, arrived at the scene at 10:05 a.m. and investigated the accident. He took photographs which were offered and admitted in evidence to illustrate and explain his and other testimony. He testified for the plaintiff as to matters hereinbefore set out, and he also gave the following recital:

"At a point about the middle of the curve there was a 1942 Dodge coupe on the west side of the highway with the left front wheel right at the pavement and the right front wheel approximately 18 inches on the pavement with the back end of the car off on the shoulder and the car was resting headed almost east; 60 feet north of the Dodge coupe was a 1953 International pickup truck lying on its right side; part of the truck was on the highway and the back wheels were off on the east shoulder. . . . The Dodge coupe was damaged on the left front side all the way down the side; the left-hand headlight was knocked out; and the lick was such that it had bowed a portion of the top, the left front door and the left quarter panel. The International truck was damaged on the left front and headlight, left front wheel, and a portion of the left side. . . . There was debris, glass, and dirt in front of the Boyd car. Between the two yellow lines and right in the center was a dug place in the highway. It was 10 feet from this mark to the Boyd car and 50 feet from this mark to the Harper truck. . . . The debris in front of the Boyd automobile was halfway between the edge of the pavement and the center line in the neighborhood of 5 feet in the south traffic lane. Directly under the Boyd car there was a mark that came from the right rear wheel out to the edge of the pavement approximately 12 inches wide. (There was no continuation of this mark onto the paved surface.) A portion of the shoulder, the right side going south, through the grass the gouge mark goes from the right rear wheel of the 1942 Dodge coupe back to the pavement. . . . The Boyd automobile was damaged in its left front fender, left door, and front of the rear left fender and quarter panel and the top. . . . The debris in front of the Boyd car appeared to be portions of mud, oil, glass—such as would apparently accumulate under a vehicle. . . . (I)n the direction of the truck are portions of mud and scurf down near the truck and mud and such parts as would fall from under one; probably oil as is under the other one. . . . (T)he road is so elevated that the liquids that come from apparently the Boyd car ran

across the road. . . . I don't recall any debris in the east lane immediately in front of the Boyd automobile. . . .(A)fter re-examining that picture it's possible there is, in fact, some debris across the center of the highway in front of the Boyd car, across the highway on the side that the Harper automobile was on, could have been very little, I don't know. . . . Plaintiff's exhibit No. 5 shows a considerable amount of debris under the Harper truck and in front of the truck was a portion of the windshield. I do not recall any debris in front of the truck. The windshield was broken but it was more or less a pretty big piece on Mr. Harper's side of the highway. The debris by the Harper truck is on the right side, right hand lane of the highway. It would be on Harper's side. . . . There was a fresh mark on the white broken line between the two yellow lines. There is a slight streak from the mark running from the white on to the edge of the yellow which would be on Harper's side. . . . As to the mark I found in the center of the road a portion of that marking was found on the east side of the centerline; with reference to the center white line near the yellow line. . . ."

A witness, who was working about 500 yards away and heard the crash, came to the scene. He observed the conditions there and his testimony corroborates the patrolman. He testified that he had seen the road that morning before the collision and at that time the road was clear of debris, mud, oil, water and marks.

There was testimony relating to damages.

At the close of the plaintiff's evidence, defendants took voluntary nonsuits as to their counterclaims and moved for judgment as of involuntary nonsuit. The motion was allowed.

From judgment in accordance with the ruling plaintiff appealed and assigned error.

W. T. Combs, Jr., B. W. Walker, and Ratcliff, Vaughn, Hudson, Ferrell & Carter for plaintiff, appellant.

Brown, Scurry, McMichael & Griffin, Bethea & Robinson and Sapp & Sapp for defendants, appellees.

MOORE, J. The allegations of the complaint with respect to reckless driving and failure to keep a reasonable lookout are not supported by the evidence, or by any reasonable inference that may be drawn therefrom, and further discussion thereof is unwarranted.

The decisive inquiry is whether, at the time of the collision in question, the defendant Harper was driving the pickup on the west (his left) side of the center line of the road in violation of G.S. 20-146 or G.S. 20-148, as alleged by the plaintiff. If so, such conduct was negli-

gence *per se*. *Hoke v. Greyhound Corp.*, 226 N.C. 692, 698, 40 S.E. 2d 345. Ordinarily, proximate cause is for the jury. *Lyerly v. Griffin*, 237 N.C. 686, 689, 75 S.E. 2d 730.

Upon arrival at the place of the accident the highway patrolman made photographs of the scene, and these were properly admitted in evidence to explain and illustrate his and other testimony. North Carolina Evidence (Stansbury), Sec. 34, p. 53; *S. v. Bass*, 249 N.C. 209, 211, 105 S.E. 2d 645. Patrolman Harrellson made extensive use of the photographs in the course of his testimony and the facts and circumstances disclosed by the photographs are in substantial accord with his recital. Counsel for plaintiff and defendants referred to them repeatedly in their arguments in this Court. We have carefully examined the photographs in the light of the testimony in the case.

Appellant contends that the inference may reasonably be drawn from the facts and circumstances in the case that his intestate came to his death because of the negligence of the defendant Harper in driving the pickup to his left of the center line of the road. He contends that the Dodge automobile driven by deceased came to rest on the west shoulder of the road, facing east, with its right front wheel about 18 inches onto the pavement; that the right rear wheel left a skid mark extending from the pavement to the point it came to rest, but that there was no skid mark on the pavement itself; that the left front door, left quarter panel and top were "bowed" in, showing that the main force of the impact on the Dodge was into its left side; and that mud, dirt, glass, and other debris were in front of the Dodge, about the center of the west lane and none in the east lane at this place. Appellant contends, therefore, that defendants' pickup came across the center line of the road, struck the side of the Dodge, turned it through an angle of about 90 degrees and left all of the debris from the impact in the west lane. Appellant emphasizes the fact that the side skidding of the right rear wheel left no mark on the pavement.

On their part, appellees point out that the pickup came to rest on the east side of the road, at about a 45 degree angle with the road, headed northwest, lying on its right side, and about two-thirds off the paved portion of the road (as shown by the testimony and explained by the photographs); that mud, dirt, glass, and other debris lay beside it in the east lane, none in the west lane; that a part of the windshield of the pickup was in front of it in the east lane. Appellees contend that the collision occurred at this point.

There were no tire marks on the road at any place. In leaving the road and coming to rest none of the tires on the Dodge left any marks

on the pavement. This is also true of the pickup. The two vehicles were 60 feet apart after the collision. At the center line and between the yellow lines, 10 feet north of the Dodge and 50 feet south of the pickup, there was a large "dug" place. With reference to this the patrolman said: "There is a slight streak from the mark running from the white on to the edge of the yellow which would be on Harper's side." If one of the vehicles made the "dug" place and the streak leading therefrom, we can only conjecture as to whether it was moving toward the east or toward the west. None of the debris near the Dodge was identified as coming from the pickup. There is no evidence to show that the pickup was ever at or beyond the center of the road. As to where the impact took place or what happened with respect to the movement of the vehicles immediately after they collided, we can only surmise.

Taken in the light most favorable to the plaintiff, the evidence does not show, and does not permit a reasonable inference, that the defendant Harper was at the time of the collision operating the pickup to the west of the center line.

"Negligence is not presumed from the mere fact that plaintiff's intestate was killed in the collision." *Williamson v. Randall,* 248 N.C. 20, 25, 102 S.E. 2d 381; *Robbins v. Crawford,* 246 N.C. 622, 628, 99 S.E. 2d 852. However, direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances. *Etheridge v. Etheridge,* 222 N.C. 616, 618, 24 S.E. 2d 477. But in a case such as this, the plaintiff must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendants. *Robbins v. Crawford, supra; Whitson v. Frances,* 240 N.C. 733, 737, 83 S.E. 2d 879; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. In *Parker v. Wilson,* 247 N.C. 47, 53, 100 S.E. 2d 258; *Parker, J.,* speaking for the Court, said: "Such inference cannot rest on conjecture or surmise. *Sowers v. Marley, supra.* 'The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff.' *Whitson v. Frances, supra.* 'A cause of action must be something more than a guess.' *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. A resort to a choice of possibilities is guesswork not decision. *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392. To carry his case to the jury the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate

inference from established facts." See also *Stegall v. Sledge,* 247 N.C. 718, 722, 102 S.E. 2d 115.

The judgment of involuntary nonsuit is

Affirmed.

SARAH TUCKER, ADMINISTRATRIX OF THE ESTATE OF JACK B. TUCKER, DECEASED, v. HUBERT L. MOOREFIELD AND HUBERT L. MOOREFIELD, JR.

(Filed 20 May, 1959.)

1. Appeal and Error § 51—

Where it is determined on appeal that nonsuit was correctly denied but a new trial is awarded for error in the charge, the Court will refrain from a discussion of the evidence.

2. Automobiles § 37—

Evidence as to the existence of a stop sign along a street on the west side of its intersection with another, and the existence of a metal post or portion thereof on the east side, is competent to be shown in evidence under the rule that the physical facts and other circumstances and conditions existing at the time and place of the collision are for the consideration of the jury on the question of due care; but evidence that a stop sign had been erected on the metal post on the east side of the intersection, that it had been removed, etc., is irrelevant on the question of the negligence of a motorist entering the intersection from the east, in the absence of evidence that such motorist knew that a stop sign had been erected there.

3. Automobiles § 17—

Where a street has not been designated a through street by city ordinance but stop signs along an intersecting street have been erected by order of the city traffic engineer under authority of ordinance, but prior to the accident the stop sign on the metal post on one side of the intersection had been removed, the mere fact that the city engineer had designated the intersection one of special hazard under the ordinance does not constitute the intersecting street a servient one, and a motorist entering the intersection along the street having no stop sign is not under duty to stop before entering the intersection.

4. Same: Automobiles § 46— Motorist may not rely upon his belief that he is on through street when stop sign on intersecting street had been removed.

The evidence tended to show that intestate was familiar with the street upon which he was riding and knew that stop signs had been erected along the intersecting street. The evidence further tended to show that the street along which intestate was riding had not been designated a through street by ordinance, but that stop signs had been erected along

the intersecting street under authority of ordinance by order of the city traffic engineer, and that the stop sign had been removed from the post along the street upon which defendants' car approached the intersection. *Held:* Whether intestate was negligent does not depend upon whether he believed and had reasonable grounds to believe that there was a stop sign erected along the intersecting street, but whether his acts constituted negligence must be determined on the basis of the actual conditions existing at the time of the accident, and therefore an instruction in regard to the rights and duties of motorists at the intersection of a through and servient street is inapplicable and must be held for prejudicial error. G.S. 20-158(a).

APPEAL by defendants from *Froneberger, J.*, September 8, 1958, Schedule B, Civil Term, of MECKLENBURG.

Civil action growing out of a collision that occurred January 21, 1957, about 4:40 p.m., at the intersection of North Smith and West Eighth Streets, in a residential district of Charlotte, N. C., resulting in the death of plaintiff's intestate, hereafter called Tucker, in personal injuries to Moorefield, Jr., hereafter called Moorefield, and in damage to the vehicles involved, to wit, (1) a Chevrolet truck operated by Tucker, and (2) a Dodge car operated by Moorefield.

As they approached the intersection, Tucker was proceeding north along Smith Street and Moorefield was proceeding west along Eighth Street. Both streets were paved. Smith Street is approximately eighteen feet, three inches wide. Eighth Street is approximately twenty-two feet, nine inches wide. The vehicles collided in the northeast portion of the intersection.

Moorefield, Sr., owned the Dodge car. His son, the operator, was then 17 years old. Admissions in defendant's pleading suffice to establish the liability of Moorefield, Sr., under the family purpose doctrine, for the actionable negligence, if any, of his son.

Additional facts, pertinent to decision on this appeal, will be stated in the opinion.

Plaintiff's action is to recover damages for the alleged wrongful death of Tucker. She alleged that the collision was caused by the negligence of Moorefield. Defendants, in their joint answer, denied negligence and pleaded contributory negligence; and, as counterclaims, they alleged that the collision was caused solely by the negligence of Tucker for which Moorefield was entitled to damages for personal injuries and Moorefield, Sr., was entitled to property damages.

Evidence was offered by plaintiff and by defendants.

Six issues were submitted. The first three, which arose on plaintiff's alleged cause of action and defendants' answer thereto, were

answered as follows: (1) negligence, "Yes," (2) contributory negligence, "No," (3) damages, "$30,000.00." The jury did not reach and answer the last three issues relating to Tucker's negligence and defendants' damages, which arose on defendants' alleged counterclaim.

Thereupon, the court adjudged that plaintiff recover of defendants, jointly and severally, the sum of $30,000.00, together with costs.

Defendants excepted and appealed, assigning errors.

Goodman & Goodman, Carpenter & Webb and John G. Golding for plaintiff, appellee.

Carswell & Justice and Kennedy, Covington, Lobdell & Hickman for defendants, appellants.

BOBBITT, J. This Court is of opinion that the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of the case to the jury. Hence, the assignment of error directed to denial of defendants' motion for judgment of nonsuit is overruled. Since a new trial is awarded for reasons stated below, we refrain from a discussion of the evidence presently before us. *Caudle v. R.R.*, 242 N.C. 466, 88 S.E. 2d 138. Similarly, when a judgment of nonsuit is reversed, we refrain from stating the evidence. *Goldston v. Tool Co.*, 245 N.C. 226, 228, 95 S.E. 2d 455; *Pavone v. Merion*, 242 N.C. 594, 595, 89 S.E. 2d 108; *Davis v. Finance Co.*, 242 N.C. 233, 234, 87 S.E. 2d 209; *Harrison v. Kapp*, 241 N.C. 408, 409, 85 S.E. 2d 337.

Plaintiff pleaded and put in evidence certain sections of Chapter 2 of the Code of the City of Charlotte. Section 40(a) designates certain streets as *through streets* but North Smith is not so designated. Nor does it appear that North Smith was so designated by "any ordinance." Hence, Sections 40(a), 40(b) and 77 (a) do not apply.

Section 77(b), in pertinent part, provides: "The city traffic engineer is hereby authorized to determine and designate intersections where particular hazard exists *upon other than through streets* and to determine whether vehicles shall stop *at one or more entrances* to any such stop intersection, and shall erect a stop sign *at every such place where a stop is required*, . . ." (Our italics) The authority conferred by Section 77(b) relates specifically to the erection of stop signs at one or more entrances at particular intersections where no through street is involved. The city traffic engineer, a witness for plaintiff, testified: "This intersection had been found to be one at which a special hazard existed and stop signs were first erected prior

to 1954." Again: "The signs were placed on Eighth Street stopping all traffic entering Smith Street from Eighth."

G.S. 20-158(a) relates to the duty of a motorist to stop in obedience thereto whenever signs notifying drivers to do so have been erected at the entrance to designated "main traveled or through highways." North Smith Street had not been so designated. Hence, G.S. 20-158(a) does not apply.

We are advertent to decisions in other jurisdictions holding that where a street has been properly designated a boulevard, through street or arterial highway, and appropriate signs have been erected along the intersecting streets or roads, its status as a main thoroughfare is not lost merely because the sign on an intersecting street has become illegible, destroyed or otherwise removed. 60 C.J.S., Motor Vehicles § 350, p. 832; *Connors v. Dobbs* (Ohio), 66 N.E. 2d 546; 5A Am. Jur., Automobiles and Highway Traffic § 328, p. 434; *Schmit v. Jansen* (Wis.), 20 N.W. 2d 542, 162 A.L.R. 925; Annotation: 162 A.L.R. 927 *et seq.*, and supplemental decisions. However, it is noted that each decision is based upon particular statutory or ordinance provisions. Compare *Chambers v. Donaldson* (Cal.), 264 P. 2d 950, and California cases cited therein. It is noteworthy that in the cases referred to the main thoroughfare had been so designated by ordinance; and in most, but not all, the motorists had knowledge of its status.

North Smith had not been designated a through street by ordinance or otherwise. The mere fact that the city traffic engineer determined that a special hazard existed at this particular intersection did not convert North Smith or the portion thereof within this intersection into a through street. A driver on North Smith Street had no preferential rights because of the city traffic engineer's said determination. His preferential rights, if any, must be predicated upon the actual presence of a stop sign.

On January 21, 1957, a stop sign on the west side of Smith Street, facing eastbound traffic, was in place; but there was no stop sign on the east side of Smith Street. The metal post or portion thereof, which had supported a stop sign, was in place; but the sign itself was gone. Thus, no stop sign faced Moorefield as he approached the intersection. Two police officers, offered by plaintiff, testified that a stop sign had been there, but did not say when they had last seen it. A neighborhood resident, offered by defendants, testified that the stop sign had been down at least two months, and that it was found, after the collision, in the back yard of a nearby house.

Defendants excepted to the admission of testimony relating to the

stop sign on the west side of Smith Street and to the metal post or portion thereof on the east side of Smith Street. It would appear that these exceptions were waived when further testimony with reference thereto was elicited by defendants' counsel. *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844. Be that as it may, testimony as to these physical facts was for consideration by the jury, together with evidence as to all other circumstances and conditions existing at the time and place of the collision, in relation to whether Moorefield exercised due care. "The degree of care required of a motorist is always controlled by and depends upon the place, circumstances, conditions, and surroundings of each particular case." 5 Am. Jur., Automobiles and Highway Traffic § 201.

These factual circumstances are noted: (1) The evidence tends to show that Moorefield had not been on Eighth Street before, that he was not familiar with the intersection; and that, as he approached Smith Street, he was looking for a street marker to ascertain whether he was approaching Cedar Street. (2) The evidence tends to show that Tucker, a route salesman, had traveled on North Smith Street two or three times a week for several years.

While evidence as to their presence was admissible, as indicated above, no legal duty to stop was imposed on Moorefield by the sign (facing eastbound traffic) on the west side of Smith Street, or by the metal post or portion thereof on the east side of Smith Street.

What legal significance, if any, did the fact that there *had been* a stop sign on the east side of Smith Street at this intersection, erected pursuant to the provisions of Section 77(b), have upon the relative rights and duties of Moorefield and Tucker? This is the crucial question.

In our view, the fact that there *had been* a stop sign on the east side of Smith Street, erected pursuant to the provisions of Section 77(b), imposed no legal duty on Moorefield. Indeed, absent evidence that Moorefield had knowledge or notice that such stop sign *had been* there, evidence as to such fact, and as to why and when the sign had been removed, was irrelevant; for Moorefield's negligence, if any, must be determined on the basis of conditions as they existed on the occasion of the collision.

Plaintiff contends that, in any event, the fact that a stop sign *had been* there was relevant as to whether Tucker was negligent. Her contentions are (1) that it may be fairly inferred that Tucker knew the stop sign *had been* there and (2) that it was for the jury to determine, with the burden of proof on defendants, whether it

should be inferred that Tucker had knowledge or notice that the sign had been removed prior to January 21, 1957.

We do not think Tucker's legal duty depends upon whether he believed, and had reasonable grounds to believe, that there was a stop sign on the east side of Smith Street facing westbound traffic on Eighth. Tucker's negligence, if any, as well as the negligence of Moorefield, if any, must be determined on the basis of the actual conditions existing when they approached the intersection; and if, in fact, there was no stop sign on the east side of Smith Street on January 21, 1957, Tucker was not legally entitled to act *as if* it were there.

In instructing the jury, the court read G.S. 20-158(a); then charged the jury that the evidence tended to show "that Smith Street where it intersects with 8th Street, has been by a city ordinance, or the evidence tends to show that Smith Street was called a dominant or main highway, whereas 8th Street was intersecting at the place in question, is what we refer to as a servient street"; and thereafter charged the jury as to the relative rights of motorists on dominant (through) highways and on servient (stop sign) highways. Defendants excepted to these and other instructions of like import. Defendants also excepted to the court's refusal to give instructions requested by defendants setting forth the law substantially as stated herein.

It seems appropriate to say that the crucial question was one of first impression in this jurisdiction and that, except for the error relating thereto, the trial was well conducted. However, having resolved the crucial question as indicated, the error with reference thereto materially prejudiced defendants and entitles them to a new trial.

New trial.

LYDE LASSITER BAKER, MARY ALICE NORVILLE AND WILLIAM EARL LASSITER v. TRAVIS D. MURPHREY.

(Filed 20 May, 1959.)

1. Husband and Wife § 5—

A deputy clerk has authority to take the certificate of a married woman in a conveyance by her to her husband. G.S. 52-12, G.S. 47-1.

2. Mortgages § 31g—

A decree for the sale of lands under foreclosure of a mortgage or deed of trust is an interlocutory order and the bid at the sale is but a proposition to buy, and confirmation is essential to the consummation of the sale and the transfer of title.

3. Mortgages § 31b: Executors and Administrators § 20—

Where the mortgagor dies intestate after decree of foreclosure but prior to confirmation, the mortgagor's heirs at law, to whom the land descends subject to be sold to make assets to pay debts, are necessary parties and are entitled to be heard as to whether the sale by the commissioners should be confirmed, and as to heirs who are not made parties the court is without jurisdiction to decree confirmation, and such heirs are entitled to set aside the foreclosure and to an adjudication that they own their proportionate part of the lands subject to outstanding liens.

APPEAL by plaintiffs from *Thompson, Special J.*, October 1958, (A) Term, of GREENE.

Civil action to have plaintiffs declared the owners of an undivided one-sixth interest in two tracts of land in Greene County containing 22½ acres and 1¼ acres, respectively, and for an accounting of rents and profits from 1941 to date.

John J. Murphrey died September 20, 1941, intestate, survived by his widow, Eliza Murphrey, and by the following heirs at law: Five children, Travis D. Murphrey (defendant herein), Addie M. May, Willie Murphrey, Annie Murphrey Rouse, and Mary Murphrey Linton, and four grandchildren, the children of Maybelle Murphrey Lassiter Gay, a daughter who predeceased John J. Murphrey, namely, Joseph Hugh Lassiter, Mary Alice Norville, Lyde Lassiter Baker, and William Earl Lassiter.

Plaintiffs assert title as heirs at law of John J. Murphrey, their grandfather, and of Joseph Hugh Lassiter, their brother, who died subsequent to the death of John J. Murphrey.

In the documents referred to below, the spelling is "Murphy." For convenience, we adopt the spelling used in the pleadings, to wit, "Murphrey."

On September 26, 1941, T. D. Murphrey, defendant herein, qualified as administrator of the estate of John J. Murphrey, and served

as such administrator until October 1, 1942, on which date he filed his final account with the clerk of superior court. His final account as administrator shows total receipts (all on September 29, 1941) of $306.32, "rents from sale of tobacco," and disbursement thereof (on or prior to November 30, 1941) in payment of crop liens, administration expenses and the balance of $6.35 "Paid to Mrs. J. J. Murphy, Year's support."

Plaintiffs offered the record of a deed dated January 7, 1928, duly recorded, by which Eliza J. Murphrey, "in consideration of One Dollar and the assumption of Mortgage indebtedness," purported to convey the two tracts to John J. Murphrey in fee simple. After full warranties, these words appear: "Except Mortgage held by Ben Albritton, and Lang & Tyson."

Plaintiffs offered the judgment roll in a civil action entitled *"Farmville Oil and Fertilizer Company v. John J. Murphy, Eliza Murphy, Richard Grimsley, John Hill Paylor, Trustee, J. H. Harris, James H. Harper, J. T. Taylor, and T. M. Dail, partners, trading as J. T. Taylor & Company,"* relating to the 22½-acre tract.

This was an action to foreclose a mortgage dated January 14, 1928, executed and delivered by John J. Murphrey and wife, Eliza Murphrey, as security for the payment of their $1,106.00 promissory note to Tyson-Lang Company, then owned by the plaintiff. The defendants, other than John J. Murphrey and Eliza Murphrey, were joined because of their claims under other mortgages. Grimsley, the only defendant who answered, asserted that he owned a $450.00 mortgage note, executed and delivered by John J. Murphrey and wife, Eliza Murphrey, to B. E. Albritton, and that this mortgage was a first lien on the 22½-acre tract. Judgment dated June 27, 1941, entered at June Term, 1941, adjudged that plaintiff recover of John J. Murphrey and Eliza Murphrey the sum of $1,106.00 with interest thereon at 6% per annum from January 1, 1931, together with costs; and, in said judgment, commissioners were appointed to sell the 22½-acre tract and disburse the proceeds as provided therein.

At the commissioners' sale on October 20, 1941, J. H. Harris, a defendant in said action, was the last and highest bidder at $2,500.00. He assigned his bid to T. D. Murphrey. The sale was confirmed November 12, 1941, by decree of the resident superior court judge, which ordered that the commissioners convey the property to T. D. Murphrey upon his payment of said purchase price. The decree of confirmation directed that the commissioners disburse the $2,500.00 as follows: First, to the payment of the costs of the action, including an allowance of $150.00 to the commissioners; second, to the payment of

taxes; third, to the payment of the mortgage indebtedness due Grimsley; and fourth, "the residue to be paid to the Farmville Oil and Fertilizer Company on Judgment entered at June Term, 1941." By deed dated November 12, 1941, the commissioners purported to convey to T. D. Murphrey in fee simple the said 22½-acre tract. The commissioners' final report shows their receipt of $2,500.00 from T. D. Murphrey and their disbursement thereof as provided in the decree of confirmation. T. D. Murphrey is Travis D. Murphrey, defendant herein.

John J. Murphrey and Eliza Murphrey were duly served with summons in said foreclosure action. Neither filed answer. The said judgment was entered at June Term, 1941. The commissioner's sale, the report thereof, decree of confirmation, etc., occurred after September 20, 1941, the date of John J. Murphrey's death.

The plaintiffs were not made parties to said foreclosure action and none was represented therein by a guardian *ad litem* or any other legal representative. When John J. Murphrey died, the ages of plaintiffs were as follows. Lyde Lassiter Baker was 18, William Earl Lassiter was 13, and Mary Alice Norville was 4. (Note: The other heirs at law of John J. Murphrey were not made parties to said foreclosure action and are not parties to this action.)

Plaintiffs offered the following evidence relating specifically to the 1¼-acre tract, which was not involved in said foreclosure action, viz.: (1) Defendant's admission that John J. Murphrey and wife, Eliza Murphrey, by mortgage dated February 22, 1939, and duly recorded, had conveyed said 1¼-acre tract to Richard Grimsley as security for an indebtedness of $150.00. (2) The record of a deed from Richard Grimsley, Mortgagee, to defendant, purporting to convey said 1¼-acre tract pursuant to foreclosure sale on December 19, 1941, under said mortgage of February 22, 1939, at which defendant became the last and highest bidder at $150.00. This deed contains full recitals as to default, advertisement, failure to receive upset bid, payment of purchase price by defendant, etc. There was no evidence as to the fair market value of the 1¼-acre tract.

The only testimony was that of Mrs. Lyde Lassiter Baker, one of the plaintiffs. She testified that her grandparents, John J. Murphrey and wife, Eliza Murphrey, lived on the "homeplace" until John J. Murphrey died; and that Eliza Murphrey continued to live there until January 1, 1956, when she was taken to the hospital, during which time Willie Murphrey, one of her sons, resided with her. There was no testimony as to whether the 22½-acre tract, or the 1¼-acre tract, or both, constituted the "homeplace."

Plaintiffs' first cause of action relates to both of said tracts. Plaintiffs alleged a second cause of action, purporting to relate to a separate 5-acre tract; but plaintiffs' statement of case on appeal sets forth that "During the course of the trial it became apparent that the 5-acre tract was a part of the 22½-acre tract" and that "Plaintiffs took a voluntary nonsuit as to their second cause of action." At the close of plaintiffs' evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiffs excepted and appealed.

Lewis & Rouse for plaintiffs, appellants.

I. Joseph Horton, K. A. Pittman and J. Faison Thomson & Son for defendant, appellee.

BOBBITT, J. It appears that Eliza J. Murphrey acknowledged the execution of her deed of January 7, 1928, to John J. Murphrey before "H. J. Brown, Deputy C.S.C.," whose certificate is in due form and includes the finding required by CS 2515, which, as amended, is now G.S. 52-12. Defendant's contention that a deputy clerk had no authority to make such finding is without merit. CS 2515 contemplated that the finding that the contract was not unreasonable or injurious to the married woman would be made by the officer before whom she was separately examined as to her execution of the deed. CS 3293, now G.S. 47-1, expressly authorized a deputy clerk of superior court to take such acknowledgment.

As to the 22½-acre tract, plaintiffs' contention that the decree of confirmation and deed, in the foreclosure action, are void as to them, is well taken.

Upon the death of an intestate, his real property descends to his heirs, subject to be sold, if necessary, to make assets to pay his debts. *Alexander v. Galloway,* 239 N.C. 554, 558, 80 S.E. 2d 369; *Linker v. Linker,* 213 N.C. 351, 353, 196 S.E. 329. As to mortgaged property, the heirs stand "in the place of their ancestor." *Fraser v. Bean,* 96 N.C. 327, 2 S.E. 159. As owners of the equity of redemption, they are necessary parties to an action for foreclosure of the mortgage. *Fraser v. Bean, supra; Chadbourn v. Johnston,* 119 N.C. 282, 285, 25 S.E. 705; *Hinkle v. Walker,* 213 N.C. 657, 197 S.E. 129; *Riddick v. Davis,* 220 N.C. 120, 125, 16 S.E. 2d 662; *Wilmington v. Merrick* 231 N.C. 297, 56 S.E. 2d 643; McIntosh, N. C. Practice and Procedure, § 233; 37 Am. Jur., Mortgages § 1129; 59 C.J.S., Mortgages § 627(e); Annotation: 119 A.L.R. 807 (As to whether the intestate's

personal representative is a necessary party, see *Geitner v. Jones*, 173 N.C. 591, 92 S.E. 493, and cases discussed therein.)

It has been held that the heirs are indispensable parties when the ancestor dies during the pendency of the action. 37 Am. Jur., Mortgages § 1129; 59 C.J.S., Mortgages § 631; 119 A.L.R. 809.

Defendant contends: "The death of a mortgagor after the decree of foreclosure, and before the sale thereunder, does not prevent such sale." 37 Am. Jur., Mortgages § 1147. This is true, but beside the point. In *Holden v. Dunn*, 144 Ill. 413, 33 N.E. 413, cited in support of the quoted text, after the decree of foreclosure, but before the sale thereunder, "notices of the decree were, pursuant to the statute, served upon the heirs of John W. Dunn and upon the administratrix of his estate." As to procedure on death of a party, see G.S. 1-75.

If plaintiffs, upon the death of John J. Murphrey, had been made parties to said foreclosure, they would have succeeded to his rights and status therein. Plaintiffs do not attack the validity of the judgment entered at June Term, 1941. But that judgment, in respect of its provisions for the sale of the 22½-acre tract by commissioners, was an interlocutory order. As stated by *Smith, C. J.*, in *Mebane v. Mebane*, 80 N.C. 34: "The commissioner acts as the agent of the Court, and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and until accepted and sanctioned by the Court, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed." In an action to foreclose a mortgage, "confirmation is essential to the consummation of the sale of the lands by the commissioner appointed and acting under the order of the court." *Beaufort County v. Bishop*, 216 N.C. 211, 215, 4 S.E. 2d 525, citing many prior cases.

Plaintiffs, as parties in interest, were entitled to be heard as to whether the sale by the commissioners should be confirmed. Since they were not parties to the foreclosure action, the court, as to plaintiffs' interest in said 22½-acre tract, was without jurisdiction to decree confirmation. As to plaintiffs' interest, the decree of confirmation was void and the commissioners' deed to defendant did not convey title. Therefore, nothing else appearing, plaintiffs now own an undivided one-sixth interest in the 22½-acre tract, subject to said judgment and such liens as may be outstanding thereon. If and when plaintiffs intervene in such foreclosure action or are made parties thereto, the court may then resolve the question as to whether the sale by commissioners' on October 20, 1941, should be confirmed. See *Bank v. Stone*, 213 N.C. 598, 601, 197 S.E. 132, and cases cited.

Plaintiffs contend, alternatively, that, if the decree of confirmation and the commissioners' deed are held valid, defendant, by reason of his status as administrator, acquired and holds title to said 22½-acre tract as trustee for the heirs. However, having held the decree and deed void as to plaintiffs' interest, we do not reach this question.

The judgment of involuntary nonsuit dismissed plaintiffs' action in its entirety without referring specifically either to the 22½-acre tract or to the 1¼-acre tract. It is noted that plaintiffs' allegations as to both tracts were compounded in a single cause of action. In reversing the judgment of involuntary nonsuit, we express no opinion as to whether the meager evidence relating thereto was sufficient to make out a *prima facie* case as to the 1¼-acre tract, i.e., that defendant acquired and holds title thereto, in respect of plaintiffs' interest, as trustee for plaintiffs, subject to his right to reimbursement. The facts relating thereto may be more fully developed at the next hearing.

Reversed.

SOUTHEASTERN FIRE INSURANCE COMPANY v. MILDRED BRADLEY MOORE AND WILLIAM P. MOORE.

(Filed 20 May, 1959.)

1. Automobiles § 41g—

Evidence tending to show that a motorist slowed almost to a stop before entering an intersection, that she looked and did not see any vehicle approaching along the intersecting street, and that she proceeded into the intersection and was about half-way across when she saw defendant's car approaching from her right, that defendant's car entered the intersection without slowing down, that defendant did not look to his left and struck plaintiff's car when it was three-fourths across the intersection, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Insurance § 53—

Payment by insurer of the damage to insured's car, less $50 deductible under the policy, under agreement that the payment should be a loan without interest repayable only in the event of recovery against the tort-feasor, that insured should cooperate in prosecuting any claim against the tort-feasor and designating insurer as agent and attorney in fact to prosecute any such action, does not authorize insurer to maintain an action in its own name against the tort-feasor, since, the claim not having been paid in full, insured continues to be the real party in interest.

APPEAL by plaintiff from *Williams, J.*, January Regular Civil Term of WAKE.

This is an action instituted by the plaintiff, the insurer of Velma Parker Lee who suffered property damages of $511.96 growing out of an automobile collision, of which amount the plaintiff paid $461.96 under the provisions of its $50.00 deductible collision policy, leaving the insured with a loss of $50.00.

When the plaintiff herein paid its insured the $461.96, it did so "as a loan, without interest, repayable only in the event and to the extent of any net recovery the undersigned (Velma Parker Lee, the insured) may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage to the property described below," etc.

The defendants demurred to the original complaint on the ground that Velma Parker Lee was the real party in interest and that plaintiff was attempting to split an indivisible cause of action. The demurrer was sustained and plaintiff amended its complaint by alleging in part that "* * * Velma Parker Lee parted with any beneficial interest to a right of action by waiving to the defendants the difference between the damage set out hereinbefore and the amount paid by the plaintiff herein; that the payment by the plaintiff of $461.96 is the only remaining basis of action for a final and complete determination of the matter." The demurrer to the amended complaint was overruled.

A subrogation agreement entitled "Loan Receipt" and referred to hereinabove states that Mrs. Lee covenanted that no settlement had been made on account of the loss sustained, and that "no such settlement will be made, nor release given without the written consent of the said Company (the plaintiff)"; and agreed to cooperate with the plaintiff "to promptly present claim and, if necessary, to commence, enter into and prosecute suit against such person or persons * * * through whose negligence or other fault the aforesaid loss was caused * * *." The instrument also designated the plaintiff, as Mrs. Lee's agent and attorney in fact, to collect the claim "* * * and to begin, prosecute, compromise or withdraw in his, its or their name * * * any and all legal proceedings that the said 'Company' may deem necessary to enforce such claim or claims * * *."

The plaintiff's evidence, with respect to the automobile collision out of which the insured's damages allegedly arose, tends to show that on 16 July 1957, about 8:00 a.m., its insured was traveling north on South Boylan Avenue in the City of Raleigh, North Carolina, in a line of traffic; that the traffic signals along said avenue were not in operation and when she approached the intersection of Morgan Street she was

traveling about 20 miles per hour; that she slowed down to almost a complete stop; that she looked and could not see any car coming; that she proceeded into the intersection, and when she was about half way across the intersection she saw the defendants' car about two car lengths to her right; that the insured's car was about three-fourths across the intersection when the accident or collision occurred.

Further evidence was offered by the plaintiff tending to show that Melvin W. Bennett was traveling in his car, following the plaintiff's insured, and stopped at the intersection of said streets; that he noticed a Plymouth automobile, allegedly owned by the defendant William P. Moore and driven by his wife and co-defendant, Mildred Bradley Moore, approaching from the east on Morgan Street; that the driver of the Plymouth car was almost at the top of the hill and did not slow down, and the driver did not look in his direction at all.

At the close of plaintiff's evidence the court allowed the defendants' motion for judgment as of nonsuit, for that the plaintiff had attempted to split an indivisible cause of action and sue in its own name. The plaintiff appeals, assigning error.

Bailey & Dixon for appellants.
Smith, Leach, Anderson & Dorsett for appellee.

DENNY, J. In our opinion, if the ruling of the court below can be sustained, it must be on the ground that the plaintiff attempted to split an indivisible cause of action. Otherwise, the evidence offered by the plaintiff was sufficient to carry the case to the jury.

In the case of *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, *Ervin,* J., collected the authorities supporting each of the following propositions:

"1. Where insured property is destroyed or damaged by the tortious act of another, the owner of the property has a single and indivisible cause of action against the tort-feasor for the total amount of the loss. * * *

"2. When it pays the insured either in full or in part for the loss thus occasioned, the insurance company is subrogated *pro tanto* in equity to the right of the insured against the tort-feasor. * * *

"3. Where the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under the statute codified as G.S. 1-57,

which specifies that 'every action must be prosecuted in the name of the real party in interest.' * * *

"4. Where the insurance paid by the insurance company covers only a portion of the loss, the insured is a necessary party plaintiff in any action against the tort-feasor for the loss. The insured may recover judgment against the tort-feasor in such case for the full amount of the loss without the joinder of the insurance company. He holds the proceeds of the judgment, however, as a trustee for the benefit of the insurance company to the extent of the insurance paid by it. The reasons supporting the rule stated in this paragraph are that the legal title to the right of action against the tort-feasor remains in the insured for the entire loss, that the insured sustains the relation of trustee to the insurance company for its proportionate part of the recovery, and that the tort-feasor cannot be compelled against his will to defend two actions for the same wrong. * * *"

It would seem that under the facts in this case the plaintiff not having paid the insured in full, the insured continues to be the real party in interest and may sue for the benefit of herself and the insurance company for the entire damages. *Burgess v. Trevathan, supra.*

On the other hand, if the complaint and the evidence in this action disclosed that the insured accepted the sum of $461.96 in full settlement of her claim for damages against the defendants, we would have an entirely different situation, one in which the plaintiff could maintain an action in its own name. *Insurance Co. v. Motor Lines,* 225 N.C. 588, 35 S.E. 2d 879.

In 46 C.J.S., Insurance, section 1209, page 153, it is said: "Insurer's rights to subrogation accrue on payment of the insurance claim; but until payment of the claim on the policy no rights to subrogation accrue. An advance by insurer of the amount of insurance to insured under an agreement reciting that the amount was received as a loan to be repaid only from such recovery as might be had from the other party is not a payment entitling insurer to subrogation."

In the case of *Phillips v. Clifton Mfg. Co.,* 204 S.C. 496, 30 S.E. 2d 146, 157 A.L.R. 1255, the plaintiff alleged that in a collision between his automobile and the defendant's truck, plaintiff's automobile had been damaged in the sum of $500.00. The plaintiff's insurance carrier paid him $450.00 under its $50.00 deductible policy and obtained a subrogation agreement from the plaintiff in the identical language as the one executed by the insured in the instant case. The South Carolina Supreme Court held the plaintiff, the insured, was

the real party in interest and had the right to bring the action, and reversed the order of the lower court making plaintiff's insurer a party plaintiff. In this jurisdiction we have held that in such a situation the insurer is not a necessary party but is a proper one. *Burgess v. Trevathan, supra; Taylor v. Green,* 242 N.C. 156, 87 S.E. 2d 11; *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; McIntosh, North Carolina Practice and Procedure, Vol. 1, 2nd Ed., section 599, page 319.

Upon the facts revealed by the record before us, the plaintiff is not authorized to maintain this action in its own name.

The ruling of the court below in sustaining the judgment as of nonsuit, for that the plaintiff has attempted to split an indivisible cause of action and sue in its own name, will be upheld.

Affirmed.

BANK OF VARINA v. W. M. SLAUGHTER AND WIFE, NELL V. SLAUGHTER, JAMES C. SLAUGHTER AND WIFE, LUCY L. SLAUGHTER, AND WILLIAM B. OLIVER, TRUSTEE.

(Filed 20 May, 1959.)

1. Contracts § 1—

A contract is an agreement between two or more parties on sufficient consideration to do or refrain from doing a particular act.

2. Contracts § 26: Evidence § 27—

Where the terms of a contract are established, prior negotiations are merged therein, and evidence of the negotiations is incompetent to enlarge or restrict its provisions.

3. Bills and Notes § 17—

Where a note and deed of trust contain an express promise by the makers to pay the sums loaned by the bank not in excess of a stipulated amount, the makers, in an action on the note for the amount loaned, may not defend on the ground that in prior negotiations it was agreed that they and their property should be liable for only that portion of the money borrowed by them individually, and that the corporation, which they controlled, would alone be liable for any credit extended on its behalf, since such agreement is in direct conflict with the writings.

4. Trial § 31d—

Objection that the court's definition and explanation of the "greater weight of the evidence" was not as full and complete as defendants desired will not be sustained in the absence of a request for special instructions.

5. Appeal and Error § 24—

Objection that the court did not fully state the contentions of appellants will not be considered on appeal when the objection was not brought to the trial court's attention in apt time.

APPEAL by W. M. Slaughter and Nell V. Slaughter from *Clark, J.*, October 1959 Regular Civil Term of WAKE.

Plaintiff seeks to recover $17,070.66, the balance asserted to be owing on a note for $25,000 given it on 26 January 1954 by W. M. Slaughter, Nell V. Slaughter, and Tri-County Farm Center, Inc., hereafter shortened to Farm Center; and to foreclose a deed of trust to William B. Oliver securing payment of the note. Execution of the note and deed of trust is stipulated.

Liability was asserted against James C. Slaughter and wife by virtue of language in a deed to them for the mortgaged property. The court held they were not liable for the debt. They are no longer interested in the controversy. It is convenient therefore to refer to W. M. Slaughter and Nell V. Slaughter as defendants.

The parties stipulate six payments have been made on the note. Two of these payments were made by defendants, the remaining four by or for Farm Center. When the total payments are deducted from the face of the note there is a balance owing as claimed by plaintiff.

Farm Center was a corporation owned and controlled by defendants and Win Donat. When the note and deed of trust were executed, defendants acquired Donat's stock so that they might, in the language of the deed of trust, "operate in its regular course of business the Tri-County Farm Center, Inc."

Farm Center was adjudged a bankrupt about four months after defendants acquired sole stock ownership and control. Plaintiff filed a claim with the trustee in bankruptcy. It received a dividend which was applied as one of the credits on the note.

Defendants for their defense allege an agreement by the bank to lend them the money to acquire stock ownership and control of Farm Center and to extend to it a line of credit in the sum of $25,000. By this agreement defendants and their property would be liable only for monies loaned them; Farm Center would alone be liable for any credit extended to it. They admitted they had borrowed $10,239.86 on which they had made two payments as shown on the note, leaving, according to their contention, a balance owing of $3,318.11, which they tendered as a full discharge.

They did not assert fraud or mistake in the note or deed of trust which they admit executing. They do not seek to reform.

Arlee C. Holleman, assistant cashier and note teller for plaintiff, testified W. M. Slaughter brought the note and deed of trust to the bank. Witness made out a deposit slip showing how the proceeds of the loan were applied. Copy of this deposit slip was given to W. M. Slaughter. The witness testified five items were deducted from the $25,000; four of these aggregating $21,798.89 were in payment of loans previously made by plaintiff to defendants for monies they had borrowed for use by Farm Center; the fifth item was interest accrued. This left a balance of $3,073.53, which was, by direction of defendants, credited to the account of Farm Center.

As determinative of the controversy the court submitted without objection this issue: In what amount, if any, are defendants W. M. Slaughter and Nell V. Slaughter indebted to plaintiff? The jury answered as contended by plaintiff. Judgment was entered in conformity with the verdict, and defendants appealed.

Thomas A. Banks for plaintiff, appellee.
Allen Langston for defendant, appellants.

RODMAN, J. Defendants complain of rulings excluding a conversation between W. M. Slaughter and his wife, Nell V. Slaughter, made prior to the execution of the note and not communicated to plaintiff. No reason is advanced which would establish the competency of this testimony.

Defendants also assign as error the refusal of the court to permit W. M. Slaughter to testify with respect to negotiations with the bank president which culminated in the execution of the note and deed of trust.

"A contract is an agreement between two or more persons or parties on sufficient consideration to do or refrain from doing a particular act." *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322.

When the terms of a contract are established, the negotiations which produced the contract cannot enlarge or restrict its provisions and are therefore not competent as evidence in an action to enforce it. *Bost v. Bost,* 234 N.C. 554, 67 S.E. 2d 745; *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644; *Home Owners' Loan Corp. v. Ford,* 212 N.C. 324, 193 S.E. 279.

The note and deed of trust constituting the contract were in writing. They contained an express promise to pay such sums as the bank loaned not in excess of $25,000. This promise could not be contradicted or destroyed by parol testimony that the makers would not be called upon to pay monies loaned pursuant to the contract. The

very purpose of reducing it to writing was to avoid any controversy as to the terms of the contract. *Neal v. Marrone,* 239 N.C. 73, 79 S.E. 2d 239; *McLawhon v. Briley,* 234 N.C. 394, 67 S.E. 2d 285; *Busbee v. Creech,* 192 N.C. 499, 135 S.E. 326; *De Loache v. De Loache,* 189 N.C. 394, 127 S.E. 419; *Rousseau v. Call,* 169 N.C. 173, 85 S.E. 414.

The court, after reviewing the evidence and contentions of the parties, charged the jury that the burden of proof rested on plaintiff to establish by the greater weight of the evidence the sums loaned directly to defendants and the amount deposited to the credit of Farm Center at the direction of defendants, and if the plaintiff had failed to establish the full amount of its claim to answer the issue in the amount admitted by defendants to be owing. The charge was not prejudicial to defendants; it was more favorable than they were entitled to.

If the court's definition and explanation of "greater weight of the evidence" was not as full and complete as defendants thought necessary, they should have requested an instruction containing the desired definition and illustration. *McAbee v. Love,* 238 N.C. 560, 78 S.E. 2d 405.

Likewise, if at the trial they thought, as they here contend, the court had not fully stated their contentions, they should have responded to the request made by the judge just before his final instruction. The court said: "Now, if there are any other instructions that counsel for either side request the Court to make I would like to have the request at this time."

The record shows: "No response from counsel." It is now too late to complain. *In re Will of Crawford,* 246 N.C. 322, 98 S.E. 2d 29; Strong, N. C. Index, Vol. 1, p. 101, n. 289.

No Error.

F. D. CLINE PAVING COMPANY v. SOUTHLAND SPEEDWAYS, INC., G. F. PENNY, J. A. MORGAN, ARCHIE FLEMING, JR., C. C. TRIPLETT AND JOHN W. GRIFFIN.

(Filed 20 May, 1959.)

1. Bills and Notes § 8—

The payee of a note is not called upon to elect whether to pursue his remedy against the maker or against the endorsers, but is entitled to call on the maker to pay the full amount of the debt and thereafter call upon the endorsers to pay any unpaid balance.

2. Same— Acceptance by payee of note of third person does not discharge endorsers on original note in absence of intent that second note should constitute payment.

A creditor, secured by a lien on the debtor's realty, and holding a note, endorsed by defendants, for part of the debt, joined in receivership proceedings participated in by the endorsers. The purchaser at the receiver's sale gave notes to the creditors, secured by deed of trust, and the liens were canceled of record. Upon default of the purchaser, a corporation was created by the holders of the purchaser's notes and stock issued in the corporation to each creditor. The maker thereafter sold its stock for one half the amount of the original debt. The court found there was no intent on the part of the maker to accept the purchaser's note or the stock in the corporation as payment. *Held:* The maker may hold endorsers liable for the balance due on the note, there having been no voluntary surrender by the payee of the lien against the maker's property, but the amount realized from the sale of the stock must be applied to the debt secured by the lien pro rata to that part represented by the note and that part not embraced in the note.

3. Payment § 9—

Payment is an affirmative defense which must be established by the party claiming its protection.

4. Payment §§ 7, 8—

Where a lienholder accepts a chose in action in the sale of the debtor's property by the receivers, discharging the liens, the amount realized upon sale of the chose is not a voluntary payment by the debtor, and the debtor is not entitled to direct the application of the payment, nor is the creditor entitled to do so upon failure of the debtor to make such direction, but the payment must be applied equally to all debts secured by the lien.

APPEAL by defendants Penny, Morgan, Fleming, and Griffin from *Fountain, S. J.*, September 1958 "A" Civil Term of WAKE.

Plaintiff bases its cause of action on a negotiable note dated 14 June 1952, payable to it on demand, in the sum of $15,000, with interest from its date. Corporate defendant, hereafter designated as Speedways, is the maker. It did not answer. The individual defendants are endorsers and are hereafter designated as defendants. The complaint alleges a balance owing of $5,000 and interest. Defendants plead payment.

A jury trial was waived. Based on the evidence offered, including stipulations of the parties, the court found facts which, summarily stated, follow:

Plaintiff in June 1952 did work for Speedways to the value of $43,342. During the course of the work the note sued on was executed. While the work was in progress Speedways paid plaintiff $25,000. Plaintiff credited $10,000 of the payment on the note. This left a total

balance owing plaintiff on account of the work done for Speedways of $18,342, which included the balance shown by the note.

Creditors of Speedways, including plaintiff, claimed liens for work done. Receivers were appointed for Speedways in an action begun by its creditors. Acting under court order, the receivers offered Speedways' properties for sale. They received two offers: one for $100,000 cash; the other from James F. Chestnutt to (a) pay in cash a mortgage amounting to $28,000 which had priority over creditors in the class with plaintiff, (b) pay $827.25 owing the State of North Carolina, and (c) give notes to plaintiff and other preferred creditors for a total of $166,493.99, this being the aggregate amount owing to such creditors, the notes to be secured by mortgage on the properties to be conveyed by the receivers.

The receivers notified creditors of the offer and a hearing to be had thereon. At a hearing in January 1953 Judge Harris, finding all creditors were present with none objecting to the acceptance of the Chesnutt offer, directed a sale to him. Defendants participated in the receivership proceedings.

Pursuant to the order the properties were conveyed to Chesnutt. He executed his notes to the creditors including a note to plaintiff for the full amount owing to it, to wit, $18,342. The notes were secured by Chesnutt's deed of trust. Plaintiff's lien was cancelled of record but it did not surrender the note sued on.

Chesnutt defaulted in the payment of his notes. His deed of trust was foreclosed and the properties purchased by Capital Investment Company, a corporation created by the holders of the Chestnutt notes. The purchase price named in the deed to Capital Investment Company represented approximately 70% of the amount owing to each of the creditors, and each was issued stock in that corporation for his pro rata share.

Defendants plead the acceptance of the Chesnutt notes as a payment and the acceptance of the stock in Capital Investment Company as a payment. The court found: "There is no evidence that the plaintiff intended any of the transactions recited above, including the acceptance of the note from James F. Chestnutt, and the stock of Capital Investment Company or its subsequent sale, to be a discharge of the original note."

Plaintiff sold its stock in Capital Investment Company for $9171, one-half of the amount owing by Speedways when the receivers were appointed and plaintiff's lien claim matured. This was the fair value at the time of sale.

Based on the findings, the court concluded plaintiff was entitled to

recover the $5,000 balance on the note with interest and entered judgment accordingly.

Defendants excepted to the findings of fact relating to payment, the conclusions of law, and appealed.

Ruark, Young, Moore & Henderson for plaintiff, appellee.
Hoffler & Mount for defendant, appellants.

RODMAN, J. Appellants contend: (1) The filing of the lien and claim with the receiver for $18,342 was an election to release them, which now bars plaintiff's right to proceed against them; (2) the acceptance of the Chesnutt note was a payment of the note endorsed by them; and (3) if the acceptance of the Chesnutt note did not discharge their obligation, the acceptance of the stock in Capital Investment Company was a payment and discharge.

None of these contentions rests on a solid foundation. Speedways was the real or primary debtor; defendants were only secondarily liable. The mere fact that the creditor called on the party primarily liable and sought to compel it to pay the full amount of its debt is not inconsistent with the creditor's right to thereafter call upon the party secondarily liable to discharge his obligation. Since there was no inconsistency in plaintiff's procedure, it was not called upon to make an election as to the remedy sought. *Thomas v. College,* 248 N.C. 609, 104 S.E. 2d 175; *Carrow v. Weston,* 247 N.C. 735, 102 S.E. 2d 134; *Surratt v. Insurance Agency,* 244 N.C. 121, 93 S.E. 2d 72; *Baker v. Edwards,* 176 N.C. 229, 97 S.E. 16.

Payment is an affirmative defense, which must be established by the party claiming its protection. *Finance Co. v. McDonald,* 249 N.C. 72. Defendants' plea of payment, if sustained, would require us to hold that a creditor who accepts from his debtor the obligation of a third person takes it in payment, releasing the debtor from his obligation irrespective of the intent with which the new obligation is assigned and accepted. The law is otherwise. It is, we think, correctly stated by *Clark, C. J.,* in *Grady v. Bank,* 184 N.C. 158, 113 S.E. 667: "The note of a third person given for a prior debt will be held a satisfaction, where it was agreed by the creditor to receive it absolutely as payment, and to run the risk of its being paid. The onus of establishing that it was so received is on the debtor. But there must be a clear and special agreement that the creditor shall take the paper absolutely as payment or it will be no payment if it afterwards turns out to be of no value. A receipt in full of an account does not establish an agreement on the part of the creditor to accept as absolute payment at his

own risk the note of a third person for the debt." *Bank v. Hall,* 174 N.C. 477, 93 S.E. 981; *Terry v. Robbins,* 128 N.C. 140; 70 C.J.S. 240; 40 Am. Jur. 786.

Here the court has found there was no intent to take in payment. The fact, as stipulated, that defendants as well as plaintiff participated in the receivership proceeding without protest to the charge in form of creditors' claims against the properties of Speedways supports the finding and negatives the plea of payment.

The findings establish a partial discharge of Speedways indebtedness to plaintiff. This payment was not a voluntary payment made by Speedways as to which it could direct its application, or which, in default of such direction, would permit the creditor to apply as may be most advantageous to it.

The payment came as the result of a lien on Speedways' property. G.S. 44-1. That lien applied with equal force to each part of Speedways' debt. When defendants, by endorsing the note, became in effect guarantors for Speedways, they became to that extent entitled to the protection of the statutory lien. If plaintiff had voluntarily surrendered the lien and thereby deprived defendants of its protection, they could have pleaded that act as a defense. *Bank v. Nimocks,* 124 N.C. 352; *Bell v. Howerton,* 111 N.C. 69; 8 Am. Jur. 471.

The statutory lien by virtue of which plaintiff has received partial payment is analogous to a mortgage securing several notes, some of which are endorsed. The proceeds derived from its enforcement must be applied ratably to the debts secured. *Kitchin v. Grandy,* 101 N.C. 86; *Whitehead v. Morrill,* 108 N.C. 65; *Demai v. Tart,* 221 N.C. 106, 19 S.E. 2d 130; *Madison Nat. Bank v. Weber,* 158 N.E. 543, 60 A.L.R. 199; *Orleans County National Bank v. Moore,* 3 L.R.A. 302; *Fielder v. Varner et al.,* 45 Ala. 429; *Bergdoll v. Sopp,* 76 A. 64; *Hargis Bank & Trust Co. v. Gambill,* 28 S.W. 2d 769; *Bancroft v. Granite Savings Bank & Trust Co.,* 44 A. 2d 542.

Plaintiff, utilizing that portion of the lien which protected defendants as endorsers, has received payment of one-half, exclusive of interest, of the total debt owing to it. Appellants are entitled to have the monies received from the sale of Capital Investment Company stock applied proportionately to all of Speedways' debt—both the part represented by the note and the part not so evidenced. The judgment of the Superior Court fixing the liability of appellants will be modified to conform to this opinion, and as so modified is affirmed.

Modified and Affirmed.

STATE v. ALEX TAYLOR.

(Filed 20 May, 1959.)

1. Criminal Law §§ 33, 84, 85— Intoxicating Liquor § 12—

Where there is testimony that the intoxicating liquor in question was placed on defendant's premises by another, and defendant has testified that on the day before the whiskey was found on defendant's premises he had not been in the presence of such other person, testimony by a State's witness that on the day before the occurrence defendant was seen in the presence of such other person is competent as material to the issue as to whether the liquor was placed on defendant's premises with his consent, and the rule that the State is concluded by the defendant's testimony as to a collateral matter is inapposite.

2. Criminal Law § 156—

Ordinarily an exception to an exerpt from the charge does not present asserted error of the court in failing to charge further on the same or another aspect of the case.

3. Intoxicating Liquor § 5—

While mere knowledge of defendant that intoxicating liquor is on his land does not establish as a matter of law that the whiskey is in defendant's constructive possession, if the whiskey is on defendant's premises with his knowledge and consent, he has constructive possession thereof while it remains on premises under his exclusive control.

4. Criminal Law §§ 135, 169—

Where no error is found on the count upon which sentence is suspended, the judgment must be set aside and the cause remanded for proper judgment.

APPEAL by defendant from *Armstrong, J.*, November 24, 1958, Criminal Term of GUILFORD, Greensboro Division.

Criminal prosecution on two-count warrant charging (1) unlawful possession of nontaxpaid whiskey, and (2) unlawful possession of nontaxpaid whiskey for the purpose of sale, tried *de novo* in superior court on appeal by defendant from conviction and judgment in Municipal-County Court of Greensboro.

Evidence was offered by the State and by defendant. The evidence disclosed that, on August 27, 1958, about 9 A.M., law enforcement officers searched defendant's premises and found thereon, "immediately behind his garage," four cases, "stacked two on two," each containing twelve half-gallon (fruit) jars of nontaxpaid whiskey, a total of twenty-four gallons, which cases or cartons were covered with logs, sacks, tarpaulins, with a piece of tin on top. Whether this whiskey (1) was in defendant's possession, and, if so, (2) was in his

possession for the purpose of sale, were the controverted and determinative questions.

The court, based on the jury's verdict of "GUILTY AS CHARGED IN THE WARRANT," pronounced these judgments, viz.: (1) On the first count, judgment imposing a sentence of twelve months; (2) on the second count, judgment imposing a sentence of eighteen months, to begin upon expiration of the sentence of twelve months imposed on the first count, suspended for three years on specified conditions.

Defendant excepted and appealed.

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

E. L. Alston, Jr., for defendant, appellant.

BOBBITT, J. Defendant's assignments of error, directed to the court's denial of his motion for judgment of nonsuit, are overruled. Indeed, on oral argument, defendant's counsel frankly conceded that the evidence, considered in the light most favorable to the State, was sufficient to warrant submission to the jury and to support the verdict. Hence, there is no need to state evidential facts other than those necessary to understand the assignments of error stressed by defendant.

On cross-examination, defendant testified: "The man I think put the stuff there is Oliver Lucas who lives right behind me." Again: "He (Oliver Lucas) came up to the house about two or three days before that to speak to me about this — I guess it's this; I don't know. He wanted to use my garage to put white liquor in and I said 'No.' And he said: 'Well, in case you do see some around there, you won't say anything about it, will you? You won't see it?' or something like that, and as far as I know, I didn't answer him. . . . I told him he couldn't use the garage. As for telling him that he couldn't put it behind the garage, I don't believe I ever answered him." Defendant testified that if he had seen Lucas the day preceding the day of his arrest, that is, on August 26, 1958, "it was off at a distance," and that he was not "in Oliver Lucas' presence."

After defendant had so testified, the State offered an ABC enforcement officer who testified, over objections by defendant, that he had seen the defendant on August 26, 1958, between seven and eight A.M., in company with Oliver Lucas and one Woodrow Jordan, on Union Street in Greensboro; that defendant and Lucas left together in a 1946 Mercury four-door sedan; and that Jordan left in another car.

Defendant's contention that the court erred in admitting the officer's

testimony is based upon the premise that it related to a collateral matter and therefore the State was bound by defendant's answer. Relevant to whether the subject of the contradictory testimony relates to a material or a collateral matter, defendant quotes Stansbury, North Carolina Evidence, § 48(3): "The proper test would seem to be whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or, in case of prior inconsistent statements, whether evidence of the facts stated would be so admissible." The "proper test," as so defined, is amply supported by cases cited by Professor Stansbury and by defendant. But when this test is applied, it appears that the officer's testimony was competent.

The State's evidence in chief contained no reference to Lucas. Lucas was introduced by defendant as a person who, *two or three days* before the whiskey was found, had approached defendant with reference to putting nontaxpaid whiskey on defendant's premises and to whom defendant had given no answer as to whether Lucas could put it behind defendant's garage. Indeed, defendant stated frankly that he believed Lucas had put it there. The fact that defendant was seen with Lucas, going off with him in a car, on the morning preceding the morning when the whiskey was found on defendant's premises, considered in connection with the testimony relating to defendant's prior conference with Lucas, was a relevant circumstance bearing upon whether the whiskey was on defendant's premises with his knowledge and consent. Thus, the evidence was properly admitted as material to the issue, not for the mere purpose of contradicting defendant in relation to a collateral matter.

Defendant assigns as error portions of the charge as given relating to constructive possession. Defendant concedes that possession may be either active or contructive. *S. v. Harrelson,* 245 N.C. 604, 606, 96 S.E. 2d 867, and cases cited. His contention is based largely on the asserted inadequacy of the court's instructions. "It is elemental that an exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case." *Peek v. Trust Co.,* 242 N.C. 1, 16, 86 S.E. 2d 745, and cases cited; *Rigsbee v. Perkins,* 242 N.C. 502, 503, 87 S.E. 2d 926. Even so, when the evidential facts are considered, the instructions given appear adequate.

Defendant asserts that the court erred in instructing the jury as follows: ". . . where liquor is on the premises of a person, or any other article of personal property for that matter, with his knowledge *and consent,* it is as a matter of law in his constructive possession." (Our

italics) In *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600, on which defendant relies, it was held that mere knowledge of the fact that the whiskey was on the defendant's premises was insufficient to establish as a matter of law that such whiskey was in the defendant's constructive possession. However, if nontaxpaid whiskey is on a person's premises with his knowledge *and consent,* he has constructive possession thereof while it remains on premises under his exclusive control.

Assignments of error directed to the court's instructions as to aiding and abetting have been fully considered but do not merit particular discussion. Suffice to say, none discloses prejudicial error.

It is noted that the court explicitly instructed the jury that defendant would not be guilty on either count if another person "came and placed it there behind this garage without his knowledge or consent."

Defendant has failed to show prejudicial error in the conduct of the trial. The judgment, as to the first count, is affirmed. As to the second count, appeal having been taken to entry of judgment suspending the prison sentence, the judgment pronounced on the second count is stricken and the cause is remanded for proper judgment. See *S. v. Henderson,* 245 N.C. 165, 95 S.E. 2d 594, and *S. v. Moore,* 245 N.C. 158, 95 S.E. 2d 548, and cases cited therein.

As to first count: No error — Judgment affirmed.

As to second count: No error in trial — Remanded for proper judgment.

GEORGE R. GRANT, TRUSTEE FOR MRS. REBECCA KENNEDY, INCOMPETENT v. DAVID STEPHEN ROYAL.

(Filed 20 May, 1959.)

1. Automobiles § 33—

A motorist has the right to assume and act on the assumption that pedestrians crossing the street between intersections where no marked crosswalk has been established will recognize the motorist's right of way.

2. Automobiles § 36—

There is no presumption of negligence from the mere fact that there has been an accident and an injury.

3. Automobiles §§ 411, 45— Evidence held not to disclose negligence in hitting pedestrian.

Evidence tending to show that ladies dressed in dark clothes attempted to cross a four-lane street between intersections at a place where there was no marked crosswalk, that the night was dark and rainy, that the pedestrians hesitated in the middle of the street and

then proceeded in the face of on-coming traffic, and that defendant's car bumped the ladies, knocked them down, but stopped before running over them, without evidence of speed, is insufficient to overrule nonsuit on the issue of negligence and does not present the issue of last clear chance, since the evidence discloses that defendant had only an instant in which to take evasive action after he discovered that the ladies had decided to continue across the street.

PARKER, J., dissenting.

APPEAL by plaintiff from *Hall, J.*, September, 1958 Civil Term, CUMBERLAND Superior Court.

Civil action to recover damages for personal injury. The plaintiff alleged the injury was proximately caused by actionable negligence in the manner in which the defendant operated his automobile on Ramsey Street in the City of Fayetteville. The defendant denied negligence, and pleaded contributory negligence as a defense and as a bar to recovery. The plaintiff, by reply, alleged the defendant was liable by reason of his negligent failure to avail himself of the last clear chance to avoid the injury.

The plaintiff's evidence at the trial, in substance, showed the following: Ramsey Street in Fayetteville runs north and south. It is of black asphalt construction, approximately 40 feet wide, with four marked lanes, the two on the east for north-bound traffic, and the two on the west for south-bound traffic. The sidewalks parallel to the street were lined with maple and oak trees, and the lights and light fixtures were all on the east and none on the west side of the street.

At the time of her injury, Mrs. Kennedy, then 85 years of age, lived on the west side of the street, 112 feet from its nearest street intersection. At the point of the accident there was no marked crosswalk for use by pedestrians. On the date of the injury, March 6, 1957, at about 7:45 o'clock at night, Mrs. Kennedy and a next-door neighbor, Miss Ida Garrett, age 70, attempted to cross Ramsey Street from west to east directly in front of Mrs. Kennedy's house. At the time, it was raining, and foggy, and the wind was blowing from the south. The ladies were dressed in dark clothes. Mrs. Kennedy carried a black umbrella.

Miss Garrett, a witness for the plaintiff, testified: "We were crossing Ramsey Street from Mrs. Kennedy's home to the east side. . . . When we started across the street, I looked to my left (north). We reached the middle of the street, I looked to my right, (south). . . . I saw cars approaching. These cars were approximately from 500 to 600 feet, as far as I could figure. I could not see the cars themselves, but I saw the lights . . . as far as I know Mrs. Kennedy and I con-

tinued to cross the street. . . . The next thing that I can recall after Mrs. Kennedy and I had started to cross the second half of the street and as we were walking as fast as we could the car hit us. I heard no horn, no brake, nothing, just the car hit us."

All the evidence tended to show the defendant's automobile going north bumped the ladies, knocking them down. The defendant's automobile stopped before running over them. "Mr. Royal . . . said that he did not see us when we stopped in the middle of the street, he saw us when we hesitated, but he thought we had turned back."

There was no evidence of speed—no skid marks. On cross-examination, Miss Garrett was asked about a statement she signed, as follows: "And started from the middle of the block to go directly across the street or to the east side of Ramsey Street. It was about 7:45 and the evening was cold and raining hard and the road was wet. . . . Yes, that was correct."

After the accident the defendant called an ambulance, sent the ladies to the hospital, and assured them they would be cared for.

At the close of the plaintiff's evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Tally, Tally & Taylor, and Donald B. Strickland for plaintiff, appellant.

Nance, Barrington & Collier, By: James R. Nance, and Rudolph G. Singleton, Jr., for defendant, appellee.

HIGGINS, J. The record in this case leaves the impression that two estimable ladies, born in the horse and buggy days, failed fully to appreciate the speed of present day automobile traffic and the dangers incident thereto. On foot, they attempted to cross a four-lane street at a place where the authorities had made no provision for such crossing. Darkness, rain, wind, fog, clothing and umbrella blending with the color of the street surface, left the defendant insufficient time to avoid them after he could have discovered their intention to continue across his lane of traffic. They had stopped or hesitated in a place of safety from his intended movement. Even so, he stopped after merely bumping them without running over them.

Plaintiff and her witness were crossing from the unlighted side of the street at a place where the defendant had a right to assume and to act on the assumption that pedestrians would recognize his right of way and not obstruct it. *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406. (See North Carolina

Index, Vol. 1, pp. 264, 265, for full citation of cases.) No presumption of negligence arises from the mere fact there has been an accident and an injury. *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821; *Merrell v. Kindley,* 244 N.C. 118, 92 S.E. 2d 671; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661.

In this case there is no evidence of speed. All the evidence indicates the defendant had only an instant in which to take evasive action after he could have observed the ladies suddenly decided to hurry across the two lanes for north-bound traffic. The wonder is that complete success to avoid the accident failed by so narrow a margin.

The judgment of involuntary nonsuit in the court below is

Affirmed.

PARKER, J., dissenting. Mrs. Ella Garrett Beard, a witness for plaintiff, asked defendant at the hospital after Mrs. Rebecca Kennedy had been carried there this question: "Why did you do it; didn't you see them?" He replied: "Yes, I saw them, but I thought they had stopped."

At the hospital this occurred in the presence of Miss Ida Garrett, her sister, Mrs. Burns and defendant: "My sister asked Mr. Royal why he run over us. He said that he did not see us when we stopped in the middle of the street, he saw us when we hesitated, but he thought we turned back. He did not say a thing about us as to when he saw us for the second time. But he did tell me that he saw myself and Mrs. Kennedy in the middle of the street and thought we had turned back, that is right. My sister heard it."

Ramsey Street is about 40 feet wide, and is practically level and straight, where the two ladies were struck. After Miss Ida Garrett was knocked down, she was next to the curbing, and Mrs. Kennedy was to her left. Other facts are stated in the majority opinion. These two elderly ladies were hurrying across the street as fast as they could from Mrs. Kennedy's home to attend prayer meeting at a neighbor's home.

Plaintiff, in reply to the defense of contributory negligence alleged in the answer, has invoked the doctrine of last clear chance. It seems to me from a study of the evidence and considering it in the light most favorable to plaintiff, that these inferences may be legitimately drawn therefrom: Defendant was negligent, Mrs. Rebecca Kennedy was guilty of contributory negligence, but that, although Mrs. Kennedy had negligently placed herself in a position of peril from which she could not escape by the exercise of reasonable care, the defendant knew, or by the exercise of reasonable care could have discovered,

her perilous position and her incapacity to escape from it before she was struck by his automobile, that the defendant had the time and means to avoid injury to her by the exercise of reasonable care after he discovered, or should have discovered, her dangerous position and her incapacity to escape therefrom, but negligently failed to use the available time and means to avoid striking her with his automobile, and for that reason struck and injured her. *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150.

I vote to reverse the judgment of nonsuit entered below.

FRED B. WILKINSON v. ERWIN MILLS, INCORPORATED.

(Filed 20 May, 1959.)

Master and Servant § 6f—

Where, in an action for wrongful discharge, plaintiff's evidence fails to establish a contract of employment for a fixed term, nonsuit is properly entered, since employment for an indefinite and unfixed duration is terminable at the will of either party.

APPEAL by plaintiff from *McKinnon, J.*, October, 1958 Civil Term, DURHAM Superior Court.

In this civil action the plaintiff has sought to recover $18,260.49 by reason of his alleged wrongful discharge on August 31, 1953, from the defendant's employment. The complaint alleged the damages consisted of the following: Loss of one year's salary at $1,000.00 per month; loss of the right to participate in the benefits of a trust fund set up by the defendant as a reward to its employees for loyal and faithful service; and loss of interest.

The plaintiff alleged in substance his faithful and loyal services began June 1, 1932, and continued to the date of his discharge. From April, 1942, he had been manager of the defendant's cotton department. During 1953 changes occurred in the ownership of defendant's capital stock which involved changes in management. During the reorganization, the plaintiff inquired of various officials whether the changes would affect his position with the company and was assured his employment would continue. He requested that if the changes should affect his position that he be given 30 days' notice prior to August 1, in order that he could seek other employment in the cotton trade. By a custom in the industry, employment usually begins August 1 each year.

The plaintiff testified in accordance with the allegations as summarized. On cross-examination, he admitted writing the following letter to the vice president of the defendant: " . . . you requested that I resign and stated that my services were no longer wanted. In view of your request, and solely because it was requested by you, I herewith tender my resignation . . . as of the close of business on August 31, 1953."

At the close of plaintiff's evidence the court entered a judgment of involuntary nonsuit, from which the plaintiff appealed.

Blackwell M. Brogden, W. J. Brogden, Jr., for plaintiff, appellant.

Reade, Fuller, Newsom & Graham, By: F. L. Fuller, Jr. By: James T. Hedrick for defendant, appellee.

PER CURIAM. The plaintiff's allegations and evidence insofar as his monthly salary is concerned show employment for a term of indefinite and unfixed duration. Such employment is terminable at the will of either party. If we disregard the letter and hold the plaintiff was discharged for causes other than failure to perform his services, nevertheless the defendant had the right to terminate plaintiff's services for its own reasons. Under the terms of the employment, the plaintiff could quit or the defendant could discharge him.

The evidence fails to show the plaintiff has not received all benefits which he has a present right to demand from the defendant under its trust plan.

This disposition makes it unnecessary for us to consider whether the lapse of time has barred plaintiff's right to maintain this action or whether the change of plaintiff's position resulted in any financial loss.

The judgment of involuntary nonsuit is

Affirmed.

T. G. BENBOW v. J. F. CAUDLE.

(Filed 20 May, 1959.)

Process § 16—

The issuance of execution against the person of defendant on order to show cause after defendant had failed to pay in full a judgment awarding punitive damages against him, even though the execution was issued after defendant's refusal to convey to plaintiff his homestead, cannot be made the basis of an action for abuse of process, since there is no evidence of abuse or misuse of execution after its issuance.

APPEAL by plaintiff from *Phillips, J.*, October Civil Term, 1958, of GUILFORD (Greensboro Division).

When this cause came on for trial in Superior Court the plaintiff stipulated in open court "that he was . . . basing his cause of action upon malicious abuse of process and not for malicious prosecution. . . ."

The substance of plaintiff's evidence at the trial is as follows:

In 1945, J. F. Caudle, defendant in the instant case, sued T. G. Benbow, plaintiff in the case at bar, in the Superior Court of Guilford County for damages for false arrest. The case was tried in 1947. The jury answered the issues in favor of Caudle and awarded $500.00 actual damages and $3,000.00 punitive damages. As a basis for the award of punitive damages the jury, in response to a separate issue as to malice, found that Benbow was actuated by malice in causing the arrest of Caudle. From judgment entered pursuant to the verdict Benbow appealed to the Supreme Court. The judgment was affirmed. *Caudle v. Benbow*, 228 N.C. 282, 45 S.E. 2d 361.

Caudle caused execution to issue and the execution was partially satisfied by levy upon and sale of Benbow's real estate. However, Benbow's homestead exemption was allotted in a parcel of land in the city of Greensboro and this was not sold under the execution. In 1954 Caudle's attorney, with Caudle's consent, proposed to accept conveyance of the homestead in full settlement of the judgment, but Benbow refused. Caudle's attorney then wrote Benbow and renewed the offer, advised that execution against the person would be sought on the basis of the jury's answer to the malice issue unless the homestead was conveyed, explained that Benbow would have to remain in jail under such execution until the judgment was paid or he was otherwise lawfully released, and pointed out that he could not take the pauper's oath so long as he retained the homestead. Benbow ignored the letter.

An order was served on Benbow to show cause why an execution against the person should not issue. The order was duly served 13 days prior to the time set for hearing thereon, but Benbow did not appear. The clerk ordered execution against the person of Benbow. The execution was issued and pursuant thereto the sheriff committed Benbow to jail on August 18, 1954. He was released on October 12, 1954, by order in a habeas corpus proceeding. The entire matter was handled by Caudle's attorney with Caudle's knowledge and consent. Benbow, after his release, instituted this action to recover damages for malicious abuse of process.

At the close of plaintiff's evidence the court allowed the defend-

ant's motion for involuntary nonsuit. From judgment pursuant thereto plaintiff appealed.

Robert S. Cahoon for plaintiff, appellant.
George C. Hampton, Jr., for defendant, appellee.

PER CURIAM. Plaintiff's evidence when considered in the light most favorable to him fails to make out a *prima facie* case of malicious abuse of process in accordance with the controlling principles laid down in *Barnette v. Woody,* 242 N.C. 424, 431, 88 S.E. 2d 223. There is no evidence of abuse or misuse of the execution after its issuance. The judgment below is

Affirmed.

IN RE CONDEMNATION BY THE CITY OF GREENSBORO OF CERTAIN LAND AND IMPROVEMENTS THEREON OWNED BY E. G. DILLARD AND WIFE, BESSIE I. DILLARD.

(Filed 20 May, 1959.)

APPEAL by petitioner from *Phillips, J.,* 8 September Regular Civil Term 1958 of GUILFORD (Greensboro Division).

This is a proceeding instituted pursuant to the provisions of Chapter 37, North Carolina Private Laws of 1923, as amended (being the Charter of the City of Greensboro), for the condemnation of 10.692 acres of land, together with the improvements thereon, owned by E. G. Dillard and wife, Bessie I. Dillard.

The preliminary resolution of condemnation was adopted by the City Council of the City of Greensboro on 5 May 1958 and was duly served on the owners. As provided in the Charter of the City of Greensboro, the City Council appointed one appraiser, the owners appointed one appraiser, and the two appraisers appointed a third appraiser.

Upon receiving the report of the Board of Appraisers, the City Council adopted a final resolution of condemnation on 19 May 1958, to which the owners excepted and gave notice of appeal to the Superior Court of Guilford County.

The case came on for trial in the Superior Court. There was a verdict and judgment for the respondents. The petitioner appeals, assigning error.

H. J. Elam, III, City Attorney; J. L. Warren, Assistant City Attorney for petitioner.

H. L. Koontz, Shuping & Shuping for respondents.

PER CURIAM. The sole question for the jury to determine in the court below was simply this: What was the fair market value of the land, and the improvements thereon, which the City of Greensboro condemned for municipal purposes, as of 5 May 1958?

The petitioner and the respondents offered numerous witnesses who testified as to the fair market value of the 10.692 acres of land, involved in this condemnation proceeding, as of 5 May 1958. The appellants have brought forward 27 assignments of error, based on 99 exceptions, most of them being directed to the admission or exclusion of evidence. However, after a careful examination of these assignments of error and the exceptions upon which they are based, we are constrained to hold that no prejudicial error of sufficient magnitude to justify a new trial is made to appear.

In the trial below there is in law

No Error.

VIRGINIA SIMMS LLOYD (AND MOTORS INSURANCE CORPORATION) v. PHILLIP GREENBERG.

(Filed 20 May, 1959.)

APPEAL by defendant from *McKinnon, J.*, October Term, 1958, of DURHAM.

Civil action instituted by Virginia Simms Lloyd, referred to herein as plaintiff, growing out of a collision that occurred November 2, 1954, on N. C. Highway 49 near its intersection with N. C. Highway 73, approximately nine miles south of Concord, N. C., between a Cadillac car, operated by defendant, and a Pontiac car, owned and operated by plaintiff, resulting in personal injury to plaintiff and damage to her car.

The cars were proceeding on Highway 49, in the same direction, southeast towards Charlotte, N. C. The Cadillac struck the rear of the Pontiac.

Prior to trial, Motors Insurance Corporation, plaintiff's collision insurance carrier, was made a party because of its interest in plaintiff's claim for damages to her car.

The court overruled defendant's motions for judgment of nonsuit.

Issues raised by the pleadings were submitted to the jury. The jury answered the (first) negligence issue, "Yes," and answered the (second) contributory negligence issue, "No." Answering separate issues, the jury awarded (third issue) $10,000.00 on account of plaintiff's personal injuries and awarded (fourth issue) $478.00 on account of the damage to her car.

It appears that plaintiff "stipulated and agreed in open court at the time of the hearing (of defendant's motion to set aside the verdict) to a reduction in the damages under the third issue to the sum of $8,000.00."

The court entered judgment (1) that plaintiff have and recover of defendant the sum of $8,000.00 damages for personal injuries, and (2) that plaintiff have and recover of defendant $478.00 as damages to her car, with provisions defining the respective interests of plaintiff and Motors Insurance Corporation in said $478.00, and (3) that defendant pay the costs.

Defendant excepted and appealed, assigning errors.

James R. Farlow and Victor S. Bryant, Jr., for plaintiffs, appellees.

Daniel K. Edwards and Robinson O. Everett for defendant, appellant.

PER CURIAM. The conclusion reached is that the evidence, when considered in the light most favorable to plaintiff, presented a case for jury determination on the issues submitted. Moreover, consideration of the assignments of error brought forward and discussed in appellant's brief fails to disclose any error of law deemed of sufficient prejudicial effect to warrant a new trial. As to the reduction of the verdict on the third issue, with plaintiff's consent, see *Caudle v. Swanson,* 248 N.C. 249, 103 S.E. 2d 357, and cases cited.

No Error.

WILLIAM FRANCIS FRAZIER v. REUBENIA MEADOWS FRAZIER.

(Filed 20 May, 1959.)

APPEAL by defendant from *Armstrong, J.,* February 2, 1959 Term of GUILFORD (Greensboro Division).

This action was begun 8 April 1958. The complaint alleges the parties were married in September 1943; that they separated 8 February 1956 and thereafter lived separate and apart, entitling plaintiff to a divorce *a vinculo,* G.S. 50-6.

The answer denies the separation. It contains a cross action which,

if established, would entitle defendant to alimony without divorce as provided by G.S. 50-16. She sought alimony *pendente lite* as well as alimony without divorce.

At the conclusion of plaintiff's evidence, defendant's motion to nonsuit was overruled. The motion was not renewed when all the evidence had been offered.

Plaintiff's motion to nonsuit the cross action was allowed.

Issues were submitted and answered entitling plaintiff to a divorce based on the separation alleged. Judgment was entered on the verdict, and defendant appealed.

George C. Hampton, Jr., for plaintiff, appellee.
J. Kenneth Lee for defendant, appellant.

PER CURIAM. Defendant assigns seven errors as the basis for her assertion that prejudicial error exists. The first and third are not mentioned in her brief and are therefore deemed abandoned. Rule 28, G.S. 4A, p. 185.

The fourth was abandoned by the introduction of evidence. G.S. 1-183.

The fifth, sixth, and seventh appear only in the assignments of error. This is not sufficient. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *In re McWhirter,* 248 N.C. 324, 103 S.E. 2d 293.

The only remaining assignment is directed to the refusal of the court to submit the issue: "Did the plaintiff desert and abandon the defendant as alleged in the answer?" The court correctly refused to submit the issue. The cross action charging plaintiff with wrongful conduct was nonsuited, and that question was not brought forward in the brief or argued here. There is no basis in the evidence to justify the issue. Plaintiff does not now argue there is, but attempts under that exception to assert that there was no intent on the part of either party to do more than have a separate vacation. The evidence was sufficient to show the defendant abandoned plaintiff, and the separation existed continuously for more than two years. No exception was taken to the charge. It correctly defines the separation required by the statute as a basis for a divorce *a vinculo.* Our examination of the record fails to disclose error.

No Error.

MRS. GENEVA CONKLIN v. W. H. PENNY, EXECUTOR OF THE ESTATE OF MRS. FLORENCE HALL, DECEASED.

APPEAL by defendant from *McKinnon, J.*, November Civil Term 1958 of DURHAM.

Civil action to recover for services rendered by plaintiff to Mrs. Florence Hall from 1 May 1951 until 8 June 1955 — the date of Mrs. Hall's death —, pursuant to an agreement by Mrs. Hall with plaintiff that she would compensate plaintiff for such services in her will.

There is ample evidence to show that plaintiff performed her part of the contract, rendered valuable services to Mrs. Hall during the last years of her life, and that the reasonable value of such services was from $9,000.00 to $10,000.00.

Upon the denial of liability by the executor and issues joined, the jury returned a verdict that plaintiff had rendered valuable services to Mrs. Hall from May 1951 until 8 June 1955 pursuant to the alleged agreement, and that the reasonable value of such services was $7,500.00.

Defendant appeals.

Claude V. Jones and Arthur Van for Plaintiff, appellee.
E. C. Brooks, Jr. and R. P. Reade for defendant, appellant.

PER CURIAM. A study of the Record, the assignments of error, and the brief filed by the defendant's counsel fails to show any error sufficient to disturb the verdict and judgment below.

No Error.

MARY L. BARNES AND HUSBAND, J. T. BARNES, JR.; VIRGINIA L. IRVIN AND HUBAND, GEORGE L. IRVIN, JR.; BARBARA L. HANES AND HUSBAND, FRANK B. HANES, AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF NANCY L. LASATER, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 12 June, 1959.)

1. Eminent Domain § 5—

Just compensation for the taking of a part of a tract of land is to be measured by the difference between the fair market value of the property as a whole immediately before and the fair market value of the remainder immediately after the appropriation, and in arriving at this difference consideration must be given to the value of the land taken considered as an integral part of the entire tract, and to the general and special benefits accruing to the landowner with respect to the land not taken.

2. Same—

Separate and independent parcels of land belonging to the same landowner may not be considered in assessing damages to lands not taken or in offsetting benefits resulting thereto.

3. Same—

Whether two or more parcels of land of the same landowner constitute a single tract or separate and independent tracts for the purpose of assessing damages to lands not taken and the offsetting of special benefits, is one of law for the court, although where there is doubt as to the predicate facts the court may submit issues to the jury under proper instructions.

4. Same—

Whether several parcels of land of the same landowner constitute but a single tract for the purpose of assessing damages to lands not taken and the offsetting of special benefits is to be determined according to the facts in each case upon the basis of unity of ownership, physical unity and unity of use. It is not required for unity of ownership that a party have the same quantity or quality of estate in all parts of the tract. Unity of use is often applied as controlling although it is limited to present use, and possible future uses may not be considered upon this question.

5. Same— Both parcels of petitioners' land held properly considered as a single tract for purposes of assessing special benefits.

Petitioners' land was divided by an easement conveyed for and used as a private paved road, but the tract was a physical unity acquired at one time, and at the time of the taking consisted of open fields and woodland, with most of each parcel being zoned for residential purposes and only the southern portion of one of the parcels being zoned for commercial purposes. *Held:* Both parcels were properly considered as a single tract in assessing damages to the land not taken and in offsetting special benefits resulting thereto from the taking of a part of

the northern parcel for highway purposes, and the difference in zoning relates to future uses and ought not to be considered on this question.

6. Same—

The fair market value of land as the basis for compensation is to be ascertained by assuming the existence of a buyer who is ready, able and willing to buy, but under no necessity to do so.

7. Same—

The fair market value of land within the rule of ascertainment of compensation is not limited to its value for the use to which the land was put at the time of the taking, but all capabilities of the land and its adaptability to other uses should be considered to the extent that such possible uses affects its then market value.

8. Eminent Domain § 6—

Petitioners' land consisted of fields and woodland situated within the limits of a municipality and surrounded by high-type residential properties and business areas. *Held:* The fair market value of the land is not limited to its value as undeveloped land, and petitioners were entitled to show that the land was suitable and available for division into lots for business and residential purposes as a prospective use affecting its market value.

9. Same—

Even though the adaptability of undeveloped land to use for residential and business purposes is so feasible as to affect its present market value, and it is competent for witnesses to testify as to its present market value taking into consideration such prospective uses, it is not competent for the jury to consider such undeveloped tract as though a subdivision thereon were an accomplished fact, and witnesses may not testify as to its speculative value based on the aggregate value of all possible lots less the cost of development.

10. Same—

Even though the adaptability of undeveloped land to use for residential and business purposes is so feasible as to affect its present market value, a map of the property showing the land divided into lots is not competent as substantive evidence but is competent solely for the purpose of illustrating and explaining the testimony of the witnesses as to the adaptability of the land to such uses.

11. Evidence § 22—

Ordinarily maps of the *locus in quo* are competent in evidence solely for the purpose of explaining or illustrating the testimony of the witnesses.

12. Appeal and Error § 59—

The language of an opinion of the Supreme Court must be read in connection with the facts in the case in which the language is used.

13. Eminent Domain § 6—

It would seem that the reasonable probability that petitioners' land

not taken would be rezoned is competent on the question of special benefits thereto resulting from the taking of a part of petitioners' property for highway purposes.

14. Appeal and Error § 41—

Appellants waive their objection to the admission of testimony when other witnesses are permitted to testify to the same import without objection.

15. Eminent Domain § 6—

Whether the price paid in a voluntary sale of nearby property is competent in ascertaining the fair market value of land taken in eminent domain proceedings depends upon whether the two tracts are sufficiently similar for the value of one to be relevant in ascertaining the value of the other, which is a question to be determined in the sound discretion of the trial judge upon the *voir dire*, and exclusion of such evidence in this case is upheld, it appearing that the two tracts were markedly dissimilar in nature, condition and zoning classification.

16. Evidence § 58—

The right to cross-examine a witness upon every phase of his examination in chief is an absolute right and not a privilege.

17. Eminent Domain § 6—

An expert who has testified in condemnation proceedings as to the value of the petitioners' land may be cross-examined with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but such cross-examination must be controlled and confined within the rules of competency, relevancy and materiality, and testimony of the witness' appraisal of a dissimilar contiguous tract, while competent to impeach the witness' testimony, is incompetent for the purpose of establishing the value of the tract condemned.

18. Same—Appellants held not prejudiced by limitation of cross-examamination of expert as to appraisals of other tracts in the neighborhood.

The action of the trial court in sustaining an objection to a question asked an expert witness on cross-examination whether he had not appraised another parcel of land in the vicinity for a stipulated price will not be held for error when the two tracts are so dissimilar that the value of one is not competent and relevant in establishing the value of the other and appellants are given opportunity to cross-examine the witness in regard to the basis of his separate appraisals, it being apparent that appellants, under the guise of cross-examination, were attempting to get before the jury the specific amount of the appraisal of the other tract for the purpose of inducing a more liberal award.

APPEAL by petitioners from *Gambill, J.*, November 17, 1958, Civil Term of FORSYTH.

On 25 June, 1956, the respondent, North Carolina State Highway

Commission, in exercise of its right of eminent domain took a portion of petitioners' lands for a right of way for highway purposes. The right of way was taken in connection with respondent's project of relocating and improving U. S. Highways Nos. 158 and 421 in and through the city of Winston-Salem. It is a part of what is known as the East-West Expressway which will be designated as a part of Interstate Highway No. 40 and U. S. Highways Nos. 158 and 421. In so far as said right of way relates to this action, it will be hereinafter referred to as Expressway. It is 260 feet wide, but is wider at its intersection with Knollwood Street in order to accommodate access ramps at this location. The highway constructed thereon is a four-lane highway, with two lanes for travel proceeding in each direction. It is a limited-access highway.

The lands of the petitioners involved in this proceeding contained 46.86 acres before the taking. All of it lies within the municipal limits of the city of Winston-Salem. Respondent took 12.19 acres for said Expressway. All petitioners' land at the time of the taking was undeveloped and consisted of open fields and woodlands. Its boundaries are irregular. A branch or creek runs from west to east through the property. About three-fourths of the area is north of the creek. The land slopes downwardly from the north to the creek and the grade is upward from the creek to the southern boundaries. At the time of the taking Knollwood Street was the only city street that traversed the property. It runs north and south and approximately through the middle of the land and intersects South Stratford Road south of the property. A paved road, twenty feet wide, makes out from Knollwood Street just south of the creek and runs eastwardly to the Thruway Shopping Center, which lies immediately east of petitioners' land. This road is in a 40-foot easement of right of way which was conveyed by petitioners' predecessors in title. This road will be hereinafter referred to as the Easement. Knollwood Street and the Easement divided the land into three tracts. The portion lying west of Knollwood Street contained 15.92 acres, and will be hereinafter referred to as tract No. 1. The area lying east of Knollwood Street and north of the Easement contained 24.22 acres, and will be referred to as tract No. 2. The part situated east of Knollwood Street and south of the Easement contained 6.72 acres, and will be referred to as tract No. 3.

The Expressway crosses petitioners' property in an east-west direction, runs parallel to the creek and is a short distance north of the creek. The Expressway runs under Knollwood Street at the intersection, and the interchange ramps at this intersection are the

only means of access to the expressway from petitioners' land.

Along its northern and western boundaries petitioners' property abuts excellent residential subdivisions and developments. This is also true as to the eastern boundary north of the Expressway. Below the Expressway on the east and along the southern boundaries is a fast-growing business area, especially along South Stratford Road. Petitioners' land has a frontage of 468 feet on South Stratford Road. At the time of the taking all petitioners' property was zoned under the City Ordinance as a "Residence A-1" district (single-family dwellings), except: (1) along South Stratford Road for a depth of 200 feet it was zoned "Business B" (retail trade, general business and outlying shopping areas), and (2) along the western boundary and south of the Expressway it was zoned "Residence A-2" (single- family and multi-family dwellings).

Additional facts necessary to a decision are set out in the opinion.

A petition was filed by the owners for the purpose of obtaining compensation for the 12.19 acres taken by respondent and for recovery of alleged damages to the property not taken. Respondent filed answer and requested that alleged benefits, general and special, to the lands not taken be assessed as offsets. On 30 July, 1958, the Clerk of Superior Court appointed commissioners to determine the damages due the petitioners. The commissioners filed their report 1 August, 1958, and assessed the sum of $132,500.00 with interest thereon from the date of taking. The Clerk entered judgment in accordance with the report. The petitioners and the respondent excepted to the report of the commissioners and to the judgment and appealed to the Superior Court.

The cause was tried in Superior Court before Judge Gambill and a jury. The jury awarded damages in the sum of $53,000.00 with interest from the date of taking. From judgment in conformity with the verdict petitioners appealed and assigned error.

Vaughn, Hudson, Ferrell & Carter, R. M. Stockton, Jr. and Norwood Robinson for petitioners, appellants.

Attorney General Seawell, Assistant Attorney General Wooten, H. Horton Rountree, and Womble, Carlyle, Sandridge & Rice for respondent, appellee.

MOORE, J. The appellants made thirty-five assignments of error in the record on this appeal. Decision in this case requires discussion of the following questions of law raised by the assignments of error.

(1) Appellants' original petition did not include tract No. 3, the

6.72 acres lying east of Knollwood Street and south of the Easement. Respondent moved before the Clerk to have this portion of the land included in the proceeding. The Clerk denied the motion and respondent excepted. The motion was heard in Superior Court preliminary to the trial. The judge made an order adding tract No. 3 to the proceeding and adjudging, in effect, that the whole property, 46.86 acres, "is properly to be included for consideration in the assessment of damages and offsetting general and special benefits, if any . . ."

Appellants contend that the Expressway crosses no part of tract No. 3, that it is separated from tract No. 2 by the Easement, that a portion of it is zoned for business while the other tracts are zoned for residences, and that the inclusion thereof was prejudicial to them. On the other hand, appellee contends that tracts 2 and 3 are logically a single tract crossed only by a private easement, that the portion immediately south of the Easement has the same zoning classification as tract No. 2, that the portion zoned for business is only a small area of about 2 acres abutting on South Stratford Road, and that a fair assessment of damages and benefits requires that the entire tract be considered.

It must be assumed that the respondent desired the inclusion of tract No. 3 because it proposed to offer evidence that this portion was benefited by the Expressway. It is evident that petitioners desired it excluded for the reason that, in their opinion, they could show no substantial damage to this area by construction of the Expressway.

Where a portion of a tract of land is taken for highway purposes, the just compensation to which the landowner is entitled is the difference between the fair market value of the property *as a whole* immediately before and immediately after the appropriation of the portion thereof. In arriving at this difference consideration must be given to the general and special benefits accruing to the landowners with respect to the land not taken. That difference includes everything which affects the value of the property taken in relation to the *entire* property affected. *Gallimore v. Highway Commission,* 241 N.C. 350, 354, 85 S.E. 2d 392.

The question is: Was the 6.72 acres, tract No. 3, such an affected part of the whole tract as to require its inclusion in order to determine what was just compensation?

"It is well settled that when the whole or a part of a particular tract of land is taken for the public use, the owner of such land is not entitled to compensation for injury to other separate and independent parcels belonging to him which results from the taking." Nichols on Eminent Domain (3rd Edition), sec. 14.3, p. 426; *Sharp*

v. United States, 191 U. S. 341, 48 L Ed. 211, 24 S. Ct. 114, aff'g. 50 C.C.A. 597, 112 F. 893, 57 L.R.A. 932. The North Carolina statute provides that "in all instances (where a portion of a tract of land is taken for highway purposes) the general and special benefits shall be assessed as offsets against damages." (Parentheses ours) G.S. 136-19. It follows that, when the State takes a part or all of a tract of land for highway purposes, it is not entitled to offset against damages the benefits to other separate and independent parcel or parcels belonging to the landowner whose land was taken.

Ordinarily the question, whether two or more parcels of land constitute one tract for the purpose of assessing damages for injury to the portion not taken or offsetting benefits against damages, is one of law for the court. However, where the doubt is factual, depending upon conflicting evidence, the court may submit issues to the jury under proper instructions. Anno: 6 A.L.R. 2d 1207, and cases there cited.

In the instant case the facts are not in dispute.

There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.

The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract. *Tyson v. Highway Commission,* 249 N.C. 732, 107 S.E. 2d 630. Under some circumstances the fact that the land is acquired in a single transaction will strengthen the claim of unity. But the fact that the land was acquired in small parcels at different times does not necessarily render the parcels separate and independent. However, there must be a substantial unity of ownership. Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages. *Light Co. v. Moss,* 220 N.C. 200, 207, 17 S.E. 2d 10.

The general rule is that parcels of land must be contiguous in order to constitute them a single tract for severance damages and benefits.

But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit. It is generally held that parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law. *Todd v. Railroad Co.*, 78 Ill. 530 (1875); *Wellington v. Railroad Co.* (Mass. 1895), 41 N.E. 652. "When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated." Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separted by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines, and undeveloped streets and alleys are not sufficient alone to destroy the unity of land. "If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract." 6 A.L.R. 2d 1200, sec. 2.

As indicated above, the factor most often applied and controlling in determining whether land is a single tract is unity of use. Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use. It has been said that "there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used." *Peck v. Railway Co.* (1887), 36 Minn. 343, 31 N.W. 217. The unifying use must be a *present* use. A mere intended use cannot be given effect. If the uses of two or more sections of land are different and inconsistent, no claim of unity can be maintained. But the mere possibility of adaptibility to different uses will not render segments of land separate and independent. If a map of a proposed subdivision is made and the lots shown thereon are actually a compact body of land, used and occupied as an entirety, they are to be treated as one tract notwithstanding the division into imaginary lots. It has been held that where suburban lots acquired under separate titles are divided by an established highway, they will be considered as one tract where the owner

uses them together for tillage and cultivation in connection with his residence on one of them. *Welch v. Railway Co.* (1890), 27 Wis. 108. ". . . (I)f a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, railroad, or canal." 18 Am. Jur., Eminent Domain, sec. 270, p. 910.

For a full discussion, exhaustive annotation and citations of authority with respect to the principles of law set out in the four preceding paragraphs, see 6 A.L.R. 2d 1200-1214, and Nichols on Eminent Domain (3rd Edition), sections 14.3, 14.31 and 14.4, Vol. 4, pp. 426-445.

In the instant case, we are of the opinion, and so hold, that the court was correct in including the 6.72-acre segment, tract No. 3, in the petition for consideration in the assessment of damages and offsetting benefits. There was unity of ownership and it was so stipulated. It was also stipulated that petitioners acquired the 46.86 acres in a single transaction. There was physical unity of tracts 2 and 3. It was divided only by a private easement of right of way, the fee to which was retained subject to the use of the right of way. No actual present use was being made of the tracts at the time of the taking. The petitioners were holding the land for possible future sale for subdivision or for future sale of lots. The tracts constituted a reasonably compact area of the same type of land. Both segments were reasonably necessary and related to the proper and best use by the owner of the land taken. The contention of appellants with respect to zoning takes into consideration possible future use and ought not to be regarded on this point under pertinent rules of law. Yet, it should be observed that the land immediately to the south of the easement was given the same "residence" classification as the land to the north of the easement. The portion zoned for business is at the extreme south end of tract No. 3 and constitutes less than one-third of its area.

The law will not permit a condemnor or a condemnee to "pick and choose" segments of a tract of land, logically to be considered as a unit, so as to include parts favorable to his claim or exclude parts unfavorable.

(2) After the taking of the land for the Expressway, petitioners caused a civil engineer to make two maps of the 46.86 acres. One map shows a residential subdivision containing streets and 86 building lots. This map does not show the Expressway and is made with-

out reference thereto. The other map shows the Expressway, streets and 62 lots. The area fronting on South Stratford Road and which had been zoned for business is shown on both maps but is not subdivided. This area contains slightly more than 2 acres. The property itself was not actually subdivided on the ground.

These maps were identified at the trial and petitioners offered them in evidence as substantive evidence of practical residential subdivisions in conformity with those adjoining the property and to show that the land was capable of being subdivided into residential lots. Upon objection the court refused to admit the maps as substantive evidence. Petitioners excepted. An expert realtor later testified that petitioners' property, immediately before and immediately after the taking, was capable of and adaptable to practical residential subdivision of a high type. The court then admitted the maps in evidence to illustrate and explain the testimony of the witness.

During the course of the trial petitioners sought to elicit from certain of their witnesses testimony as to the value of the property before and after the taking based on the number of lots and the value per lot, less estimated cost of subdividing and developing. Upon objection this testimony was excluded. Petitioners excepted.

When a governmental agency takes or appropriates private property for public use, the law imposes upon it a correlative duty to make just compensation to the owner of the property appropriated. *Sale v. Highway Commission*, 242 N.C. 612, 617, 89 S.E. 2d 290. When the property is appropriated by the State Highway Commission for highway purposes, the measure of damages is the difference between the fair market value of the entire tract of land immediately before the taking and the fair market value of what is left immediately after the taking. *Proctor v. Highway Commission*, 230 N.C. 687, 691, 55 S.E. 2d 479. "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses?" *Power Co. v. Power Co.*, 186 N.C. 179, 183-4, 119 S.E. 213, quoting from *Boom Co. v. Patterson*, 98 U. S. 403. The jury should take into consideration, in arriving at the fair market value of the land taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking and not merely the

condition it was in and the use to which it was then applied by the owner. But compensation should not exceed just compensation, and value should not exceed fair market value. The application of the concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so. *Gallimore v. Highway Commission, supra.*

But the fair market value of the lands of petitioners immediately before the taking was not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It was the fair market value of the lands as a whole in its then state according to the purpose or purposes for which it was then best adapted and in accordance with its best and highest capabilities.

Petitioners' lands at the time of the taking consisted of fields and woodlands. They are situated within the city limits of Winston-Salem and surrounded by high-type residential properties and valuable business areas. It would be manifestly unfair to appraise them merely as agricultural lands and forests. In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Light Co. v. Moss, supra* (220 N.C. at p. 205), and cases cited. "The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *R. R. v. Armfield,* 167 N.C. 464, 466, 83 S.E. 809, quoting from Pierce on Railroads, p. 217.

But the value to be placed on land taken under the right of eminent domain must not be speculative or based on imaginary situations. The uncontradicted testimony in the instant case is that the best and highest capabilities of petitioners' land was for subdivision into lots, a small part for business, the greater part for residences. "It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush and boulders. The measure of compensation is not, however, the aggregate of the prices of the lots into which the tract could be best divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all of the lots are disposed of

cannot be ignored and is too uncertain and conjectural to be computed." Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.3142 (1), pp. 107-109. It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative. See Law of Eminent Domain—Lewis (3rd Edition), Vol. 2, section 707, p. 1236; 18 Am. Jur., Eminent Domain, sec. 347, p. 991; 29 C.J.S., Eminent Domain, sec. 160, pp. 1027-8; *Land Co. v. Traction Co.*, 162 N.C. 503, 506, 78 S.E. 299; *Philadelphia v. United States*, 53 F. Supp. 492 (1943); *City of Los Angeles v. Hughes* (Cal. 1927), 262 P. 737, 738; *Investment Co. v. McIntosh County* (N.D. 1950), 45 N.W. 2d 417; *Public Service Co. v. Development Co.* (W. Va. 1926), 132 S.E. 380.

In *Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40, a civil engineer was permitted to testify that 90 to 100 cemetery lots could be included in a plot of 1 1/5 acres. He did not testify to the value per lot. This Court held that the testimony was competent since it was "merely a simple question of arithmetic" and "some evidence to indicate, no doubt, the damage to respondent's other land in having constantly so many new graves dug contingent to it." The Court further stated "The witness indicated the method of subdivision, but did not put any value on the land. He described the way the subdivision could be made and stated the facts. We can see no objection to this testimony." In some jurisdictions condemnation for cemetery purposes seems to furnish an exception to the majority rule stated in the preceding paragraph. *St. Agnes Cemetery v. State of New York* (N. Y. 1957), 143 N.E. 2d 377, 380.

In estimating the fair market value of land before and after the appropriation of a portion thereof for public use, all the capabilities of the property, and all the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered. In short, everything which affects the value of the property taken in relation to the entire property affected must be considered, for compensation must be full and complete. But all the factors affecting value must be considered only with respect to their effect upon the fair market value of the property, as of the time immediately before and immediately after the taking in the then state of the property taken as a whole. *Gallimore v. Highway Commission, supra*, and cases

there cited. The Court in *Land Co. v. Traction Co., supra,* (162 N.C. 503) paraphrasing the opinion in *R. R. v. Stocker,* 128 Pa. 233, said: "(I)t was held that the jury could not value a tract upon the theory of what it might bring when platted and divided up into building lots; but they could inquire what a present purchaser would be willing to pay for it in its present condition, and not what a speculator might be able to realize out of a resale in the future." To the same effect is *Light Co. v. Moss supra,* (220 N.C. 200) where it is said at p. 208: "(T)he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as a measure of value but to the full extent that such prospect or demand for such use affected the market value at the time respondents were deprived of their (property)." (Parentheses ours). "The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use." Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.3142 (1), p. 109.

It is manifest that the court was correct in excluding testimony as to value of the land based on supposed subdivisions and the sale of lots at an estimated price per lot after deducting an estimated cost per lot for development. Such a method of valuation is too speculative and remote. The question is: What was the fair market value of the property as a whole in its then state for future subdivision?

"Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant . . ." *Abernathy v. R. R.,* 150 N.C. 97, 109, 63 S.E. 180; *Gallimore v. Highway Commission, supra,* at page 354. Testimony that the condition, location and surroundings of the land rendered it available for high-type subdivision, and that it was physically capable of practical subdivision in relation to its surroundings, was properly admitted. Such evidence having been adduced, the court properly ruled that the maps showing subdivisions were relevant and competent to illustrate and explain the testimony as to the possibility and manner of subdividing. "A witness may use a map . . . to illustrate his testimony and make it more intelligible to the court and jury . . . The North Carolina Court has often said that materials of this sort are not evidence, or are not substantive evidence, and that they can be used only to 'illustrate' or 'explain' the testimony of a witness." North Carolina Evidence: Stansbury, sec. 34, pp. 50-53. Stansbury points out that there has been a trend toward a relaxation of the rule and the admission of maps and similar materials as substantive evidence. But it is well to bear in mind "that the language of (Court)

opinions must be read in connection with the facts of the case in which the language was used." *Light Co. v. Moss, supra,* at page 209. The area at the crest of a lofty mountain or in an inaccessible swamp might well be subdivided on paper, but the value of such a map in revealing truth to a jury would be less than nothing. It is only against the background of pertinent testimony, refined by proper cross-examination, that maps such as the ones offered in this case can be of value in revealing truth.

The court properly excluded the maps as substantive evidence. As stated above, they were properly admitted to illustrate and explain the pertinent testimony. The petitioners had the full benefit of the maps upon those phases of the case to which they properly pertained.

(3) Over the objection of the petitioners, witnesses for the respondent were permitted to testify that there was a reasonable probability that a part of petitioners' land would be rezoned by the City and changed from "residence" to "business" property in the near future. One witness testified that "all petitions for rezoning that have been made in this area had been allowed by the planning board."

On this question, the court instructed the jury as follows: "In arriving at your verdict as to the fair market value of the property you may take into consideration the reasonable probability of a change of the zoning ordinance in the near future and the influence that that circumstance might have on the value of the land."

Our Court has never passed upon this question directly, but in *Power Co. v. Power Co., supra,* (186 N.C. at p. 183), it is said: ". . . (T)he measure of compensation to be awarded the owner (in a condemnation proceeding) is the fair market value, taking into consideration any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied." (Parentheses ours). To the same effect is *Light Co. v. Clark,* 243 N.C. 577, 580, 91 S.E. 2d 569.

The weight of authority in other jurisdictions is well declared as follows: "As stated in *Beverly Hills v. Anger* (1932), 127 Cal. App. 223, 15 P. 2d 867, a zoning ordinance restricting the use of property is proper evidence for determining the market value of land being condemned, for the reason that in determining the market value of realty, all circumstances and conditions which become either an advantage or a detriment to the property should be considered. . . . (I)f the land taken is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a reasonable probability of a

change in the near future in the zoning ordinance or other restriction, then the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing the present market value. However, if the possible change in a zoning ordinance restricting the use of the property condemned is purely speculative, such possibility is not to be considered." Anno: 173 A.L.R. 265, 266.

The principle is well stated in *Board of Education v. 13 Acres of Land* (Del. 1957), 131 A. 2d 180, in the seventh headnote: "In ascertaining market value in an eminent domain proceeding reasonable probability of a rezoning of the condemned property, to permit the highest and best use, may be considered in determining such market value." To the same effect are: *U. S. v. Meadow Brook Club* (C.C.A. 2d, 1958), 259 F. 2d 41; *U. S. v. 29.28 Acres of Land* (D. C. N. J. 1958), 162 F. Supp. 502; *Roads Commission v Warringer* (Md. 1957), 128 A. 2d 248; *Bergeman v. Roads Commission* (Md. 1958), 146 A. 2d 48; *State v. Gorga* (N. J. 1957), 138 A. 2d 833; *State v. Williams* (Mo. 1956), 289 S.W. 2d 64; *City of Austin v. Cannizzo* (Tex. 1954), 267 S.W. 2d 808; *School District v. Flodine* (Cal. 1957), 314 P. 2d 581; *People v. Dunn* (Cal. 1956), 297 P. 2d 964; *City of Menlo Park v. Artino* (Cal. 1957), 311 P. 2d 135; *City of Beverly Hills v. Anger* (Cal. 1930), 294 P. 476; *In Re: Garden City* (N.Y. 1956), 167 N. Y. Supp. 2d 166; *Board of Commissioners v. Tallahassee B & T Co.* (Fla. 1958), 100 S. 2d 67.

But an expert witness, after testifying to the reasonable probability of rezoning, may not give an opinion as to the worth of the property for business. He may only consider the influence of the probability on value in giving his opinion of the worth of the property. *School District v. Stewart* (Cal. 1947), 185 P. 2d 585.

In the instant case several of petitioners' witnesses on cross-examination testified without objection that they had taken into consideration the reasonable probability of rezoning in placing a value on the property. So, in any event, the objections were waived. *Price v. Gray*, 246 N.C. 162, 165, 97 S.E. 2d 844, and cases there cited.

(4) Prior to or about the time of the taking of petitioners' property for the Expressway, respondent bought a 13.2-acre right of way immediately adjoining petitioners' property to the east and paid therefor the sum of $300,000.00. Counsel for petitioners, on direct examination, asked their witness: "I'll ask you if you know that approximately 13 acres of land were sold . . . abutting on the east side of this property right here, on or about April 10, 1956, for $300,000.00?" Upon objection the witness was not permitted to answer. He would have responded in the affirmative had he been per-

mitted to answer. In the absence of the jury the court heard the contentions of counsel with respect to the 13.2-acre tract and the competency of the evidence sought to be elicited.

Later in the trial an expert realtor, who was testifying for the respondent and who had previously made an appraisal for the owners of the 13.2-acre tract, was asked on cross-examination by counsel for petitioners the following question: "Now, Mr. Minish, you yourself appraised approximately 13 acres of property directly east of this property and abutting on this property for $300,000.00 didn't you?" Objection to the question was sustained. If permitted to answer the witness would have testified: "I was the agent for the owner of the property facing both sides of Stratford Road . . . and the 13.2-acres was appraised at $300,000.00 by me."

In the absence of the jury the court heard evidence and contentions of counsel with respect to the 13.2-acres. The evidence tended to show the following facts. The portion of petitioners' property taken for the Expressway was all zoned for residences. A small portion of the 13.2-acre tract was zoned for residential purposes, the remainder for business and commercial purposes. The 13.2-acre tract included 1027 feet of frontage on both sides of South Stratford Road; one side was zoned for business, the other for commercial purposes. Comparatively the witness had appraised the business and residential property on the 13.2 acres higher than on petitioners' land, on a foot front and acreage basis.

Counsel for petitioners stated that the question on cross-examination was for the purpose of impeaching the witness, and that they did not desire to show that respondent bought the 13.2-acre tract or what the respondent paid for it. He further stated: "All we want to do is ask him the total amount, and let him break it down."

The court ruled that the 13.2 acres and petitioners' lands were not comparable tracts and that the witness would not be permitted to testify to the total appraised value placed by the witness on the 13.2 acres, but that the witness might testify to the comparative values per acre of residential property and the comparative values per foot front of business property he had placed on the 13.2-acre tract and petitioners' property, respectively, and give his reasons therefor.

Upon return of the jury to the courtroom the witness was cross-examined briefly concerning the 13.2-acre tract. The gist of the testimony elicited was that he appraised the residential property of the 13.2-acre tract at "considerably more than $3000.00" per acre.

He had previously testified that he appraised the residential property of petitioners' lands at $3000.00 per acre.

It is held in most jurisdictions that the price paid at voluntary sales of land similar to condemnee's land at or about the time of the taking is admissible as independent evidence of the value of the land taken. But the land must be similar to the land taken, else the evidence is not admissible on direct examination. Actually no two parcels of land are exactly alike. Only such parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities. Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.311(3), pp. 55, 59; *Belding v. Archer* 131 N.C. 287, 315, 42 S.E. 800.

It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of the sale admissible. It is the better practice for the judge to hear evidence in the absence of the jury as a basis for determining admissibility. Anno: 118 A.L.R. 904.

In the instant case the court was correct in excluding evidence on direct examination of the sale of the 13.2 acres of land adjacent to petitioners' land. The lands were markedly dissimilar in nature, condition, and zoning classification, and the court's ruling will not be disturbed.

"One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. . . . (C)ross-examination may be made to serve three general purposes: (1) To elicit further details of the story related on direct examination, in the hope of presenting a complete picture which will be less unfavorable to the cross-examiner's case; (2) to bring out new and different facts relevant to the whole case; (3) to impeach the witness, or cast doubt upon his credibility." North Carolina Evidence (Stansbury), pp. 54, 56, 57. "The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief, is an absolute right and not a mere privilege." *Milling Co. v. Highway Commission,* 190 N.C. 692, 696, 130 S.E. 724.

The majority rule is that an expert witness may be questioned on cross-examination with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but not for the purpose of fixing value. This is especially true if the witness used such sales as a basis for his appraisal of the property taken, or if he had actually appraised the property sold. Nichols on Eminent Domain (3rd Edition), Vol. 4, section

12.311(3), p. 40; Orgel on Valuation under Eminent Domain (2d Edition), Vol. 1, section 145, p. 612-3; *Railway Co. v. Southern Pacific Co.* (Cal. 1936), 57 P. 2d 575; *Stone v. Railroad Co.* (Pa. 1917), 101 A. 813; *Cline v. Gas & Electric Co.* (Kan. 1957), 318 P. 2d 1000; *Steck v. City of Wichita* (Kan. 1956) 295 P. 2d 1068; *City of Beverly Hills v. Anger* (Cal. 1932), 15 P. 2d 867; *State v. Peek* (Utah, 1953), 265 P. 2d 630; *Utility District v. Kieffer* (Cal. 1929), 278 P. 476; *Felin v. City of Philadelphia* (Pa. 1946), 47 A. 2d 227; *Parrish v. State* (Tex. 1958), 310 S.W. 2d 709; *Pennsylvania Co. v. City of Philadelphia* (Pa. 1920), 112 A. 76.

The North Carolina Court has not decided the point directly. There is an indication that this Court does not rigidly follow the majority rule. In *Highway Commission v. Privett,* 246 N.C. 501, 506, 99 S.E. 2d 61, a witness was asked on cross-examination if he knew the values of any other property in the area or the prices at which such properties had been sold, and he answered in the negative. *Bobbitt, J.,* speaking for the Court said: "The testimony so elicited was relevant solely to the credibility of the witness, and the weight, if any, to be given to his testimony. Let it be noted that none of the questions undertook to elicit testimony as to the valuations or sales prices of other properties, the questions being directed to whether the witness *had opinions or knowledge* with reference thereto." It would seem that utmost freedom of cross-examination with reference to sales and sales prices in the vicinity should be accorded the landowner, subject to the right and duty of the presiding judge to exercise his sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality.

It is not competent to cross-examine with reference to the sale price of a parcel of land where the price was fixed by a compromise judgment. *Power & Light Co. v. Sloan,* 227 N.C. 151, 154, 41 S.E. 2d 361. "The price paid in settlement of condemnation proceedings or the sum paid by the condemner for similar land, even if proceedings have not been begun, is not admissible. Such payments are in the nature of compromise, to avoid the expense and uncertainty of litigation, and are not fair indications of market value; . . . A sale otherwise competent is not necessarily inadmissible because the condemner was the purchaser, if it does not appear that the sale was in connection with or in anticipation of condemnation proceedings." 18 Am. Jur., Eminent Domain, Sec. 352, p. 996. Cross-examination as to prices paid by condemnor for other tracts for the same project is improper. *U. S. v. Foster* (C.C.A. 8th. 1942), 131 F. 2d 3.

In the instant case counsel for petitioners disclaimed any intention to cross-examine with respect to the sale of the 13.2-acre tract to respondent or the price paid therefor by respondent. Indeed the question on cross-examination of the witness Minish was whether he had appraised the tract for $300,000.00.

It has been held that where the witness appraised the adjacent land, he shall be required on cross-examination to state what he appraised it for, but that no reference should be made to a sale thereof to condemnor or to the price paid by condemnor. *U. S. v. Foster, supra.*

The Court might well have permitted the witness to answer the question. But it does not appear to us that the failure to do so was prejudicial to the petitioners. Because of the dissimilarity of the tracts, testimony adduced thereby was incompetent on the question of value. The total appraisal value placed on the land by the witness would not of itself have impeached the witness or have shown lack of knowledge of values in the vicinity. It was apparent upon examination of the witness on the *voir dire* that he had appraised the business and residential property in the 13.2-acre tract on a front foot and acreage basis at a higher value than petitioners' land. The court ruled that he might be fully cross-examined as to these matters. Petitioners did not avail themselves of this opportunity. The conclusion is inevitable that petitioners desired only to get the $300,000.00 figure before the jury to induce thereby a liberal award. This within itself would violate the applicable rule of evidence, since such evidence under the circumstances cannot be considered on the question of value. *Ziegler v. Sypher* (Mich. 1944), 16 N.W. 2d 676.

We have carefully examined and considered the other assignments of error and the contentions of appellants with respect thereto. Prejudicial error has not been made to appear. *In Re Gamble,* 244 N.C. 149, 156, 93 S.E. 2d 66.

No error.

JAMES M. WILLARD v. P. T. HUFFMAN, INDIVIDUALLY AND P. T. HUFFMAN TRANSFER, INC.

(Filed 12 June, 1959.)

1. Master and Servant § 2e: Courts § 18— State Court has jurisdiction of action in tort for discharge in violation of Right to Work Act even though employer's business affects interstate commerce.

Where the National Labor Relations Board has declined to exercise jurisdiction in the matter because the amount of interstate and inter-

lining business carried on by the employer is less than the jurisdictional amount fixed by the Board, our State Court has jurisdiction of an action in tort brought by an employee to recover for his discharge because of his membership in a labor union in violation of the State Right to Work Act, G.S. 95-81, G.S. 95-83, irrespective whether the conduct of the employer was an unfair labor practice within the purview of the National Labor Relations Act and notwithstanding that the employer's interstate or interlining business is such as to constitute it an industry affecting interstate commerce within the purview of the Federal decisions.

2. Constitutional Law § 24—

A party whose rights have been infringed contrary to law is entitled to his day in court.

APPEAL by defendants from *Crissman, J.*, January Civil Term 1959 of GUILFORD (Greensboro Division).

This is a civil action instituted by the plaintiff to recover for his alleged wrongful discharge by the defendants in violation of G.S. 95-81.

This case, on the same pleadings and on substantially the same evidence, was before this Court at the Fall Term 1957 and the opinion of the Court is reported in *Willard v. Huffman,* 247 N.C. 523, 101 S.E. 2d 373.

The facts will not be restated herein except as may be necessary to an understanding of the appeal.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff discharged by the defendants because he did not abstain or refrain from membership in a labor union or labor organization? Answer: Yes.

"2. If so, what amount of damages, if any, did the plaintiff sustain by being so discharged? Answer: $1,000.00."

Judgment was entered on the verdict and the defendants appeal, assigning error.

Robert S. Cahoon for plaintiff, appellee.

McLendon, Brimm, Holderness & Brooks for defendants appellant.

DENNY, J. The determinative question posed on this appeal is whether or not the courts of North Carolina have jurisdiction to adjudicate a claim for damages resulting from an unfair labor practice, under the provisions of our Right to Work Act, Chapter 328, Session Laws of 1947, codified as General Statutes of North Carolina, Chapter 95, Sections 78 through 84, where the employer is engaged in a business that affects interstate commerce.

While the previous appeal was pending in this Court, the defendant appellants filed a motion to remand to the Superior Court of Guilford

County for the purpose of determining the identical question now presented. We granted a new trial for errors committed in the court's charge to the jury, and pointed out that since a new trial was being granted, the defendants could raise the question of jurisdiction in the trial court, as requested in their motion to remand. Hence, we did not rule on the jurisdictional question now before us. *Willard v. Huffman, supra.*

The plaintiff was discharged from his employment with defendants on 18 January 1956, and it has been duly determined by the jury in the trial below that the discharge was on the ground prohibited by G.S. 95-81, which reads as follows: "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

The section of our Right to Work Act on which the plaintiff bottoms his action for damages is G.S. 95-83, which provides: "Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Our Right to Work Act was upheld by this Court in *S. v. Whitaker,* 228 N.C. 352, 45 S.E. 2d 860. *Certiorari* was allowed by the Supreme Court of the United States and the case was heard and decided with a Nebraska case, *Lincoln Fed. L. U. v. Northwestern I. & M. Co.,* and the decision of this Court was upheld. See *Whitaker, et al, v. State of North Carolina,* 335 U.S. 525, 93 L. Ed. 212, 6 A.L.R. 2d 473.

On 19 January 1956, the day after his discharge, the plaintiff herein filed a charge against the corporate defendant with the National Labor Relations Board (hereinafter referred to as NLRB) for his alleged wrongful discharge in violation of Section 158 (a), subsections (1) and (3) of the National Labor Relations Act, asserting that its unfair labor practices were unfair labor practices affecting commerce within the meaning of the Act.

It appears from the record that on the same date, 19 January 1956, the NLRB informed the corporate defendant of the charges that had been filed against it and requested the defendant to fill out a questionnaire on "commerce data." According to this questionnaire, the defendant had done a dollar volume of business during the year

preceding that date, of approximately $100,000, twenty per cent of which involved interstate movements.

Prior to the time of filing the aforesaid charges with the NLRB, the Board had adopted certain jurisdictional criteria which determined whether or not it would accept jurisdiction in unfair labor practice and representation cases. Under the rules in force and effect at the time James M. Willard filed charges against the employer, the Board accepted jurisdiction in unfair labor practice cases involving trucking companies operating interstate and intrastate, only if the interstate revenue amounted to $100,000, or if the total of interstate and "interlining" revenue amounted to $100,000.

Under date of 2 March 1956 the plaintiff was notified by the NLRB that it was refusing to issue complaint in the case because "further proceedings are not warranted inasmuch as the operations of the employer do not appear to meet the required standards to warrant the Board's exercise of its jurisdiction in this matter."

None of the corporate defendant's trucks operate across State lines, the "interstate" aspects of its business coming from "interline" operations that is, where a cargo is transferred by the corporate defendant to another carrier who carries the cargo out of the State.

In the trial below, the court, in the absence of the jury, heard testimony without objection as to the character of the corporate defendant's business. Defendant P. T. Huffman testified that the company's gross income from the transportation of freight in 1955 was $119,334.44, eighteen per cent of that amount being in interstate commerce; that in 1956 its gross receipts from that source were $110,158.83, of which amount 31.1 per cent was in interstate commerce. The trial judge declined to make any findings of fact or conclusions of law relative to the interstate aspect of the corporate defendant's business. The defendants excepted to the refusal of the court to find facts and make its conclusions of law in this respect.

It is obvious that the corporate appellant was not engaged in interstate commerce as such on 18 January 1956. However, if its operations were such as to affect commerce, the Labor Management Relations Act applies. USCA, Title 29, section 142, provides as follows: "(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce."

In light of the rulings in *Guss v. Utah Labor Relations Board,* 353 U.S. 1, 1 L. Ed. 2d 601, *Amalgamated Meat Cutters v. Fairlawn Meats,* 353 U.S. 20, 1 L. Ed. 2d 613, and similar decisions, it would seem to

be clear that the corporate defendant's interline transportation of freight did affect interstate commerce. Even so, the volume of its business in interstate commerce fell far below that required by the NLRB before it will exercise jurisdiction in such cases.

It is obvious that if the lower court had no jurisdiction, neither does this Court. Moreover, if the subject matter of this action has been pre-empted by the National Labor Relations Act, as amended, as contended by the appellants, then the court below should have allowed the defendants' motion for judgment as of nonsuit, otherwise not.

We shall not undertake to cite and discuss all the cases cited and relied upon by the respective parties in their briefs. However, we shall undertake to discuss those we think particularly applicable to the facts before us. It must be conceded, however, that many of the cases bearing on the question before us seem to be in irreconcilable conflict.

In the case of Local Union No. 10, *A. F. of L. v. Graham,* 345 U.S. 192, 97 L. Ed. 946, the unions picketed a construction project because some of the subcontractors employed nonunion help. Although the picketing was peaceful, the Virginia Court enjoined it on the ground that it was carried on for purposes in conflict with the Virginia "Right to Work" statute. On appeal, the Supreme Court of the United States said: "The policy of Virginia which is expressed in its Right to Work Statute is summarized as follows by its highest court: 'It provides in substance that neither membership nor nonmembership in a labor union shall be made a condition of employment; that a contract limiting employment to union members is against public policy; and that a person denied employment because he is either a member of a union or not a member of a union shall have a right of action for damages.' *Finney v. Hawkins,* 189 Va. 878, 880, 54 S.E. 2d 872, 874.

"Based upon the findings of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project.

"Assuming the above conclusions to have been established, petitioners still contend that the injunction in this case was inconsistent with the Fourteenth Amendment to the Constitution of the United States. On the reasoning and authority of our recent decisions, we

reaffirm our position to the contrary." (Citations omitted.) The judgment of the Supreme Court of Appeals of Virginia was affirmed.

In *Garner v. Teamsters C. & H. Union,* 346 U.S. 485, 98 L. Ed. 228, a labor union peacefully picketed the loading platform of an interstate trucking company for the purpose of inducing the employees of the company to join the union. No labor dispute was in progress and at no time did the company object to its employees joining the union. None of the pickets were employees of the company. Drivers for other carriers refused to cross the picket line and as a consequence the company's business fell off as much as ninety-five per cent.

A Pennsylvania court of equity enjoined the union's conduct as being in violation of the State Labor Relations Act. However, the Supreme Court of Pennsylvania reversed on the ground that the union's activities fell within the jurisdiction of the NLRB. On appeal, in upholding the decision of the Supreme Court of Pennsylvania, the United States Supreme Court said: "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

"This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the state or it is entirely ungoverned.' "

The Court further said: " * * * it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity

of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. * * * And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action. * * *" (Citations omitted.)

In the case of *United Const. Workers, et al v. Laburnum Const. Corp.*, 347 U.S. 656, 98 L. Ed. 1025, while the construction corporation was performing work in Kentucky, agents of the labor unions involved demanded that the contractor's employees join one of the defendant unions. Upon refusal of the plaintiff contractor and many of its employees, the unions' agents threatened plaintiff and its employees with violence to such degree that plaintiff was compelled to abandon all its projects in the area. An action in tort was brought by the plaintiff construction company against the unions in the State of Virginia. The trial court awarded compensatory damages in the sum of $175,437.19 and punitive damages of $100,000. The compensatory damages were reduced to $29,326.09. Judgment was entered for $129,326.09. The Supreme Court of Appeals of Virginia affirmed. *Certiorari* was allowed and the Supreme Court of the United States affirmed. Justice Burton, speaking for the Court, said: "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. For the reasons hereafter stated, we hold that it has not. * * * In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and the legislative history of the Act."

And, further, "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case *(Garner)* recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primary nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law."

After pointing out that the Labor Management Relations Act "sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay," the Court went on to say: "If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done."

In *Guss v. Utah Labor Relations Board, supra,* a labor union filed charges of violation of the National Labor Relations Act, Title 29, USCA, section 158 with the NLRB, alleging unfair labor practices on the part of the employer whose business affected interstate commerce. The Board declined to consider the charges on the ground that the operations of the employer involved were predominantly local in character. Thereafter, the union filed substantially the same charges with the Utah Labor Relations Board, pursuant to the Utah Labor Relations Act. The state board granted relief and, on writ of review, its decision was affirmed by the Supreme Court of Utah (5 Utah 2d 68, 296 P. 2d 733). *Warren, C. J.,* in speaking for the Supreme Court of the United States said: "The question presented by this appeal * * * is whether Congress, by vesting in the National Labor Relations Board jurisdiction over labor relations matters affecting interstate commerce, has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction pursuant to the proviso to section 10 (a) of the National Labor Relations Act."

The Court pointed out that the NLRB has not ceded jurisdiction in any cases to the Utah Board pursuant to section 10 (a) of the

National Act, and then said: "We hold that the proviso to section 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board. * * *

"We are told by appellee that to deny the state jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflict with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the State is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land. * * *"

In the case of *Amalgamated Meat Cutters v. Fairlawn Meats, supra,* a companion case to *Guss v. Utah Labor Relations Board, supra,* and decided contemporaneously, the Ohio Court of Common Pleas enjoined the union from picketing the employer, from trespassing upon its premises, and from exerting secondary pressure upon its suppliers. The union objected to the jurisdiction of the court on the ground that the jurisdiction of the NLRB was exclusive. The Ohio Court of Appeals continued the injunction (99 Ohio App. 517, 135 N.E. 2d 689) and the Ohio Supreme Court dismissed the union's appeal (164 Ohio St. 285, 130 N.E. 2d 237). The Supreme Court of the United States vacated the judgment below and remanded the case. The Court said: "As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact, and 'trespassing upon plaintiff's property' is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know. The judgment therefore is vacated and the case remanded for proceedings not inconsistent with this opinion."

In the case of *San Diego Bldg. Trades v. Garmon,* 353 U.S. 26, 1 L. Ed. 2d 618, likewise decided on the same date as the two last cited cases, the California Superior Court enjoined unions, not representing the majority of the employees, from picketing or exerting secondary pressure in support of their demands for a union shop agreement unless and until one or another of the unions had been designated as the collective bargaining representative of the employees; the court

also awarded damages. The California Supreme Court affirmed (45 Cal. 2d 657, 291 P. 2d 1), expressing the view that the NLRB's declination, in pursuance of its jurisdictional policy, to entertain the unions' representation petition, left the State free to act.

The Supreme Court of the United States vacated the judgment entered below and held that a State court has no power to enjoin a union, not representing a majority of the employees, from peaceably picketing an employer engaged in interstate commerce for the purpose of compelling him to sign a contract including a union shop provision, although the N L R B had declined to exercise jurisdiction. With respect to damages, the Court said: "Respondents, however, argue that the award of damages must be sustained under *United Const. Workers v. Laburnum Const. Corp.* 347 U.S. 656, 98 L. Ed. 1025, 74 S. Ct. 833. We do not reach this question. The California Supreme Court leaves us in doubt, but its opinion indicates that it felt bound to 'apply' or in some sense follow federal law in this case. There is, of course, no such compulsion. Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation. We therefore vacate the judgment and remand the case to the Supreme Court of California for proceedings not inconsistent with this opinion and the opinions in *Guss v. Utah Labor Relations Board* and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, both (U.S.) *supra.*"

In *International Asso. Machinists v. Gonzales,* 356 U.S. 617, 2 L. Ed. 2d 1018, Marcos Gonzales, a labor union member, claiming to have been expelled from membership in violation of his rights under the constitution and by-laws of the union, was ordered reinstated and awarded damages for lost wages and physical and mental suffering by a trial court in California. The judgment was affirmed by the California District Court of Appeals (142 Cal. App. 2d 207, 298 P. 2d 92), and the Supreme Court of California denied rehearing. On *certiorari* to the California District Court of Appeals, the United States Supreme Court affirmed the judgment below. *Justice Frankfurter,* speaking for the Court, said: " * * * the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to section 8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.' 61 Stat. 141, 29 U.S.C. section 158 (b) (1). * * *

"No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A.A.A.I.W. v. Russell,* 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932."

In the case of *International Union, U.A.A. & A.I.W. v. Russell,* 356 U.S. 634, 2 L. Ed. 2d 1030, Russell, an employee who was denied access to his employer's plant by a striking union which engaged in mass picketing and threats of violence, brought an action against the union in Circuit Court, Morgan County, Alabama, claiming compensatory damages for loss of earnings and mental anguish, plus punitive damages. The union filed a plea to the jurisdiction of the court, alleging that the N L R B had exclusive jurisdiction. This plea was denied and Russell was awarded a verdict including punitive damages. The Supreme Court of Alabama affirmed the trial court's jurisdiction and also affirmed on the merits (264 Ala. 456, 88 So. 2d 175, 62 A.L.R. 2d 669).

On *certiorari,* the Supreme Court of the United States reviewed the case. Argument was made that since the NLRB could award back pay, the court was pre-empted by the federal act. However, the Court rejected this contention, saying in part: "In the instant case, there would be no 'conflict' even if one forum awarded back pay and the other did not. There is nothing inconsistent in holding that an employee may recover lost wages as damages in a tort action under State law, and also holding that the award of such damages is not necessary to effectuate the purposes of the Federal Act. * * * We conclude that an employee's right to recover, in the State courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here."

In the second appeal of *San Diego Bldg. Trades v. Garmon* (decided 20 April 1959) ..... U.S. ....., 3 L. Ed. 2d 775, which was remanded on the question of damages, the Court in effect held that damages could not be assessed by a State court as a result of peace-

ful picketing, and said: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the Taft-Hartley Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. * * *"

Justice Frankfurter wrote the majority opinion for the Court and, among other things, said: "What we said in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, deserves repetition, because the consideration there outlined guide this day's decision: 'By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union, supra.* But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling how much." 346 U.S. at 488. This penumbral area can be rendered progressively clear only by the course of litigation.' * * *

"As we pointed out the other day, 'the statutory implications concerning what has been taken from the States and what has been left to them are of a *Delphic* nature, to be translated into concreteness by the process of litigating elucidation.' *International Assn. of Machinists v. Gonzales,* 356 U.S. 617, 619. * * *

"At times it has not been clear whether the particular activity regulated by the States was governed by section 7 or section 8 or was, perhaps, outside both these actions. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. * * *

"When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democra-

cy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. * * *

"When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted. * * *

"Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of section 7 or section 8 of the Act, the State's jurisdiction is displaced."

It is quite clear, since the NLRB had declined to exercise jurisdiction in this case, if the courts of this State are not open for the adjudication of the plaintiff's claim for damages in tort, based on his wrongful discharge, pursuant to the provisions of our Right to Work Act, then there is no forum in either the federal or state judicial systems where the plaintiff can have his rights litigated and determined. This runs counter to our conception of justice and it makes no difference whether Congress intended to permit the creation of this no-man's-land by giving the NLRB exclusive jurisdiction on the one hand, but not requiring its exercise on the other, or whether this vacuum has been the result of judicial interpretation is beside the point, such a situation affecting the rights of so many employers and employees ought not to be permitted to continue. Congress ought to correct it. Unnecessary delay in correcting such a situation in the field of labor-management relations is indefensible. A citizen, whether employer or employee, is entitled to his day in court if his rights have been infringed upon contrary to law.

Our courts, in the case before us, are not seeking to administer the provisions of section 158 (a), subsections (1) and (3), of the Labor Relations Act, Title 29, U.S.C.A.; they seek only to enforce the provisions of our own Right to Work Act, provisions which have no counterpart in the National Labor Relations Act.

Moreover, this Court does not seek to evade any clear mandate of the Supreme Court of the United States, whether it agrees with that Court's opinions or not. *Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163. On the other hand, we do not hasten to surrender voluntarily any right which we believe we have both the legal right and duty to uphold and enforce.

As heretofore pointed out, our Right to Work Act has been held to be constitutional by this Court and by the Supreme Court of the

United States. *Whitaker, et al v. State of North Carolina, supra.* Certainly, Congress did not undertake to provide for the adjustment of unfair labor practices applicable exclusively to intrastate business. This view, we think, it supported by section 164 (b), Title 29, USC A, of the Taft-Hartley Act, which reads as follows: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

We do not need any exemption from the provisions of the Taft-Hartley Act with respect to a union shop agreement where the employer and his employees are engaged exclusively in intrastate business which does not affect interstate commerce. Moreover, it was said in *United Const. Workers v. Laburnum Const. Corp., supra,* that "Congress had neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." The Court then went on to say: "To the extent that Congress prescribed preventive procedure against unfair labor practices * * * the Act excludes conflicting State procedure to the same end. To the extent, however, that Congress has not prescribed procedures for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." And there has been no amendment to the Taft-Hartley Act since the foregoing decision was filed on 7 June 1954. It follows, therefore, if the N L R B has not been given jurisdiction of the subject matter in such an action, it has nothing to cede to a State agency pursuant to the provisions of Section 10 (a) of the National Labor Relations Act. See Section 160 (a), Title 29, USCA, and *Guss v. Utah Labor Relations Board, supra.*

In view of what was said in Local Union No. 10, *A. F. of L. v. Graham, supra; United Const. Workers, et al v. Laburnum Const. Corp., supra; International Asso. Machinists v. Gonzales, supra;* and *International Union, U.A.A. & A.I.W. v. Russell, supra,* relative to the right to recover damages for tortious conduct, irrespective of whether or not such conduct was an unfair labor practice, in our opinion the judgment of the court below should be upheld, and we so hold.

No error.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION AND THE ALEXANDER RAILROAD COMPANY, ET AL V. STATE OF NORTH CAROLINA; THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA FARM BUREAU FEDERATION.

(Filed 12 June, 1959.)

1. Appeal and Error § 60: Judgments § 32: Utilities Commission § 6— Reversal of order of Utilities Commission on ground that it was not supported by evidence is not res judicata.

Where judgment of the Superior Court, reversing an order of the Utilities Commission granting an increase in rates, is affirmed on appeal to the Supreme Court on the ground that the evidence before the Utilities Commission was insufficient to support the order, and on petition to rehear it is expressly provided that the decision did not preclude the carriers from thereafter filing a petition before the Utilities Commission and offering evidence in support of the prior order of the Commission, the decisions become the law of the case and authorize the carriers' petition to reopen the case so that they might offer evidence in support of the order, and such further proceedings being had in the original cause, the order of the Commission putting into effect the increase in rates upon supporting competent, material and substantial evidence does not involve retroactive rate making, and the principle of *res judicata* is inapposite.

2. Carriers § 5: Utilities Commission § 8—

An order of the Utilities Commission granting an increase in intrastate rates of carriers upon its finding that such increase was necessary to give the carriers a reasonable return on their investment of properties used in their intrastate businesses, upon supporting evidence as to the proportion and valuation of the properties used in the intrastate business, operating costs, etc. conforms to G.S. 62-124, and will be upheld.

3. Utilities Commission §§ 3, 5— In ordering increase in intrastate rates Utilities Commission may take statistical evidence of major carriers as typical of all the carriers.

Where proceedings by railroad carriers for an increase in intrastate rates is heard upon the theory that the rate conditions of the four major carriers were reasonably typical of the others, and the major carriers introduced competent, material and substantial evidence supporting the findings of the Utilities Commission upon which an increase in rates is ordered, protestants may not for the first time on appeal object that the order granting such increase of intrastate rates for all the carriers was not supported by statistical evidence of the smaller carriers, and it is error for the Superior Court to affirm the order as to the major carriers and remand the cause for the intoduction of evidence in regard to the other carriers, and the ruling of the Commission granting the increase in rates as to all the carriers is affirmed.

APPEAL by (1) Alexander Railroad Company and twenty other railroads, naming them, in North Carolina, and Meade Corporation,

and North Carolina Farm Bureau Federation; and (2) by the State of North Carolina; and North Carolina Department of Agriculture, from judgment of *Clark, J.*, at Second Regular August Civil Term 1958 of WAKE (docketed and argued in Supreme Court as Number 457, Fall Term 1958) — in which after findings of fact, and conclusions of law are made, it is ordered, adjudged and decreed that this case be and the same is remanded to the North Carolina Utilities Commission for further proceeding and such hearing as will allow each of the petitioners which has not already done so the opportunity to present evidence of the revenues, expenses, and investments, as required by law, and thereafter to enter the proper order as to each petitioner and in the event none of the other petitioners do so, to amend its order so as to make the increase in rates and charges applicable to the Southern Railway Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company and the Norfolk Southern Railway Company,— it not being intended or purposed to require the hearing of further evidence as to these last named petitioners.

The appellants except and assign error.

Joyner & Howison, Simms & Simms, Ehringhaus & Ellis for Railroads, appellants.

Broughton & Broughton for N. C. Farm Bureau Fed.

Malcolm B. Seawell, Attorney General, F. Kent Burns, Assistant Attorney General for the State of North Carolina and North Carolina Department of Agriculture.

WINBORNE, C. J. For historic background of this proceeding see *Utilities Commission v. State,* 243 N.C. 12, 89 S.E. 2d 727, and s. c. on rehearing, 243 N.C. 685, 91 S.E. 2d 899, to which, and the records on which they are based, reference is here made for statement of facts involved.

Nevertheless, a recital in substance of salient facts is appropriate to this appeal.

Reference thereto reveals that on 3 January, 1952, the Utilities Commission of North Carolina granted petition of "the railroads operating in the State of North Carolina" for a six per cent increase in their freight rate schedules for intrastate shipments.

And on 2 June, 1952, "the railroads operating in the State of North Carolina" petitioned the North Carolina Utilities Commission for authority to make additional increase of nine per cent in the intrastate rates and charges in North Carolina which when added to the

previous increase of six per cent would correspond with the interstate increase, generally fifteen per cent, authorized by the Interstate Commerce Commission by its order and report of 11 April, 1952, in Ex Parte 175, 284 ICC 589, such increases to expire on 28 February, 1954, unless sooner cancelled, changed or extended.

The petition so made came on for hearing before the North Carolina Utilities Commission properly constituted, and after notice, and was heard from time to time. At hearing on 9 February, 1953, the State of North Carolina and the Department of Agriculture of the State of North Carolina, the North Carolina State Highway Commission, numerous farm organizations, shippers and associations of shippers appeared in protest against the requested increase in the rates.

On 9 July, 1953, the Utilities Commission entered its final order in substance authorizing the petitioning railroads to increase their rates and charges for the transportation of freight in intrastate commerce within the State of North Carolina by fifteen per cent, including the six per cent increase previously allowed— the increase to expire 28 February, 1954.

Moreover, adverting to the record of the order of the Commission, dated 9 July, 1953, this appears:

"Upon consideration of all the evidence in this case, the Commission finds that (except in certain respects) the intrastate freight rates now in effect within the State of North Carolina are approximately 9% below the level of interstate rates on traffic of the same nature moving under similar conditions to and from points in this State, and that, subject to certain exceptions set out by the Commission, in its order of January 3, 1952, authorizing the 6% rate increase, the additional increase in intrastate rates herein requested amounting to approximately 9% is fair, just and reasonable."

The State of North Carolina and the Department of Agriculture of the State of North Carolina in due course of procedure appealed to the Superior Court of Wake County, North Carolina. And after hearing, Harris, Judge resident of Seventh Judicial District, and in Wake County on 3 March, 1954, signed judgment presented by the appellants, ordering, adjudging and decreeing that the said order of Utilities Commission dated 9 July, 1953, be reversed, from which the twenty-five railroads operating within the State of North Carolina appealed to Supreme Court. For decisions see *Utilities Commission v. State,* 243 N.C. 12, and s. c. on rehearing 243 N.C. 685.

The judgment entered, in the Superior Court, from which the appeal was taken, was affirmed in opinion by *Barnhill, C. J.*

Thereafter, in due time, Alexander Railroad Company and all other railroads operating in the State of North Carolina, listed on appendix A, attached thereto, petitioned for rehearing on the several grounds shown in the record of the petition. "The petition (was) allowed for the sole purpose of making an additional statement concerning the precise scope of the decision."

Thereupon the Court, in denying petition to rehear, in opinion by *Barnhill, C. J.*, 243 N.C. 685, 91 S.E. 2d 899, after referring to the report of the original opinion and to the purpose for which rehearing is allowed, had this to say: " * * * we still adhere to the original decision. The question there decided is not now before us for review. The Commission found and concluded that it was necessary for the petitioners to raise their intrastate freight rates by nine per cent in order to provide just and reasonable compensation for the service rendered by them. The Superior Court reversed. We affirmed the judgment of the Superior Court for the reason that the Commission, in making its findings and conclusions of fact and entering its order allowing an increase in the freight tariffs theretofore charged by the petitioners, did not follow the standards provided by the pertinent law of the State. Our decision rested exclusively on that conclusion. We did not discuss or decide whether the increase allowed was just or unjust, reasonable or unreasonable. That is still an open question as to the period the Utilities Commission order was in effect.

"The former opinion in this case constituted no estoppel against the petitioners which prevents them from filing a petition at this time requesting that an order be entered affirming the increase *nunc pro tunc*. However, should the petitioners elect to pursue the matter further, the Commission must determine what increase, if any, was necessary during the period its order was in force to afford the petitioners a fair return on their property used and useful in connection with their intrastate business under the standard prescribed by our statute, G.S. Ch. 62 Art. 7 as construed by this Court. *Utilities Comm. v. Telephone Co.*, 239 N.C. 333, 80 S.E. 2d 133. In determining the merits of a petition, due regard must be had in particular for the provisions of G.S. 62-124. It was stated 'or stipulated' by counsel for petitioners during the original hearings that the petitioners did not have available and could not offer evidence under the provisions of G.S. 62-124. We assume counsel meant such evidence was not then available to them. Be that as it may, they are now at liberty to attempt to meet the requirements of that statute if they so desire, unaffected by the original opinion except as herein noted.

"This Court fully realizes that the value of the properties owned

by the several petitioners used and useful for their intrastate traffic cannot be determined with mathematical exactitude. But they can no doubt approximate the rateable proportion of their property devoted to intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact under our statute, and issue such order as it determines the facts found may warrant. In any event this Court knows of no statute or rule of law which denies the petitioners the right to attempt to do so if they are now so advised. Subject to the explanatory comments herein made, the petition to rehear is denied."

Thus the original decision as so clarified became and is the law of the case, and binding on the parties and on the Court. Hence it appears that the case was open for further proceedings as there outlined. Therefore the doctrine of *res judicata* is inapplicable.

Thereafter on 2 July, 1956, and within the authority so granted, the Alexander Railroad Company, and all other railroads operating in the State of North Carolina, as specifically shown in appendix A thereto, petitioned the North Carolina Utilities Commission "for reopening and further hearing," and set forth that "On November 2, 1953, the Supreme Court of North Carolina, in affirming the March 3 judgment of the court below, held that where the railroad had no testimony tending to show the fair value of their respective properties used and useful in conducting their intrastate business, separate and apart from their interstate business, the order entered by the Utilities Commission was unsupported by evidence and was improper"— citing *State of North Carolina ex rel Utilities Commission* and the *Alexander Railroad Company et al vs. State of North Carolina, et al,* 243 N.C. 12, 89 S.E. 2d 727, and asked the "Commission to reopen this proceeding * * * to afford them an opportunity to present additional evidence in conformity with the provisions of G.S. Sec. 62-124, as interpreted by the Supreme Court of North Carolina in the above mentioned decisions, and that after said further hearing the Commission find that the applicable rates during the period the Commission's order was in effect were just, reasonable and otherwise lawful and for such other and further relief as to the Commission may seem just and proper."

Thereafter, on 17 July, 1956, the State of North Carolina and North Carolina Department of Agriculture, protestants, answering the petition of the Railroads "for re-opening and further hearing" while admitting in the main allegations of the petition, they aver that the North Carolina Utilities Commission was created by Act of the Gen-

eral Assembly; that its rate making is governed by statute; that it has no authority to make rates retroactive; that the decision filed 21 March, 1956, by the Supreme Court and reported in 243 N.C. 685 is judicial matter subject to opinion reported in 243 N.C. 12, and is not binding upon the Commission; that all matters and things in controversy have been fully adjudicated and would be *res judicata* and said judgment of the Supreme Court in 243 N.C. 12 is hereby pleaded in bar of any further rights petitioners might have to increase rates for the period beginning with final order of the Commission up to and including opinion of the Supreme Court affirming Judge Harris. Wherefore they pray that the petition be dismissed for the reasons enumerated in this answer.

The Commission denied the request and overruled the motion to dismiss the petition to reopen, and by directive issued 17 July, 1956, set the matter for further hearing on 2 October, 1956. This ruling is deemed proper and consistent with the decision of this Court.

Pursuant thereto the record of case on appeal contains statement of evidence offered by the applicant railroads on hearing before the Commission.

The record of case on appeal also discloses this recitation by and declaration of the Commission in its order: "The protestants have filed exhaustive briefs, citing numerous rulings of numerous courts on the questions of retroactive rate makings; rulings *'nunc pro tunc'* and *'res judicata'*.

"We adhere to our original position. We conclude that neither the principle of retroactive rate-making or *'res judicata'* is invokable here. It is as simple as this: The railroads do not file, bring or prosecute a new action. They make a motion to reopen and take additional testimony in the same action. The rates they seek to establish as being just, reasonable and lawful by this motion have already been made. In fact, they were made on July 9, 1953, put into effect on July 16, 1953, and remained in effect and were collected by the railroads to and including February 28, 1954. By motion in the cause the railroads seek to establish the justness, reasonableness and lawfulness of rates already established and collected. The principle of retroactive ratemaking is not involved. The situation is that the North Carolina Utilities Commission found the rates which the railroads put into effect on July 16, 1953, and collected until February, 1954, to be reasonable, just and lawful * * *." In the light of the former opinion, 243 N.C. 685, this appears to be a logical deduction.

The record of case on appeal also discloses order of the Utilities

Commission in which, after reviewing the evidence, these findings of fact were made:

"1. The intrastate rates and charges in effect by the railroad companies in North Carolina on July 9, 1953, were not sufficient to produce revenue adequate to provide a fair, reasonable and just rate of return on property committed to intrastate use and used and useful in producing revenue.

"2. The rates and charges prescribed by the order of the North Carolina Utilities Commission in this matter on July 9, 1953, were reasonable, fair, just and lawful.

"3. The increase in intrastate rates and charges for the railroads as prescribed in the order by the Commission on July 9, 1953, in this matter was necessary at that time and at all times between that date and February 28, 1954, to afford the railroads a fair return on their properties used and useful in connection with their intrastate operations in North Carolina."

And in the record of the order of June 21, 1957, it is recited that "in the further hearing after the matter had been re-opened following the Supreme Court decisions, the railroads undertake to separate the inter- and intrastate properties and the inter- and intrastate operations with a view to showing that they were not earning a fair rate of return on July 9, 1953, on their intrastate properties in North Carolina used and useful in intrastate operations."

It is noted that "eighty-seven per cent of the intrastate business and eighty-nine per cent of the interstate business in North Carolina is done by the four larger railroads; namely, Southern, Seaboard Air Line, Atlantic Coast Line and Norfolk Southern. A committee of four, one from each of said railroads, was appointed to make a study of the properties and operations of these four railroads and devise formulae and means for separating intrastate properties and operations from interstate. Exhibit 5A as introduced shows statistical results of the work of this committee."

Further recitation is too voluminous to admit of quotation.

And the Commission further concluded that "the methods used by the petitioners in separating intrastate operations and property from interstate operations and property were sufficient to reasonably establish the North Carolina intrastate operating expenses, the revenue derived from such operations and the value of the intrastate properties used and useful in producing such revenue."

Thereupon the Commission further concluded that "intrastate rates and charges of the railroads on July 9, 1953, were not sufficient to provide a fair, reasonable and just rate of return on their intrastate

properties used and useful in producing such revenue"; and that the increase in rates and charges allowed and granted to the railroads by the order of the North Carolina Utilities Commission on July 9, 1953, was necessary at that time, and has been necessary at all times since, in order that the railroads might realize a fair, just and reasonable rate of return on their intrastate properties used and useful in producing such revenue in North Carolina.

Thereupon the Commission ordered "that increase in rates and charges prescribed by the North Carolina Utilities Commission for the petitioners in this cause in its order issued on July 9, 1953, was fair, just and reasonable and necessary to provide a fair, just and reasonable rate of return to the petitioners on the value of their intrastate investment in property in North Carolina used and useful in their intrastate operations."

And the record shows that from order of June 21, 1957, the State of North Carolina, the Department of Agriculture of the State of North Carolina, the State Highway Commission, the North Carolina Farm Bureau Federation, the Mead Corporation and other protestants, gave notice of appeal to the Superior Court of Wake County, and requested that the Commission transmit the record of the proceedings, certified under the seal of the Commission, for a determination by that court of all matters arising upon such appeal in accordance with the provisions of Chapter 62 of the General Statutes of North Carolina, and for grounds of appeal, say that said order and orders are unlawful, unjust, unreasonable and unwarranted, and specifically that: Here follows eleven grounds of exception— in no one of which is there any specific reference to later contention that the evidence offered by petitioners relates only to the four major railroads and not to the twenty-one minor railroads.

And on hearing in Superior Court at First August Term 1958, specifically 8 September, 1958, upon the record so certified by the Utilities Commission, and being reviewed, the court finds:

"1. That this (is) the same proceeding instituted by the Alexander Railroad Company, and others hereinafter named as petitioners, for authority to increase their intrastate freight rate in North Carolina and which was originally heard by the North Carolina Utilities Commission and Order issued by the Commission on July 9, 1953, granting the increase sought. Which Order was reversed by Honorable W. C. Harris, Judge of the Superior Court, on March 3, 1954, which Judgment was upheld by the Supreme Court of North Carolina, its opinion being reported in Volume 243 at page 12 of the North Carolina Supreme Court Rep., and was thereafter reopened for further

hearing by the North Carolina Utilities Commission following the opinion of the North Carolina Supreme Court reported in Volume 243 *at* page 685 of its report (which opinion, as interpreted by this Court, had the effect of remanding this cause to the Commission for further hearings this being a continuation of the same cause the principle of *res judicata* and the rule of law which forbids retroactive rate making are not applicable to the Order of the Commission under review by this Court).

"2. At the hearings held in this proceeding before the Utilities Commission, upon which the Order of June 21, 1957 is based, only four of the petitioning railroads, namely, the Seaboard Air Line Railroad Company, the Southern Railway Company, the Atlantic Coast Line Railroad Company, and the Norfolk Southern Railway Company presented competent, material, and substantial evidence in support of increased intrastate rates and charges as prescribed in the Order of the Commission, and as to these petitioners the Order is fully justified. However, the other petitioning railroads (which, as disclosed by the record, constitute 13 per cent of the intrastate railroad activity in this State)"— naming them— "presented no evidence and no evidence was heard by the Commission, as disclosed by the records, as to the revenues, expenses, or investments of any of these companies and the increase in rates and charges approved by the orders of the Commission for their companies are not supported by any competent, material, or substantial evidence.

"3. This court is of the opinion that under General Statute 62-26.10 it does not have the authority to amend the order of the Utilities Commission so as to approve the same insofar as it pertains to the four major railroad companies which presented the competent, material, and substantial evidence in support of the increase in intrastate rates and charges as prescribed in the Order and disapprove the same as to the other petitioning railroad companies which have failed to do so. It further appearing to this court that in view of the apparent practice of the Commission to apply uniform railroad rates, as was done in this case, and inasmuch as this specific objection as to the propriety of approving rates and charges for the petitioning railroads not offering evidence was raised for the first time after the last order of the Utilities Commission at the hearing of this matter before this Court, the ends of justice require that these railroad companies be given a further opportunity to present competent, material, and substantial evidence to the Commission before a final determination of this proceeding. * * *

"4. That as to the exceptions filed by the protestants, it is the

opinion of this court that Exceptions Nos. 1, 2, 3, 7, 8 and 11 are not supported by the record under the law of North Carolina for the reasons set out above, and exceptions Nos. 4, 5, 6, 9 and 10 are well taken only as to those petitioners above mentioned which did not offer evidence before the Commission.

"Now, therefore, it is Ordered, adjudged and decreed that this case be, and the same hereby is, remanded to the North Carolina Utilities Commission for further proceeding and such hearing as will allow each of the petitioners which has not already done so the opportunity to present evidence of its revenues, expenses, and investments, as required by law, and thereafter to enter the proper order as to each petitioner and in the event none of the other petitioners do so, to amend its order so as to make the increase in rates and charges applicable to the Southern Railway Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company and the Norfolk Southern Railway Company. It is not the intent nor purpose of this order to require the hearing of further evidence as to these last-named petitioners."

Appeal of Petitioners:

The twenty-one minor railroads except to and appeal from the judgment of Clark, J., above fully set out, upon several grounds, and stressfully contend, at the outset, that the protestants are not in a position to raise in the Superior Court for the first time, the objection that the evidence was insufficient as to these appellant railroads on the grounds that the operating statistics were those of the four major railroads. Exceptions 3, 5 and 6. Assignments of error 2 and 3.

A review of the entire proceedings since the institution of it leads to conclusion that the contention is meritorious.

And bearing in mind that the statute, G.S. 62-26.10 pertaining to record on appeal and extent of review, declares "the appellant shall not be permitted to rely upon any grounds for relief on appeals which were not set forth specifically in his petition for rehearing by the Commission."

Applying this statute to the facts of instant case the point raised by the protestants for the first time after the last order of the Utilities Commission, at the hearing of the matter before Superior Court, seems to come too late.

Indeed the original petition was filed jointly by all the railroads in North Carolina, twenty-five in number. And the record discloses that the case has been tried throughout on the theory that the rate conditions of the four major petitioning railroads handling 87 per cent of all the intrastate traffic in North Carolina, were reasonably

typical of the other twenty-one petitioning railroads, handling the remaining 13 per cent, and that the making of a case for the four petitioning major railroads would be a case for all.

It may be noted that the record in this case on former appeal, No. 449, Fall Term of 1954, from Wake, incorporated by reference as a part of the record in this case, shows that in the original case before the Utilities Commission the twenty-five petitioning railroads presented operating statistics for only the four railroads, Southern, Seaboard, Atlantic Coast Line and Norfolk Southern, and an affiliate of one of them, all as set out there.

And all of this evidence was offered for the purpose of showing the operating results of the railroads as a group— not as individuals. The requested rate increase was to apply to all railroads operating in North Carolina. And attention is called to the fact that all through the proceeding the railroads were all treated as a group and the rate increase was treated as applying to all railroads operating in the State. That was the theory of the case.

And it seems clear from the record and from the order of the Commission here under review that the Commission accepted the evidence for the four major railroads as reasonably applicable to all the railroads. Therefore, it would seem that as disclosed by the record the revenues, expenses and investments of all these companies, and the increase in rates and charges approved by the order of the Commission for their companies are supported by competent, material and substantial evidence. The order indicates that the rates charged by all the railroads are reasonable, just and proper. And by statute, G.S. 62-123, the rates or charges established by the Commission are deemed just and reasonable. Hence the ruling of the judge below in this respect must be reversed, and the ruling of the Utilities Commission, in approving the increase in intrastate rates, sustained.

Now as to the appeal of protestants from judgment rendered by Judge Presiding, as aforesaid, the correctness thereof is challenged in the main upon the contention that the court erred in overruling the pleas of *res judicata*.

It is held hereinabove in recitation of historical data that the opinion of the former appeal, 243 N.C. 12, 89 S.E. 2d 727, and the explanatory statement on petition to rehear, 243 N.C. 685, 91 S.E. 2d 899, constitute the law of the case and are binding upon the parties and upon the Court.

Manifestly the case was left open for petitioners to take further action to have the case reopened in manner followed by the petitioners.

Other assignments of error by the protestants have been duly considered, and in them prejudicial error is not made to appear.

Therefore, for reasons stated, the order of the Utilities Commission of 21 June, 1957 is approved and sustained.

As to appeal of Petitioners— Error.

As to appeal of Protestants— Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. CAROLINA POWER AND LIGHT COMPANY

AND

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, v. CAROLINAS COMMITTEE FOR INDUSTRIAL POWER RATES AND AREA DEVELOPMENT, INC., AILEEN MILLS COMPANY, ALEO MANUFACTURING COMPANY, AMEROTRON CORPORATION, BLADENBORO COTTON MILLS, BURLINGTON INDUSTRIES, INC.; CAROLINA BAGGING COMPANY, A DIVISION OF TEXTRON, INC.; CLAYTON SPINNING COMPANY, COLLINS AND AIKMAN CORPORATION, FOREMOST YARN MILLS, FRED WHITAKER COMPANY, GREYSTONE GRANITE QUARRIES, HADLEY PEOPLES MANUFACTURING COMPANY, HARRIET COTTON MILLS, HENDERSON COTTON MILLS, HOLT-WILLIAMSON MANUFACTURING COMPANY, HORNWOOD WARP KNITTING COMPANY, J. P. STEVENS AND COMPANY, INC., JORDAN SPINNING COMPANY, LEDBETTER MANUFACTURING COMPANY, LIBERTY HOSIERY MILLS, INC., LITTLE COTTON MANUFACTURING COMPANY, McLEOD PLYWOOD BOX COMPANY, PECK MANUFACTURING COMPANY, PILOT MILLS COMPANY, RAMSEUR INTER-LOCK KNITTING COMPANY, ROCKY MOUNT MILLS, ROSEBORO SPINNING MILLS PLANT, ROXBORO COTTON MILLS, ROYAL COTTON MILLS COMPANY, RUSSELL HOSIERY MILLS, INC., SANFORD MILLING COMPANY, SILER CITY MANUFACTURING COMPANY, INC., SILER CITY MILLS, SPOFFORD MILLS, INC., STERLING COTTON MILLS, INC.; TOLAR, HART AND HOLT MILLS; TUNGSTEN MINING CORPORATION, AND WADE MANUFACTURING CORPORATION.

(Filed 12 June, 1959.)

1. Electricity § 3: Utilities Commission § 2—

The Utilities Commission, in the exercise of delegated police power, has authority to fix rates for public service companies including supervision of rates charged and service rendered by corporations furnishing electric light and power, with the exception of municipal corporations, and it has the duty, in the exercise of its *quasi judicial* functions to establish reasonable and just rates therefor. G. S. 62-30, G. S. 62-31, G. S. 62-122.

2. Same—

The duty of the Utilities Commission to protect the public in reason-

able service at just and reasonable rates also requires it to fix rates that are just and reasonable to power companies so that they will have sufficient earnings to enable them to give reasonable service, to expand and improve their facilities as necessary in the public interest, to meet their obligations, to pay their stockholders a reasonable rate, and to compete in the market for capital funds.

3. Electricity § 3: Utilities Commission § 3—

In initially establishing the rate structure of a public utility, or in revising such rate structure or any substantial part thereof, the Utilities Commission must follow the procedure indicated by G.S. 62-124, in which event the proceeding is a "general rate case" requiring investigation and findings in regard to investment, probable income and operating costs, etc., in determining a rate which will give a just and reasonable return upon the investment.

4. Same—

The establishment of a rate structure for a power company in proceedings under G.S. 62-124 does not come within the doctrine of *stare decisis*, but such rates are subject to modification or change for change of conditions upon proper petition at any time.

5. Same—

Where the rate structure of a public utility has been established, petition for the amendment, modification or recision of a single rate, or a small part of the rate structure, constitutes a "complaint proceeding" under the provisions of G.S. 62-72 and G.S. 62-26.5, in which the procedure outlined in G.S. 62-124 is not applicable.

6. Same—

It is necessary for the Utilities Commission to determine whether a proceeding before it is a general rate case or a complaint proceeding in order that it may apply the proper procedure, and its finding on this point will not be disturbed in the absence of a clear showing that the rights of the parties have been prejudiced. A proceeding which involves only a fuel clause affecting only one class of consumers and only a few of the company's rate schedules is properly heard as a complaint proceeding.

7. Same—

Where the rate structure of a power company has been established such rates are deemed *prima facie* just and reasonable, and in a subsequent complaint proceeding before the Utilities Commission attacking as discriminatory, unjust and unreasonable, a fuel clause applicable only to one class of consumers and affecting only a few of the rates, the Commission properly holds that the burden is upon complainants to show that the fuel clause and the rates resulting from the application thereof are discriminatory, unjust or unreasonable.

8. Same—

In this complaint proceeding attacking an order of the Utilities Commission putting into effect a fuel clause applicable to only one class of customers and affecting only a few of the company's rate schedules, the

order of the Commission taken as a whole *is held* to find that the fuel clause was not discriminatory, unjust or unreasonable and to be in substantial compliance with G. S. 62-26.3.

9. Same—

While the words "unjust, unreasonable, insufficient, discriminatory and unlawful" may be overlapping and interdependent in their meaning, it will be assumed that the General Assembly intended by the insertion of all of them that each should have some distinct and proper meaning, and it is held that G.S. 62-72 authorizes the Commission to modify a rate in a complaint proceeding on the basis of whether the rate is sufficient or insufficient, as well as whether it is discriminatory, unjust or unreasonable.

10. Same — Utilities Commission has authority to consider financial status of power company in determining sufficiency or insufficiency of rates.

In a complaint proceeding attacking an order of the Utilities Commission putting into effect a fuel clause applicable to only one class of customers and affecting only a few of the company's rate schedules, the Utilities Commission, upon finding that the fuel clause is not discriminatory, unjust or unreasonable, may consider evidence and find facts in regard to the necessity for the insertion of the fuel clause and as to the sufficiency or insufficiency of the applicable rates thereunder, and has the power to either increase or decrease the base price of the fuel upon which the rates are computed in accordance with the exigencies of the financial condition of the power company in a hearing under the provisions of G.S. 62-72, without applying the procedure outlined in G.S. 62-124, and its order retaining the fuel clause, with modification of the base price of fuel, will not be disturbed when its findings are supported by competent, material and substantial evidence.

11. Appeal and Error § 49—

Assignments of error based on objections to the admission of evidence which could not materially affect the findings of fact need not be considered.

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

APPEAL by complainants and the North Carolina Utilities Commission from *Sharp, S. J.*, November 24, 1958, Civil Term of WAKE.

Sometime prior to 26 March, 1948, the Carolina Power and Light Company, hereinafter referred to as "Power Company," made application to the North Carolina Utilities Commission, hereinafter called "Commission," for authorization to put into effect "Coal Adjustment Rider No. 4," sometimes referred to as "fuel Clause," to be applicable to and become a part of Rate Schedules G-1A, G-2A, G-1C, P-16, P-27, P-28, P-31A, P-37, P-39, P-40, and P-41, of said Power Company.

The designated rate schedules had theretofore been established by order of the Commission in determining rates to be paid for electric

power, in the territory served by the Power Company, by industrial users of electricity, including textile manufacturers, milling and mining companies, and other large industrial plants.

It was proposed to add Coal Adjustment Rider No. 4 to said rates and thereby increase the charges for electric power thereunder on a graduated scale in relation to the change in price of coal used by the Power Company.

Coal Adjustment Rider No. 4, or fuel clause, as proposed by the Power Company, was as follows:

> "*BILLING:* The net monthly bill, computed under the schedule with which this Rider is applicable, shall be increased by .0065c per kilowatt-hour, for those kilowatt-hours used by customer during the current billing month in excess of 15,000 kilowatt-hours, for each whole 10c above $6.00 per short ton in the average cost of coal burned during the twelve months period ending with the second preceding month. Whenever the heating value per pound of coal as received is less than 13,500 BTU, the cost may be adjusted to the equivalent of 13,500 BTU per pound."

Under this fuel clause a business to which one of the designated rates applied would pay an additional charge for electricity provided it used more than 15,000 kilowatt-hours in a given month and provided the average cost of coal to the Power Company during the preceding year exceeded $6.00 per short ton. In order that the quality of coal should not affect the result, it was provided that a quantity of coal producing 13,500 British Thermal Units was to be considered one pound of coal. The particular business would pay, under the fuel clause in addition to the established rate, .0065c per kilowatt-hour for each whole 10c above $6.00 that the Power Company had paid on an average during the preceding year for a short ton of coal. Thus the lower the base price of coal fixed in the fuel clause the greater the revenue to the Power Company. A base price of $6.00 would produce more than one of $7.00.

In support of its application to put the fuel clause into effect, the Power Company alleged and offered evidence at the hearing tending to support the following propositions: (a) that the revenue collected from the textile industry and large power customers under the then existing rates was not compensatory, that is, it was less than the cost of generating and delivering the current to such users; (b) that the Power Company was in need of additional revenue to meet the rising cost of coal, labor, materials and supplies; and (c) the Power Company was in need of additional revenue to enable it to pay dividends and maintain an unimpaired credit condition in order that it might

obtain through loans and sales of stock sufficient money for expansion and improvement of its facilities to meet the great post-war demand for current and services.

The affected industrial users made appearances at the hearing and strongly resisted the imposition of the fuel clause on the following grounds (a) that it was discriminatory in that it did not apply uniformly to all consumers of electricity, but placed all the burden on textile and large power users; and (b) that it would be disastrous to the users involved for it would increase the cost of production in the highly competitive industries of the protestants.

The Commission made an order on 8 April, 1948, in which it found:

"1. That the petitioner needs an increase in revenue, but not in the amount requested.

"2. That some textile and large industrial users are getting current at a non-compensatory figure.

"3. That a coal clause should be permitted but the base price should be $7.00 per ton.

"4. . . . The contention that the proposed increase should be spread alike on all classes of service appears plausible, but from a sense of equity it is not compelling. Electric rates are not uniform and practical rate-making does not require that they be made uniform. The measure of a rate is determined by the various elements which enter into the service that is to be performed."

The order put Coal Adjustment Rider No. 4 into effect, but fixed the base rate of coal at $7.00. The cause was retained for one year for the Power Company to file four quarterly income statements, and the Commission retained the right within 30 days after the filing of any of said statements to increase or decrease the base rate of coal.

After a further hearing the Commission on 28 February, 1950, modified its former order by "fixing the base price of coal in its fuel adjustment rider at $6.00 per ton, with a cost adjustment to the equivalent of 13,500 BTU per pound, when the heating value per pound as received varies as much as 100 BTU per pound either above or below 13,500 BTU."

The protestants filed a petition for a re-hearing, but the Commission refused to rehear the matter. There was no effective appeal from the order putting the fuel clause in effect or from the order of modification.

In 1958 the complainants filed a petition and alleged: that elec-

tric power is necessary to the operation of their businesses and the cost thereof is a substantial portion of the cost of their products; that they are subject to rate schedules G-1C, G-2A, P-27 and P-28, and therefore are affected by the fuel clause; that the fuel clause is discriminatory and causes them to pay an inequitable portion of the costs, expenses and revenues of the Power Company; that it is discriminatory with respect to competition with like industries in Duke Power Company territory; that the fuel clause is unjust, unreasonable and unlawful and retards industrial development in the Power Company territory; that the Power Company no longer needs the revenue derived from the fuel clause and would have a fair return without it; and that it endangers the ability of complainants to continue operations.

Complainants prayed: (1) that the fuel clause be eliminated; and (2) that the Commission fix fair, just and reasonable rates.

The Power Company denied generally and in particular the allegations of complainants' complaint and asked that it be dismissed.

The complainants consist of thirty-eight textile, milling and mining companies, users of electric power, and the Carolinas Committee for Industrial Power Rates and Area Development, Inc., a non-user organized for the promotion and encouragement of industry and industrial development in the Carolinas. Many of the complainants were protestants in the hearings referred to above.

The cause came on to be heard before the Commission and the hearing was in progress for two weeks. Twenty witnesses were heard and voluminous documentary evidence, consisting of 55 exhibits, was offered and admitted in evidence. The record of the case on appeal consists of 722 pages. The exhibits are even greater in volume.

The order of the Commission gives a history of the former hearings as to the fuel clause, reviews generally the evidence of complainants and the Power Company, and states:

> "We have not considered this case as a general rate case. We do not attempt to determine the fair value of the Company's investment. From the complaint filed and testimony offered, we view this matter from two aspects: 1. Is the fuel clause, designated Rider No. 4, as provided for in the orders of the Commission in 1948 and 1950, discriminatory so far as the Complainants are concerned? 2. Are the earnings of the Company such at this time as to reasonably permit the elimination of, or change in, the fuel clause, reducing the revenue to the Company?"

The order further states:

"During the hearing we ruled that the Complainants had not established the fuel clause provisions to be discriminatory. We so hold. . . . The statute specifically provides that a rate made by the Commission is deemed to be just and reasonable, and the statute further provides the Complainants have the burden of showing that the rate which it complains about is unjust, unreasonable, or discriminatory. This the Complainants did not do."

The order made the following findings of fact:

"1. The operating experience and financial condition of the Company are now such as to justify a reduction in the cost of the fuel adjustment clause to the customers of the Company subject to this clause.

"2. The earnings of the Company are not sufficient to justify an elimination of the fuel clause but are sufficient to justify a change in the fuel clause by changing the base rate price of coal from $6 to $7."

The order provided for a modification of the "fuel" clause so as to change the base price of coal from $6.00 to $7.00. The effective date of the modification is September 1, 1958.

The Complainants and the Power Company filed exceptions to the order and the findings therein adverse to them, respectively, and appealed to the Superior Court.

The Power Company was relieved from the order pending the appeal, but was required to keep records so that accurate refunds might be made in case of a decision on appeal adverse to it.

The appeal was heard in Superior Court. The following are the pertinent portions of the judgment entered by Judge Sharp:

"1. In the following language on page 11 of its order the Commission found specifically that the complainants failed to establish their allegations that the rate complained of is unjust, unreasonable, or discriminatory:

'The statute specifically provides that a rate made by the Commission is deemed to be just and reasonable, and the statute further provides the Complainants have the burden of showing that the rate which it complains about is unjust, unreasonable, or discriminatory. This the Complainants did not do.'

"That in holding that the complainants have failed to show that Rider No. 4 is unjust, unreasonable or discriminatory as applied to the complainants, the Commission necessarily held that the complainants failed to overcome the presumption that as between the complainants and others similarly situated on the one hand and all

other ratepayers on the other hand, the proper balance existed and the appropriate distribution of revenue requirements had been met.

"2. The foregoing finding and conclusion of the Commission is supported by the record.

"3. That notwithstanding the ruling of the Commission that the complainants had failed to show that Rider No. 4 was unjust, unreasonable or discriminatory, it proceeded to reduce the rate for the complainants by raising the base price of coal from $6 to $7 a ton.

"That the reasons assigned for this reduction were that the defendant company 'can forego a part of the revenue produced by the fuel clause without any serious detriment to its operations'; that 'it does not appear that the loss of this much revenue will seriously impair the ability of the Company to finance its future needs'; and that 'operating experience and financial condition of the Company are now such as to justify a reduction in the cost of the fuel adjustment clause.'

"That these conclusions are not a legal basis for a rate reduction under the statute.

"4. The pleadings, the evidence, statements of counsel for the respective parties, and the Commission's order herein all establish that this proceeding is not a general rate case; and establish that it is strictly a complaint proceeding which challenges the validity and effect of only one of the defendant's rates, that is, its Adjustment Rider No. 4. The Commission having found that the complainants had failed to carry the burden of showing that Adjustment Rider No. 4 is unjust, unreasonable, or discriminatory, which finding is supported by the record, consideration by the Commission of the defendant's financial condition became unnecessary and any findings by the Commission with respect thereto were without legal consequence.

"5. The facts found by the Commission and its conclusions based thereon do not warrant a reduction of the defendant's rates or charges under its Adjustment Rider No. 4 and do not support the Commission's order of July 31, 1958.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, on the defendant's appeal, that the order entered in this proceeding by the North Carolina Utilities Commission on July 31, 1958, ordering 'that Carolina Power and Light Company, as of its next billing date after August 1, 1958, change the base price of coal, as now provided in its fuel clause adjustment, known as Rider No. 4, from $6 to $7,' be, and the same hereby is reversed."

In said judgment the court overruled all of complainants' exceptions.

From the foregoing judgment the Commission and Complainants appealed and assigned error.

Attorney General Seawell and Assistant Attorney General Burns for the North Carolina Utilities Commission.

Broughton & Broughton and Fletcher & Lake for Complainants, appellants.

Joyner & Howison, W. H. Weatherspoon, Charles F. Rouse and Shearon Harris for Carolina Power & Light Company, appellee.

MOORE, J. In the exercise of the police powers of the State the General Assembly has conferred upon the Utilities Commission the duty and authority to fix rates for public-service companies that are reasonable and just. *Corporation Commission v. Manufacturing Co.*, 185 N.C. 17, 23, 116 S.E. 178. The powers of the Commission are supervisory and regulatory, and it possesses *quasi-judicial* functions. The Commission has general supervision over rates charged and service rendered by electric light and power companies. G.S. 62-30. And it is under duty to inquire into service rendered and rates charged by them and to fix and determine the reasonableness thereof. G.S. 62-31. It must establish reasonable and just rates and charges of and for "persons, companies and corporations, other than municipal corporations, engaged in furnishing electricity, electric lights, current, (and) power . . ." G.S. 62-122. (Parentheses ours.)

In fixing any maximum rate or charge, or tariff of rates or charges, the Commission shall take into consideration the value of the power company's property used in public service, the reasonable cost of construction thereof, the amount expended in permanent improvements thereon, and the present compared with the original cost. The Commission shall also consider the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of the power company, and all other facts that will enable it to determine what are reasonable and just rates and charges. G.S. 62-124.

In *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N. C. 333, 344, 80 S. E. 2d 133, *Barnhill, J.*, (*later C. J.*), speaking for the Court explained the application of G.S. 62-124 as follows:

"Necessarily, what is a 'just and reasonable' rate which will produce a fair return on the investment depends on (1) the value of the investment — usually referred to in rate-making cases as the Rate Base — which earns the return; (2) the gross income received by the

applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined Rate Base. When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. Due to changing economic conditions and other factors, the rate of return so fixed is not exact. Necessarily it is nothing more than an estimate. In finding these essential, ultimate facts, the Commission must consider all the factors particularized in the statute and 'all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs.' G.S. 62-124. It must then arrive at its own independent conclusion, without reference to any specific formula, as to (1) what constitutes a fair value, for rate-making purposes, of applicant's investment used in rendering intrastate service — the Rate Base, and (2) what rate of return on the predetermined Rate Base will constitute a rate that is just and reasonable both to the applicant and to the public."

A power company is a monopoly and the State exercises its police powers through the Commission to protect the public in reasonable service at just and reasonable rates. At the same time it requires the Commission to fix rates that are just and reasonable to the power company and which will provide for it sufficient earnings to enable the power company to give reasonable service, to expand and improve its facilities to meet the needs of users in its territory, to meet its obligations, to pay its stockholders a reasonable return, and to compete in the market for capital funds.

In fixing the rate schedules and rate classifications, or in revising said rates and classifications, or a substantial part thereof, the procedure indicated by G.S. 62-124 must be observed. Where the whole or a substantial portion of the rate structure of a public utility is being initially established or is under review, and where the required procedure under G.S. 62-124 is being carried out, the hearing before the Commission to establish or revise the rates is referred to as a "general rate case." Obviously such hearing is expensive and time-consuming for all concerned. Besides, the final order of the Commission therein is not within the doctrine of *stare decisis*. 73 C.J.S., Public Utilities, sec. 57 c, p. 1134. Circumstances change and emergencies arise. Petitions for amendment, modification or revocation of rate orders may be filed at any time.

Where a public utility has many rate schedules applying to many

different classes of service customers and only one rate or a few rates are involved in a petition for amendment, modification or rescission, ordinarily it is not required that the utility's property be valued and that the provisions of G.S. 62-124 be observed in such case. "A valuation of the property of the utility is not necessary in every proceeding before the Commission to fix rates or determine their reasonableness; so a specific rate may, in a proper case, be fixed without such valuation." 73 C.J.S., Public Utilities, sec. 41 bb, p. 1094. *Edison Co. v. Utilities Commission* (Ohio 1954), 118 N.E. 2d 531; *Town of Granada v. City of Lamar,* 5 PUR (N.S.) 519, 525, (1935).

G.S. 62-72 provides as follows: "Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint, finds that the existing rates in effect and collected by any public utility for any service, product, or commodity, are unjust, unreasonable, insufficient or discriminatory, or in anywise in violation of any provision of law, the Commission shall determine the just, reasonable and sufficient rates to be thereafter observed and in force, and shall fix the same by order as hereinafter provided." And it is further provided in G.S. 62-26.5 that, "The Commission may at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it."

A hearing pursuant to the foregoing provisions of G.S. 62-72 and G.S. 62-26.5 which involves a single rate or a small part of the rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of the utility and may be resolved without involving the procedure outlined in G.S. 62-124, and does not justify the expense and loss of time involved in such procedure. In many instances the complainants are unable to bear such expense, in others the Utility might suffer irreparable loss by the delay involved.

The instant case is a complaint proceeding. It involves only "Coal Adjustment Rider No. 4," applies to one class of electric power users, and affects only a few of the Power Company's rate schedules. The Commission in its order says: "We have not considered this case as a general rate case. We do not attempt to determine the fair value of the Company's investment."

It is within the province of the Commission to determine whether a hearing is a general rate case or a complaint proceeding. Indeed it is necessary as a matter of procedure that such determination be made in every hearing involving the establishment, modification or

revocation of rates. The findings of the Commission on this point will not be disturbed in any case in the absence of a clear showing that the rights of the parties have been prejudiced. In the case at bar we hold that the Commission was correct in declaring this a complaint proceeding.

The complainants alleged in express terms that the fuel clause was discriminatory, unjust and unreasonable. The burden was upon the complainants to establish the truth of these allegations. The prior establishment of the fuel clause as a part of the rate schedules applicable to complainants constituted *prima facie* evidence of its validity and that it was just and reasonable. *State v. Municipal Corporations*, 243 N.C. 193, 208, 90 S.E. 2d 519. The Commission found that complainants had not shown that the fuel clause and the rates resulting from the application thereof were discriminatory, unjust or unreasonable. This finding was supported by competent, material and substantial evidence. However, the Commission changed the base price of coal from $6.00 to $7.00, which had the effect of reducing the applicable rates. This modification was based on findings that will be discussed below.

The Power Company appealed from the order of the Commission changing the base price of coal and complainants appealed from the order on the ground that it did not rescind the fuel clause in its entirety. The Superior Court reversed the Commission and in effect adjudged that the fuel clause shall remain unchanged with the base price of coal at $6.00. The judgment of the Superior Court declared in effect that the finding by the Commission that the fuel clause was not discriminatory, unjust or unreasonable made any modification thereof erroneous as a matter of law, and "consideration by the Commission of the defendant's financial condition became unnecessary and any findings by the Commission with respect thereto were without legal consequence."

Complainants contend that a careful construction and analysis of the Commission's order shows that it intended to find only that the fuel clause was not discriminatory, and that there is no finding that it was not unjust or unreasonable. We concede that the order might have been more clearly drawn. It intermingles its findings with a history of the fuel clause, a review of the evidence and contentions of the parties, explanations, and conclusions of law, so that it presents some difficulties of interpretation. But taken as a whole, it is in substantial compliance with G.S. 62-26.3. We conclude that it did find that the fuel clause was not discriminatory, unjust or unreasonable.

G.S. 62-72 provides that where the Commission finds that a rate is "unjust, unreasonable, *insufficient or* discriminatory, *or* in anywise in violation of any provision of law, the Commission shall determine the just, reasonable and *sufficient*" rate. (Emphasis ours.) It is our view that the decision in this case turns on the matter of the *sufficiency* of the rate or rates involved. It is true that under certain circumstances the words, unjust, unreasonable, insufficient, discriminatory and unlawful, may be overlapping and inter-dependent in their meaning. At times the existence of one may be implied from the applicability of another. But the General Assembly must have intended by the insertion of all of them that each had some distinct and proper meaning.

The adoption of the fuel clause in the orders of 8 April, 1948, and 28 February, 1950, was based on findings that (1) the Power Company needed an increase in revenue; and (2) that textile and large industrial users were getting current at non-compensatory rates. Certainly these findings dealt directly with the sufficiency or insufficiency of the pertinent rate schedules.

In the instant case the complainants alleged that the Power Company no longer needs the revenue derived from the fuel clause and would have a fair return should it be revoked. This clearly raises the question of the sufficiency of the pertinent rate schedules. Both the complainants and the Power Company offered evidence on the question thus raised. The Commission found as a fact:

"1. The operating experience and financial condition of the Company are now such as to justify a reduction in the cost of the fuel adjustment clause to the customers of the Company subject to this clause.

"2. The earnings of the Company are not sufficient to justify an elimination of the fuel clause but are sufficient to justify a change in the fuel clause by changing the base rate price of coal from $6 to $7."

These findings deal directly with the sufficiency of the applicable rates. They do not necessarily involve questions as to whether the fuel clause is discriminatory, unjust or unreasonable.

The Power Company appellee insists that a reduction of rate based on financial condition can only be made after the procedure outlined in G.S. 62-124 has been followed, that is, in a general rate case. But the logic of such contention is not apparent. The orders of 1948 and 1950 which put the fuel clause into effect were made in complaint proceedings and not in general rate cases. If the Commission may increase certain rates without applying G.S. 62-124, it may also re-

duce these same rates without reference thereto. Furthermore, if the Commission may consider the insufficiency of a rate, it must necessarily consider the sufficiency thereof. G.S. 62-72 requires the Commission in a hearing under the provisions thereof to determine "just, reasonable and *sufficient*" rates.

At the hearing the Commission had before it the financial statements and balance sheets of the Power Company for the years 1948 to 1957, inclusive, the printed Annual Reports of said company for the years 1949 and 1952 to 1958, inclusive, operation analyses by a certified public accountant for the years 1948 to 1957, inclusive, a prospectus with reference to first mortgage bonds of the Power Company of 1 March, 1958, a statement to stockholders dated 1 May, 1958, the Commission's own examination of operations and rate of return for 1957, a financial study made for complainants by David A. Kosh in April, 1958, a financial study made for complainants by George E. Goldthwaite, and many other documents relating to the financial condition of the Power Company. There was ample evidence of financial condition upon which to base the findings as to the sufficiency of the particular rates.

The users of electric current generally, the Power Company or the Commission itself may institute a general rate case at any time. The case before us is not such. The Commission had before it ample evidence to support the adjustment in rate made by it.

We have already indicated that the findings of the Commission are supported by competent, material and substantial evidence. These findings dispose of complainants' assignments of error based on the proposition that the fuel clause should have been eliminated entirely. It is unnecessary to consider the assignments based on the admission of evidence, since the evidence complained of does not materially affect the findings of the Commission.

It is noted that many of the complainants in this case were protestants at the hearing in 1948 when the fuel clause was put in effect and that they did not appeal from that order.

As to the appeal of the Commission, the judgment of Judge Sharp is reversed. As to the appeal of complainants in so far as it seeks to have the cause remanded to the Commission for further findings and an order rescinding the fuel clause, the judgment below is affirmed. The Commission is directed to put into effect its order of 31 July, 1958. G.S. 62-26.13.

On Commission's appeal — Reversed.

On Complainants' appeal — Affirmed.

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

ANNIE W. HUDSON v. PETROLEUM TRANSIT COMPANY, INC., CHARLES THOMAS MINTON AND CLAUDE HUDSON MILLER.

(Filed 12 June, 1959.)

1. Automobiles § 17—

Where the evidence discloses that electric traffic control signals were maintained at the intersection within a municipality but no ordinance of the municipality in regard thereto is introduced in evidence, G.S. 20-158(c) is not applicable, and the rights of way of motorists at such intersection must be determined upon the basis of the well-recognized meaning of such signal lights, and motorists will be required to give that obedience to them which a reasonably prudent operator would give.

2. Automobiles § 8—

A vehicle turning left at an intersection is required to approach the intersection in his lane of travel nearest the center of the highway and pass as closely as practicable to the right of the center of the intersection. G.S. 20-153(a).

3. Automobiles § 17—

The driver of a vehicle desiring to turn left at an intersection of highways controlled by traffic control signals is entitled to move into the intersection when the traffic signal facing him is green, but, before turning left across the lanes of travel of vehicles headed in the opposite direction, is under duty to yield them the right of way. G. S. 20-155.

4. Same—

A motorist approaching an intersection controlled by traffic lights is entitled to proceed straight across the intersection when faced by the green signal, and, in the absence of anything which gives or should give him notice to the contrary, is not under duty to anticipate that a motorist approaching along the intersecting highway from his left will fail to yield the right of way as required by statute. G.S. 20-155.

5. Automobiles § 38—

Testimony of a witness that a vehicle was traveling some 65 m.p.h. is without probative value when it is made to appear that the witness' estimate of speed was based solely upon seeing the lights of such vehicle as it approached her from the opposite direction at night time.

6. Negligence § 19a—

What is negligence is a question of law, and when the facts are admitted or established it is for the Court to determine whether negligence exists or not, and if so whether it is a proximate cause.

7. Negligence § 19b(1)—

When all the evidence, considered in the light most favorable to plaintiff, fails to show actionable negligence on the part of defendant, or clearly establishes that the injury was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person, nonsuit is proper.

8. Automobiles § 41g— Negligence of driver turning left at intersection across lanes of travel of vehicles having green light held sole proximate cause of collision.

The evidence tended to show that plaintiff was a passenger in an automobile traveling west on a four-lane highway, that as the vehicle approached an intersection controlled by traffic lights the traffic light facing the driver turned green, that the driver entered the intersection and turned left in front of two cars standing in the northern lane for eastbound traffic, and continued on across the southern lane for eastbound traffic where the car was struck by a tractor-trailer traveling east in the southern lane. *Held:* Even conceding that the tractor-trailer was traveling at an excessive speed, the driver thereof entered the intersection with the green light and was not under duty to anticipate that another vehicle would cross his lane of travel from his left, and therefore the motion for involuntary nonsuit of the driver and owner of the tractor-trailer was properly allowed, since the evidence discloses that the collision was independently and proximately caused by the negligence of the driver of the car.

APPEAL by plaintiff from *Oliver, J.*, at October-November 1958 Mixed Term of UNION.

Civil action to recover damages for personal injury sustained about 9:20 P. M., on 22 June, 1957, in a collision between a 1956 International tractor-trailer truck, owned by defendant Petroleum Transit Company, incorporated, (hereinafter referred to as Transit Company) and operated by defendant Charles Thomas Minton (hereinafter referred to as Minton) as its agent, servant and employee in and about its business, and a 1950 Ford two-door automobile owned and operated by defendant Claude Hudson Miller, (hereinafter referred to as Miller), and in which plaintiff was a passenger, at the intersection of U. S. Highway #74, also known as Roosevelt Boulevard, and N. C. Highway #200, also known as Morgan Mill Road, in the town of Monroe, North Carolina. This factual situation is not controverted.

The record of case on appeal shows the following admissions in the pleadings:

Highway #74 runs in an easterly-westerly direction. It has four paved lanes, two eastbound approximately twenty-four feet wide, and two westbound approximately twenty-four feet wide, the two eastbound and the two westbound being separated by a grass plot thirty feet wide. And Highway #200 runs in northerly-southerly direction, with paved surface approximately twenty-four feet wide. The two highways intersect at right angles. There are traffic signals at the intersection; one signal light facing west on the eastbound traffic lane of U. S. Highway #74, suspended straight above the center of said dual lanes, and one signal light facing east on westbound traffic lanes of said highway, suspended straight above the center of said dual

lanes, and on Highway #200 one traffic light facing north and suspended straight above and over the south edge of the dual westbound traffic lanes of U. S. Highway #74, and one facing south and suspended straight above and over Highway #200 on the north edge of the dual lanes of eastbound traffic lanes on Highway #74. The traffic signal lights, at the time of said collision, were operating in perfect order. The light on the eastbound traffic on Highway #74 and the light on the westbound traffic on Highway #74 operate simultaneously, that is, when the light on one was red, the light on the other was red, and when the light on one was green, the light on the other was green; and the traffic lights facing north and south on Highway #200 work simultaneously,— both being red at the same time, and both being green at the same time. And these lights facing on Highway #200 work simultaneously with the two lights facing the traffic on Highway #74, that is, when the lights facing the traffic on Highway #74 were green, the lights facing the traffic on Highway #200 were red, and when the lights facing Highway #74 were red, the lights facing the traffic on Highway #200 were green.

And the record on appeal shows that plaintiff alleges in paragraph 9 of her complaint that at the time and place of the collision the defendant Minton was operating the said tractor-trailer truck for his employer, Transit Company, Inc., in an easterly direction along Highway #74, and as said truck came near the said intersection, the traffic signal light facing him was red, and that there were two motor vehicles that had stopped in the left lane of the eastbound traffic for said red light signal; that as said defendant Minton came within about 150 feet of said intersection, he released the accelerator and let the truck roll to within about 75 feet of the said traffic light over said intersection; and when the traffic light changed to green or "Go", the said defendant Minton immediately accelerated the speed of said truck and drove in the right lane of the eastbound traffic, and passed the said two waiting motor vehicles at a fast, unlawful and reckless rate of speed at above 65 miles per hour, and ran into the right side of the 1950 Ford two-door automobile operated by defendant Miller, and causing the resulting wreck, and damage to plaintiff, as hereinafter more fully set out. (This the defendants Transit Company and Minton deny).

And the record on appeal shows that plaintiff alleges in paragraph 10 of her complaint that defendant Miller at the time and place referred to was operating his said automobile, in which plaintiff was a passenger, in a westerly direction on Highway #74, in the left lane of said traffic, and as he came near the said intersection the traffic

signal, which had been red changed to green or "Go"; that the said defendant Miller, without bringing his said automobile to a stop, turned it to his left and across the eastbound traffic on Highway #74, and drove across in front of the two automobiles that had stopped on the left lane of Highway #74, heading in an easterly direction, as aforesaid, and drove his said Ford automobile straight across the right traffic lane heading east on Highway #74 directly in the lane of traffic occupied by his co-defendant's tractor-trailer truck, causing the wreck and injuring plaintiff as therein more fully set out. (Defendants Transit Company and Minton admit the allegations of this paragraph).

The record on appeal further shows that plaintiff alleges in paragraph 11 of her complaint that defendants Transit Company and Minton were negligent in substantially these ways: That the truck of Transit Company was being operated at a fast, reckless and dangerous manner at an unlawful rate of speed of 65 miles per hour, so as to endanger other persons and property upon the highway, and at a greater speed than was reasonable and prudent under the conditions and circumstances then and there existing, into the intersection at a time when the intersection was occupied by another vehicle, the said Ford automobile in which plaintiff was a passenger, and when it, the Ford, had passed almost completely through the intersection before the truck entered the intersection. And that the operator of the truck failed to keep it under control, and failed to keep a proper lookout and observe the Ford automobile in the intersection in front of him, and failed to apply his brakes, and slow the speed of the truck, but rather drove the truck with tremendous speed into the side of the Ford— driving it sideways a considerable distance down the highway before ramming it into the curbing of the street * * * all of which negligence on the part of defendants Minton and Transit Company was "the sole and proximate cause, or one of the proximate causes of the injuries suffered by plaintiff." This the defendants Minton and Transit Company say is untrue and is denied.

The record further shows that plaintiff, in paragraph 12 of the complaint, alleges that defendant Miller was negligent in said collision in these ways:

"(a) He drove his said automobile into said intersection and to his left at a speed of approximately 15 miles per hour, when he saw or should have seen that said left turn could not be made in safety.

"(b) That he entered said intersection * * * without first ascertaining that the said crossing could be made through said intersection in safety.

"(c) That he failed to apply his brakes, sound his horn, or keep his said automobile under control, as the law required him to do.

"(d) That he failed to use the care, caution and circumspection that a person of ordinary reason and prudence would have used under the conditions and circumstances then and there existing.

"And that said negligence on the part of the defendant * * * Miller was one of the proximate causes of the injuries suffered by the plaintiff, as hereinafter more fully set out * * * ."

Upon the trial in Superior Court plaintiff offered evidence in pertinent part substantially as follows: Parts of the pleadings admitted by defendants Transit Company, Inc., and Minton.

J. C. Wicker, a policeman of the city of Monroe, introduced by plaintiff testified: "I investigated * * * a collision at the intersection of U. S. Highway 74 and N. C. Highway 200 on June 22, 1957. I have made a diagram of this intersection * * * I got there to the scene of the collision at approximately 9:25 P. M. The two vehicles are numbered 1 and 2 * * * #1 is the one that the Transit Company owned * * * vehicle #1 was headed east on U. S. Highway 74. I saw the 1950 Ford in which the plaintiff was riding when I reached the scene of the collision. It was east of the intersection of #200 and the front end, the front wheels, were up on the curb * * * about 6 or 8 inches high. Part of the bumper of the tractor was embedded into the right side of the * * * Ford, I'd say a third of the way up in it * * * I mean * * * into this vehicle #2. The front seat was completely torn loose * * * and this vehicle #1, the bumper was pushed back against the left front wheel.

"I got the skid marks of the tractor-trailer. There was 56 feet skid marks of the tractor-trailer. I believe there was (were) 14 feet skid marks before the collision and 42 feet after the collision. I did not see any tire marks or skid marks leading to the 1950 Ford. There was debris or something on the highway there in that vicinity of where the wreck occurred. It was approximately 42 feet back from where #2 came to rest. The kind of debris I found was dirt and glass. All the glass on the right side of the * * * Ford was broken. I measured the distance from the left lane of traffic heading west to the point where I found the debris in the highway. It was 56 feet. I measured from the line of the intersection, the curb line, on the eastbound traffic lane in which the truck was traveling to the point where I found the debris. That's 26 feet from the curb line of N. C. #200 to the debris. N. C. #200 is 24 feet wide right at that point. It was 26 feet from the extension of the curb line to automobile. I misunderstood your question. From the west line of the intersection on the eastbound lanes

of #74 to the point where I found the debris on the street is 8 feet and 8 inches."

Then on cross-examination this witness testified in pertinent part: "I saw the plaintiff Annie Hudson * * * at the scene. I helped load her in the ambulance. I wouldn't swear who was drinking; my opinion they all were. There was a terrible odor of alcohol on all of them. There was a strong odor of whiskey in the 1950 Ford, odor of some alcoholic beverage. All of the marks, tracks and debris that I saw at the intersection or near it, and near the * * * Miller * * * Ford and the tractor-trailer unit of * * * Transit Company, were in the right-hand eastbound lane of traffic on Roosevelt Boulevard (#74). * * * The rear wheels of the tractor-trailer would be about two or three feet, something like that, from the intersecting west line of Morgan Mill Road, or #200, in my opinion * * * At the time of this collision there was a signal control light on Roosevelt Boulevard in each lane, controlling east and westbound traffic. There was also a signal control light on each side of #200 or the Boulevard, controlling traffic on #200 crossing the Boulevard * * * on vehicle #2 * * * there wasn't any lights on it when I arrived there, but the lights on the tractor-trailer were still burning.

"At the southeast corner of the intersection there is an Amoco filling station. At the northwest corner * * * is a Gulf service station, and on up the highway some 300 feet * * * on the westbound lane, there is an Esso filling station. Except for those filling stations located there at that time, that territory all the way through the town is practically uninhabited. It is country there. At the time of this collision the Highway Department had erected traffic speed signs out there. The traffic speed sign erected approaching and in this vicinity controlling traffic, going both ways, was Automobiles 55 and Trucks 45."

Then plaintiff, as witness for herself, testified in pertinent part as follows: " * * * On the night of June 22, 1957, I was riding in an automobile at the time of this collision. Claude Robinson, that's what they called him, was operating that automobile. I guess that's his name, I don't know much about him. The car had two seats in it. I was * * * in the front seat on the right * * * We were heading west as we came to the intersection of Highway #74 and N. C. Highway #200 * * * We turned around at the filling station * * * We were on the right side coming back on the side the cafe is on, at the Boulevard. I don't know much about that road, the 'second time I been on there since I been living'. I was on the far side of the road coming back. We were over close to the grass part where we made

our turn. There was (were) two cars in the intersection * * * as we came toward the intersection, the control sign light was red, before we got to it. And when we got right up to it, and it come on green, and we stopped, and then it come on red, and I looked down the road and I says 'Claude, there come(s) a car' * * * When we made our turn, we were heading toward Monroe, coming on home. That would be to our left. When we made our turn, I seen a truck in the eastbound traffic, the lanes that we were going to cross. It didn't look like no truck when I first saw it. I could see the lights going like that (indicating) and the next thing I seen, it was some kind of truck, and I said, 'There come(s) a truck or something,' and Claude said 'We got the green light' * * * Before I saw the truck close to the intersection, I seen two cars in that lane in the intersection. Those cars were standing * * * They were heading east * * * They was in the grass plot, all I could tell. It was night and you know I won't paying any attention; I don't know, now. Then I saw lights of a vehicle coming. At the time we entered the intersection and turned to our left, those lights of that vehicle would be about as far as from here to the bank or a little further across here when I seen it. I don't know how far that would be. The lights on the coming vehicle I saw, bouncing up and down, were in the inside lane, I guess that's what you call it. These two cars I saw parked there were in the first lane over here. Wasn't in the lane over there. The lights were coming down this way * * * from Charlotte. In this lane on this side here, the left lane. I don't drive a car, and I don't know. We made our turn to come out, and when we made our turn to come out, this truck was getting closer and closer to us, and I said 'That truck's getting too close right there', and when we pulled up a little further that truck just moved in on me right here and my leg was at the door. I would say that from the time I seen it till it got to where I was, that truck was traveling around 65 to 75 miles per hour, because I couldn't see nothing but the lights when I saw it."

Then on cross-examination plaintiff testified in pertinent part: "Claude was married to my cousin and him and her was in the car * * * I told him to take me to get my uniforms, and when we got over there, Miss Mattie was getting out of her car, her and her daughter-in-law and two men, and I went in the house * * * When I come back, they had got in the car where me and Claude had come there in * * * and Claude pulled down to bring me home. That's why we turned around * * * I did not get so drunk I didn't know where I went * * * I had low blood and Dr. ..... told me to drink homebrew, and I drink it * * * I had one glass * * * I don't know

anything about no Miller. I just don't know whether Claude was a fast driver. He was not driving fast when the wreck was. I told him 'That truck's coming up the road; stop' and he say he had the green light, let him go. I never told him to slow down in my life, no, sir."

Hoyle Penegar, also a witness for plaintiff, testified in pertinent part as follows: "I was close to the vicinity of this wreck on the night of June 22, 1957, when it occurred. I was at the Shell Service Station on the right * * * in the southwest corner of the intersection * * * by which the truck passed before it had the wreck. I observed the truck coming down the road, as it come by the drive-in there. I did not notice any cars in the left lane. I did not observe any cars near the intersection before the truck got there.

"I saw the truck coming up on the right side. He was going at a pretty good rate of speed, about 45, when he come around the drive-in there, and he started slowing down, and the stop light turned to 'Go' and he increased his speed and went on through and there was a crash. He was about two car lengths from the intersection when the light turned green. I did not see the other car, the Miller car, before the collision. The collision occurred in the middle of the intersection. The truck was going in the right lane."

Then on cross-examination this witness concluded as follows: "I did not observe any cars on the left-hand traffic heading east. The filling station we're talking about sits back about 150 feet from Winchester Ave. and from the Boulevard. The driveway I'm talking about is about 250 feet from the intersection. I just happened to look down that way and saw this tractor-trailer equipment coming up the hill. Then I turned and looked and saw the light turn green giving him the go ahead. At the most, he would be 100 feet from the intersection when the light turned to green. I never did see the car operated by Claude Hudson Miller that was in the collision until the collision. I did not see it turn from the westbound lane into the right bound lane. I couldn't see the car, because of the truck * * * blocking my view. The truck was between me and the car, if it come across there."

The plaintiff rested.

Then motion of defendants Transit Company, Inc., and Minton for judgment as of nonsuit was allowed, and from judgment in accordance therewith plaintiff excepted, and appealed to Supreme Court and assigns error.

Coble Funderburk for plaintiff, appellant.

E. Osborne Ayscue for defendants Transit Company and Minton, appellees.

WINBORNE, C. J. As stated in brief of plaintiff appellant the only question involved on this appeal is whether or not the judge holding the court committed error by granting the defendants' motion for judgment as of nonsuit at the end of the plaintiff's evidence.

In this connection this Court held in *Williams v. Funeral Home,* 248, N.C. 524, 103 S.E. 2d 714, in opinion by *Rodman, J.,* that: "Where a collision occurs at an intersection controlled by a traffic light within a municipality so that G.S. 20-158 (c) is inapplicable, and the municipal ordinance is not introduced in evidence, the rights of the parties will be determined upon the basis that motorists must give the lights their well-recognized meaning and give that obedience to them which a reasonably prudent operator would give." Such is the situation in the case in hand. The collision here involved occurred at an intersection controlled by traffic lights within the town of Monroe so that the provisions of G.S. 20-158 (c) are inapplicable and the municipal ordinance is not introduced in evidence. Therefore the rights of the parties will be determined upon the basis that motorists must give the lights their well-recognized meaning and give that obedience to them which a reasonably prudent operator would give.

Bearing in mind the location of the signal lights as hereinabove described in detail, the operator of the Ford automobile traveling west, desiring to turn left when he came to the red light, at the intersection of the two highways, was permitted to do so, when the traffic light changed to green, but in that event he was required (1) to approach such intersection in the lane for the traffic to the right of and nearest to the center of Highway #74, and (2) in turning to pass beyond the center of the intersection,— passing as closely as practicable to the right thereof before turning such vehicle to the left. G.S. 20-153 (a). *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849. Then his vehicle, the Ford, was in no-man's land of the light area, so to speak, subject to control of no signal light, but charged with the duty to yield the right of way to vehicles moving in eastbound traffic on Highway #74— that is, traffic approaching the intersection from his right at approximately the same time. G.S. 20-155.

Then what is the duty of the operator of the truck of defendant Transit Company, driven by defendant Minton, moving in eastbound traffic on the south lane of such traffic, with respect to the duty of the operator of the Ford automobile? It seems clear that he would be privileged to move forward only when facing a green light over his lane. And upon the signal turning green, he was warranted in entering the intersection and, in the absence of anything which gives or

should give him notice to the contrary, he was not under duty to anticipate that a motorist approaching along the intersecting highway from the left would fail to yield the right of way as required by G.S. 20-155. *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124.

Is there evidence sufficient in support of the charge of speeding to take the case to the jury on the first issue? While plaintiff alleges in her complaint that the truck of Transit Company was being operated in a fast, reckless and dangerous manner at an unlawful speed of 65 miles per hour, she testified that the truck was traveling around 65 to 75 miles per hour because she "couldn't see nothing but the light when I saw it."

Bearing in mind that the truck was coming toward her, and that it was in the night time, the suggested speed of 65 to 75 miles per hour would seem to be guesswork and contrary to human experience and without probative value. *Tysinger v. Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337.

Moreover, the physical facts refute the charge of recklessness on the part of the driver of the truck.

Indeed, the testimony of the witness Penegar is to the effect that as the truck was coming up it was coming on the right side, at a good rate of speed, about 45 (the lawful rate for a truck at the time and place) and started slowing down, and when the stop light turned to "Go", the operator increased its speed and went on through and there was a crash. And the witness testified that the truck was about two car lengths, 100 feet at most, from intersection when the light turned green, and that he did not see the other car before the collision, and that the collision occurred in the middle of the intersection.

Is there evidence shown in the case on appeal sufficient in probative value to support the charge of negligence as against defendants Transit Company and Minton to take the case to the jury? In this connection, the principle prevails in this State that what is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist. "This rule extends and applies not only to the question of negligent breach of duty, but also the feature of proximate cause," *Hoke, J.*, in *Hicks v. Mfg. Co.*, 138 N.C. 319, 50 S.E. 703. *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d, 239, and cases cited.

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit: "1. When all the evidence taken in the light most favorable to the plaintiff fails to show any actionable negligence on the part of the defendant * * * 2.

When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88, and *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808.

Finally, if it be conceded that there is evidence tending to show that the speed of the truck was excessive and, therefor, *prima facie* unlawful, it is manifest from the evidence that its speed would have resulted in no injury but for the negligent act of the operator of the Ford automobile. Hence the proximate cause of the collision must be attributed to the gross and palpable negligence of the operator of the Ford as it appears from the testimony of the plaintiff, as in *Butner v. Spease, supra.*

It is worthy of note that the Act of the General Assembly amending subsection (1) of G.S. 20-38 defining the word "intersection" did not become effective until after July 1st, 1957, just 8 days after the collision in the instant case took place.

The judgment below is

Affirmed.

GLENN H. FOX v. CLYDE W. ALBEA, INDIVIDUALLY, AND CLYDE W. ALBEA, EXECUTOR OF THE ESTATE OF LORENE KERR ALBEA.

(Filed 12 June, 1959.)

1. Automobiles § 54f—

G.S. 20-71.1 applies only to establish *prima facie* agency in those instances in which the vehicle causing damage is operated by a person other than the owner, and proof that the vehicle, driven by the wife, was registered in the name of the husband and wife or survivor, does not tend to establish that the wife was driving as agent of the husband, since the statute can have no application where the operator of the vehicle is the owner as shown by the registration.

2. Automobiles § 55—

Where the husband is sought to be held liable under the family purpose doctrine for the alleged negligent operation of a vehicle by his wife, the uncontradictory evidence to the effect that the vehicle was registered in the name of the husband and wife or survivor, that the wife alone negotiated the purchase and made the initial and installment payments out of her separate funds, earned in her separate employment, and that the husband had no control or supervision of the operation of the vehicle by his wife, justifies peremptory instructions in his favor on the question.

3. Trial § 32—

Request for peremptory instructions should be in writing.

4. Automobiles § 41c— Evidence held for jury on defendant's counterclaim alleging negligence of plaintiff in failing to keep proper lookout.

Defendant's allegations and evidence on his counterclaim tended to show that his intestate, operating her vehicle in a westerly direction, had stopped, with the vehicle standing entirely in the northern half of a street and turned on her signals indicating her intention of turning left into the parking area of a store on the south side of the street, that plaintiff, traveling east on his motorcycle at an excessive speed, failed to keep a proper lookout and was heading directly into the stationary vehicle, and that when plaintiff again looked to the front he attempted to stop but lost control and crashed into the front end of the automobile. *Held:* Nonsuit on defendant's counterclaim was erroneously entered.

APPEAL by defendants from *Preyer, J.*, at March 17, 1958 Regular Civil Term of IREDELL— docketed and argued as No. 384 at the Fall Term 1958 of this Court.

Civil action to recover for personal injury and property damage allegedly sustained by plaintiff in a collision 21 May, 1957, between his motorcycle and a Dodge automobile operated by Lorene Kerr Albea which was registered jointly in the name of Lorene Kerr Albea and Clyde M. Albea or survivor, at a point on West Front Street, known also as Taylorsville Road, in Statesville, North Carolina.

Plaintiff, a resident of Iredell County, instituted this action on 9 December, 1957, against defendant Clyde W. Albea, both individually and as executor of the estate of his wife, Lorene Kerr Albea.

Plaintiff alleges in his complaint, among other things:

"III. That at all times mentioned in this complaint, Clyde W. Albea and his wife, Lorene Kerr Albea, were the owners of a certain 1956 4-door Dodge automobile, vehicle registration No. 1957-YW 4251 N. C. Motor No. 3989188A; that said Dodge automobile was owned and kept and maintained by the defendant Clyde W. Albea and his wife, Lorene Kerr Albea, for the use, comfort and convenience of their family, and more particularly for their own use; that said automobile was owned, used and maintained for and by the defendants as a family purpose automobile; that at all times herein mentioned said 1956 Dodge automobile was being operated and driven by the said Lorene Kerr Albea as a family purpose automobile and within the scope and purpose for which it was owned, kept and maintained.

"IV. That on the 21st day of May, 1957, at or around 7:15 P. M., plaintiff was operating his * * * motorcycle in an easterly direction

along West Front Street in the city of Statesville, North Carolina, at or near a business establishment known and referred to as 'Smith's Superette', and that Lorene Kerr Albea at about the same time was operating the said 1956 Dodge automobile, owned by her and her said husband, in a westerly direction over and along West Front Street * * * at or near the said 'Smith's Superette'; that the motor vehicle owned and operated by Lorene Kerr Albea struck and hit the said * * * motorcycle * * * causing the damages and injuries to the plaintiff herein complained of; that the aforementioned Smith 'Superette' is located on the south side of West Front Street; that West Front Street in the city of Statesville runs in a general east-west direction, and that at a point where the said 1956 Dodge automobile being operated by the said Lorene Kerr Albea struck the plaintiff's motorcycle, West Front Street is straight for a considerable distance both east and west at Smith's 'Superette'."

And upon trial in Superior Court plaintiff offered in evidence a certificate of title of motor vehicle as plaintiff's Exhibit #1, and the parties stipulated that this is the certificate of title of the motor vehicle operated by Mrs. Clyde W. Albea on the occasion of the accident on 21 May, 1957, and that the automobile is registered in conformity with the certificate of title with the North Carolina Department of Motor Vehicles, bearing notation, among other data, (1) these words "Clyde William Albea, Sr., and Lorene Kerr Albea, or survivor" and (2) "1st lien in favor Wilkes Auto Sales, Inc.,—paid date 10-7-57." Signed "Wilkes Auto Sales, Inc., by W. A. Absher."

Defendants, answering, deny the allegations contained in paragraphs III and IV of the complaint, except as admitted in defendant's further answer and defense.

And for further answer and defense thereto defendants aver:

"4. That the 1956 4-door Dodge automobile referred to in the complaint was purchased by Lorene Kerr Albea with her own funds; that she was in fact the owner of said automobile and was paying for said automobile out of her own separate earnings; that the certificate of title was registered in the name of Clyde William Albea, Sr., and Lorene Kerr Albea OR SURVIVOR with the Department of Motor Vehicles, State of North Carolina; that it was so registered only for the purpose of providing survivorship rights in said automobile; that if in law the registered owners were joint owners each being vested with the title subject to survivorship to the other, each had full enjoyment of the use of said automobile independent of the authority, consent, or control of the other; that no relation of agency whatsoever was involved or existed between the joint owners, but each was

free and had the right to use the automobile for his or her own particular purposes; that the said automobile was not in fact the property of the defendant Clyde W. Albea by reason of the facts aforesaid, and on the occasion alleged in the complaint was not being operated under his direction, or control, or with his consent, or in any manner so as to constitute the operator thereof as his agent; that the said Clyde W. Albea owned a 1947 Chrysler automobile which he used for his purposes, and the 1956 Dodge automobile was used by defendant operator for her purposes, each using the said automobile free and clear of the consent, authority and control of the other. It is specifically alleged that the family purpose doctrine would have no application to the automobile, or its owners, for the reasons stated herein."

"12. That the defendant operator, at the time of and prior to the accident and subsequent injuries, was a life insurance agent for the Reserve Life Insurance Company and had an earning capacity of approximately $100.00 per week * * * ."

And upon trial in Superior Court defendants offered evidence in this respect substantially as follows:

The witness W. O. Absher testified: "I live in North Wilkesboro and am in the automobile business. Our dealership sold Mrs. Albea a new car in 1956, and I handled the transaction. I recognize this certificate of title from the Department of Motor Vehicles. I sold Mrs. Albea a 1956 Dodge Sedan. This title certificate is in the name of 'Clyde W. Albea and Lorene Kerr Albea, or survivor'. Mrs. Albea bought the car from us and made the down payment and we financed the balance of the indebtedness with Wachovia Trust Company in Winston-Salem. She bargained for the automobile. Our salesman handled the deal, the actual selling, and when the deal was consummated I worked it out in the office. Mr. Ruth handled the deal with Mrs. Albea. I did not at any time suggest to Mrs. Albea how this automobile should be titled."

The witness Claude H. Ruth testified: " * * * I had occasion to sell to Mrs. Clyde Albea an automobile * * * during the first days of August 1956 * * *; it was a new Dodge 4-door sedan. That is the title to it there. I entered into negotiation with Mrs. Albea for that automobile. Mrs. Albea was the one who paid for the automobile. Mrs. Albea was the one who used the automobile. Mr. Albea did not have anything to do with the negotiations, purchase or sale of the automobile." And, on cross-examination, this witness continued: "I know the car that was sold to her and I saw her using it * * * Her husband was with her twice when I saw her * * * ."

The defendant Clyde Albea testified: "I was married to Lorene Kerr Albea, who was 54 years of age. We had been married 38 years. The car named in the certificate of title introduced into evidence was Mrs. Albea's car individually. She bought the car from Wilkes Auto Sales; she paid for it herself. She had the title put that way under the joint names of Lorene Kerr Albea and Clyde W. Albea, Sr., or survivor. I did not ever use this car, only when I went with her to church on Sunday. I have a car, a 1947 Chrysler. I paid for the Chrysler. I had absolutely no control or exercise of dominion over the use of the Dodge automobile. Mrs. Albea was a saleslady for Reserve Life Insurance Company and she used it for that business herself. She worked and made the money which paid for her car. I did not make any payments on it."

Then on cross-examination Mr. Albea continued: "We have three children and I visited them. I went to church in her car. Sometimes I drove it and sometimes she drove it. I have used the car to go visit the children. When she went up to get the car, I went with her. I didn't know how the title was being drawn up. I knew when it got back from Raleigh. I have driven the car when my wife was not with me. I didn't have any use for driving her car for I drove my own car in my business. My wife drove my car very seldom; it was too heavy and I didn't let her drive it much; she did drive it occasionally. I was not with her when the accident happened, I was a patient at Davis Hospital. My wife used her car to go buy groceries at Smith's; she traded there. She was going to Smith's when she left the hospital at about 6:30. She used her car to go buy groceries and for her own use. We lived together and ate the same groceries, but I was in the hospital at the time. We had a joint checking account, and we both put money in the account and we both used the money. She did not issue a check for the down payment on the car; she paid cash. As to the monthly payments, she always had the money because she always carried a fair amount. She always sent it in by check which was on the joint account. She always used the car to buy groceries. I very seldom bought groceries. I never used her car to buy groceries. I never used her car to go to work. I used my car in my own business and didn't need hers. We took trips together in her car; we didn't take any long trips; I think we went to the mountains once that year. She drove part of the time and I drove part of the time. Nobody else went, just her and I, about two weeks before the accident. We went up and spent the day and had picnic lunch. On a rainy Sunday, if she had her car cleaned up, I would drive my own car to keep hers from getting dirty."

And plaintiff in respect to the collision alleged in his complaint:

"V. That immediately before the Albea automobile struck the plaintiff's motorcycle * * * the plaintiff * * * proceeding over and along West Front Street in an easterly direction and * * * approaching the point * * * observed the automobile being operated by Lorene Kerr Albea standing in the northern lane of West Front Street at a point immediately across from the driveway that enters Smith's Superette, and * * * observed that the turn signals on the Albea automobile were turned on and were indicating that Mrs. Albea intended to turn the Dodge automobile to her left to cross the southern lane of West Front Street and enter the driveway approaching Smith's Superette; that as the plaintiff approached, he decreased the speed of the motorcycle * * * in order to be sure that Mrs. Albea was not going to turn to her left immediately in front of him; that after observing that said automobile was motionless and that the operator of said automobile was not turning, the plaintiff proceeded along West Front Street at a prudent and reasonable rate of speed and at all times kept the vehicle which he was operating under proper control; that just as the plaintiff reached the point where he was about to pass the automobile that Mrs. Albea was driving, she * * * began to turn her automobile to the left into the southern lane of West Front Street over which the plaintiff was proceeding as aforesaid * * * that Mrs. Albea continued to drive * * * directly toward plaintiff without turning to either side * * * or without decreasing the speed of said automobile until the Albea automobile struck the plaintiff's motorcycle causing the damages and injuries herein complained of."

And plaintiff further alleges, as acts of negligence proximately causing his injury and damage, that Lorene Kerr Albea, negligently and unlawfully, "(a) * * * failed to yield to the plaintiff the right of way to the southern lane of West Front Street; (b) * * * operated said Dodge automobile at an excessive and unlawful rate of speed under the circumstances then and there existing; (c) * * * failed to keep the motor vehicle which she was operating under proper control so as to avoid striking and running into the plaintiff and the motorcycle which he was operating; (d) * * * failed to keep a proper lookout for other persons and vehicles using the public streets and that she specifically failed to keep a proper lookout for the plaintiff and the motorcycle which he was operating; (e) * * * failed to apply the brakes to the automobile which she was operating so as to stop and keep from striking and running into the plaintiff and the motorcycle which he was operating." And that as a result thereof plaintiff sus-

tained personal injury and property damage as alleged for which he prays judgment.

On the other hand, defendant, individually and as executor aforesaid, answering, denies in material aspect the various allegations of the complaint except as admitted in defendant's further answer and defense, and for a further answer and defense, and alleging new matter to establish contributory negligence, and set out a counterclaim, defendant in so far as pertinent to this appeal avers and says: That the true facts concerning the matters and events which occurred upon the occasion when the plaintiff was injured on the 21st day of May, 1957, are as follows and not otherwise: "1. * * *

"2. That hereinafter * * * Mrs. Lorene Kerr Albea * * * (is) referred to * * * as 'defendant operator' and Clyde W. Albea * * * 'defendant as administrator and individually.'

"3. That the point of the collision * * * is situated approximately 35 feet east of the intersection of Park Drive and the Taylorsville Road; that businesses adjoin the said road on each side and the area constitutes a business district * * * as defined in * * * General Statutes, Section 20-38A; that approximately 150 feet to the west * * * is the crest of a hill; that the width of * * * Taylorsville Road is approximately 36 feet."

"4. (Here repeat paragraph 4 of defendant's further answer and defense hereinabove set forth.)

"5. That defendant, as administrator and individually, is informed and believes that on the 21st day of May, 1957, at or about 7:00 P. M., defendant operator was operating her 1956 4-door Dodge * * * in a westerly direction over and along West Front Street (also known as Taylorsville Road) * * * in a reasonable and prudent manner in the right or northern lane * * *; that as * * * (she) * * * approached the east entrance to Smith's Superette, she slowed her automobile by applying brakes and turned on her left-hand turn signal as provided by law to signal her intention to make a left turn into the entrance to the parking area located in front of Smith's Superette; that immediately before defendant operator arrived at a point opposite the entrance of said parking lot * * * defendant, as administrator and individually, is advised and believes, and so alleges, that defendant operator first observed plaintiff approaching over the crest of a hill and traveling in his lane of travel in an easterly direction on his * * * motorcycle, which he was operating at a high and dangerous rate of speed toward the point wherein defendant operator was intending to turn; that defendant operator * * * stopped her automobile completely in the

northern or her right-hand lane immediately across from the east driveway * * * in order to allow plaintiff's vehicle to pass in the southern lane * * * ; that as the plaintiff approached * * * he suddenly turned his head, and looked in another direction, away from his front * * * ; that plaintiff continued traveling at said high and reckless rate of speed and when he again looked to his front he was heading directly toward the vehicle driven by defendant operator; that then plaintiff attempted to stop his vehicle, but lost control and crashed into the front end of the automobile driven by defendant operator, which was standing still waiting for plaintiff to pass; that as a result * * * (thereof) the defendant operator was injured, and the automobile she was driving was badly damaged.

"6. * * * that at all times hereinabove and hereinafter alleged, the plaintiff had a clear, wide, unobstructed lane of travel in which to properly pass the defendant operator's vehicle, but the plaintiff negligently lost control of his vehicle, crashing into the car operated by defendant operator, while said vehicle was in its proper lane.

"7. That the above described accident was caused by the sole * * * negligence of the plaintiff; that if the defendant operator was guilty of any negligence, which is expressly denied, then the carelessness, negligence and unlawful acts of plaintiff, as aforesaid constitute contributory negligence on his part, and said * * * conduct is hereby pleaded as contributory negligence and in complete bar to any recovery by the plaintiff against said defendant."

And as acts of negligence on the part of plaintiff, defendant specifies failure to keep a proper lookout, reckless driving, failure to keep control, failure to drive in his lane of traffic, inadequate brakes or failure to use them, and failure to yield to defendant operator in her lane of travel.

And defendant further avers and says that as a result of the negligence of plaintiff (a) the defendant operator's automobile was damaged in the amount of $400, and (b) she received serious internal injuries to her kidneys, and other internal organs, and suffered great mental and physical pain, to her damage, all as set forth; and that as a direct and proximate result of such injuries by negligent acts of plaintiff she died on September 17, 1957— resulting in damage to her estate.

And pursuant thereto defendant prays judgment, *inter alia,* that plaintiff recover nothing of him, individually or representatively, and that defendant as administrator of the estate of Lorene Kerr Albea recover damages in specified sum.

Plaintiff replying denies material averments of the further answer and counterclaim of defendants.

And upon the calling of the case for trial the parties stipulated that while the counterclaim setting out a cause of action for personal injuries and a cause of action for wrongful death are not separately stated, it is agreed that this defect in the pleadings is waived by the plaintiff without the necessity of an amendment to the pleadings.

And, upon the trial in Superior Court, plaintiff, as witness for himself, testified and offered testimony of others tending to support his version of the circumstances attending the happening of the collision, details of which appear in record of statement of case on appeal.

And, also, upon the trial defendant, as administrator and individually, through cross-examination of plaintiff's witnesses and testimony of his witnesses offered testimony tending to support the averments of his plea of contributory negligence, and counterclaim, details of which are set out extensively in the record of case on appeal.

At the close of the evidence motion of defendant for judgment as of nonsuit was denied. But motion of plaintiff for judgment as of nonsuit as to defendant's counterclaim was granted. Exception #8.

The case was thereupon submitted to the jury under charge of the court, on these issues which were answered by the jury as indicated:

"1. Was the plaintiff Glenn H. Fox injured and damaged by the negligence of the defendant operator Mrs. Lorene Kerr Albea, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff Glenn H. Fox, by his own negligence, contribute to his injury and damage, as alleged in the Answer? Answer: No.

"3. Was Mrs. Lorene Kerr Albea operating the 1956 Dodge automobile as agent of the defendant Clyde W. Albea and acting within the scope of her authority, as alleged in the complaint? Answer: Yes.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant for his personal injuries? Answer: $29,350.00.

"5. What amount, if any, is plaintiff entitled to recover of the defendant for damage to his motorcycle? Answer: $650.00."

And to the signing of judgment entered in accordance therewith defendant excepts and appeals to Supreme Court and assigns error.

R. A. Hedrick, Baxter H. Finch for plaintiff, appellee.

Scott, Collier and Nash, Jack R. Harris, Smith, Moore, Smith, Schell & Hunter, Stephen Milliken for defendant, appellant.

WINBORNE, C. J. While defendant concedes that there is sufficient

evidence of negligence on the part of Mrs. Albea to take the plaintiff's case to the jury, and to sustain a verdict against her estate, the defendant individually, Clyde W. Albea, contends that there is not sufficient evidence in any aspect to make a *prima facie* case of liability against him for her acts. He challenges, and we hold properly so, the charge of the court applying the provisions of G.S. 20-71.1 and the family purpose doctrine.

In this connection the record of case on appeal discloses that the only evidence offered by plaintiff, in respect to G.S. 20-71.1 is the certificate of title of the automobile driven by Mrs. Albea at the time of the collision here involved showing registration in the names of "Clyde William Albea, Sr., and Lorene Kerr Albea, or survivor." By this means plaintiff invokes the provisions of the statute to make out a *prima facie* case of agency as between Mrs. Albea and Clyde William Albea, her husband, to hold him liable for her acts in the operation of the said automobile.

G.S. 20-71.1 is a codification of Chapter 494 of Session Laws 1951 entitled "An Act to Provide New Rules of Evidence in Regard to the Agency of the Operator of a Motor Vehicle Involved in Any Accident."

It reads in pertinent part as follows: "(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which such injury or cause of action arose. (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation shall for the purpose of any such action, be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment * * *." This statute, as declared by this Court in *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767, in opinion by *Barnhill, J., later C. J.*, is "designed to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. * * * It does not have, and was not intended to have, any other or further force or effect."

And the case of *Travis v. Duckworth*, 237 N.C. 471, 75 S.E. 2d 309,

is cited in approval. To like effect are *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373, and *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462.

In the *Roberts* case, *supra,* this Court in opinion by *Barnhill, C. J.,* had this to say: "A careful consideration of the original Act * * * including its caption, leads us to the conclusion that it was designed and intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a nonowner operator under the doctrine of *respondeat superior.* 'Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. It does not and was not intended to have any other force or effect.' *Hartley v. Smith,* 239 N.C. 170. (Emphasis added) This language appearing in the *Hartley* case was used advisedly. We adhere to what is there said."

Further, in the *Osborne* case, *supra,* this Court in opinion by *Parker, J.,* in disposing of an unacceptable contention, said: "To adopt plaintiff's view would require us to overrule what was said by *Barnhill, J.,* in speaking for a unanimous court in *Hartley v. Smith, supra,* and by *Barnhill, C. J.,* for a unanimous Court in *Roberts v. Hill, supra.*" Then what is said in this respect in *Hartley v. Smith, supra,* and in *Roberts v. Hill, supra,* concluded by saying: "We adhere to what was said in the excerpts from those two cases quoted above."

Now the Court adheres to what is there said.

And applying this provision to the case in hand, it is seen that the operator of the automobile in question, if the ownership be as reflected by the registration, is the owner, and the provisions of G.S. 20-71.1 are inapplicable. Hence the charge applying them to case in hand is erroneous and constitutes error for which a new trial must be had.

Furthermore the plaintiff having alleged the existence of factual situation tending to bring the case under family purpose doctrine, and defendant having denied these allegations, and offered evidence contradicting same as to agency, "such evidence may warrant a peremptory instruction based thereon, but not a judgment of nonsuit." See *Davis v. Lawrence,* 242 N.C. 496, 87 S.E. 2d 915.

In this connection, while the record of case on appeal in instant case shows exception #12, assignment of error #7, to the failure of the trial court to give peremptory instruction, the record does not show written request therefor. See McIntosh N.C. P & P, W & W, Vol. 2, Sec. 1517.

Lastly, the appellant assigns as error the granting of motion of

plaintiff, aptly made, for judgment as of nonsuit of cause of action on counterclaim set up by defendant.

Bearing in mind that defendant avers in the further answer and counterclaim a cause of action for actionable negligence proximately causing damage in three phases (1) for damage to automobile, (2) for physical pain and suffering after accident and prior to death, and (3) for wrongful death, upon the trial he offered evidence susceptible of supporting inference.

Therefore exception to the granting of the nonsuit on the counterclaim is well taken.

Hence the judgments entered upon trial below are set aside, and a new trial ordered.

New Trial.

BEVERLYAN TURNER, BY HER NEXT FRIEND, S. B. TURNER v. GASTONIA CITY BOARD OF EDUCATION AND NORTH CAROLINA STATE BOARD OF EDUCATION.

(Filed 12 June, 1959.)

1. State § 3a—

While formal pleadings are not required in a proceeding under the State Tort Claims Act, the jurisdiction of the Industrial Commission must be invoked by affidavit in duplicate setting forth facts sufficient to identify the employee whose alleged negligent act caused the injury and a brief statement of the facts constituting the basis of the claim. G.S. 143-291, G.S. 143-297.

2. Pleadings § 15—

A demurrer is apposite in any kind of judicial proceeding to raise the question whether, admitting the facts alleged to be true, the proceeding can be maintained.

3. State § 3a—

A claim under the State Tort Claims Act may be challenged by demurrer.

4. Same—

Where claim under the State Tort Claims Act is filed against both a City Board of Education and the State Board of Education, demurrer thereto cannot be sustained if the proceeding can be maintained against either of respondents.

5. Appeal and Error § 16—

Certiorari granted by the Supreme Court brings the entire record up and extends the scope of review to all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of.

6. Schools 4b—

In proceedings to recover for injury to a school pupil resulting from the alleged negligence of an employee while operating a power mower on the school ground in the course of his employment, the demurrer of the City Board of Education is properly sustained when the injury occurred prior to the effective date of Chapter 1256, Session Laws of 1955, since the City Board was then clothed with governmental immunity. The statute lifting the governmental immunity of such local boards for such injuries, has prospective effect only and waives governmental immunity only on condition and to the extent that the local board has obtained liability insurance.

7. Same—

Local boards of education are given general control and supervision of all matters pertaining to the public schools in their respective units except such as the law assigns to the State Board of Education or other authorized agency, G.S. 115-54, G.S. 115-8, and local boards have authority to select, hire, direct and supervise employees to care for school buildings and grounds within their respective units, and an employee engaged to perform such duties and paid by a City Board of Education is an employee of the City Board and not the State Board of Education.

8. State § 3b—

A person employed by a City Board of Education to do maintenance work on the city school grounds is not an employee of the State, and demurrer of the State Board of Education is properly sustained in proceedings against it under the State Tort Claims Act to recover for the negligence of such employee in the discharge of his duties.

9. Statutes § 5a—

Where a statute employs words of general enumeration following those of specific classification, the general words will be interpreted to fall within the same category as those specifically enumerated under the maxim *ejusdem generis.*

PARKER, J., dissenting.

On *certiorari* to review a judgment of *Fountain, S. J.*, August, 1958 Civil Term, GASTON Superior Court.

On September 12, 1956, Beverlyan Turner, by her Next Friend, instituted this proceeding before the North Carolina Industrial Commission by filing a verified claim for damages against the Gastonia City Board of Education and the North Carolina State Board of Education. In addition to the claimant's name and address, the claim contained the following:

"3. That he hereby files a claim against Gastonia City Board of Education for damages resulting from the negligence of Houston D. Tolbert.

"4. That he has been damaged in the amount of $10,000.00 by reason of the negligent conduct of the employee or agent named above.

"5. That the injury giving rise to this claim occurred at Gaston County, in front of entrance to Abernathy School on W. Second Avenue in Gastonia, N. C. on May 11, 1955 at 9:00 a.m.

"6. That the injury or property damage occurred in the following manner:

"That said injury occurred to the claimant's daughter when she was proceeding up the cement walkway leading into the said school when she was struck on her left ankle by a heavy cable; said cable striking the claimant's daughter so severely as to break her left ankle and do serious and permanent injury to the bones, muscle and nerve tissues in her ankle.

"That the said cable struck the claimant's daughter as the result of the negligence of Houston D. Tolbert, who was operating a power lawn mower on the school yard and operated said machine in such a manner so as to strike a heavy steel cable with the blade of the said lawn mower and caused the said cable to be propelled with great force against the person of the claimant's daughter, Beverlyan Turner."

Paragraph 7 alleged that hospital and medical bills of $231.85 were incurred in treating the claimant's injury.

The Gastonia City Board of Education filed a demurrer upon two grounds:

"1. The claimant was a pupil in Abernathy Primary School, which is a unit of Gastonia Graded School District or Gastonia Administrative school unit, and while playing or being present upon the school grounds about May 11, 1955, she claims that her foot was injured by a wire thrown by a power mower which was being operated upon the school grounds by an employee of said defendant.

"2. Said defendant is informed and believes that the North Carolina Industrial Commission is without jurisdiction on the facts set forth in the preceding paragraph and that the laws of the State of North Carolina have made no provisions for liability of said defendant in such case."

The State Board of Education joined in the demurrer.

On hearing before the North Carolina Industrial Commission, the hearing commissioner sustained the demurrer and upon review by

the full commission his decision was affirmed. The claimant appealed to the superior court and, after hearing, Judge Fountain entered the following judgment:

> "This cause coming on to be heard and being heard before the undersigned Judge presiding upon the demurrer of each defendant; and upon the hearing it is stipulated by the parties that Houston D. Tolbert was an employee of the Gastonia City Board of Education at the time that the injuries to Beverlyan Turner are alleged to have been sustained, and the only question raised by the appeal of the plaintiff from the North Carolina Utilities *(sic)* Commission is the same question presented to that Commission for determination as follows:
>
> 'Is an employee of a city board of education an agent of the State within the meaning of the State Tort Claims Act?'
>
> "And the Court being of the opinion that each demurrer is well taken and should be allowed and that an employee of a city board of education is not an agent of the State within the meaning of the State Tort Claims Act, and plaintiff's counsel in open Court having stated that such question is the sole question presented for determination by plaintiff's appeal;
>
> "IT IS NOW, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the demurrer of each defendant be and the same is hereby allowed, and the plaintiff's action is hereby dismissed at the cost of the plaintiff."

Our writ of *certiorari* brought the record here for review.

L. B. Hollowell, Hugh W. Johnston for plaintiff, appellant.

Malcolm B. Seawell, Attorney General, Ralph Moody, Assistant Attorney General, Charles D. Barham, Bernard A. Harrell, Staff Attorneys for defendant State Board of Education, appellee.

Garland & Garland By: James B. Garland for defendant Gastonia City Board of Education, appellee.

HIGGINS, J. The facts alleged and those which arise from them by fair implication disclose the claim resulted from an injury to Beverlyan Turner, a pupil, while she was in the act of entering one of the public schools of the City of Gastonia. The injury was caused by the negligent manner in which Houston D. Tolbert operated a lawnmower upon the school grounds. Houston D. Tolbert, at the time, was an employee of the Gastonia City Board of Education.

The claimant contended, as a matter of law: (1) That Houston D.

Tolbert, having been employed by the Gastonia City Board of Education to mow the school grounds, was, by reason of such employment, an employee of the North Carolina State Board of Education. (2) That claimant may recover from the State Board damages caused by the negligent act in a tort claim proceeding before the North Carolina Industrial Commission.

The first question presented is whether the City and State Boards of Education may challenge the claim by demurrer.

The North Carolina Industrial Commission is constituted a court by G.S. 143-291 to hear and pass "on tort claims against the State Board of Education, the State Highway & Public Works Commission, and all other departments, institutions, and agencies of the State."

The jurisdiction of the Commission is invoked by affidavit in duplicate setting forth certain facts which constitute the basis for the claim. G.S. 143-297; *Floyd v. State Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703; *Alliance Co. v. State Hospital,* 241 N.C. 329, 85 S.E. 2d 386. Adherence to formal rules of pleading is not required but the claim should state facts sufficient to identify the agent or employee and a brief statement of the negligent act that caused the injury. Upon the filing of a claim, the duty devolves upon the Industrial Commission to conduct a hearing, find facts, state conclusions of law, and make an award based thereon. However, if the claim, upon its face, shows that the State department or agency sought to be charged is not liable, then the Commission may end the proceeding. It seems that a proper way to take advantage of the defect is by demurrer. "A demurrer is a form of pleading incident to every kind of judicial proceeding, and may be defined as an allegation that, admitting the facts of the preceding pleading to be true as stated, no cause is shown why demurrant should be compelled to proceed further." 71 C.J.S., "Pleadings," §211. See *Hoover v. U. S.* 253 Fed. 2d 266; *Wooldridge Mfg. Co. v. U. S.,* 235 Fed 2d 513. From the foregoing, we conclude that the respondents (boards of education) may challenge the claim by demurrer and have it dismissed if it shows upon its face, as a matter of law, that it cannot be maintained against either board.

The brief of the claimant, the briefs of the City and State Boards of Education, and the judgment entered in the court below state the question in the same words: "Is an employee of a city board of education an agent of the State within the meaning of the State Tort Claims Act?" However, the claim is filed against both the Gastonia City Board of Education and the State Board of Education. The judgment sustained the demurrer and dismissed the claim as to both.

The writ of *certiorari* brings the entire record up for review: " . . . Its *(certiorari)* office extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of . . . " *Belk's Department Store v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; *Chambers v. Board of Adjustment,* 250 N.C. 194. It is necessary, therefore, for us to review the judgment of the superior court as it relates to both the Gastonia City and the State Boards of Education.

Is the Gaston City Board of Education liable for the injury? Although at the time of the injury the city schools were operated by trustees, the City Board of Education has succeeded to their powers, duties, and liabilities and, if the trustees were liable, it appears the liability would devolve upon the city board.

The claimant contends that county and city boards of education are made corporate bodies by G.S. 115-27 (1957 Supplement), with power to sue and defend actions against them. G.S. 115-31. Their duties and powers are fixed by G.S. 115-35:

> "1. . . . It shall be the duty of county and city boards of education to provide an adequate school system within their respective administrative units, as directed by law."
> "2. . . . All powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other official, are conferred and imposed upon county and city boards of education. Said boards of education shall have general control and supervision of all matters pertaining to the public schools in their respective units and they shall enforce the school law in their respective units."

G.S. 115-47 (1957 Supplement) provides: "It shall be the duty of every county and city board of education to provide for the prompt monthly payment of all salaries due teachers, other school officials and employees, all current bills and other necessary operating expenses."

By Chapter 1256, Session Laws of 1955, the General Assembly provided:

> "Any county or city board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed

to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort . . . "A county or city board of education may incur liability pursuant to this Act only with respect to a claim arising after such board of education has procured liability insurance pursuant to this Act and during the time when such insurance is in force."

The foregoing provisions became effective on May 25, 1955. The claimant's injury occurred on May 11, 1955. We must determine the liability as of the date the injury occurred. *Tucker v. Highway Commission*, 247 N.C. 171, 100 S.E. 2d 514. We conclude the Gastonia City Board of Education was not liable for the tort of its employee, Houston D. Tolbert, on May 11, 1955, because on that date the Board and its predecessors, the trustees, retained governmental immunity. The act lifting the immunity, in its nature, was not retroactive. The waiver was conditioned on the Board's obtaining liability insurance, which necessarily would be prospective in order to be within the period of coverage. We do not pass on the question whether, after obtaining insurance, a claim for damages for an employee's negligence may be maintained by a claim before the North Carolina Industrial Commission or whether by an action in the superior court.

At the time of claimant's injury, the county boards of education, by G.S. 115-54, 55, and 56, and the city boards, by G.S. 115-8, were given general control and supervision of all matters pertaining to the public schools in their respective units, except as to such matters as the law assigned to the State Board of Education or other authorized agency. The duty of selecting janitors was not so assigned and consequently remained with the local boards. See generally, *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E. 2d 322; *Coggins v. Board of Education*, 223 N.C. 763, 28 S.E. 2d 527; *Key v. Board of Education*, 170 N.C. 123, 86 S.E. 1002. It would be unrealistic, indeed, to conclude the county boards of education and city trustees did not have the authority to select, hire, direct, and supervise those selected to care for the school buildings and grounds within their jurisdiction on May 11, 1955. Lack of such power would be entirely inconsistent with the duties assigned to these units both before and after the changes made by the Act effective May 25, 1955. That Act made no substantial change in the budgetary methods or in plant and grounds maintenance and management. *Coggins v. Board of Education, supra.*

The General Assembly created the State Board of Education and fixed its duties. It is an agency of the State with statewide application. The General Assembly likewise created the county and city

boards and fixed their duties which are altogether local. The Tort Claims Act, applicable to the State Board of Education and to the State departments and agencies, does not include local units such as county and city boards of education.

The parties admit that Houston D. Tolbert was employed by the Gastonia City Board of Education to do maintenance work on the city school grounds. Is he, thereby, an employee of the State? The question was not decided in *Adams v. Board of Education*, 248 N.C. 506, 103 S.E. 2d 854.

Tort claims may be filed before the Industrial Commission against "the State Board of Education, State Highway & Public Works Commission, and all other departments, institutions, and agencies of the State." Claims for tort liability are allowed only by virtue of the waiver of the State's immunity. *Floyd v. State Highway & Public Works Commission, supra.* Under the ordinary rules of construction, "departments, institutions, and agencies of the State" must be interpreted in connection with the preceding designation, "State Board of Education and State Highway & Public Works Commission." Where words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated. The maxim *ejusdem generis* applies especially to the construction of legislative enactments. It is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted. *Chambers v. Board of Adjustment*, 250 N. C. 195; 82 C.J.S., "Statutes," 661, 662. In no sense may we consider the Gastonia City Board of Education in the same category as the State Board of Education and the State Highway & Public Works Commission. For example, we may well consider the State Board of Agriculture, G.S. 106-2, the Board of Conservation and Development, G.S. 113-4, and the State Board of Public Welfare, G.S. 108-1, in the same general category as the State Board of Education and the State Highway & Public Works Commission. The Gastonia City Board of Education does not meet the classification. County and city boards of education serve very important, though purely local functions. The State contributes to the school fund, but the local boards select and hire the teachers, other employees and operating personnel. The local boards run the schools.

Claims have been allowed against the State Board of Education for torts committed by school bus drivers serving local schools. However, at the time, the busses were owned and operated by the State Board of Education. When the State board gave up the operation

and transferred the busses to the local boards, the Legislature provided (1957 Supplement, §115-181), upon such transfer that, "Neither the State nor the State Board of Education shall in any manner be liable . . . for any neglect or other action of any county or city board of education, or any employee of any such board, in the operation or maintenance of any school bus." The provision was made by reason of the fact that the State Board of Education had previously operated the busses, and upon the transfer of ownership and operation the State was disclaiming responsibility for negligent operations after the transfer. As a corollary to the Act withdrawing liability of the State Board of Education for negligent acts of school bus drivers, the General Assembly placed the financial responsibility for such act squarely on the county and city boards of education. G.S. 143-300.1. The section, effective July 1, 1955, amended the State Tort Claims Act by prescribing that claims against county and city boards for such injuries shall be heard by the North Carolina Industrial Commission under rules of liability and procedure as provided with respect to tort claims against the State Board of Education.

In this case the claim against the Gastonia School Trustees and their successors could not be maintained for an injury caused by a negligent employee on May 11, 1955, because of their governmental immunity. Likewise the claim could not be maintained against the State Board of Education for the reason that the employee of the Gastonia City School Trustees was not an employee of the State Board of Education. The claim here involved, upon its face, shows it cannot be maintained against either respondent. "If the cause of action, as stated . . . is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action." *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910.

The judgment of the Superior Court of Gaston County sustaining the demurrer and dismissing the claim is

Affirmed.

PARKER, J., dissenting. This proceeding was heard upon a demurrer.

A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked. *Construction Co. v. Electrical Workers Union*, 246 N.C. 481, 98 S.E. 2d 852; *Cheshire v. First Presbyterian Church*, 220 N.C. 393, 17 S.E. 2d 344; *Credit Corp. v. Satterfield*, 218 N.C. 298, 10 S.E. 2d 914; *Kennerly v. Town of Dallas*, 215 N.C. 532, 2 S.E. 2d 538; 41 Am. Jur., Pleading, § 208.

A demurrer which requires reference to facts not appearing on the

face of the pleading assailed is a "speaking demurrer," and is bad. *McDowell v. Blythe Bros. Co.*, 236 N.C. 396, 72 S.E. 2d 860. In that case the Court said: "The Court will not consider the supposed fact introduced by the 'speaking demurrer' in passing on the legal sufficiency of the facts alleged in the complaint."

The Supreme Court of Vermont said in *Vermont Hydro-Electric Corp. v. Dunn*, 95 Vt. 144, 112 A. 223, 12 A.L.R. 1495: "It has been held that a demurrer is not aided by facts not appearing in the pleadings, even though conceded at the hearing."

To drag in matters *dehors* the pleading assailed by a demurrer would be, in effect, an attempt to try the case on the merits by indirection and prematurely. "Since a demurrer is itself a critic, it ought to be free from imperfections." *McDowell v. Blythe Bros. Co., supra.*

The majority opinion states "Houston D. Tolbert, at the time, was an employee of the Gastonia City Board of Education." My study of claimant's affidavit filed pursuant to G.S. 143-297, and setting forth her claim does not show that Houston D. Tolbert was an employee of the Gastonia City Board of Education. The stipulation that he was such an employee is *dehors* claimant's affidavit. The demurrer is bad, and the lower court should have overruled it.

No formal pleadings are required in proceedings under our State Tort Claims Act. In order to invoke the jurisdiction of the Industrial Commission, the claimant, or the person in whose behalf the claim is made, is required by G.S. 143-297 to file with the Industrial Commission an affidavit in duplicate setting forth certain material facts. G.S. 143-297 does not require the use of legal and technical or formal language, and the claimant is not held to the strict rules of pleading applicable to common law actions. However, the claimant must have in his affidavit, among other things, "a brief statement of the facts and circumstances surrounding the injury and giving rise to the claim" showing that he is entitled to relief, though he need not go further in stating his claim than is required by the provisions of G.S. 143-297.

Dioguardi v. Durning, 139 F. 2d 774, is to the effect that a complaint under the Federal Tort Claims Act inartistically drawn by a layman must be closely scrutinized to determine if some claim can be found therein. I think the same principle applies to a complaint under our State Tort Claims Act.

The majority opinion states this proceeding was instituted by filing a verified claim for damages against the Gastonia City Board of Education and the North Carolina State Board of Education. The claim filed states that the injury to Beverlyan Turner resulted from the negligence of Houston D. Tolbert, the employee or agent above

named, but it doesn't state whether he was the employee or agent of the Gastonia City Board of Education or the North Carolina State Board of Education. In my opinion, the complaint is not so totally insufficient as to be overthrown by a demurrer.

Gastonia City Board of Education and the North Carolina State Board of Education contend that the Gastonia City Board of Education is not an agency of the State within the meaning of the State Tort Claims Act. They further contend that Houston D. Tolbert was employed by the local unit, paid by the local unit from local funds, controlled by the local unit as to the details of his work, and answerable to the local unit for the manner in which his work is performed. They further contend that the State Board of Education had no control over his selection or engagement as a janitor, no control over the work he performed, or when he performed it, and no control over the amount or manner of his compensation. The facts as to the employment of Houston D. Tolbert, as contended by Gastonia City Board of Education and the State Board of Education, do not appear in claimant's affidavit.

I would remand the proceeding to the Industrial Commission to determine whether Houston D. Tolbert is or is not an employee of the State within the meaning of the State Tort Claims Act. G.S. 143-291. When the Industrial Commission has heard the evidence, and found with particularity the facts in respect to his employment, and made its conclusion of law in respect thereto, then the Superior Court and this Court, if appeals are taken, can with safety and accuracy pass upon the question attempted to be presented by indirection and prematurely on this appeal by a demurrer, which was sustained not upon claimant's affidavit filed pursuant to G.S. 143-297, but upon a stipulation of the parties *dehors* claimant's affidavit.

STATE PLANTERS BANK v. COURTESY MOTORS, INC.

(Filed 12 June, 1959.)

1. Banks and Banking § 9: Bills and Notes § 9—

A depositor and bank of deposit are free to make their own contract in respect to deposits so long as the rights of third parties are not injuriously affected and the contract is not contrary to law or public policy, and whether the contract between them constitutes the bank of deposit a collecting agent or the owner of cheques deposited is to be determined in accordance with the mutual intent at the time the deposit is made.

2. Contracts § 12—

The heart of a contract is the intention of the parties.

3. Banks and Banking § 9: Bills and Notes § 9—

The mere fact that the bank of deposit credits a cheque to the account of the depositor, without more, does not constitute the bank a holder in due course of the cheque. If the bank of deposit permits the depositor to withdraw completely or otherwise completely employ the proceeds of the cheque deposited in advance of collection, the bank of deposit, in the absence of notice of any defect or infirmity in the cheque or in the title of the depositor, is a holder in due course, in the absence of an agreement to the contrary. G. S. 25-31.

4. Same—

The agreement between the depositor and the bank of deposit as set forth in the deposit slip to the effect that the bank of deposit should be only an agent for collection of cheques deposited may be waived.

5. Same— Evidence held to raise issue of fact as to whether bank of deposit was purchaser or agent for collection of cheque deposited.

Evidence tending to show that a depositor deposited a cheque, using a deposit slip stating that the bank should be solely an agent for collection of items deposited, but that at the time the deposit was made it was the agreement and understanding of the parties that the amount of the cheque so deposited should be used immediately to pay cheques drawn on his account by the depositor and the depositor thus given the immediate benefit of the entire amount of the cheque, with evidence that the amount of the depositor's account was at that time and thereafter wholly insufficient in amount to permit the bank of deposit to charge the account with the cheque if it were not collected, that the cheque was complete, regular and negotiable on its face and endorsed in blank, and that the bank had no notice of any infirmity in the cheque or in the title of the depositor, raises an issue of fact for the jury, or, upon waiver of jury trial, for the judge, as to whether the bank was a purchaser for value and holder in due course of the cheque.

6. Bills and Notes § 17—

Where the bank of deposit is a purchaser and holder in due course of a negotiable cheque deposited by the payee, the bank can recover thereon as against the drawer who had stopped payment on the cheque, notwithstanding that the drawer had a complete defense as against the payee.

7. Same—

Unless the negotiable instrument is void by application of statute, legal incapacity of the parties to contract, or fraud in the *factum*, a *bona fide* holder thereof in due course without notice holds title valid as against all the world, G.S. 25-58, free from any defense available as between the original parties.

8. Appeal and Error § 40—

Where the findings of fact in a trial by the court under agreement are supported by competent evidence, they are as conclusive as a verdict of a jury, and when such findings support the court's conclusions of law the judgment based thereon must be affirmed.

APPEAL by defendant from *Crissman, J.*, 6 October Term 1958 of STOKES.

Civil action to recover the amount of a cheque negotiable in form allegedly owned by plaintiff as a holder in due course.

The parties, pursuant to G.S. 1-184, 1-185, waived a trial by jury, and agreed that the Judge might find the facts, make conclusions of law, and render judgment thereon.

SUMMARY OF FINDINGS OF FACT.

Plaintiff is a domestic corporation, with its principal office in Walnut Cove, Stokes County, North Carolina. Defendant is a domestic corporation engaged in the automobile business, with its principal place of business in Charlotte, Mecklenburg County, North Carolina.

Walnut Cove Motor Company, hereafter called Motor Company, a domestic corporation with its principal place of business in Walnut Cove, maintained a checking account with plaintiff, and at the close of business on 17 October 1957 had a balance in this account of $712.62. At the same time plaintiff had received cheques in excess of $12,000.00 drawn on it by Motor Company. On the afternoon of that day, and on the following morning, the president of plaintiff advised the president of Motor Company that plaintiff had received these cheques of defendant in excess of $12,000.00, and that unless Motor Company delivered sufficient money to cover these cheques by one o'clock p. m. on the following day, the cheques would be returned dishonored to the forwarding banks for lack of sufficient funds to pay them. The president of Motor Company on both occasions told the president of plaintiff that he would deliver to plaintiff by the close of business the following day money to pay these cheques.

On the morning of 18 October 1957 defendant at its place of business in Charlotte bought from Motor Company five new Ford automobiles for $11,142.61, and paid for them by its cheque in that amount drawn on American Trust Company of Charlotte payable to Motor Company. About one o'clock p. m. on the same day the president of Motor Company delivered currency and other cheques and this cheque for $11,142.61, with the words "Walnut Cove Motor Company, Walnut Cove, North Carolina" stamped on the back thereof, with two deposit slips in duplicate, to plaintiff. The total amount of the deposit was $11,443.77. The receiving teller of plaintiff initialed

one of the deposit slips, and returned it to the president of Motor Company. This deposit slip contains the following language: "In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited." The bank book of Motor Company shows an entry of $11,443.77 on 18 October 1957. The ledger sheet kept by plaintiff of Motor Company's account shows a deposit of $11,443.77 on 18 October 1957. Solely as the result of the delivery of this cheque for $11,142.61 and in reliance thereon, plaintiff on the afternoon of that day and on the following morning honored and paid the cheques of Motor Company which it had on hand at the close of business on 17 October 1957 by the issuance of cheques drawn by itself on its account at the Wachovia Bank & Trust Company payable to the forwarding banks, thereby exhausting Motor Company's balance of $712.61 and the cheque for $11,142.61.

The automobiles sold by Motor Company to defendant had been mortgaged prior thereto by it to Wachovia Bank & Trust Company in the amount of $11,195.29, which mortgages were recorded in the Register of Deeds Office for Stokes County during the period 26 August 1957 through 14 October 1957. Upon learning of these mortgages defendant stopped payment of its cheque to Motor Company, and as a result of such stop payment order American Trust Company upon presentment of the cheque returned it unpaid to plaintiff.

On 21 October 1957 the president of Motor Company left the State, and immediately thereafter Motor Company was placed in receivership.

Defendant has refused to pay its cheque, though demand for payment has been made by plaintiff.

On other occasions prior to 17 October 1957 Motor Company had overdrawn its account with plaintiff, and similar conversations occurred as on 17 October 1957 between plaintiff and Motor Company. On those occasions upon delivery of cheques payable to Motor Company and duly endorsed by it to plaintiff, plaintiff honored the cheques

of Motor Company then on hand, without waiting for the delivered cheques to be honored by the banks upon which they were drawn.

When the president of Motor Company came into the plaintiff bank about one o'clock p. m. on 18 October 1957, as set forth above, the president of plaintiff told him that since he had talked with him earlier that day additional cheques totaling more than $10,000.00 drawn by Motor Company on plaintiff had been presented for payment, and that Motor Company must deposit sufficient money by noon of the following day to pay these cheques, or they would be dishonored. The president of Motor Company said he would try to deposit sufficient funds within time to pay these additional cheques, but failed to do so, and plaintiff dishonored said cheques for lack of sufficient funds of Motor Company to pay them. At the close of business on 19 October 1957 Motor Company had on deposit with plaintiff $274.35, and thereafter its deposit never exceeded $124.00.

It was the intention of plaintiff and Motor Company, when defendant's cheque for $11,142.61 payable to Motor Company was duly endorsed and delivered by Motor Company to plaintiff, that this cheque would become the exclusive property of plaintiff, that title thereto should pass unconditionally to plaintiff, that such transaction constituted a sale of this cheque to plaintiff for value, and plaintiff became the owner thereof. That this cheque for $11,142.61 is complete and regular on its face; that plaintiff became the holder and owner of this cheque before it was overdue and without notice of any previous dishonor; that plaintiff took this cheque in good faith and for value; that this cheque was endorsed in blank by Motor Company and delivered to plaintiff, and was purchased by plaintiff, who at the time had no notice of any infirmity in this cheque or defect in the title of Motor Company.

CONCLUSIONS OF LAW.

One. Plaintiff is a holder in due course of the cheque for $11,142.61 made and issued by defendant.

Two. Defendant is liable to plaintiff for the full amount of this cheque for $11,142.61, with interest at 6% per annum from 22 October 1957.

Whereupon, the Judge entered judgment that plaintiff have and recover from defendant the sum of $11,142.61, with interest at the rate of 6% per annum from 22 October 1957 until paid, together with the costs.

From the judgment defendant appeals.

Vaughn, Hudson, Ferrell & Carter and Robert G. Stockton, R. M. Stockton, Jr. and Norwood Robinson for plaintiff, appellee.

Womble, Carlyle, Sandridge & Rice and Wade M. Gallant, Jr. for defendant, appellant.

PARKER, J. Plaintiff alleges that it is the owner and holder in due course of the cheque sued on, and entitled to enforce payment of it for the full amount against defendant. Defendant stopped payment on its cheque for $11,142.61 issued to Motor Company and duly endorsed in blank by it, and alleges as a defense of this civil action that plaintiff is not the owner and holder in due course of the cheque, but was acting only as a collecting agent for Motor Company, against whom defendant claims it has a good defense.

Pursuant to the provisions of G.S. 1-184, 1-185 the parties waived a jury trial. The Judge's findings of fact are set forth in ten numbered paragraphs. His conclusions of law are set forth in two numbered paragraphs. Defendant has no assignment of error as to the first eight findings of fact.

Defendant does assign as errors the ninth and tenth findings of fact, the two conclusions of law, and the judgment entered. The ninth and tenth findings of fact are in substance as follows: It was the intention of plaintiff and Motor Company, when defendant's cheque for $11,142.61 payable to Motor Company was duly endorsed and delivered by Motor Company to plaintiff, that this cheque would become the exclusive property of plaintiff, that title thereto should pass unconditionally to plaintiff, that such transaction constituted a sale of this cheque to plaintiff for value, and plaintiff became the owner thereof. That this cheque for $11,142.61 is complete and regular on its face; that plaintiff became the holder and owner of this cheque before it was overdue and without notice of any previous dishonor; that plaintiff took this cheque in good faith and for value; that this cheque was endorsed in blank by Motor Company and delivered to plaintiff, and was purchased by plaintiff, who at the time had no notice of any infirmity in this cheque or defect in the title of Motor Company.

There is evidence in the Record to this effect: At the close of business on 17 October 1957 Motor Company had a balance in its account with plaintiff in the amount of $712.62. On that day plaintiff had received cheques amounting to between $11,000.00 and $12,000.00 drawn on it by Motor Company. These were cheques Motor Company had mailed from Walnut Cove. Correspondent banks had mailed these cheques to plaintiff. The president of plaintiff at the close of business

that day saw the president of Motor Company, and told him if plaintiff honored these cheques, Motor Company would be overdrawn between $11,000.00 and $12,000.00. The president of Motor Company asked him how long he would give him to get the money. He replied until 12:30 p.m. the following day, when plaintiff had to pay the cheques or return them. The next morning the president of Motor Company said to the president of plaintiff: "I have got the money in sight, and I have made all the arrangements, and I will have the money here by 12:30 like you demanded it." About one o'clock p. m. on 18 October 1957 Motor Company deposited with plaintiff the cheque for $11,142.61 issued and dated that day by defendant to Motor Company as payee, duly endorsed in blank by it as payee, and received a deposit slip reciting, among other things, that "in receiving items for deposit or collection, this Bank acts only as depositor's collecting agent." This cheque is negotiable in form and regular and complete on its face. All of the proceeds of this cheque for $11,142.61 were used by plaintiff to pay cheques of Motor Company drawn on it, and which were on hand on the morning of 18 October 1957. When the president of Motor Company deposited this cheque about one o'clock p. m. on 18 October 1957, the president of plaintiff told him additional cheques of Motor Company totaling about $10,000.00 had come in. Plaintiff returned these additional cheques unpaid for lack of funds to pay them. The inference from this evidence is permissible, if not demanded, that at the time this cheque for $11,142.61 was negotiated to plaintiff, it took it in good faith, and had no notice of any infirmity in the instrument, or defect in the title of Motor Company. On 21 October 1957 defendant learned that Wachovia Bank & Trust Company had mortgages totaling $11,195.29 on the Ford automobiles it bought from Motor Company, and stopped payment on its cheque for $11,142.61 issued to Motor Company as payee. On 22 or 23 October 1957 plaintiff received notice that payment of this cheque had been stopped.

The real determinative question presented to the Trial Judge was whether plaintiff is the owner or a collecting agent of this cheque of $11,142.61. The deposit contract is a matter about which plaintiff and Motor Company had a legal right to make their own contract, so long as the rights of third parties are not injuriously affected, and it is not contrary to law or public policy. *Clark v. Butts,* 240 N.C. 709, 83 S.E. 2d 885; 7 Am. Jur., Banks, Section 442. What the contract between them is with respect to the title of this cheque depends on their intention to be determined as a fact from the evidence. *Worth Co. v. Feed Co.,* 172 N.C. 335, 90 S.E. 295; *Sterling Mills v.*

Milling Co., 184 N.C. 461, 114 S.E. 756; *Denton v Milling Co.*, 205 N.C. 77, 170 S.E. 107; 9 C.J.S., Banks and Banking, p. 473. "Such intention must, however, be determined as of the date when the deposit is made, and not in the light of subsequent events." 7 Am. Jur., Banks, p. 319. "The heart of a contract is the intention of the parties." *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906.

There can be no doubt about the fact that Motor Company and plaintiff intended, when this cheque for $11,142.61 was deposited, that the entire proceeds of the cheque should be used by plaintiff immediately upon deposit to pay the cheques of Motor Company, which plaintiff had received the day before from correspondent banks, and had no funds on deposit of Motor Company to pay, and it was so used. All the evidence plainly shows that Motor Company had no funds against which defendant's cheque could be charged back, if it was dishonored or payment upon it stopped. This cheque was for $11,142.61, and Motor Company at the close of business on 19 October 1957 had on deposit with plaintiff $274.35, and thereafter its deposit never exceeded $124.00.

Although the overwhelming majority of the courts have held that the mere crediting of the proceeds of a cheque to the account of its depositor will not, without more, make the bank a holder in due course of the cheque, it has been held or stated by a large majority of the courts that when the bank permits its depositor to withdraw completely or otherwise completely employ the proceeds of the cheque deposited in advance of collection and prior to receipt of any notice that payment of the cheque has been stopped or that there is any infirmity in the cheque or defect in the title of the person negotiating it, the bank of deposit, in the absence of an agreement to the contrary, has given value for the cheque, and is the owner of it and a holder in due course. *Bank v. McNair*, 114 N.C. 335, 19 S.E. 361; *Latham v. Spragins*, 162 N.C. 404, 78 S.E. 282; *Trust Co. v. Bank*, 166 N.C. 112, 81 S.E. 1074; *Bank v. Roberts*, 168 N.C. 473, 84 S.E. 706; *Ledwell v. Milling Co.*, 215 N.C. 371, 1 S.E. 2d 841; *Lowrance Motor Co. v. First Nat. Bank*, 238 F. 2d 625, 59 A.L.R. 2d 1164; 9 C.J.S., Banks and Banking, pp. 474-475; 10 C.J.S., Bills and Notes, Section 316b; 8 Am. Jur., Bills and Notes, Section 442; 7 Am. Jur., Banks, Section 452; Annotation 59 A.L.R. 2d pp. 1181-1184.

G.S. 25-31 provides that "where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time." In *Bank of Sutton v. Skidmore*, 113 W. Va. 25, 167 S.E. 144, the Court said in respect to a statute similar to G.S. 25-31: "This rule also antedates the

N. I. L. Lord Ellenborough said in 1807 that when paper was left with a banker for collection, he became an agent, but, 'If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his services *(sic).' Giles v. Perkins,* 9 East, 12, 14." In our copy of English Reports, Full Reprint, 103, p. 477, 478, (King's Bench Book 32), the last word in the quotation from *Giles v. Perkins* reads *advance* instead of *services.*

Defendant contends that the notice upon the deposit slip received by Motor Company, when it deposited the $11,142.61 cheque, reciting that plaintiff acts as a collecting agent in receiving this cheque, and that the cheque is credited to Motor Company's account subject to final payment in cash or solvent credits, prevents the passing of title of this cheque to plaintiff.

The bank may waive such a provision. 7 Am. Jur., Banks, p. 326. In *Ledwell v. Milling Co., supra,* there were similar recitals in the deposit slip. The Court in awarding a new trial said: "Under the evidence in this cause it clearly appears that the draft in question was originally deposited with the appellant under a written agreement that the bank was to act as collector. This agreement being in writing, it is not subject to contradiction by proof that another and a different agreement was in fact at the time made. There is, however, evidence offered by the appellant from which a jury might permissibly draw the conclusion that after the proceeds of this draft were deposited in the appellant bank they were drawn against by the depositor and the checks were honored by the bank, and that in fact, the proceeds of the draft were actually paid to the depositor. . . . Upon a consideration of the authorities on the subject, we are of the opinion that the appellant has offered sufficient evidence to require the submission of this cause to a jury on the question as to whether the original agreement that the bank should act as collector only was thereafter waived."

In the instant case it clearly appears from the evidence that when the $11,142.61 cheque was deposited with plaintiff the agreement between Motor Company and plaintiff was that all of the proceeds from it were to be used to pay cheques of Motor Company which plaintiff had received the day before, and which Motor Company had no funds on deposit to pay, and were so used, and that Motor Company and plaintiff used the standard form of a deposit slip. Regardless of formal statements on a deposit slip such as that deposits are accepted for collection only, or that items are credited conditionally, or are subject to final payment, if the facts and circumstances surrounding

the making of the deposit indicate at the time it was made it was the actual agreement and intention of the parties that the depositor might withdraw completely the deposit, or otherwise completely employ it, and he does so, the title to the item deposited thereupon passes to the bank. *Lowrance Motor Co.v First Nat. Bank, supra; McAuley v. Morris Plan Bank of Virginia,* 155 Va. 777, 156 S.E. 418; 9 C.J.S., Banks and Banking, pp. 475-476; Annotations: 99 A.L.R. 497, 59 A.L.R. 2d 1181, 1187. "The more recent cases, however, do not regard such statements as conclusive upon the question of title; they take the position that they should be considered in determining whether the parties intended that title to commercial paper should pass to the bank, but they yield to the actual agreement of the parties as evidenced by a course of conduct or otherwise." 7 Am. Jur., Banks, p. 326. See *Universal C. I. T. Credit Corp. v. Guaranty Bank & Tr. Co.* (1958), 161 F. Supp. 790.

Considering the facts and attendant circumstances surrounding the making of the deposit of the cheque sued on and the use made of the entire proceeds of this cheque, and the recitals in the deposit slip, it was an issue of fact for the Trial Judge to determine, a jury trial having been waived, as to whether plaintiff and Motor Company intended by the actual agreement between them, when the cheque was deposited, that title to the cheque sued on should pass to plaintiff, or that plaintiff should receive the cheque as a collecting agent.

There is substantial competent evidence in the Record to support the Court's findings of fact numbered nine and ten. Such being the case, these findings of fact are as binding as the verdict of a jury, and are conclusive on appeal. *Milk Commission v. Galloway,* 249 N. C. 658, 107 S.E. 2d 631; *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885.

Trust Co. v. Raynor, 243 N.C. 417, 90 S.E. 2d 894, relied on by defendant, is distinguishable. In that case the bank was not a holder in due course of the cheque sued on, and further the evidence was susceptible of only one construction, and that was that the bank received the cheque as an agent for collection.

The findings of fact support the first conclusion of law that plaintiff is a holder in due course of the cheque for $11,142.61. G.S. 25-58.

Subject to certain limitations, e. g., when a negotiable instrument is declared void by statute, legal incapacity to contract, fraud in the *factum,* which are not relevant to the case *sub judice,* the rule under the law merchant and also under the Uniform Negotiable Instrument Act is that a *bona fide* holder of a negotiable instrument in

due course holds a title valid as against all the world. *Reddick v. Jones,* 28 N.C. 107; *Glenn v. Bank,* 70 N.C. 191; *Ward v. Sugg,* 113 N.C. 489, 18 S.E. 717; *Bank v. Felton,* 188 N.C. 384, 391-2, 124 S.E. 849, 854; *Finance Corp. v. Rinehardt,* 216 N.C. 380, 5 S.E. 2d 138; 10 C.J.S., Bills and Notes, Sections 482, 499(b), 503, 506(a), (b), (c) and (d); 8 Am. Jur., Bills and Notes, Section 355.

As plaintiff is a holder in due course under our Negotiable Instruments Act of this cheque for $11,142.61, it holds the cheque free from any defect of title of Motor Company and free from any defense available to defendant against Motor Company, and may enforce payment of the cheque for the full amount against defendant. G.S. 25-63; *Bank v. Atmore,* 200 N.C. 437, 157 S.E. 129; *Trust Co. v. Boykin,* 192 N.C. 262, 134 S.E. 643; *Bank v. Starkey,* 190 N.C. 867, 129 S.E. 727; 8 Am. Jur., Bills and Notes, Sections 355, 356. For a similar statement of the law by this Court under the law merchant see: *Riddick v. Jones, supra; Glenn v. Bank, supra; Ward v. Sugg, supra; Bank v. Felton, supra.*

The findings of fact support the second conclusion of law that defendant is liable to plaintiff for the full amount of this cheque for $11,142.61, with interest.

The findings of fact are sufficient to support the conclusions of law, and the judgment based thereon. *Lumber Co. v. Chair Co.,* 250 N.C. 71, 108 S. E. 2d 70; *Woody v. Barnett,* 239 N. C. 420, 79 S. E. 2d 789

All defendant's assignments of error are overruled. The judgment below is

Affirmed.

KATHLEEN McC. ANDREWS v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 12 June, 1959.)

Insurance § 27— Testimony held insufficient to show that employee was totally disabled at the time of discharge terminating her insurance.

Evidence tending to show that an employee was discharged for violation of company rules, that for some years prior to her discharge she had suffered severe headaches and had intermittently lost time from work because of them, together with expert testimony that the headaches were due to nervous tension and were without organic basis, *is held* insufficient to show that the employee was disabled on the date of her discharge terminating her disability insurance under the group policy sued on, and testimony of experts as to their opinion that she

was totally disabled at the time of her discharge was nullified by their testimony on cross-examination admitting that if she performed the duties of her employment on the date of her discharge she was not then totally disabled.

APPEAL by plaintiff from *Armstrong, J.*, at October 20, 1958, Term of FORSYTH.

Civil action to recover total and permanent disability benefits under a group insurance policy.

The record on this appeal discloses that at pre-trial hearing the following stipulations were made:

"1. That on the 3rd day of December, 1929, the defendant issued to the R. J. Reynolds Tobacco Company, for the benefit of its employees, what is known and designated as a Group Life Insurance Policy, which said policy, being Policy No. 3255, was in full force and effect on the dates mentioned in the pleadings, and is marked Plaintiff's Exhibit No. 1.

"2. That on the 28th day of January, 1945, the defendant issued to plaintiff its certificate No. 3255-27253, under the terms of which the defendant agreed to pay the plaintiff, in the event she became totally and permanently disabled, as defined in said certificate of insurance, the benefits referred to therein, to wit, the amount of $8,000.00, payable in monthly installments.

"3. The plaintiff was employed by the R. J. Reynolds Tobacco Company on January 28, 1945, and was discharged by the R. J. Reynolds Tobacco Company from her employment with that company on February 7, 1957, and that prior to February 7, 1957, the plaintiff was insured under the above certificate of insurance, which was terminated and ceased to be in full force and effect upon the date of her discharge on February 7, 1957, in accordance with the terms and provisions of the certificate.

"4. That the plaintiff, before institution of this action, duly complied with the terms of said insurance policy in the filing of notice of her claim."

The certificate of insurance issued by the defendant to the plaintiff, in so far as pertinent to this appeal, provides that "In the event that any Employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of commencement, the Society will, in termination of all insurance of

such Employee under the policy, pay equal monthly disability-installments," etc.

Plaintiff Kathleen Andrews, as witness for herself, testified in part:

"I was employed by the R. J. Reynolds Tobacco Company. I started work * * * July 28, 1944. I was issued an insurance policy, covering permanent disability, about six months after I went to work for the company * * * I worked at Factory Number 9 * * * I don't remember just exactly what my classification was, but we were working on Prince Albert tobacco in 1945. After that time I moved around all over the entire factory, in all the departments, all the plants except one.

"In February of 1957 I was an inspector on a cigarette machine in Plant Number 64 where Salem cigarettes were made. I had been an inspector in the cigarette factory approximately two or two and a half years at that time * * *

"The general state of my health has been poor since I went to work for Reynolds Tobacco Company in 1944. The first ten years I lost four hundred and forty-five days on account of my health * * * (in August of 1955). At that time the condition of my health was bad. I was under the care of a doctor * * * After August of 1955 I think I was absent around two hundred days in the next two years because of my health. That was from August of 1955 until February of 1957. I had severe headaches, and I had quite a bit of trouble with my kidneys. I was not operated on for my kidney trouble, but I had several kidney treatments. I was admitted to the hospital because of my kidney trouble.

"I suffered from severe headaches. I have the headaches all the time, but about two days out of a month they are not quite as bad as they are the rest of the time. That condition was gradually getting worse. I don't remember how old I was when my headaches started, but I do remember that I started having them before I started to school, when I was approximately five or six years old. They had gradually gotten worse as I have gotten older. In November of 1956 I think I was working in Plant Number 64. At that time the condition of my health was gradually getting worse all the time. As to whether or not I missed any work in November of 1956: I was out so much until really I don't know just when I was out. As to December: I just don't remember exactly the dates I was out, but I think I was out some in December. I was out in January of 1957. I was out the first of January for either one or two days, and then the last of January I was out for six days. I returned to work either the 3rd or 4th of February, I don't remember which,

but it was on a Monday. At that time I still wasn't feeling good. I don't recall whether or not I was working on the 18th of January, 1957. It was the last of January that I was out. From the time I last returned to work there until the time that I was discharged, my condition was getting worse. I was receiving medical treatment when I was out in January. Dr. G. J. Robbins and Dr. Hart were treating me. * * * In January of 1957, the period about which I am now testify(ing), I had another severe headache and my kidneys got bad. Dr. Robbins and Dr. Hart were prescribing medicine for me. February 7th was the last day that I worked. When I went to work there that day, I had a very bad headache. I had taken four B. C. powders from 6:30 until 8:00 o'clock that day. I also took some after I left the factory which was about 10:30. I did not take any cigarettes that morning * * * After I returned to work in January of 1957, I was not able to perform my work properly. I was having severe headaches. For the headaches I was taking B. C. powders, Anacin tablets, Goody powders, Bufferin tablets, and the medicine that the doctor had prescribed for me. I would take, on the average, about eight to ten B. C. powders a day, and I was taking my medicine that the doctor had prescribed in addition to those.

"Since I left the employment of Reynolds Tobacco Company, my health has gotten worse than it was then, and I am not able to do anything at all now. I have not been able to do any regular work. I have not had any regular work * * * I couldn't keep the housework up like it should be * * * . I was not able to do the housework then. I am not able to do it now * * * I do not do the housework now because I don't feel like it. Right now my condition is very poor. This morning I got up the first time at a quarter after six, took something for my head, went back to bed, and got up again at 11:30. I have taken three B. C. powders since I got up at 11:30. I carry with me at all times something to take for my headaches. I have with me now two large packs of B. C. powders, a bottle of Bufferin tablets, and my prescription that Dr. Robbins gives me * * * If I follow Dr. Robbins prescription as he has given it to me, I sleep all the time * * * ."

Then plaintiff, under cross-examination, testified in pertinent part as follows: "I started work for Reynolds Tobacco Company in 1944. At that time I was thirty-eight years old * * * I was out either one or two days during the first part of January 1957. After those * * * I worked regularly every day up to about January 18, 1957. I think $1.67 per hour is what I was making * * * that was the highest rate

paid at that time for cigarette inspectors * * * from January 18th through January 22, 1957, I was out six days— that didn't include Saturday and Sunday. I don't think I went back to work on January 28, 1957. It was around the first of February * * * After I went back to work, I worked every day up until February 7, 1957 * * * being paid at the rate of $1.67 per hour for my work * * * On February 7th and from the first of January, 1957, I had been working in * * * Factory #64. I know it is against the rules to take cigarettes off the premises. There is a sign posted in every department * * * Mr. Leight did not tell me that I was being discharged because of my taking those cigarettes contrary to the rules. He just told me he'd have to discharge me * * * I returned the next day and received a check * * * for all wages the company owed me up to and including the time I worked on February 7, 1957."

Dr. Richard C. Proctor, witness for the plaintiff, admitted by defendant to be a medical expert, specializing in the field of psychiatry, testified in part: "I examined Mrs. Kathleen Andrews on March 4, 1957 * * * She told me that she had missed about one-fourth of the time from work for the preceding year prior to the time I saw her, and that she had been employed at the Reynolds Tobacco Company for about twelve and a half years in her work there. As a result of my examination, it was my opinion that she was suffering from tension headaches, what is called phychiatrically, a conversion reaction. I think that everybody has a certain amount of nervous tension or energy within them. Quite commonly with people this energy is converted into a physical symptom. In some people it is converted into headache— in others into nausea and vomiting, and it was my opinion in this particular patient that this tension, this nervous energy was converted into headaches. To a person suffering from this conversion reaction, the headache is real and can be disabling. I had, on March 4, 1957, an opinion satisfactory to myself, as to whether or not Mrs. Andrews is totally and permanently disabled so that she is unable to work with reasonable continuity in her usual occupation or in such an occupation as she is qualified physically and mentally under all the circumstances to perform substantially the reasonable and essential duties incident thereto; my opinion is that she was not able to perform the duties mentioned. I have an opinion as to whether or not she will be able to perform them in the future. I don't believe she will.

"If the jury should find from the evidence and by its greater weight that in January of 1957 Mrs. Andrews was suffering from these headaches; that she had been absent from work on numerous occa-

sions on account of it in the past and that her physical and mental condition at that time was approximately the same as it was when I examined her in March of 1957, I have an opinion, satisfactory to myself, as to whether or not in January of 1957 Mrs. Andrews was permanently and totally disabled. My opinion is that she was permanently and totally disabled."

And continuing on cross-examination Dr. Proctor testified in pertinent part: "I did not know that on the specific day of February 7, 1957, Mrs. Andrews went to work about 7:30 in the morning and worked for several hours and was paid $1.67 an hour by the R. J. Reynolds Tobacco Company for her work. I did not know that Mrs. Andrews worked the specific days from February 1st up until February 7th and worked the full work load down there and was paid $1.67 an hour as a cigarette inspector. As to whether or not she was able to work; Mrs. Andrews was working. If a person works, that is some evidence that they are able to work. I am testifying about facts that don't take into account the fact that she did work many days and was paid at the going rate. Mrs. Andrews was just in my office one time, for practically an hour. I took a history during that time. In her history she told me about the headaches. Headache is a very common ailment. It is about one of the most common ailments that all human flesh is addicted to. There are a lot of people who have headaches and nobody knows the cause of them. It is nothing organic. It is just a part of the makeup of that particular person. I know plenty of people * * * who have headaches, but yet they are working and carrying on in the great duty of life. If you'd say everybody is totally and permanently disabled and thereby prevented for life from engaging in any permanent employment because they have headaches every now and then, you would rule out a lot of people * * * ."

Dr. G. J. Robbins, witness for plaintiff, was admitted by defendant to be a duly licensed doctor in general practice. He testified in part: "I have seen and have treated Mrs. Kathleen Andrews. The first time I saw her was in April, 1956, or thereabouts * * * I saw her intermittently after that. I received a history during the course of my treatment of her. On the initial visit she had primarily the headaches; I took a history as to headaches, upper respiratory infection, colds and pleurisy. She had had the headaches for many years. They were at times incapacitating * * * She enumerated various stresses that caused these particular headaches. As far as physically, there were no actual physical ailments, nothing organically wrong as regards the headaches. My diagnosis was that they were tension head-

aches which is the same thing as tension hysteria, conversion headache is one type * * * I was still seeing her in the early part of 1957 * * *."

Dr. Robbins was asked, "Now, doctor, from your examinations which you have made of Mrs. Andrews * * * with particular reference to her condition as you knew it as her physician in January of 1957, do you have an opinion satisfactory to yourself, as to whether or not Mrs. Andrews is totally and permanently disabled so that she is unable to work with reasonable continuity in her usual occupation or in such an occupation as she is qualified physically and mentally and under all circumstances to perform substantially the reasonable and essential duties incident thereto?"

He answered that he had such an opinion, and that it was that "She is unable to perform the duties that you have outlined."

Dr. Robbins further testified in part: "If the jury should find, from the evidence and by its greater weight, that over a period of many years, since Mrs. Andrews was a little girl of about school age or before, she had had recurrent headaches; that over the years these headaches had become worse as she grew older; that she reached the point that she had them daily, with maybe one or two days out of each month; that during the years she lost intermittent periods from work because of these headaches; that in 1955 and 1956 she was out of work on a number of occasions due to the headaches; that during that period of time her headaches became worse; that in January, 1957, she was continuing to suffer with these headaches, which worsened, rather than getting better; that she has not worked since February 7, 1957, and that since that time her headaches have become worse instead of better; that she is not able to do her housework, I have an opinion, satisfactory to myself, as to whether or not in January, 1957, Mrs. Andrews was permanently and totally disabled: My opinion is that she was permanently disabled and that her disability was total."

Then the doctor, under cross-examination, continued in pertinent part: "All that I found wrong with Mrs. Andrews was a respiratory condition and tension headache when she came to see me in April, 1956 * * * she stayed away from work on account of the respiratory condition approximately four days, from my records. After she recovered, she was allowed to go back to work * * * and I assume she did * * * I let her go back to work. At Reynolds * * * she was able to go back to her job as the operator of a cigarette machine * * * she was not totally and permanently disabled at that time.

"I saw her next in May of that year. According to my records,

then again she was out from work about four or five days * * * She had a kidney ailment * * * After the kidney infection cleared up, I approved her to go back to work again * * * In my opinion, at that time she was not totally and permanently disabled * * * I took her blood pressure * * * a number of times, and it was normal every time. Blood pressure is one of the revealing factors that a doctor looks for when somebody comes to him to find out whether or not they are really sick. I never did find this lady's blood pressure elevated a bit. It was borderline. I never found anything the matter with her head. * * * I saw her again later on in May of that year * * * We thought she had a stomach condition (gall bladder) and hospitalized her * * * We discharged her from hospital on June 5th * * * She didn't have any stomach disorder. In my opinion, tension is causing the headaches she was complaining about. We all have tension. Everybody sitting in this courtroom at one time has tension * * * The only thing I could find causing these headaches she was complaining about was tension. I could find no organic condition that was causing the headaches. I relied upon her word almost altogether that she was having these headaches."

Chet McCann, witness for plaintiff, testified in part: "I am the father of Mrs. Kathleen Andrews. During and prior to January of 1957, I saw Mrs. Andrews most of the time about once or twice a week. She was just sick all the time; looked like sometimes when I'd see her, her eyes were just sticking out on stobs nearly; and, of course, when she didn't have that headache or something, why seemed like she was a little more 'perter'. She complained to me of having headache; she had it most of the time about every two weeks; looked like she'd have it worse about every two weeks than any other time. She was just pale and white, looked like she couldn't hardly go at all. Sometimes she'd walk pretty good, and sometimes she'd stagger. She didn't complain to me about nothing but that headache. She has had headaches off and on for ten or twelve years, I reckon."

In response to the question: "The condition which you have described as having seen her over a period of ten or twelve years and up to and including January of 1957, had it improved or had it gotten worse?", the witness answered, "Yes, it seemed like it gets worse all the time." And in response to this question: "Now, Mr. McCann, from your observation and contact with your daughter, Mrs. Kathleen Andrews, and based upon your observation of her, do you have an opinion, satisfactory to yourself, as to whether or not in January, 1957, she was able to work with regularity and carry on the duties

incident to her occupation?", the witness answered: "No, I don't think she was."

At the close of plaintiff's evidence the defendant demurred to the evidence, and moved for judgment as of nonsuit. Motion was allowed. Plaintiff excepts thereto and appeals to Supreme Court and assigns error.

Fred M. Parrish, Jr., W. Scott Buck for plaintiff, appellant.
Womble, Carlyle, Sandridge & Rice for defendant, appellee.

WINBORNE, C. J. The determinative question on this appeal is whether the trial court erred in sustaining defendant's motion for judgment as of nonsuit entered at the close of plaintiff's evidence. Testing the sufficiency of the evidence, under applicable principles of law, in the light most favorable to plaintiff, and giving to her the benefit of all reasonable inferences to be drawn therefrom, it is manifest that the trial court correctly ruled in granting the nonsuit.

The identical provision, pertaining to total permanent disability has been the subject of four other recent cases in this Court against the present defendant. They are: *Boozer v. Assurance Society,* 206 N.C. 848, 175 S.E. 175; *Johnson v. Assurance Society,* 239 N.C. 296, 79 S.E. 2d 776; *Drummond v. Assurance Society,* 241 N.C. 379, 85 S.E. 2d 338, and *Fair v. Assurance Society,* 247 N.C. 135, 100 S.E. 2d 373.

The facts in these cases are similar to the facts in instant case, indeed, more favorable to plaintiff, for there the plaintiffs had some organic condition,— while here the plaintiff has no organic disease. And in neither does it appear that at the time the insurance was terminated the plaintiff was totally and permanently disabled within the meaning of the insurance provision of the insurance policy.

The testimony of the doctors, under cross-examination, completely negatives any opinion given on direct examination to the effect that plaintiff, at the time the insurance was terminated, was totally and permanently disabled.

Hence, as in the cases above cited, evidence does not support the crucial averment which is essential to recover, to wit: that she was *totally and permanently disabled* by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value — on or before February 7, 1957, the date of her discharge for cause and the termination of the insurance.

The judgment below is

Affirmed.

THE RED SPRINGS CITY BOARD OF EDUCATION v. MARY C. McMILLAN, CORNELIA S. McMILLAN, HAMILTON McMILLAN, MIGNON McMILLAN, JANE McMILLAN, MARY E. PALMER AND HUSBAND, MELVIN PALMER, AND CATHERINE M. TUDOR AND HUSBAND, CHARLES TUDOR.

(Filed 12 June, 1959.)

1. Eminent Domain § 7b—

Under G.S. 40-12 allegation that the agency or corporation seeking to acquire land by condemnation had made a *bona fide* attempt to purchase the land by agreement is jurisdictional but presents a question to be decided in the first instance by the clerk, subject to review by the judge, and does not raise an issue of fact for the jury.

2. Same—

Where the court finds upon supporting evidence that petitioner negotiated for the purchase of the land and that respondents stated they would not sell at any price, its conclusion that petitioner had complied with the provisions of G.S. 40-12 will not be disturbed, notwithstanding the absence of evidence that petitioner ever made a specific offer, since the law does not require the doing of a vain thing.

3. Eminent Domain § 9—

In proceedings to condemn land, the burden is properly placed upon respondents to prove their damages by the greater weight of the evidence.

4. Judgments § 17b—

The judgment must conform to the verdict of the jury in all substantial particulars.

5. Eminent Domain § 5—

It is error for the judgment for the amount fixed by the jury as compensation in condemnation proceedings to award interest from the date the condemnation proceedings were instituted, since it will be assumed that the jury in fixing the amount of the damages included therein any interest properly recoverable, and on appeal the judgment will be amended by striking out the item of interest but will stand for the amount assessed by the jury with interest from the rendition of the judgment.

PARKER, J., concurring in the result.

HIGGINS, J., joins in the concurring opinion.

APPEAL by both respondents and petitioner from *Williams, J.*, at May 1958 Term of ROBESON— argued as No. 744 at Fall Term 1958.

Special proceeding instituted 10 June, 1957, by the Red Springs City Board of Education to condemn a certain tract of land in the town of Red Springs, Robeson County, North Carolina, specifically described in Exhibit A attached to the petition of petitioners, owned

by Mary C. McMillan, and others, respondents, for school purposes.

Pertinent to this appeal it is alleged in the petition:

"7. That petitioner has been unable to acquire the said premises described in Exhibit A hereto attached by purchase and has been unable to get an agreement for the purchase of the said premises.

"8. That petitioner has attempted to negotiate for the purchase of said property with defendants and has made to defendants a fair and reasonable offer for said premises but defendants refuse to accept said offer and refuse to make any counter-offer."

Whereupon petitioner prays that the aforesaid tract of land be condemned for its purposes as provided by law.

In answer thereto respondents aver:

"7. That seventh paragraph is denied, and these respondents say that the petitioner has made no *bona fide* effort to acquire the said lands by purchase from these respondents, * * *

"8. These respondents say that there has been no *bona fide* effort to negotiate for the purchase of said property from these respondents and no offer has been made, only a mere statement of the opinion of values, without any effort to negotiate a purchase of the same, and except as herein admitted the said eighth paragraph is denied."

Upon the trial in Superior Court the parties offered evidence, and the case was submitted to jury on issue shown hereinafter, answered as indicated, upon which judgment was entered as hereinafter shown, from which both respondents and petitioner appeal to Supreme Court and assign error.

Varser, McIntyre, Henry & Hedgpeth for respondents, appellants and appellees.

Henry A. McKinnon, William E. Timberlake for petitioner appellant and appellee.

The appeal by respondents, McMillan, appellants:

WINBORNE, C. J. These appellants in brief filed on this appeal make this statement of facts: "The petitioner, Red Springs City Board of Education, an administrative unit in the school system of Robeson County, instituted three proceedings to condemn additional lands adjoining its school site, and the respondents answered as appears of record. The three proceedings were consolidated for trial in the Superior Court, and the appeal by the respondents is one of these proceedings, the other two, called the Hodgin and McKenzie interests, have not appealed and are not further interested.

The respondents McMillan own a small parcel of land desired by

the petitioner, and a proceeding was instituted, along with two others, to condemn the respondents' land, described in the petition.

"There is no dispute about the description of the area of land claimed for condemnation.

"These three proceedings, including the McMillan proceeding were instituted 10 June, 1957. Three proceedings, including the McMillan lands had been instituted prior to that time, but on account of the amendment to the school condemnation law enacted by the General Assembly of 1957, the first proceedings were dismissed and the petitioner proceeded on 10 June, 1957, under the amendment enacted in 1957, putting such proceedings within the terms of the Eminent Domain Statute, Chapter 40, General Statutes 40-1 to 40-53, and the instant proceeding was conducted pursuant to Chapter 40 of the General Statutes, as above indicated.

"The several steps provided by the above statute were complied with and were had before the Clerk and the appraisers, and upon the return of the appraisers and the exceptions filed by both sides to the rulings severally made, until the cause reached the Superior Court and the court, by consent of the parties, struck out all of the orders heretofore made and proceeded to try the case *de novo* upon the pleadings as filed. There was no dispute as to the fact that the petitioning Board of Education had determined that the land sought to be condemned was needed for school purposes.

"The court reserved the question as to whether there had been proper negotiations to acquire the land sought to be condemned before the proceeding was instituted, as appears in the record.

"The respondent appellants contend that prejudice was suffered by them in the trial, in the several exceptions and assignments of error noted herein, and that they did not receive at the hands of the jury adequate compensation for their lands and, apparently no consideration whatever for the effect of taking the lands sought to be condemned away from the other lands of the respondents."

And these respondents, the appellants McMillan, state three questions as involved on this appeal. *The first is this:*

"Did the court err in the admission and rejection of evidence?" Under this question fourteen assignments of error based upon a like number of exceptions arrayed in the main, without reason or argument stated or authority cited.

However, the fourteenth assignment of error appears to be a challenge to the ruling of the trial judge in holding that the requirements of the statute with respect to preliminary negotiations have been complied with. In this connection the statute, G.S. 40-12, pertaining

to acquisition of title by condemnation proceeding provides in pertinent part that the corporation may present a petition to the Clerk of the Superior Court of the County in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal; and must state, in effect, that the land described in the petition is required for the purpose of conducting the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability.

Decisions of this Court hold that "this allegation is necessary because it is the statement of a preliminary jurisdictional fact. It presents a question to be decided in the first instance by the Clerk, whose ruling is subject to review at the proper time by the judge on appeal; but the denial of it in the answer does not raise an issue of fact to be tried by the jury." See *Power Co. v. Moses*, 191 N.C. 744, 133 S.E. 5.

Now, turning to the judgment in instant case, it is related that the court upon the call of the motion calendar finds that it was ordered "that the only issues yet to be determined were the issues * * * as to whether plaintiff negotiated for the purchase of the several properties as required by law, and * * * as to the damage caused, or to be caused, by the condemnation; that the issue(s) as to whether plaintiff negotiated as required by law was transferred to the Judge holding the court when the cause(s) came on for trial, and that the trial of the issue as to damages to the respondents should be had by a jury * * * ."

* * * the Clerk of the court found * * * "that petitioner has found that it was necessary for it to acquire said land for school purposes and that it was necessary that said lands be so acquired; that petitioner was unable to acquire said land by purchase and had attempted to purchase the same * * * ."

And the court further finds: "4. That upon the * * * cause(s) coming on for trial as calendared * * * * the court announced that the court would hear the evidence and determine the issue as to whether petitioner had attempted to acquire the lands by purchase and had negotiated as required by law, and the court did hear the evidence of petitioner and of the respondents on this question, and the respondents in each proceeding owning the lands testified that they advised the petitioner at the time when the proposed acquisition was first mentioned to them that they would not sell the lands at any price, and they testified that they would not now sell it at any price, and the court found from the evidence and now finds as a fact that the petitioner * * * complied with the statutes and laws of North Carolina with reference to attempting to acquire the lands by pur-

chase and did negotiate for the purchase of the several properties, and that the petitioner was entitled to condemn the land for the purposes set forth in the petition (s)."

Indeed the record in case on appeal is replete with testimony as to statements of respondent owners such as these: " * * * that they definitely were not interested in selling; that they would not sell to school; that they did not want to sell." An offer made under such presence would be a vain thing, which is not required by law.

In the light of the findings of fact, and applicable principles of law, the ruling of the court is held to be proper.

The second question:

"Did the court err in its charge to the jury?" Under this question these respondents, the appellants McMillan, stake out exception to nineteen excerpts from the charge of the court as bases for a like number of assignments of error.

Here it is contended that the court erred in putting the burden of the issue of damages upon the respondents, and require them to satisfy the jury by the greater weight of the evidence that the respondents have been damaged.

The charge appears to be accordant with *Statesville v. Anderson,* 245 N.C. 208, 95 S.E. 2d 591, where in opinion by *Rodman, J.,* the Court held that "Defendant has the burden of establishing by competent evidence the damage he will sustain by the act of the plaintiff."

And considering the charge as a whole, prejudicial error is not made to appear.

The third question:

"Did the court err in the judgment entered?"

This is formal and no further express consideration need be given to it on this appeal.

The Appeal by Petitioner, The Red Springs City Board of Education.

The question here is this: "Did the court err in the judgment in allowing the respondent's interest on the award from June 10, 1957, the date this condemnation proceeding was instituted?"

In this connection reference to the record discloses that upon the trial in Superior Court this issue was submitted to the jury, and answered by the jury as indicated.

"What amount are the McMillan respondents entitled to recover as damages for condemnation of their lands by the petitioner and as compensation for the injury, if any, to the remaining land? Answer: $1,450.00."

And in respect thereto the pertinent portions of the judgment there-

on follow: "Now, therefore, it is considered, ordered and adjudged as follows: A. That the petitioner Red Springs City Board of Education is entitled to acquire by eminent domain the lands described on Exhibit A in this judgment as 'McMillan Lands' and upon the payment to the court for the use and benefit of Cornelia S. McMillan and Hamilton McMillan of the damages awarded by the jury as above set out in the amount of $1,450.00 and any interest thereon as hereinafter mentioned, the petitioner shall become and is the owner of in fee simple of said lands free and clear of any and all claims of the respondents or any of them named above in the proceeding entitled *'Red Springs City Board of Education, petitioner v. Mary E. McMillan and others,'* and petitioner is and shall be upon such payment entitled to the immediate possession, control and ownership of said property and that the payment of said damages so awarded is and shall be in full compensation for the fee simple title to said lands, and petitioner shall be entitled to any appropriate writ to enforce such possession and control. * * * *

"D. That said awards shall bear interest at the rate of six per cent per annum from June 10, 1957, the date in which the (three) proceedings were instituted.

"E. That if there are liens of record against any of said lands, same shall be satisfied from the proceeds paid into the court for the use and benefit of the owners of such lands."

In the light of the verdict, error in the judgment with respect to interest is manifest. *Supply Co. v. Horton,* 220 N.C. 373, 17 S.E. 2d 493; *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210; *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433. Decisions of this Court hold that "there is no principle in law more firmly established than that the judgment must follow and conform to the verdict or findings."

And in *Hutchins v. Davis, supra,* the opinion of *Ervin, J.,* is introduced with the declaration that "Nothing is better settled in law than the rule that in all cases tried by a jury the judgment must be supported by and conform to the verdict in all substantial particulars," citing cases.

Indeed, in *Durham v. Davis, supra,* this headnote epitomizes the decision of the Court: "The judgment in an action must correspond with the verdict, and where in condemnation proceedings tried in the Superior Court on appeal the jury have in their verdict ascertained the damages to the owner of the land, the verdict will be presumed to include the element of interest, nothing else appearing, and it is reversible error for the trial judge to allow interest from the time the damages were determined upon by the appraisers and render judg-

ment accordingly. Revisal, sec. 1954, providing for the payment of interest on moneys due by contract, etc., has no application." Revisal 1954 is codified as C. S. 2309 and G. S. 24-5.

Applying this principle to the case in hand, the trial judge was without authority to add the provision for interest. Hence on the appeal of petitioner there is error. And the judgment will be amended by striking out the interest, and will stand only for the amount assessed by the jury, $1,450.00, with interest from the rendition of the judgment, and costs. *Durham v. Davis, supra.*

On Appeal of Respondents—No Error.

On Appeal of Petitioner—Modified and Affirmed.

PARKER, J., concurring in the result. This proceeding was instituted on 10 June 1957. As I read the Record, petitioner did not make an actual entry upon the McMillan respondents' land, and exercise dominion over it prior to the trial in the Superior Court. The taking of the McMillan land by petitioner occurred, it would seem from the judgment entered herein, immediately after the trial in the Superior Court.

This Court said in *Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817, quoting from 18 Am. Jur., p. 757-8: "What is a taking of property within the due process clauses of the Federal and State Constitutions is not always clear, but so far as general rules are permissible of declaration on the subject, it may be said that there is a taking when the act involves an actual interference with, or disturbance of, property rights, resulting in injuries which are not merely consequential or incidental."

There is conflict in authority as to the right to recover interest upon the judgment in condemnation proceedings taking private property for public use. Nichols' On Eminent Domain, 3rd Ed., (1953), Vol. 6 §26.64; 29 C.J.S., Eminent Domain, §333.

In the above cited section of Nichols, it is said: "The right to interest *upon* the judgment in condemnation has been held generally to depend upon statutory authorization although, even in the absence of legislative sanction, it has been said that the constitutional provision for just compensation requires the allowance of such interest. In any event, such interest has generally been allowed."

In *Winston-Salem v. Wells*, 249 N.C. 148, 105 S.E. 2d 435, a condemnation proceeding, it is held that the respondents are entitled to interest on judgment for $10,000.00 from the date of the taking until paid.

I concur in the result here that the McMillan respondents are en-

titled to interest on the judgment from the date of its rendition until paid.

In my opinion, when private property is taken under the power of eminent domain for public use, Article I, §17, of the North Carolina Constitution requires the payment of interest on the judgment until paid, for without it there is no just compensation. This constitutional prohibition against taking private property for public use without the payment of just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation. *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290; *People ex rel. Wanless v. Chicago,* 378 Ill. 453, 38 N.E. 2d 743, 138 A.L.R. 1298; *People ex rel. Markgraff v. Rosenfield, Director of Public Works and Buildings,* 383 Ill. 468, 50 N.E. 2d 479; *State Highway Commission v. Mason,* 192 Miss. 576, 6 So. 2d 468; *Parker v. State Highway Commission,* 173 Miss. 213, 162 So. 162; *Virginia Hot Springs Co. v. Lowman,* 126 Va. 424, 101 S.E. 326; *Nelson County v. Loving,* 126 Va. 283, 101 S.E. 406; *Angelle v. State,* 212 La. 1069, 34 So. 2d 321, 2 A.L.R. 2d 666; *Schmutte v. State,* 147 Neb. 193, 22 N.W. 2d 691; *Rose v. State,* 19 Cal. 2d 713, 123 P. 2d 505; *Tomasek v. State,* 196 Or. 120, 248 P. 2d 703; *Milhous v. State Highway Dept.,* 194 S.C. 33, 8 S.E. 2d 852, 128 A.L.R. 1186; 16 C.J.S., Constitutional Law, pp. 149-150 (when Constitutional Law was in one volume of C.J.S., this was 16 C.J.S., Constitutional Law, p. 102). The sounder cases cited in Nichols and Corpus Juris Secundum in the sections above cited support, I think, my view.

In *Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256, a taking of private property for public use, this Court held that the respondent was not required to pay interest on the judgment, because no statute authorized such payment. In my judgment, the decision is wrong, and does violence to Article I, §17, of the State Constitution, and to the 14th Amendment to the United States Constitution. See *United States v. Rogers* 255 U.S. 163, 65 L. Ed. 566. The decisions in *Winston-Salem v. Wells, supra,* and in the instant case have disemboweled the *Yancey* case without referring to it by name. I would administer the *coup de grace* to the Yancey decision by specifically overruling it.

HIGGINS, J., joins in concurring opinion.

THE HYDE COUNTY BOARD OF EDUCATION, PETITIONER v. EUGENE D. MANN AND WIFE, BEATRICE L. MANN, AND CARROLL D. MANN AND WIFE, GENEVA F. MANN, RESPONDENTS.

(Filed 12 June, 1959.)

1. Appeal and Error § 41—

Exception to exclusion of testimony will not be sustained where the record fails to show what the witnesses would have testified had they been permitted to answer.

2. Schools § 6a—

Consent judgment was entered that the site for a consolidated school should be within ½ mile of the junction of two highways. The highway terminating at its juncture with the other divided into two prongs before it joined the other, and it appeared that the site selected by the board of education to the west of the junction had all but 150 feet of its 1,000 foot frontage within ½ mile radius of the west prong of the junction, and that the area to be served by the consolidated school was some 22 miles across. *Held:* The site was within the intent and purpose of the consent judgment.

3. Judgments § 3½—

The courts, in construing the ambiguous language of a consent judgment, under like rule for the construction of statutes and ordinances, will consider all the facts and circumstances existing at the time of and leading up to the execution of the judgment and the objective or objectives to be accomplished thereby.

4. Eminent Domain § 7b—

The Court's finding that the petitioner, prior to the institution of condemnation proceedings, negotiated in good faith for the purchase of the property *held* supported by ample, competent evidence, and is conclusive.

5. Appeal and Error § 35—

Where the charge is not in the record it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts.

MOORE, J., not sitting.

APPEAL by respondents from *Thompson, Special Judge,* March Special Term 1959 of HYDE.

Prior to September 1957 an action was instituted by fifty or more citizens and taxpayers of Hyde County against the Hyde County Board of Education, presumably to prevent the assignment of pupils in East Hyde High School at Englehard, North Carolina to the West Hyde High School at Swan Quarter, North Carolina, pending the consolidation of the above schools into a single centrally located high school.

It appears that when the above case came on for hearing at the September Special Term 1957 of the Superior Court of Hyde County, which convened on 9 September, the parties to the litigation informed the court that all matters in controversy in said action "have been fully compromised and settled in accordance with the following resolution unanimously passed by the Hyde County Board of Education at a meeting of said Board held on September 12, 1957, at which meeting all members were present, said resolution being as follows:

"BE IT RESOLVED that the Board of Education of Hyde County proceed immediately with the building of a new Hyde County High School named Mattamuskeet High School.

"The site to be within ½ mile from the junction of the south side of the Lake Road. That the State Department of Public Instruction be requested to have the Engineer recommend a site to the Board of Education for their approval by the October Board meeting. That it is the intention of the Board of Education to spend its remaining State Funds on the building of this High School. * * *"

The court, by consent of the parties through their counsel, on 12 September 1957, entered judgment incorporating the foregoing resolution therein and adopting the resolution as the judgment of the court, which resolution further provided for the continued operation of the East Hyde High School at Englehard until the construction of the new high school plant was completed and ready for occupancy.

Thereafter, the State Board of Education allocated for the purpose of constructing said consolidated high school $164,484.44, pursuant to the provisions of the Session Laws of North Carolina, 1953, Chapter 1046.

Before allocating said funds, the State Board of Education approved plans for said consolidated high school and approved a site consisting of 15.32 acres, the site now in controversy, which site had been selected by the Board of Education of Hyde County upon recommendation of a committee representing the State Board of Education, which committee visited Hyde County on 25 September 1957 and made its recommendation on 27 September 1957 to the Hyde County Board of Education, and, among other things, this report contains the following: "The entire area within 'one-half mile from the junction of the south side of the Lake Road' was inspected and the Mann Tract lying west of the junction and west of the Mann homestead was chosen as the most desirable. If the Hyde County Board of Education encounters difficulty in acquiring this site, the Boomer property located to the east of the junction is recommended as an alternate site."

Thereafter, the Board of Education of Hyde County acquired

title in fee simple to 3.04 acres of said site on 26 December 1957, being a part of the estate of M. S. Mann.

After the Superintendent of Public Instruction of Hyde County had tried unsucessfully to negotiate on behalf of the Board of Education of Hyde County for the purchase of 7.66 acres of land from Eugene D. Mann, which land adjoins the 3.04 acres owned by the County Board of Education on the west, and 4.62 acres of land owned by Carroll D. Mann, which adjoins the property of Eugene D. Mann on the west, this action was instituted.

Thereafter, the County Board of Education advertised for bids for the construction of the Mattamuskeet High School building to be erected on the 3.04 acre tract.

In the meantime an action was instituted by *Earl Topping v. Hyde County Board of Education, et al,* to restrain the Hyde County Board of Education, its members and the Superintendent of Public Instruction of the County, from entering into a contract for the erection of a consolidated high school building to be known as Mattamuskeet High School. The lower court refused to grant the request for a restraining order. The plaintiff appealed and when the case was heard in this Court the contract had been let and construction had been started. We held the question involved was then academic. *Topping v. Bd. of Education,* 248 N.C. 719, 104 S.E. 2d 857.

Likewise, in the meantime, the case of *Topping v. N. C. State Board of Education, et al,* had been instituted for the purpose of restraining the expenditure of the allocated funds for the construction of the Mattamuskeet High School until the entire site had been procured. That case reached this Court at the Fall Term 1958 and the opinion is reported in 249 N.C. 291, 106 S.E. 2d 502.

This condemnation proceeding came on for hearing on exceptions to the report of the commissioners who had assessed the damages and upon exception to the order of the Clerk of the Superior Court of Hyde County affirming the report of the commissioners.

In the absence of the jury, the court, upon the evidence and statements of counsel made in open court, stipulations of counsel, and upon consideration of the record in this proceeding, found certain facts.

Among the exceptions passed upon by the court below were the following: (1) The respondents except to the condemnation of their lands, alleging that all their lands condemned by petitioner in their entirety lie outside the area of "one-half mile from the junction of the south side of the Lake Road." (2) Respondents excepted to the validity of the condemnation proceeding on the ground that no ne-

gotiations were made with them in good faith to purchase the lands sought to be condemned before instituting this proceeding.

The court found as a fact that Lake Road referred to in the consent judgment is North Carolina Highway No. 94 which runs in a general north-south direction and that its southern extremity terminates at its juncture with U. S. Highway No. 264 which runs in a general east-west direction. "The juncture of the said two highways cannot be identified by one certain geographical point for that some distance prior to its termination in U. S. Highway 264 the Lake Road branches off into two prongs, the said two prongs extending onto and terminating in Highway 264, the center line of said two prongs at the terminus of same in U. S. Highway 264, being 850 feet apart. The Court finds that the purpose and intent and requirement of said judgment was that the school site to be selected by the Board of Education be within a radius of one-half mile from the juncture of said Lake Road with U. S. Highway 264 at either the western or eastern prong of said Lake Road.

"The Court further finds that all of the Eugene D. Mann land condemned by the petitioner, consisting of 7.66 acres, is within a radius of one-half mile from the juncture of the said Lake Road at its western prong with said U. S. Highway 264, and that 1.62 acres of the 4.62 acres of the Carroll D. Mann land condemned is within one-half mile of said junctures; that all the 3.04 acre tract presently owned by the Hyde County Board of Education is within one-half mile radius; so that of the 15.32 acres comprising the school site selected by the Hyde County Board of Education 12.32 acres of same is situate within the one-half mile radius from the juncture of the western prong of the Lake Road and Highway 264, which the Court finds and holds to be in compliance with the terms of said judgment at the September 1957 Term.

"That prior to the institution of this proceeding for the condemnation of the land described in the petition, the petitioners through their duly authorized secretary and agent negotiated in good faith with each of the respondents for the purchase of the land belonging to the respondent Eugene D. Mann and the land belonging to the respondent Carroll D. Mann, and the petitioner was unable through negotiations so conducted to purchase and acquire title to the same.

"That no evidence was introduced with respect to respondents' third exception, which challenges the action of the Commissioners upon the alleged ground that it was arbitrary, capricious and not made in good faith, and the Court finds upon the record that the Commissioners complied with the provisions of the statutes, and

finds as a fact that the petitioner acted in good faith and without abusing its discretion as to the selection of the site or in the proceedings had to acquire the land."

The court further found that the sole issue to be determined upon this appeal is the amount of compensation and damages which each respondent is entitled to recover. The following issues were submitted to the jury and answered as indicated.

"What amount of damages is the respondent, Eugene D. Mann, entitled to recover of the petitioner by reason of the taking of the 7.66 acre tract and resultant damages, if any, to the remaining portion of the 65 acre tract owned by the respondent Eugene D. Mann? Answer: $9,778.30.

"What amount of damages is the respondent, Carroll D. Mann, entitled to recover of the petitioner by reason of the taking of the 4.62 acre tract and resultant damages, if any, to the remaining portion of the 65 acre tract owned by the respondent Carroll D. Mann: Answer: $3,576.13."

Judgment was entered on the verdict and the respondents appeal, assigning error.

O. L. Williams, White & Aycock for petitioner.
Bryan Grimes, LeRoy Scott, Wilkinson & Ward for respondents.

DENNY, J. The respondents' first three exceptions brought forward as assignments of error Nos. 1, 2 and 3, relate to the court having sustained the objections of the petitioner to certain questions propounded by the respondents' attorneys to the respondents. These exceptions are without merit for the reason that the respondents failed to insert in the record what the response of the respective respondents would have been had they been permitted to answer. *Highway Comm. v. Privett,* 246 N.C. 501, 99 S.E. 2d 61; *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104; *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342.

Assignment of error No. 4 is directed to the court's finding of fact to the effect " • • • that the purpose and intent and requirement of said judgment was that the school site to be selected by the Board of Education be within a radius of one-half mile from the juncture of said Lake Road with U. S. Highway 264 at either the western or eastern prong of said Lake Road."

In our opinion, based on the evidence with respect to the juncture of Highway 94 with Highway 264 by an eastern and western prong, and the further evidence showing that 12.32 acres of the site selected

for the location of the consolidated high school is within one-half mile of the western prong of the juncture with Highway 264, the court was correct in its interpretation of the consent judgment with respect to the location of the site, and the finding of fact and the conclusion of law with respect thereto will be upheld.

Moreover, where the language of a statute, ordinance, or judgment, is ambiguous, the courts will take into consideration all the facts and circumstances existing at the time of and leading up to the enactment of the statute, the ordinance, or the entry of judgment, and in the interpretation of such statute, ordinance, or judgment, the courts will take into consideration the objective or objectives to be accomplished thereby. 82 C.J.S., Statutes, section 352, page 739, et seq.; 49 C.J.S., Judgments, section 436, page 862, et seq.

What do we have as a basis for the validity of this assignment of error? We have a site selected in good faith by the proper authorities, as provided by law and in compliance with the compromise agreed upon in the consent judgment, except it has been determined after some two years of litigation and after the contract for the construction of the consolidated high school has been let and construction partially completed that three acres of the 15.32 acre site is not within a one-half mile radius of the western prong of Highway 94 where it enters Highway 264.

This proposed centrally located high school is to serve the areas heretofore served by East Hyde High School at Englehard and West Hyde High School at Swan Quarter; the combined area to be served is more than 22 miles across from east to west.

A map prepared on 16 February 1959 by Meriwether Lewis, a registered surveyor, was used by him as a witness for the petitioner to illustrate his testimony. According to said map, the portions of the respondents' lands condemned in this proceeding, together with the 3.04 acre tract owned in fee simple by the Hyde County Board of Education, have a combined frontage on the south side of Highway 264 of 1,000 feet; that all of this frontage except 150 feet of the condemned land of Carroll D. Mann lies within one-half mile of the juncture of the western prong of Highway 94 and Highway 264. In light of the objective to be accomplished by the construction of a consolidated high school to serve the area contemplated, no useful or beneficial purpose could possibly be served by shifting this site 150 feet or even 1,000 feet eastward so that it would be within one-half mile of where the eastern prong of Highway 94 enters Highway 264.

It appears in the consent judgment entered on 12 September 1957,

which was made a part of the record in a former appeal involving this controversy, that East Hyde High School at Englehard at that time had only 74 pupils enrolled. The records in this litigation further reveal that the Mattamuskeet High School building when completed will contain only six classrooms. Therefore, the consolidated school in all probability will have fewer than 200 pupils enrolled therein. Moreover, practically all, if not all, of these pupils will be transported in school busses operated and maintained by the County. It cannot be said in good faith that it is unfair or unjust for the pupils residing in the eastern portion of the area to be served to be required to ride 150 feet farther west on a school bus than they would be required to do if the site were moved eastwardly to that extent so that the entire site would be within a radius of one-half mile from the juncture with Lake Road. Such a contention would be indefensible.

In the case of *Ralls v. Parrish,* 105 Tex. 253, 147 S.W. 564, it was provided by statute that no county seat situate within five miles of the geographical center of a county was to be removed except by a two-thirds vote of the electors of the county voting thereon. An election was held to determine whether the county seat of Crosby County would remain at Emma or be removed to Crosbyton. The election returns showed that 199 votes were cast for Crosbyton as the county seat, while 120 voted for Emma being continued as the county seat. All of Crosbyton was within five miles of the geographical center of the county, while all of Emma was not within five miles of said geographical center. Therefore, it was contended that since all of the town of Emma was not within five miles of the geographical center of the county, a two-thirds vote in favor of the removal of the county seat to Crosbyton was not necessary. The Supreme Court of Texas said: "If any portion of the town of Emma as that town was known and recognized at the time the proposed change of the county seat was ordered to be voted upon and as the voters intended it should constitute the county seat, * * * is located within a radius of five miles of the geographical center of Crosby County, then the town of Emma in contemplation of article 811, Sayles' Civil Statutes, is within such radius. *Bradford v. Robison,* 141 S.W. 769. Differently stated, it is not necessary that a county seat should be wholly within the radius of five miles of the geographical center of the county, but only partially so, in order to make applicable the two-thirds rule in removing such county seat."

This assignment of error is feckless and is therefore overruled.

The respondents' fifth assignment of error is based on their excep-

tion to the court's finding that prior to the institution of this proceeding for the condemnation of land described in the petition, the petitioner through its duly authorized agent negotiated in good faith as hereinabove set out in the statement of facts.

The court's finding of fact in this respect is supported by ample and competent evidence and no useful purpose would be served by its inclusion herein. Therefore, this assignment of error is likewise without merit and is overruled.

The charge of the trial court was not included in the record on appeal. Consequently, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Hatcher v. Clayton, supra.*

We have carefully examined all the exceptions and assignments of error, and no prejudicial error has been shown.

The findings of fact, the conclusions of law, the verdict and the judgment of the court below, will be upheld.

No Error.

MOORE, J., not sitting.

R. E. EDWARDS AND WIFE, ANNIE BELLE EDWARDS v. FLOYD J. ARNOLD AND WIFE, MARY N. ARNOLD, AND BLADEN COUNTY.

(Filed 12 June, 1959.)

1. Quieting Title § 2—

In action to quiet title, defendants' pleas of the bar of the statute of limitations and the acquisition of title by them by adverse possession are affirmative defenses and not a cross-action.

2. Husband and Wife § 15—

In an estate by the entireties, husband and wife are each seized of the entire estate and neither owns a divisible interest.

3. Same: Judicial Sales § 7: Taxation § 40c—

Where tax foreclosure proceedings under G.S. 105-392 are instituted in regard to land held by husband and wife by the entireties but the proceedings are solely against the husband without notice to the wife, the tax sale on the certificate-judgment is wholly ineffectual, since the wife is not bound thereby and the husband has no divisible interest in the property which is subject to execution.

4. Judicial Sales § 7: Taxation § 40c—

Purchasers at a tax foreclosure sale and those claiming under them are charged with notice of vitiating defects appearing on the face of the record itself.

5. Taxation § 40g: Quieting Title § 2—

G. S. 1-52, (10), is not applicable to actions to remove a cloud on title.

6. Trial § 26—

A judgment as of nonsuit should merely dismiss the action, and it is error for the judgment to go further and purport to adjudicate the rights of the parties without the establishment of the predicate facts by stipulation, verdict or otherwise.

APPEALS by plaintiff R. E. Edwards and by defendants from *Carr, J.*, November Term, 1958, of BLADEN.

Civil action under G.S. 41-10 to remove clouds from plaintiffs' alleged title to real property.

The subject property consists of two separately described tracts of land in Turnbull Township, Bladen County, containing 65 acres, more or less, and 62 acres, more or less, respectively.

Defendants denied plaintiffs' title. They alleged defendants Arnold acquired title to and now own the subject property under a tax foreclosure proceeding conducted in accordance with Section 1720, Chapter 310, Public Laws of 1939, which, as amended, is now codified as G.S. 105-392, and under deeds referred to below. In addition, they pleaded *in bar* of plaintiffs' action (1) the one-year limitation prescribed in G.S. 105-393, (2) the three-year limitation prescribed in G.S. 1-52, subsection 10, and (3) adverse possession under color of title for more than seven years.

Plaintiffs alleged the tax foreclosure proceeding, in particulars set forth, did not comply with the requirements of G.S. 105-392. They alleged further that G.S. 105-392, if construed to authorize a judgment, execution and sale of an interest in property without the joinder of or notice to the owner thereof, is in conflict with Article 1, Section 17, of the Constitution of North Carolina.

The facts alleged by defendants are set forth in "A FURTHER ANSWER AND DEFENSE." Defendants' prayer for relief is that plaintiffs (1) take nothing by reason of their action, (2) that the costs be taxed against plaintiffs, and (3) that defendants have and recover from plaintiffs such other and further relief as defendants may be entitled to receive in the premises.

To establish title, plaintiffs introduced deed dated September 18, 1937, recorded in Book 100, page 160, Bladen County Registry, which describes and conveys the subject property, executed and delivered by M. M. Sandy and wife, Ethel Sandy, to R. E. Edwards and wife, Annie Belle Edwards, "of Sampson County," plaintiffs herein. (It was stipulated that the subject property had been

conveyed to A. P. Smith by deed dated April 12, 1882, recorded in Book 4, page 469, said registry.)

Plaintiffs then introduced, for the purpose of attack, "the entire proceedings on file in the office of the Clerk of the Superior Court of Bladen County in that certain tax foreclosure proceeding entitled *'Bladen County v. R. E. Edwards'*" and the deeds under which defendants Arnold assert title.

The tax foreclosure proceeding discloses the facts narrated in the following numbered paragraphs.

1. The Tax Collector of Bladen County filed with the said clerk a certificate dated May 4, 1945, setting forth that taxes for the years 1938-1944, inclusive, in the amount of $177.38, inclusive of principal, interest, penalties and costs, "are due and owing to the said County by R. E. Edwards" and constitute a lien on the real estate in Turnbull Township, listed in the name of R. E. Edwards, to wit: "125 acres, A. P. Smith land." This certificate was docketed as a judgment on May 5, 1945.

2. A minute entry indicates that an execution was issued July 19, 1946. This execution, if issued, is not in the file. Nothing indicates that any action was taken thereunder.

3. An alias execution was issued January 25, 1947, which commands the Sheriff of Bladen County "to satisfy the said judgment out of the personal property of the said defendant within your county, or if sufficient personal property cannot be found, then out of the real property in your county belonging to such defendant."

4. The sheriff's return, dated January 31, 1947, endorsed on said alias execution, consists of these words: "After a due and diligent search R. E. Edwards not to be found in Bladen County."

5. An unnotarized purported "Affidavit of Publication" wherein the business manager of The Bladen Journal states that the notice of sale, described in the next paragraph, was published in said newspaper once a week for four consecutive weeks "in its issues of March 13, 20, & 27, and April 3, 1947."

6. Notice of sale by J. B. Allen, Sheriff, setting forth that, by virtue of an execution directed to him by said clerk in the action entitled *"Bladen County vs R. E. Edwards,"* he would, "on Monday, the 7th day of April, 1947, at 12 o'clock p.m., at the courthouse door of said county, sell to the highest bidder for cash to satisfy said execution, *all the right, title and interest which the said R. E. Edwards, the defendant, has* in the following described real estate, to wit: 125 acres A. P. Smith land in Turnbull Township as listed

for taxation for the years 1938, 1939, 1940, 1941, 1942, 1943 and 1944 in the Public Registry of Bladen County." (Our italics)

These facts were stipulated: (a) By registered letter dated April 12, 1945, to R. E. Edwards, Roseboro, N. C., the tax collector notified said addressee that the certificate described in paragraph 1 above would be filed. (b) A copy of the notice of sale described in paragraph 6 above "was mailed by the Tax Collector of Bladen County on March 3, 1947, to R. E. Edwards, Roseboro, North Carolina, as provided by law, except the same was not sent by registered or certified mail."

By deed dated April 28, 1947, recorded in Book 118, page 403, said registry, J. B. Allen, Sheriff of Bladen County, purported to convey to Bladen County, its successors and assigns, land in Turnbull Township described therein as follows: "125 acres, more or less, A. P. Smith land; being all of the land owned and listed for taxation in the years 1938 through 1944 by R. E. Edwards in said Township, County and state, and being more particularly described in a deed dated the 18th day of September, 1937, from M. M. Sandy, et ux, *to R. E. Edwards, et ux,* and recorded in Book 100 at page 160, Registry of Bladen County." (Our italics) This deed recites that the sheriff, pursuant to said judgment and execution, sold the real estate therein described on April 7, 1947, and that Bladen County became the last and highest bidder at its bid of $253.42.

By deed dated May 5, 1947, recorded in Book 118, page 352, said registry, the County of Bladen, a body corporate, purported to convey to W. P. Smith, his heirs and assigns, the subject property. The description in this deed consists of that, quoted above, appearing in the sheriff's deed to Bladen County, *and in addition thereto* the more particular description appearing in the deed dated September 18, 1937, from M. M. Sandy and wife, Ethel Sandy, to R. E. Edwards and wife, Annie Belle Edwards, the latter being the description of the subject property set forth in the complaint.

By warranty deed dated March 5, 1956, recorded in Book 133, page 186, said registry, W. P. Smith (single) purported to convey to Floyd J. Arnold and wife, Mary N. Arnold, defendants herein, their heirs and assigns, 1156 acres, more or less, described therein by metes and bounds as a single tract, of which approximately 346 acres is located in Beaverdam Township, Cumberland County, and the remainder is located in Turnbull Township, Bladen County. It was stipulated that the subject property is within the outer boundaries of the 1156-acre tract described in said deed.

Evidence was offered by defendants for the purpose of showing adverse possession by W. P. Smith and later by defendants Arnold.

Defendants offered evidence that the property was on the Tax Books of Bladen County "as 125 acres A. P. Smith lands' for the years 1939-1946, inclusive, in the name of R. E. Edwards, Roseboro, N. C., but that R. E. Edwards did not pay the taxes or any part thereof; that the taxes through 1946 were paid out of the proceeds of the sale in 1947 to W. P. Smith; and that the subject property was listed thereafter and the taxes thereon paid by W. P. Smith or Floyd J. Arnold.

Plaintiffs offered no further evidence. No issues were tendered or submitted.

The case on appeal shows: At the close of the defendants' evidence, *plaintiffs* moved for a directed verdict in their favor. Motion denied. Plaintiffs excepted. At the close of all the evidence, *defendants* moved for judgment of nonsuit on the ground that plaintiffs' action was barred by G.S. 1-52(10). Motion allowed as to plaintiff R. E. Edwards and he excepted. Motion denied as to plaintiff Annie Belle Edwards and defendants excepted.

The judgment recites that plaintiffs renewed "said motion" at the close of *all the evidence;* that the court then intimated plaintiffs' motion would be allowed unless the court was convinced that G.S. 105-392 was unconstitutional; and that, by consent, the entry of appropriate judgment was deferred. The judgment discloses that the court reached the conclusion that G.S. 105-392 was constitutional and valid "insofar as the interest of R. E. Edwards is concerned," but that, as to the interest of Annie Belle Edwards, said statute is unconstitutional as violative of Article 1, Section 17, of the Constitution of North Carolina, and, as to her, the tax foreclosure proceeding and the sale thereunder are void.

The judgment contains these adjudications, viz.:

"It is therefore ordered, adjudged and decreed that the action be dismissed as to the cause of action of the plaintiff R. E. Edwards, and that he has no interest in said land, and that the defendants' title to his interest in said land is valid and the said R. E. Edwards is barred from any right, claim or interest in the same.

"It is further ordered, adjudged and decreed that as to the interest of the plaintiff Annabel *(sic)* Edwards in said land, she is not barred by the sale of said land under execution and that she holds her interest in the same unaffected by said sale and the defendants are not the owners of her interest in said land.

"It is ordered that the plaintiff R. E. Edwards pay the cost of this action."

Plaintiff R. E. Edwards and defendants excepted and appealed, assigning as error the respective adverse rulings and adjudications.

Clark, Clark & Grady for plaintiffs.
Leon D. Smith and Hester & Hester for defendants.

BOBBITT, J. The judgment recites that plaintiffs' motion "for judgment of nonsuit on defendants' cross action" was denied at the close of defendants' evidence but allowed "at the close of all the evidence." Affirmative defenses, not a cross action, were pleaded by defendants. In view of the quoted adjudications, this recital in the judgment would seem only to reflect a ruling by the court that defendants' evidence was not sufficient to require submission of an issue relating to defendants' alleged adverse possession under color of title for more than seven years. Since, for reasons stated below, the cause is remanded for trial *de novo*, we do not discuss defendants' contention that such issue should have been submitted.

Now we consider the legal effect, if any, of the tax foreclosure proceeding, the principal subject of controversy.

G.S. 105-392(a) provides, in part, that the certificate of the tax collector, when docketed in the manner prescribed "shall constitute a valid judgment against said property, with the priority hereinbefore provided for tax liens, which said judgment, except as herein expressly provided, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, . . ." G.S. 105-392(c) provides, in part, that "execution shall be issued . . . in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; . . ."

According to the deed introduced by plaintiffs, the title to the subject property vested in R. E. Edwards and wife, Annie Belle Edwards, as tenants by the entirety. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566, and *Johnson v. Leavitt*, 188 N.C. 682, 125 S.E. 490, where the distinctive properties and incidents of an estate by the entirety are set forth.

In such estate, the husband and wife are deemed to be seized of the entirety, *per tout et non per my*. The entire estate is a unit. Neith-

er husband nor wife owns a *divisible* part. *Davis v. Bass, supra; Gray v. Bailey,* 117 N.C. 439, 23 S.E. 318.

"Land held by husband and wife as tenants by the entirety are not subject to levy under execution on a judgment rendered against either the husband or the wife alone, nor can the interest of either be thus sold, because the right of survivorship is merely an incident of the estate, and does not constitute a remainder, either vested or contingent, . . ." *Johnson v. Leavitt, supra.* "The possibility that the husband might survive his wife and thus become the sole owner of the property, was not the subject of sale or lien. This did not constitute or create any present estate, legal or equitable, any more than a contingent remainder or any other mere prospective possibility." *Bruce v. Nicholson,* 109 N.C. 202, 13 S.E. 790.

"During the wife's life the husband has no such interest as is subject to levy and sale to satisfy a judgment against him." *Hood v. Mercer,* 150 N.C. 699, 64 S.E. 897; *Davis v. Bass, supra; Winchester-Simmons Co. v. Cutler,* 199 N.C. 709, 155 S.E. 611; *Air Conditioning Co. v. Douglass,* 241 N.C 170. 84 S.E. 2d 828.

In *Johnson v. Leavitt, supra,* a deed executed by husband and wife, tendered as compliance with their contract to sell their estate by the entirety, was held sufficient to convey a good title free and clear of judgment liens against the husband.

True, a *joint* judgment against both husband and wife constitutes a lien on their estate by the entirety, *Finch v. Cecil,* 170 N.C. 72, 86 S.E. 992, and their land may be sold under execution to satisfy such judgment, *Martin v. Lewis,* 187 N.C. 473, 122 S.E. 180. See *Distributing Co. v. Carraway,* 189 N.C. 420, 127 S.E. 427.

Too, a conveyance by one spouse to another of land owned by them as tenants by the entirety, when the requirements of the law are complied with in the execution thereof, is valid *as an estoppel. Jones v. Lewis,* 243 N.C. 259, 262, 90 S.E. 2d 547, and cases cited. In this connection, see *Davis v. Bass, supra,* p. 206, and cases cited.

Based upon the authorities cited, it must be held that R. E. Edwards had no (divisible) interest in the subject property that was subject to sale under judgment and execution against him alone. Hence, the sheriff's purported sale was void. While his deed to Bladen County purported to convey *the property* described therein, his authority to convey was limited to that conferred upon him by the judgment, the execution and by his own advertisement and sale.

Persons who assert title under a sheriff's deed made pursuant to a tax foreclosure proceeding under G.S. 105-392 are charged with notice of what appears in the records comprising such proceeding. *Wil-*

mington v. Merrick, 234 N.C. 46, 65 S.E. 2d 373; *Boone v. Sparrow,* 235 N.C. 396, 403-404, 70 S.E. 2d 204.

Defendants pleaded the limitations prescribed in G.S. 105-393 and in G.S. 1-52(10) in bar of plaintiffs' action. We need not determine whether either of these statutes would apply if the sheriff had advertised and sold *the property* described in his advertisement. Suffice to say, they do not apply when it appears on the face of the record that all he purported to sell was the right, title and interest of R. E. Edwards therein. Neither Bladen County nor subsequent grantees could succeed to R. E. Edwards' status in respect of an estate by the entirety. As to G.S. 1-52(10), as applicable to an action to remove a cloud from a title, see *Price v. Slagle,* 189 N.C. 757, 765, 128 S.E. 161, and cases cited; *Bailey v. Howell,* 209 N.C. 712, 184 S.E. 476.

Having decided that, upon the evidence presented, the sheriff's deed was void and conveyed no title, we pass, without consideration, whether the procedure followed in the tax foreclosure proceeding complied with G. S. 105-392 and whether G. S. 105-392, in the respect challenged, is unconstitutional. However, it is noted that Annie Belle Edwards was not a party to the tax foreclosure proceeding nor does it appear that she was notified concerning any feature thereof. It is noted further: Nothing in the tax foreclosure proceeding indicates a prior sale of the tax lien for any of the years 1938-1944, inclusive, under G. S. 105-387. See G. S. 105-392(a) which authorizes the docketing of certificate (judgment) within prescribed time "following the collector's sale of certificates"; also, see *Boone v. Sparrow, supra,* Compare G. S. 105-391(c).

Plaintiffs do not attack the validity of the tax liens. Questions relating to the rights of defendants arising from the payment of taxes constituting liens on the subject property, for which plaintiffs were liable, are not presented by the pleadings or by this appeal.

Upon the evidence presented, we are of opinion, and so hold, that plaintiff Annie Belle Edwards is not barred by the tax foreclosure proceeding or otherwise; and, as to her, the court properly denied defendants' motion for judgment of nonsuit.

Upon the evidence presented, we are of opinion, and so hold, that plaintiff R. E. Edwards is not barred by the tax foreclosure proceeding or otherwise; and, as to him, the court erred in ruling, in effect, that defendants were entitled to judgment of nonsuit.

The facts were not stipulated or otherwise established. The judgment is predicated on evidence rather than on findings. There was no factual basis for a final definitive adjudication of the ultimate rights of the respective parties. It seems appropriate, therefore, that

the judgment be vacated and the cause remanded for trial *de novo* consistent with the law as stated herein.

Error and remanded.

A. B. BRASWELL, JR., AND WIFE, PEGGY S. BRASWELL, PETITIONERS V. STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 12 June, 1959.)

1. Water and Water Courses § 2c—

The right to recover for the wrongful diversion of the waters of a stream is not dependent upon negligence.

2. Eminent Domain § 1—

Our Constitution guarantees payment of compensation for property taken by sovereign authority. Art. I, s. 17.

3. Water and Water Courses § 2c—

The right of a lower proprietor to have water drain according to terrain and natural flow is a property right in the nature of an easement appurtenant.

4. Same: Eminent Domain § 2—

Diversion of the natural flow and drainage of streams and surface waters incident to the construction of a highway, resulting in the periodic flooding of the lands of a proprietor, is a "taking" of property for which just compensation must be paid.

5. Eminent Domain § 9—

Where the evidence discloses that the Highway Commission, incident to the construction of a new highway, diverted the flow of a stream and altered the drainage of the land, conflicting evidence as to whether such diversion resulted in the periodic flooding of petitioners' land or whether such flooding was the result of excessive rains, etc. takes the issue to the jury.

6. Water and Water Courses § 2c—

The charge of the Court to the effect that the upper proprietor may increase or accelerate the natural flow of water but cannot divert it and cause it to flow upon the lands of the lower proprietor in a different manner or in a different place, and that the damages recoverable by the lower proprietor are limited to those proximately caused by such wrongful diversion, *held* not prejudicial.

APPEAL by respondent from *Craven, S. J.*, December 1958 Special Civil Term of MECKLENBURG.

Petitioners seek compensation for the alleged diversion of water resulting in damage to their home by the construction of U. S. High-

way 29 bypassing Charlotte. Commissioners were appointed by the clerk. They assessed damages. Judgment was entered awarding damages in conformity with the report. Respondent appealed to the Superior Court in term. There an amended petition and answer were filed. The court submitted the controversy to a jury on these issues:

"1. Are the petitioners the owners of house and lots described in the amended petition? Answer:.....

"2. Did respondent take an easement of flooding on or across the property of petitioners, as alleged in the amended petition? Answer: .....

"3. What sum, if any, are petitioners entitled to recover of respondent as just compensation for such easement? Answer:....."

The jury answered the first two issues in the affirmative and fixed the amount of petitioners' damage. Thereupon the court entered judgment declaring respondent the owner of an easement entitling it to flood petitioners' property as there specifically described. The judgment also adjudged defendant liable for the amount fixed by the jury as compensation for the easement. Respondent appealed.

Sedberry Sanders & Walker for petitioner appellees.

Attorney General Seawell and Assistant Attorney General Wooten, Harrison Lewis, and McDougle, Ervin, Horack & Snepp for respondent, appellant.

RODMAN, J. Respondent, by demurrer filed here and by exceptions duly noted in the record, presents for determination these questions: (1) Does the amended petition state a cause of action; (2) if so, does the evidence require submission of issues to the jury; and (3) was prejudicial error committed during the trial entitling respondent to a *venire de novo?*

An answer to the first question is not only essential, but the reasons which are the basis for the answer will materially simplify the solution of the remaining questions. The answer is, of course, to be found by looking at the facts alleged. For that purpose we make this summary of the amended petition:

(1) Petitioners own and occupy as their home lot 25 and a part of lot 24, Block 6, in Beechwood Acres, a residential subdivision adjacent to Charlotte. Their dwelling was constructed and occupied prior to 1956. (2) In the spring of 1956 respondent began construction of a road through Beechwood Acres to form a bypass around Charlotte for U. S. Highway 29. The right of way for the bypass is 260 feet wide and lies in a general east-west direction. (3) Prior to road con-

struction Beechwood Acres was drained by two branches which united to form a creek. Branch 1 flowed in a southerly direction, Branch 2 in an easterly direction. These branches united at the edge of the fill constructed by respondent. The creek flowed in a southeasterly direction under a bridge at Beechwood Road to and through a culvert under the P & N Railroad. This bypass crosses over P & N Railroad north of the bed of the creek. (4) The divide for waters in Beechwood Acres, and land to the west of Beechwood Acres was to the east of Tuckaseegee Road. This watershed was cut by respondent and water from another drainage basin diverted into Branch 2, which branch was enlarged, relocated, straightened, and in part paved. The petition specifically alleges: "That respondent has caused a diversion of water in the construction of said new highway in certain particulars . . ." This is followed with six detailed and specific allegations of diversion. (5) Petitioners' property fronts on Glenwood Road and runs back to the creek. It is situate about 250 feet from the bypass. (6) The diversion of the waters has caused the creek to overflow its banks and flood petitioners' property. It will continue subject to the flooding in periods of heavy rain. The diversion and resulting damage constituted a taking entitling petitioners to compensation.

The demurrer admits respondent in the construction of the bypass has, as alleged, diverted water resulting in damage to petitioners.

Counsel for respondents recognize the general rule that liability exists for damage resulting from a diversion of water. They quote from *Hocutt v. R. R.*, 124 N.C. 214: "It is now well settled that neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert." They then frankly say: "It is admitted that if the 'diversion equals liability' rule is applicable to the State Highway Commission, then the amended petition states a cause of action."

Their position is that liability cannot be imposed on a governmental agency for damages resulting from road construction unless there be negligence in the design or manner in which the work is done, and since the petition does not allege negligence in planning the road nor in the actual construction, the petition fails to state a cause of action. As authority for their position they cite *Yowmans v. Hendersonville*, 175 N.C. 574, 96 S.E. 45, and *Eller v. Greensboro*, 190 N.C. 715, 130 S.E. 851.

It is true that language is to be found in those cases which may seem to support respondent's position, but when the factual situation dealt with in those cases is understood, it is readily apparent that

the conclusions reached in those cases have no application to the factual situation here presented.

First it may be noted that those cases dealt with the improvement of an existing road. Here there was no road prior to 1956. But more important, those cases dealt with the duties and obligations of upper and lower proprietors with respect to the disposition of waters falling within the watershed.

That negligence need not be alleged to create liability for a diversion is, we think, apparent from what is said in the *Yowmans* case, *supra:* "In further consideration of the facts in evidence, it is very generally held here and elsewhere that while municipal authorities may pave and grade their streets and are not ordinarily liable for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie. . . . And, under appropriate instructions applied to the facts and principles of law heretofore stated, the question of defendant's responsibility should be made to depend chiefly on whether, having gathered and concentrated the surface water into artificial drains or sewers, it turned same on plaintiff's property in such manner and such volume that the injuries complained of were likely to result, and did result, under and from the conditions presented. If so, the issue should be answered 'Yes.'"

Our Constitution, Art. I, s. 17, guarantees payment of compensation for property taken by sovereign authority. *Eller v. Board of Education*, 242 N.C. 584, 89 S.E. 2d 144; *Sale v. Highway Com.*, 242 N.C. 612, 89 S.E. 2d 290; *Raleigh v. Edwards*, 235 N.C. 671, 71 S.E. 2d 396; *McKinney v. Deneen*, 231 N.C. 540, 58 S.E. 2d 107.

If the right to have water flow in the direction provided by nature is a property right, it follows that the owner of property is protected by the constitutional guarantee and must be compensated when he has been damaged by the destruction of that right.

Repeated decisions of this Court have clearly indicated if not expressly declared that the benefits accruing to property by adhering to nature and permitting water to drain according to the terrain and natural flow is a property right. *Eller v. Board of Education, supra; Johnson v. Winston-Salem*, 239 N.C. 697, 81 S.E. 2d 153;

Phillips v. Chesson, 231 N.C. 566, 58 S.E. 2d 343; *McKinney v. Deneen, supra; Mizzell v. McGowan*, 120 N. C. 134.

With reference to a similar situation, it is said in *Beach v. R. R.*, 120 N.C. 498: "The interest and convenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. Therefore, a lump sum is recoverable, at the demand of either party, in consideration of which the defendant acquires the *right* to discharge its ditches upon plaintiff's land. *This is nothing more than an easement appurtenant to defendant's right of way.*" (Emphasis supplied.)

Easements are interests in land. *Reed v. Elmore*, 246 N.C. 221, 98 S.E. 2d 360; *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541; *Sanders v. Smithfield*, 221 N.C. 166, 19 S.E. 2d 630; *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697.

Chief Justice Hughes, speaking with reference to a similar factual situation, said, in *Jacobs v. U. S.*, 290 U.S. 13, 78 L. Ed. 142: "A servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes. 45 F. (2d) p. 37, 63 F. (2d) p. 327. There was thus a partial taking of the lands for which the Government was bound to make compensation under the Fifth Amendment."

The rule as stated has been uniformly applied in other jurisdictions. As illustrative, see *Levene v. City of Salem*, 229 P. 2d 255 (Ore.); *City of Portsmouth v. Weiss*, 133 S.E. 781 (Va.); *Rau v. Wilden Acres*, 103 A. 2d 422 (Pa.); *Armbruster v. Stanton-Pilger Drainage District*, 86 N.W. 2d 56 (Neb.); *Panama City v. York*, 26 So. 2d 184 (Fla.); *White v. City of Santa Monica*, 299 P. 819 (Cal.); *O'Brien v. City of St. Paul*, 25 Minn. 331; *Elser v. Village of Gross Point*, 79 N.E. 27 (Ill.); *Nevins v. City of Peoria*, 41 Ill. 502; 38 Am. Jur. 352, 63 C.J.S. 271-3.

The petition states a cause of action. The demurrer is overruled.

That respondent cut through the ridge near Tuckaseegee Road and thereby brought into Beechwood Acres and the creek forming a boundary of petitioners' property water which had never flowed in that direction prior to the construction of the road is not controverted. It is established by witnesses for both petitioners and respondent.

Witnesses for respondent fixed the area from which the water is so diverted as approximating three acres and the quantity of water so diverted as small and insufficient to cause damage. Petitioners do not concede the accuracy of acreage or quantity diverted as asserted by respondent's witnesses. Their testimony is fairly subject to the

interpretation that the water admittedly diverted was largely responsible for the damage.

In addition to the admitted diversion from the west side there is evidence that water falling on the northern portion of the development drained eastwardly down Beachwood Road and into the creek below petitioners' home. The highway is on a fill 30-40 feet high where it passes petitioners' home. This fill divided what was Beechwood Road into two distinct parts, preventing the water from following its natural flow. To take care of the water from the north formerly flowing along Beechwood Road, respondent cut a ditch on the north side of its embankment and into Branch 1 above petitioners' home. Petitioners claim this diversion materially added to their damage.

Sharp disagreement exists with respect to the situation where the bypass crosses by overpass the P & N Railroad. Respondent's evidence tends to establish its work drained water from some 30 acres away from Beechwood Acres and petitioners' property and as a result petitioners are less likely to suffer from floods than they would if the road had not been built.

Petitioners testified their property had never been flooded prior to 1956 when the construction work was started, although the creek had several times run bank full. Between the completion of the fill and the trial in December 1958 petitioners' property had been flooded nineteen times, the water, on one occasion, rising to a height of four feet.

Respondent countered by showing an abnormal number of heavy rains during that period. Between 1 August 1957 and 1 August 1958 the rainfall in Charlotte exceeded that for the preceding twelve months by 9.21 inches and exceeded the average for the preceding five years by 26.9%.

Petitioners' testimony, if true, established a diversion resulting in damage. What the truth was upon the conflicting testimony was a question for the jury.

The motion to nonsuit was properly overruled.

In the charge the court stated: ". . . the theory of this case as pleaded in petitioners' amended petition is that of diversion." He followed that statement by a correct definition of diversion. Then he told the jury: "I charge you that the owner or occupant of the higher lands may increase the natural flow of water and may accelerate it but cannot divert the water and cause it to flow upon the lands of the lower owner in a different manner or in a different place from which it would naturally go." The quoted portion is assigned as error. It is a correct statement of law applicable to the facts of this case.

Phillips v. Chesson, supra; Cardwell v. R. R., 171 N.C. 365, 88 S.E. 495; *Brown v. R. R.*, 165 N.C. 392, 81 S.E. 450; *Hooker v. R. R.*, 156 N.C. 155, 72 S.E 210; *Barcliff v R. R.*, 168 N.C. 268, 84 S.E. 290; *Rice v. R. R.*, 130 N.C. 375; *Hocutt v. R.R., supra.*

The court further charged that the jury, to answer the second issue in the affirmative, would have to find not only the diversion as claimed but would have to find that such diversion was the proximate cause of petitioners' damage, and only to the extent the flooding was proximately caused by respondent would there be a taking for which it could be required to pay compensation.

The court's definition of taking requiring payment of compensation is taken from 18 Am. Jur. 756 and is quoted as correctly stating the law in *Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817.

Each of the exceptions to the charge have been examined; but when considered as a whole and not in disconnected clauses and sentences, we have not found error of which respondent can fairly complain.

No Error.

STATE v. Z. R. BISSETTE.

(Filed 12 June, 1959.)

1. Constitutional Law § 28—

A valid bill of indictment is required as an essential of jurisdiction in all prosecutions for crime originating in the Superior Court. Constitution, Art. I, sec. 12.

2. Indictment and Warrant § 9—

An indictment must charge the offense with certainty so as to identify the offense, protect the accused from being twice put in jeopardy for the same offense, enable the accused to prepare for trial, and support judgment upon conviction or plea, and it is required that the indictment state the essential facts and not mere conclusions.

3. Agriculture § 9½—

An indictment under G.S. 106-283 charging the sale or offering for sale seed not labeled in accordance with G.S. 106-281 should allege the person to whom defendant sold or offered to sell seed not properly labeled, or that the purchaser was in fact unknown, the particulars in which the label failed to meet the statutory requirements, and where and how the seed were exposed to sale.

4. Same—

An indictment under G.S. 106-283 charging that defendant sold or offered for sale tobacco seed having a false or misleading label should allege

the person to whom the seed were sold or offered for sale or that the purchaser was in fact unknown, and the intent to defraud.

PARKER, J., dissenting.

APPEAL by defendant from *Crissman, J.*, December 1958 Term of ROCKINGHAM.

The grand jury at the October 1958 Term returned as a true bill the following:

"The Jurors for the State upon their oath present, That Z. R. Bissette, late of the County of Rockingham, on or about Dec., 1956 and/or Jan., in the year of our Lord one thousand nine hundred and 57, with force and arms, at and in the County aforesaid, First count—Did unlawfully and willfully sell, offer, and expose for sale tobacco seed not labelled in accordance with N. C. General Statutes 106-281;

"Second Count—Did unlawfully and willfully sell, offer, and expose for sale tobacco seed having a false and misleading label in that said label represented the seed as being Bissette's 711 when in fact said seed was not Bissette's 711 tobacco seed.

against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant in apt time moved to quash the bill for failure to state facts sufficient to charge defendant with the commission of a crime.

This motion was overruled. Thereupon he filed a separate motion to quash the second count. This motion was likewise overruled. Defendant, having excepted to the refusal to allow his motions, pleaded not guilty. The jury returned a verdict of not guilty on the first count and guilty on the second count. Defendant made motions to set aside the verdict of guilty and in arrest of judgment. These motions were denied. Prayer for judgment was continued to the December Term 1958, at which time a fine was imposed, and defendant appealed.

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

Gwyn & Gwyn and Robert A. Farris for defendant, appellant.

RODMAN, J. Art. I, sec. 12 of our Constitution requires a bill of indictment, unless waived, for all criminal actions originating in the Superior Court, and a valid bill is necessary to vest the court with authority to determine the question of guilt or innocence. *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 243; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

What are the essentials for a valid bill of indictment? *Parker, J.,*

gave a clear and concise answer to this question in *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. He said: "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 provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. (Cases cited.)" The essentials have been restated in equally clear and emphatic language in several recent cases. *S. v. Walker,* 249 N.C. 35; *S. v. Banks,* 247 N.C. 745, 102 S.E. 2d 245; *S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497; *S. v. Helms, supra; S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Burton,* 243 N.C. 277, 90 S.E. 2d 390; *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d 654.

Mere conclusions of the pleader are not sufficient. A plain and concise statement of facts is required by statute in both civil (G.S. 1-122) and criminal (G.S. 15-153) actions.

When this rule is applied to the bill here considered, is it sufficient to meet the test? The answer can only be found by looking at the statutes defining the asserted criminal conduct.

G.S. 106-283 declares it unlawful for any person to sell or offer for sale agricultural seed for seeding purposes: "(3) Not labeled in accordance with the provisions of s. 106-281, or having a false or misleading label, or having seed analysis tags attached to the containers of seed bearing thereon a liability or nonwarranty clause: Provided, that the provisions of s. 106-281 shall not apply to seed being sold by a grower to a dealer, or to seed consigned to or in storage in a seed cleaning or processing establishment for cleaning or processing. . . ."

Agricultural seed sold or exposed for sale are required to be labeled. G. S. 106-281. The provisions of this section pertinent to tobacco seed provide: "(1) The label requirements for peanuts, cotton and tobacco seed shall be limited to: (a) Lot number or other identification. (b) Origin, if known; if unknown, so stated. (c) Commonly accepted name of kind and variety. (d) Percentage of germination with month and year of test. (e) Name and address of person who labeled said seed or who sells, offers, or exposes said seed for sale."

"(7) No person shall be subject to the penalties of this article for having sold, offered, or exposed for sale in this State any agricultural

or vegetable seeds which were incorrectly labeled or represented as to origin, kind and variety, when such seeds cannot be identified by examination thereof, unless he has failed to obtain an invoice or grower's declaration giving origin, kind and variety, and to take such other precautions as may be necessary to insure the identity to be that stated."

The first count merely alleges a sale or offer to sell or exposure for sale of tobacco seed not labeled as required by G.S. 106-281. It does not tell (a) to whom the seed were sold or offered for sale or where or how exposed for sale, or (b) the manner in which the label failed to comply with statutory requirements. Was the asserted failure to label as required by the statute due to (a) absence of the name and address of the person labeling, or (b) an incorrect statement of germination or absence of a statement of germination, or (c) an incorrect statement as to date tested for germination, or (d) an incorrect statement of the variety of seed in the container?

Looking at the evidence and not at the indictment, it appears that defendant, a grower, sold to Penn Hardware Company, a seed dealer, tobacco seed which it in turn sold to tobacco farmers. Some of the seed so sold produced tobacco of a discount variety, 244, instead of 711 as labeled. Different varieties of tobacco cannot be determined by an examination of the seed; only the resulting plant will show the difference. Conviction was sought on the first count because the label named the seed as variety 711 when in fact it was 244 or a mixture with 244 predominating. There is no suggestion that the label failed in any other way to comply with the requirements of G.S. 106-281. The court charged if the defendant willfully failed to take precautions necessary to keep the seed up to the standard stated to return a verdict of guilty on this count. Notwithstanding this direction the jury returned a verdict of not guilty.

The second count charges a sale or exposure for sale of seed having a false and misleading label in that the label stated the seed to be 711 "when in fact said seed was not Bissette's 711 tobacco seed." The evidence offered to support this count is the same evidence offered to support the first count. The jury found defendant guilty—an incongruous result, demonstrating the wisdom of the rule requiring a statement of facts and not mere conclusions.

The bill of indictment makes the sale of the incorrectly labeled seed the basis for the prosecution. Where a sale is prohibited, it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the sale was made or that his name is unknown, unless some statute eliminates that requirement. The proof

must, of course, conform to the allegations and establish a sale to the named person or that the purchaser was in fact unknown. *S. v. Tisdale,* 145 N.C. 422; *S. v. Dowdy,* 145 N.C. 432; *S. v. Miller,* 93 N.C. 511; *S. v. Trice,* 88 N.C 627; *S. v. Pickens,* 79 N.C. 652; *S. v. Stamey,* 71 N.C. 202; *S. v. Faucett,* 20 N.C. 239; *S. v. Blythe,* 18 N.C. 199.

King v. State, 286 S.W. 2d 422 (Tex.) is the only case we have found which is based on the sale of falsely labeled agricultural seed. The court there held the bill fatally defective for failure to name the purchaser. True, the court there points out their statutes provide "To charge an unlawful sale, it is necessary to name the purchaser"; but they also refer to earlier decisions which recognize the rule of the common law.

It is not now necessary to allege the name of the purchaser of intoxicating liquors illegally sold. G.S. 18-17.

G.S. 15-151 likewise modifies the common law. It is not now necessary to name the injured party where prosecution is based on forgery or other fraud. It is, however, necessary to allege and prove the evil intent when fraud is the foundation for the prosecution. *S. v. Phillips,* 228 N.C. 446, 45 S.E. 2d 535; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Horton,* 199 N.C. 771, 155 S.E. 866; *S. v. Reed,* 196 N.C. 357, 145 S.E. 691; *S. v. Edwards,* 190 N.C. 322, 130 S.E. 10; *S. v. Farmer,* 104 N.C. 887.

Defendant stands convicted on the second count. It alleges a sale of seed with a false and misleading label. It does not name a purchaser. It does not charge the incorrect statement of variety appearing on the label was part of a plan to defraud. Intent is ignored.

Defendant has been convicted on a bill which fails to state facts constituting a crime. His motion to quash should have been allowed.

Reversed.

PARKER, J., dissenting. G.S. 106-283 provides: "It shall be unlawful: a. For any person within this State to sell, offer, or expose for sale any agricultural or vegetable seed for seeding purposes . . . (3) . . . having a false or misleading label."

The bill of indictment with two counts is set forth in the majority opinion. The jury acquitted on the first count, and convicted on the second. Therefore, we are not concerned with the first count. The majority opinion holds that the second count in the bill should be quashed for two reasons: One. It does not allege a purchaser. Two. It does not allege a fraudulent intent.

The language of the statute creating the offense charged in the second count does not require allegation or proof of a fraudulent in-

tent to make out the offense prohibited. If the General Assembly had intended to make fraudulent intent as essential element of the offense, it would have said so. For this Court to write such a requirement into the language of the statute is judicial legislation.

The majority opinion states that the second count is defective because it does not name a purchaser, and cites in support of the statement some of our earlier cases, five of which involve the form of an indictment charging the sale of intoxicating liquor prior to G.S. 18-17, one of which holds that where an indictment under the Acts of 1885, Ch. 175, §28, charges a sale by a drummer of goods, wares and merchandise to have been to two as partners and the proof is a sale to one only the variance is fatal, and another is an indictment for conspiracy in three counts — first for conspiring to commit rape upon F, second the like offense upon E, and third the same upon "certain females to the jurors unknown," and another deals with the form of an indictment for disposing of mortgaged property.

In an indictment for the unlawful sale of intoxicating liquor, the authorities, in the absence of a statute upon the subject, are so entirely divided on the question as to whether or not the name of the person to whom the sale was made should be alleged that neither side can be said to be supported by a general current of judicial opinion. Black on Intoxicating Liquors, §464; 33 C.J., Intoxicating Liquors, p. 724 — many cases are cited in both text books —; 48 C.J.S., Intoxicating Liquors, p. 448; 30 Am. Jur., Intoxicating Liquors, §316.

The majority opinion states: "Looking at the evidence and not at the indictment, it appears that defendant, a grower, sold to Penn Hardware Company, a seed dealer, tobacco seed which it in turn sold to tobacco farmers."

W. K. Glenn, a witness for the State, testified: "My partners and I, trading as Penn's Hardware Company, have had an arrangement with the defendant, Z. R. Bissette, under which we were to sell Bissette's seeds on consignment. We have sold the seeds on this basis either eight or nine years. We sold some Bissette's 711 seeds on or about December of 1956 and January 1957." Later, on redirect examination, Glenn testified: "Bissette's 711 seed sold for $5.00 per ounce retail. The seed was left to us to sell what we could and return what wasn't sold. We paid Mr. Bissette for what was sold and we returned any unsold seed." According to Glenn's testimony, the defendant shipped Penn's Hardware Company on 3 December 1956 thirty-two ounces of tobacco seed labelled Bissette's 711, on 24 December 1956 thirty-two ounces of tobacco seed with a similar

label, and on 7 January 1957 sixteen ounces of tobacco seed with a similar label.

I am aware of the rule that the Court in ruling on a motion to quash an indictment is not permitted to consider extraneous evidence, but is restricted entirely to the face of the indictment. *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. In order to quash an indictment it must appear from the face of the indictment that no crime is charged, *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Gardner,* 219 N.C. 331, 13 S.E. 2d 529, or that the indictment is otherwise so defective that it will not support a judgment, *S. v. Francis,* 157 N.C. 612, 72 S.E. 1041; *S. v. Taylor,* 172 N.C. 892, 90 S.E. 294; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Cochran, supra.*

The second count in the indictment charges more than a sale. Conceding for the sake of argument that when a sale of tobacco seed is charged the name of the buyer must be alleged, I know of no law, when an article is unlawfully offered and exposed for sale, that requires the indictment to allege the names of prospective purchasers. The second count in the indictment charges also the offense of offering and exposing for sale tobacco seed having a false and misleading label, etc., in the language of the statute prohibiting the offense.

As a general rule, an indictment is sufficient when it charges the offense in the language of the statute. *S. v. Loesch,* 237 N.C. 611, 75 S.E. 2d 654; *S. v. Gregory, supra; S. v. Gibson,* 221 N.C. 252, 20 S. E. 2d 51; *S. v. George,* 93 N. C. 567; *S. v. Stanton,* 23 N. C. 424. There are a few exceptions to the rule, *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, but, in my opinion, they do not embrace that part of the second count in the indictment which charges the defendant "did unlawfully and willfully offer and expose for sale tobacco seed having a false and misleading label in that said label represented the seed as being Bissette's 711 when in fact said seed was not Bissette's 711 tobacco seed."

I vote to overrule the motion to quash the second count in the indictment.

T. T. WISEMAN AND WIFE, WILLIE M. WISEMAN v. TOMRICH CONSTRUCTION COMPANY.

(Filed 12 June, 1959.)

1. Water and Water Courses § 2c—

A person who wrongfully diverts or collects and discharges surface water on the lands of a lower proprietor is liable for the damages resulting therefrom.

2. Same: Nuisance § 4—

Where a private corporation, in developing a residential area, lays out streets and drains so as to collect and discharge the surface waters through a culvert under a street upon the lands of an adjacent owner, and the streets are thereafter dedicated to and accepted by a municipality, the interest of the public precludes abatement.

3. Same: Trespass § 1g—

Where a private development company collects and discharges surface waters through a drain under a street the continuing damage to the land of the lower proprietor results from the single original wrong in the construction of the drain and is not a continuing trespass.

4. Same: Easements § 5— Where condition cannot be abated, permanent damages may be recovered for wrongful diversion of water by private company.

Where a private development company collects and discharges surface waters through a drain under a street and the street is later dedicated to and accepted by a municipality, the municipality, by accepting the dedication, does not participate in the original wrong and, the interest of the public being of such an exigent nature that the right of abatement may not be granted, the lower proprietor is entitled to recover permanent damages against the private corporation. The fact that the work was done under the supervision of the city in order to induce the later inclusion of the development within the city limits, is not relevant to the liability of the parties.

5. Appeal and Error § 35—

When the charge is not in the record it will be presumed that the jury was properly instructed as to every principle of law applicable to the facts.

APPEAL by defendant from *McKinnon, J.*, November Civil Term, 1958, of DURHAM.

Plaintiffs instituted this action January 23, 1957, alleging defendant had wrongfully diverted the natural flow of surface waters on its land, causing it to empty upon and damage plaintiffs' adjoining land, for which plaintiffs sought a permanent injunction, or, if not entitled to injunctive relief, permanent damages.

In May, 1955, defendant, a private corporation, purchased a rugged and undeveloped 60-acre tract of land for development as a residen-

tial subdivision to be known as Glendale Heights Extension. The 60-acre tract, except for a comparatively small portion along the southern boundary, was then beyond the city limits of Durham.

Plaintiffs purchased in 1946 and own an 82-acre tract of land lying east of and adjoining said 60-acre tract.

Evidence offered by plaintiff tended to show that defendant, in its development of Glendale Heights Extension, laid out, graded and paved streets, putting in curbs and gutters, and laid out and graded lots, built residences on certain of the lots and made sales to present occupants, and constructed an underground drainage system; and that the surface water collected in said drainage system emptied into a 54-inch pipe constructed by defendant under Lorain Avenue and, at the end of this 54-inch pipe, was discharged upon and damaged plaintiffs' land.

Evidence for defendant tended to show: On November 5, 1956, an additional portion of the 60-acre tract, including the portion of Lorain Avenue where the 54-inch pipe was located, was annexed to and became a part of the City of Durham. Prior to November 5, 1956, defendant had installed the 54-inch pipe in Lorain Avenue. About November, 1957, Lorain Avenue was accepted for maintenance by the City of Durham. On January 1, 1958, the remainder of the 60-acre tract was annexed to and became a part of the City of Durham. The 54-inch pipe was installed under the supervision of the Director of Public Works of the City of Durham.

The land annexed by the City of Durham on November 5, 1956, is shown on a map of "Section One, Glendale Heights Extension," filed by defendant on May 30, 1957, in the office of the Register of Deeds of Durham County, on which defendant certified, *inter alia*, "that all public streets, alleys, easements, and other open spaces so designated upon said plat are hereby dedicated for such use, and that all public and private easements upon said plat are hereby granted for the uses stipulated."

Section 66 of the Charter of the City of Durham, in part, provides: ". . . in the absence of any contracts with said city in relation to the lands used or occupied by it for the purpose of streets, sidewalks, alleys, or other public works of said city, signed by the owner thereof or his agent, it shall be presumed that the said land has been granted to said city by the owner or owners thereof, and said city shall have good right and title thereto, and shall have, hold, and enjoy the same. . . ."

The court submitted, and the jury answered, these issues: "1. Has the plaintiffs' land been damaged by the wrongful act of the defend-

ant? Answer: Yes. 2. In what amount, if any, are the plaintiffs entitled to recover for permanent damage to their land? Answer: $5,000.00."

Thereupon, it was ordered, adjudged and decreed that plaintiffs have and recover of defendant the sum of $5,000.00; that, upon payment thereof, defendant, its successors and assigns, "shall have and are granted a permanent easement upon and over the lands of the plaintiffs for the discharge of surface waters from the existing watershed area which flow through the 54-inch pipe line now located in what is known as Lorain Avenue . . ."; and that the costs of the action be taxed against defendant.

Defendant excepted and appealed, assigning errors.

Bryant, Lipton, Strayhorn & Bryant for plaintiffs, appellees.
Spears, Spears & Powe for defendant, appellant.

BOBBITT, J. Defendant's assignments of error are directed (1) to the admission, over its objection, of testimony relating to the fair market value of plaintiffs' land immediately before and immediately after the installation of the 54-inch pipe; (2) to the submission, over its objection, of said second issue; and (3) to the court's refusal to submit in lieu of said second issue an issue tendered by it, to wit: "If so, in what amount have the plaintiffs been damaged between the time of completion of construction of the storm drain in Lorain Avenue and the time of the acceptance of Loraine Avenue for maintenance and use as a public street by the City of Durham?"

"It is well settled that an action at law for damages will lie against one who wrongfully diverts or collects and discharges surface water on adjoining lands . . ." 56 Am. Jur., Waters § 85; 93 C.J.S., Waters § 127; *Phillips v. Chesson,* 231 N.C. 566, 58 S.E. 2d 343; *Jackson v. Kearns,* 185 N.C. 417, 117 S.E. 345.

If, upon the facts in evidence, plaintiffs were entitled to recover permanent damages, the said testimony was relevant and properly admitted. *Clinard v. Kernersville,* 215 N.C. 745, 752, 3 S.E. 2d 267; *Langley v. Hosiery Mills,* 194 N.C. 644, 140 S.E. 440; *Brown v. Chemical Co.,* 162 N.C. 83, 77 S.E. 1102.

The determinative question is whether defendant, a private corporation, is legally liable to plaintiffs for permanent damages. Defendant says "No," contending its liability is limited to damages sustained by plaintiffs during the period between the completion by defendant of its construction of the 54-inch storm drain in Lorain Avenue and

the acceptance of Lorain Avenue for maintenance and use as a public street by the City of Durham.

No decision, in this jurisdiction or elsewhere, cited or disclosed by our research, involves a closely analogous factual situation. For analysis of decisions obliquely relevant, see Case Comment by Charles P. Rouse, "Damages—Nuisance—Single or Successive Recoveries for Permanent and Continuing Nuisances and Trespasses," 7 N.C.L.R. 464, and "Distinction between Completed and Continuing Invasions of the Landowner's Interest—the 'Permanent Nuisance' Doctrine," McCormick on Damages, § 127.

Our decisions sanction the recovery of permanent damages by a landowner as a matter of right when the defendant, a municipal or other corporation having the power of eminent domain, could acquire by condemnation the right to commit the alleged continuing nuisance or trespass. In such case, permanent damages will be assessed upon demand of either party; and, when such demand is made, the action becomes in effect a condemnation proceeding. *Clinard v. Kernersville, supra,* and cases cited. When the defendant's right to continue the alleged nuisance or trespass is protected by its power of eminent domain, the remedy of abatement is not available to the landowner. *Rhodes v. Durham,* 165 N.C. 679, 81 S.E. 938, and cases cited.

On the other hand, this Court has held that a landowner may not as a matter of right recover permanent damages from a private corporation or individual for the maintenance of a continuing nuisance or trespass. His remedy is to recover in separate and successive actions for damages sustained to the time of the trial. *Phillips v. Chesson, supra,* and cases cited. However, the parties may consent that an issue as to permanent damages be submitted; and in such case the defendant, upon payment of permanent damages so assessed, acquires a permanent right to continue such nuisance or trespass as in condemnation. *Aydlett v. By-Products Co.,* 215 N.C. 700, 2 S.E. 2d 881; *Clinard v. Kernersville, supra.*

With reference to actions against private corporations or individuals, our decisions suggest two reasons for the stated rule: (1) The defendant may voluntarily abate the nuisance, or the nuisance or trespass may be abated or restrained by court action. (2) ". . . the defendant's willingness to abate or remove the cause of damage may be stimulated when repeatedly mulcted in damages by reason of its continued maintenance." *Phillips v. Chesson, supra,* and cases cited; *Ridley v. R. R.,* 118 N.C. 996, 24 S.E. 730.

The factual situations considered by this Court in actions between

private parties where the landowner's remedy in respect of damages was so restricted, may be classified as follows: (1) Actions between adjoining landowners, absent such public interest as may be involved in the continued operation of a manufacturing or similar plant, e.g., *Phillips v. Chesson, supra,* and *Winchester v. Byers,* 196 N.C. 383, 145 S.E. 774. Whether, in the cited cases, the plaintiff was entitled to injunctive relief was not decided. Compare *Wharton v. Manufacturing Co.,* 196 N.C. 719, 146 S.E. 867, where the nuisance was abated prior to trial. (2) Actions based on the defendant's operation of a manufacturing or similar plant in such manner as to pollute the air by the discharge of noxious and offensive fumes and gases, *Webb v. Chemical Co.,* 170 N.C. 662, 87 S.E. 633; *Morrow v. Mills,* 181 N.C. 423, 107 S.E. 445; *Brown v. Chemical Co., supra;* S. c., 165 N.C. 421, 81 S.E. 463; or in such manner as to contaminate a stream by discharging waste materials therein, *Clinard v. Kernersville, supra; Langley v. Hosiery Mills, supra; Webb v. Chemical Co., supra.*

Whether the remedy of abatement was available to plaintiffs prior to defendant's said development of Glendale Heights Extension need not be considered. Suffice to say, after defendant had completed such development, and had constructed houses and sold lots within the subdivision, and had dedicated the streets to public use, and the streets so dedicated had been accepted as public streets by the City of Durham, the rights of individual homeowners and of the public had intervened to such extent that the remedy of abatement was not available to plaintiffs.

These distinctive features of cases of the second class should be noted: Whether the remedy of abatement is available to plaintiff depends upon all circumstances relating to the operation of such plant. *Causby v. Oil Co.,* 244 N.C. 235, 93 S.E. 2d 79; *Webb v. Chemical Co., supra; Duffy v. Meadows,* 131 N.C. 31, 42 S.E. 460. Too, the recurring or intermittent damages flow from the recurring or intermittent operation by defendant of its plant. The underlying idea is that such damages result from successive wrongs for which separate recoveries may be had rather than from a single irremediable wrongful act.

It is stated in 21 A. & E. Enc., "Nuisances," pp. 732-733, that the entire damages, both past and prospective, are recoverable in one action, at the election of the plaintiff, "where the source of injury is permanent in its nature and will continue to be productive of injury, independent of any subsequent wrongful act." While not the basis of decision, this statement is quoted in *Webb v. Chemical Co., supra.*

In *Mast v. Sapp,* 140 N. C. 533, 53 S.E. 350, it was held that defendant's negligence became actionable when the wall of his reservoir gave

way destroying a nearby house and killing the owner-occupant. Whether the intestate's administrator or her heir was entitled to damages for destruction of the house was the question presented. It was held that the recovery was indivisible and that the heir was not entitled to recover unless he established that the wrong occurred after the intestate's death.

In *Mast v. Sapp, supra, Walker, J.*, distinguished cases involving "a nuisance or trespass, which torts are continuing in their nature, the nuisance of today being a substantive cause of action, and not the same with the nuisance of yesterday, and likewise in the case of a continuing trespass." With further reference to such cases, *Walker, J.*, stated: "They are manifestly not like a case where the wrongful act is single and the *tort feasor* has irrevocably done all that he can do, though the unlawful act has not fully spent its force, but as a self-acting agency once put in motion continues to cause damage. The wrong itself is an accomplished fact, which its author can not recall or stop, though its consequences in the way of damage still go on." Here, the consequences of defendant's wrongful act will continue indefinitely and defendant, by its conduct, has deprived itself of legal authority to relieve plaintiffs from such consequences.

It is stated by *Hoke, J.* (later C. J.), in *Rhodes v. Durham, supra:* "Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or *because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied,* it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement. (Citations)" (Our italics) This is quoted verbatim in *Webb v. Chemical Co., supra,* and restated in *Clinard v. Kernersville, supra.* A similar statement appears in *Brown v. Chemical Co., supra* (165 N.C. 421).

Apparently, no decision has applied the proposition set forth in the italicized words. They are appropriate to the present factual situation.

Defendant's development of Glendale Heights Extension, including the construction and installation of the 54-inch storm drain in Lorain Avenue, was a single, completed, wrongful act. Defendant created a permanent condition which, when the rains descend and the floods come, cause and will continue to cause recurring and intermittent damage to plaintiffs' land. All such damages result proximately from de-

fendant's original wrongful act. Glendale Heights Extension was so developed to enhance the value of the lots sold and to be sold, after as well as before the acceptance of the streets, including Lorain Avenue, as public streets of the City of Durham.

The City of Durham, which is not a party to this action, committed no wrongful act. Its acceptance of Lorain Avenue for maintenance and use as a public street did not affect the damage done to plaintiffs' land. It simply relieved defendant of further obligation for such maintenance. Whether, under the quoted charter provision, the City of Durham acquired the fee in Lorain Avenue as distinguished from the right to the use thereof as a public street makes no difference. Plaintiffs' cause of action is indivisible and accrued not later than the first occasion when surface waters were collected in said 54-inch storm drain and were discharged upon and damaged plaintiffs' land. *Mast v. Sapp, supra.*

The fact that Glendale Heights Extension was developed in respect of streets, drainage systems, etc., under the supervision and in accordance with the requirements of the City of Durham does not affect defendant's liability. The work was so conducted for defendant's benefit in order to induce the inclusion of its residential subdivision within the City of Durham and the acceptance by the City of Durham as public streets of the areas laid out in defendant's subdivision and designated as streets.

Under the circumstances here disclosed, plaintiffs were entitled to recover permanent damages from defendant.

No question is raised as to the measure of damages in such case. Indeed, the charge of the trial court was not included in the record on appeal. Hence, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Hatcher v. Clayton,* 242 N.C. 450, 453, 88 S.E. 2d 104.

The judgment of the court below is affirmed.

Affirmed.

ROY JONES v. SILER CITY MILLS, INCORPORATED, ORIGINAL DEFENDANT; MRS. ROY JONES, ADDITIONAL DEFENDANT.

(Filed 12 June, 1959.)

1. Appeal and Error § 51—

Where defendant introduces evidence, only the motion to nonsuit made at the close of all the evidence is to be considered.

2. Sales § 15—

Where goods are bought and sold for a particular use there is an implied warranty that the goods are reasonably fit for such use.

3. Sales § 27— Circumstantial evidence of breach of implied warranty in sale of feed held sufficient.

Plaintiff's evidence tending to show that defendant manufactured feed for broilers and for laying hens, that feed for broilers contained nicarbazin, that plaintiff purchased all his feed from defendant and purchased the feed in suit for laying mash, that abruptly egg production from plaintiff's flock dropped to about one-half, that the chickens moulted, that the color of the eggs changed from brown to white and were watery, together with expert testimony of two witnesses that nicarbazin should not be fed to laying hens and that only nicarbazin could have caused the results observed in plaintiff's flock *is held* sufficient to be submitted to the jury on the issue of breach of implied warranty that the feed was reasonably fit for the use contemplated by both parties, notwithstanding the absence of evidence that nicarbazin was upon analysis actually found in the chickens, eggs or feed.

4. Same—

Ordinarily the measure of damages for the breach of implied warranty is the damage proximately caused by such breach, but when, at the conclusion of the evidence, the parties stipulate the measure of damages, an instruction in strict accord with such stipulation will not be held for error.

APPEAL by defendant Siler City Mills, Incorporated, from *Preyer, J.*, November Term, 1958, of WILKES.

Civil action to recover for damages to plaintiff's flock of laying chickens allegedly caused by their consumption of feed sold by Siler City Mills, Incorporated, hereafter called defendant, for plaintiff's use in raising said chickens.

Plaintiff alleged that the feed contained nicarbazin, a chemical sold under the trade name of Nicarb; that it was not fit for use in feed for laying chickens; and that, on account of its harmful effects, there was a sharp drop in egg production, resulting in damages of $7,000.00. Plaintiff alleged (1) breach of express warranty, (2) breach of implied warranty, and (3) negligence; but, as indicated below, the issues submitted relate to alleged breach of implied warranty.

Defendant, answering, admitted the sale of the feed for consumption by plaintiff's flock of laying chickens, but denied that the condition of plaintiff's chickens was caused by any harmful element in the feed; and, as a counterclaim, defendant alleged that plaintiff and Mrs. Roy Jones, plaintiff's wife, were indebted to it in the amount of $3,316.37, exclusive of interest, to wit, the balance on their account for chickens, feed and supplies purchased by them from defendant.

Mrs. Roy Jones was made a party. In separate answers to defendant's said counterclaim, plaintiff and Mrs. Roy Jones denied that Mrs. Roy Jones had made any purchases from defendant and denied her liability for purchases made by plaintiff from defendant.

At the conclusion of the evidence, the court, in its discretion, allowed plaintiff to amend his complaint. In the amendment, plaintiff alleged that, "in addition to the damages hereinbefore alleged in said original complaint," "the poultry which he had, consisting of 3,980 hens," was damaged by their consumption of feed containing nicarbazin; that immediately prior to such consumption they were reasonably worth $12,000.00 but immediately thereafter were reasonably worth $4,000.00; and that he was entitled to recover $8,000.00 on account thereof.

The following appears in the agreed case on appeal: "After conclusion of the evidence and before the charge of the Court, it was agreed between counsel for plaintiff and counsel for defendant that the measure of damages for the plaintiff should be determined by the difference in the reasonable market value of the chickens immediately before the drop in production and the reasonable market value immediately thereafter."

The court submitted and the jury answered these issues: "1. Was there an implied warranty that the feed was reasonably fit for the purpose for which it was sold and purchased, as alleged in the Complaint? Answer: Yes. 2. If so, was there a breach of said implied warranty by the defendant, Siler City Mills, Inc., as alleged in the Complaint? Answer: Yes. 3. If so, what amount of damages, if any, is the plaintiff, Roy Jones, entitled to recover from the defendant? Answer: $7,000.00. 4. In what amount, if any, is the plaintiff, Roy Jones, indebted to the defendant, Siler City Mills, Inc.? Answer: $3,104.37. 5. In what amount, if any, is Mrs. Roy Jones indebted to the defendant, Siler City Mills, Inc.? Answer: No."

Judgment was entered, providing: (1) ". . . that the plaintiff have and recover judgment against the defendant in the amount of $7,000.00"; (2) ". . . that the defendant have and recover judgment against the plaintiff in the amount of $3,104.37"; (3) ". . . that the plaintiff be taxed with one-half the cost and that the defendant be taxed with one-half the cost."

Defendant excepted and appealed, assigning errors.

McElwee & Ferree for plaintiff, appellee.

W. G. Mitchell for defendant Siler City Mills, Incorporated, appellant.

BOBBITT, J. Defendant assigns as error the court's denial of its motions for judgment of nonsuit. Since defendant offered evidence, we consider only the ruling on the motion made by defendant at the close of all the evidence. G.S. 1-183; *Spaugh v. Winston-Salem,* 249 N.C. 194, 196, 105 S.E. 2d 610.

Uncontradicted evidence is to the effect that the feed was sold and purchased for a particular use, namely, to be fed to plaintiff's flock of laying chickens. Under these circumstances, there was an implied warranty that the feed was reasonably fit for the use contemplated by both seller and purchaser. *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12, and cases cited therein; *Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141; *Keith v. Gregg,* 210 N.C. 802, 188 S.E. 849. Indeed, defendant did not except to the court's peremptory instruction in plaintiff's favor on the first issue.

Defendant contends there was no evidence sufficient to support a finding that it had breached said implied warranty. Defendant cites *Poovey v. Sugar Co., supra,* where *Brogden, J.,* observed that the law should not be so interpreted as to "unloose a jury to wander aimlessly in the fields of speculation." But the evidential facts in *Poovey v. Sugar Co., supra,* are quite different from those now considered.

There was evidence tending to show the facts narrated below.

Plaintiff purchased day-old chicks in October, 1956. They progressed satisfactorily. Production commenced in five to five and one-half months and increased until daily production exceeded 2,900 eggs. Then, within a period of about two weeks, late June — early July, 1957, production dropped from nearly 3,000 eggs daily to 1,500 daily. There was a further gradual drop in production. Later, plaintiff sold the chickens "for eating, table use."

Plaintiff's dealings were with defendant's North Wilkesboro branch of which Coley Jones was manager. Plaintiff notified Coley Jones of the sharp drop in egg production. W. D. Jester, a poultry expert, specializing in poultry diseases, was sent to investigate. W. D. Jester went to plaintiff's farm, talked with plaintiff and made his investigation.

Along with the sharp drop in production in late June — early July, plaintiff's hens went into a moult, losing their feathers. The color of the egg shells changed from brown to white. Inside, the yellow and white ran together. Changes occurred in the ovaries and the ovaducts of the hens.

All of the feed consumed by plaintiff's hens was supplied by defendant. There was no change in the feeding pattern except that a

short time prior to late June — early July worm medicine had been mixed in the feed.

W. D. Jester was offered by plaintiff. He testified to conditions he found when he visited the farm and inspected plaintiff's hens. He also testified, without objection, to certain statements then made to him by plaintiff. Based thereon, he testified that in his opinion the drop in production and the color and watery consistency of the eggs were caused by "a substance in there that should not have been in the laying feed."

Plaintiff offered Dr. Franklin Joseph Hein, an employee of the North Carolina Department of Agriculture, then in charge of the Poultry Pathology Diagnostic Laboratory in North Wilkesboro.

Predicated on the finding by the jury of facts substantially as stated above, each was asked his opinion as to what could have caused the drop in egg production in late June — early July, 1957. Jester answered: "I thought it was Nicarbazin." Dr. Hein answered: "My opinion would be that they had been poisoned with nicarbazin." He went on to explain that he did not know of any condition other than nicarbazin poisoning that would cause these pathological changes.

Nicarbazin is used to prevent or control a disease of young chickens known as coccidiosis and is added to feed for broilers, that is, chicks raised in brooder houses and sold at from eight to ten weeks as frying size chickens. L. C. Howell, defendant's employee and witness, testified: "It is a fact that our company never knowingly feeds any nicarbazin in layer mash to chickens." Jester testified that a worm preparation "should not be nicarbazin."

Defendant, in its North Wilkesboro plant, used the same mixer to mix feed for broilers and feed for layers. Plaintiff testified that Coley Jones, defendant's North Wilkesboro manager, stated to him that "there could have been some broiler feed mixed by mistake."

Defendant's evidence tended to show the precautions taken in the mixing of feed at its North Wilkesboro plant. Defendant's evidence also tended to show that all of the symptoms found in plaintiff's hens could not have been caused by nicarbazin and that certain of the symptoms found in plaintiff's hens could have been caused by a variety of other factors. Dr. W. H. Rhodes, an employee of the manufacturer of Nicarb, was offered by defendant. He testified: "In these hens, at a .0125% of consumption of nicarbazin there is no doubt but what there could have been a drop in production provided it was fed long enough. There is no doubt whatsoever but that the feeding of nicarb at that level would change the color of the eggs from brown

to white." He had previously testified: "The normal use level for broilers is .0125%"

Defendant stresses the absence of evidence tending to show that nicarbazin was, upon analysis, actually found in the chickens, eggs or feed. It is noted that defendant continuously supplied feed to plaintiff and there is no contention that any specific shipment of feed caused the damage. Jester, who investigated for defendant, "just made a field examination." He didn't "make any kind of laboratory tests . . . any kind of blood tests or take any samples of blood or anything like that." Under the circumstances, the mere fact that there is no evidence that an analysis was made by either party may not be regarded as fatal to plaintiff's case.

Here we are concerned with the rule applicable to the sufficiency of circumstantial evidence in a civil action. See *Hat Shops v. Insurance Co.*, 234 N.C. 698, 707, 68 S.E. 2d 824, and cases cited; *Jyachosky v. Wensil,* 240 N.C. 217, 224, 81 S.E. 2d 644. In respect of the sufficiency of circumstantial evidence to warrant a finding of negligence, see *Frazier v. Gas Co.*, 247 N.C. 256, 100 S.E. 2d 501.

The evidence of damage to plaintiff's hens is plenary. Was the evidence sufficient to support a finding that the feed was not reasonably fit for the purpose for which it was sold and used? If the feed contained nicarbazin, the answer is, "Yes." When considered in the light most favorable to plaintiff, we are of opinion that the circumstantial evidence, together with the opinion testimony of Mr. Jester and Dr. Hein, was sufficient to support a finding that the feed consumed by plaintiff's hens contained nicarbazin. Hence, defendant's motion for judgment of nonsuit was properly overruled.

Defendant assigns as error the court's failure to instruct the jury, in relation to the third issue, that plaintiff was entitled to recover only such damages *as were proximately caused* by its breach of implied warranty. This assignment is based on exception set forth in case on appeal.

Ordinarily, the damages recoverable for breach of implied warranty would be the damages proximately caused by such breach; and it would be the duty of the trial judge, in his instructions relating to the measure of damages, to so charge the jury. However, as indicated below, the trial took a somewhat irregular course.

In his original complaint, plaintiff asserted damages for loss of eggs, in respect of quantity and quality, and much evidence was offered in relation thereto. Plaintiff also offered evidence as to the fair market value of the chickens before and after the drop in production in late June — early July.

At the conclusion of the evidence, (1) the complaint was amended, and (2) the parties stipulated as to the measure of damages, all as set forth in our preliminary statement of facts.

The court instructed the jury on the third issue in strict accordance with the stipulation. Obviously, the court understood that, under the stipulation, the only question for jury determination was the difference in the market value of the chickens *caused by the drop in production.* At the conclusion of the charge, the court asked: "Are there any further instructions as to the law or further contentions which you would like me to give?" Defendant's counsel answered: "No, sir." Under these circumstances, the court's failure to go beyond the language of the stipulation does not constitute ground for a new trial. The court's instructions were based squarely on the stipulation, not on principles of law that were or may have been applicable absent such stipulation.

The remaining assignments of error brought forward and argued in defendant's brief have been carefully considered. Discussion thereof in detail would serve no useful purpose. Suffice to say, none discloses error of law deemed sufficiently prejudicial to justify a new trial.

It is noteworthy that plaintiff's account, the basis of defendant's recovery on its counterclaim, includes charges for the feed which allegedly caused the damage to plaintiff's flock of laying hens.

No error.

JOHN R. TAYLOR COMPANY, INC., PETITIONER, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 12 June, 1959.)

1. Eminent Domain § 9— Charge on fair market value held not prejudicial.

An instruction to the effect that the market value of property taken by eminent domain should be measured by what the property would bring in voluntary sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of buying, will not be held prejudicial for failure to charge that the buyer must be one desiring to buy, when it appears from the entire charge, construed contextually, that the jury could not have been misled but must have understood that the market value was to be determined by what the property would bring by a willing seller, not required to sell, to a wanting buyer, not required to buy.

2. Eminent Domain § 13—

Where petitioner by stipulation and the introduction of evidence elects

to try his case on the theory that the "taking" occurred on a particular date, petitioner will not be allowed to attack the verdict on the ground that the taking occurred at a later date when the value of the property had increased.

3. Eminent Domain § 9—

An instruction to the effect that the jury might consider as an element of compensation benefits resulting to the remainder of the tract resulting from the taking, instead of assessing such benefits as an offset against damages, is prejudicial to respondent and not to petitioner, and will not be held for error on petitioner's appeal.

4. Appeal and Error § 20—

Appellant will not be permitted to complain of an error in the charge favorable to him.

5. Eminent Domain § 9—

A charge to the effect that the petitioner is entitled to recover all damages resulting from the taking, past and future, will not be held prejudicial for failure to include present damages when, construing the charge as a whole, such failure is inconsequential. All damages incurred up to the present moment are encompassed in the term "past damages" and all damages incurred after the present moment are included in the term "future damages."

6. Appeal and Error § 42—

The charge to the jury must be read as a composite whole and not in detached fragments.

7. Appeal and Error § 39—

The burden is on appellant not only to show error, but that the alleged error was prejudicial and amounted to the denial of some substantial right.

APPEAL by petitioner from *Phillips, J.*, 20 October 1958 Regular Civil Term of GUILFORD, Greensboro Division.

Special proceeding for recovery of compensation for part of land of petitioner, to wit 10.44 acres, taken by respondent for the relocation, reconstructing, widening and improving of U. S. 421 Federal Interstate and Defense Highway.

The proceeding was instituted before the Clerk of the Superior Court on 26 February 1957. After the pleadings were filed, the Clerk appointed commissioners to fix the compensation to be awarded petitioner. The commissioners filed their report, and the Clerk entered judgment in accordance with the report. Petitioner and respondent excepted to the report, and each appealed to the Superior Court for a trial by jury at term.

In the Superior Court the following issue was submitted to the jury, and answered as follows:

"What sum, if any, is petitioner entitled to recover of respondent for the appropriation of the lands described in paragraph 2 of respondent's further answer, together with the damages, if any, to the remainder of the 93.25-acre tract described by reference in the petition over and above all general and special benefits, if any, accruing to petitioner's lands by reason of the construction of the extension of Patterson Street into interstate Highway No. 40? Answer: $12,300.00."

From judgment entered upon the verdict, petitioner appeals.

Hoyle & Hoyle by J. Sam Johnson, Jr., for petitioner, appellant.

Malcolm B. Seawell, Attorney General, Kenneth Wooten, Jr., Assistant Attorney General, H. Horton Rountree, Trial Attorney, and Falk, Carruthers & Roth by Joseph T. Carruthers, Jr. for respondent, appellee.

PARKER, J. All petitioner's assignments of error, except formal ones and one to a ruling of the court as to the date of the taking of the land by respondent, relate to the charge of the court to the jury.

Petitioner's assignment of error Number 2 is to this part of the charge: "Market value of property is the price which it would bring when it is offered for sale by one who desires to sell but is not obliged to sell it and *is bought by one who is under no necessity of having it.*" Petitioner contends that the learned judge omitted an essential element of market value in that he should have charged in part as follows: *Is bought by one who desires but is not required to buy it.* In support of its contention it cites *Moses v. Morganton,* 195 N.C. 92, 141 S.E. 484, where this language is used: "The principle of damages is laid down thus in 10 R.C.L., part § 112: 'When a parcel of land is taken by eminent domain, the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy; in other words the test is the fair market value of the land.'" The identical language quoted from R.C.L. now appears in 18 Am. Jur., Eminent Domain, § 242. It also cites to the same effect 29 C.J.S., Eminent Domain, p. 974; 18 Am. Jur., Eminent Domain, § 242; *Talbot v. City of Norfolk,* 158 Va. 387, 163 S.E. 100. Petitioner could have cited to the same effect *Gallimore v. Highway Comm.,* 241 N.C. 350, 85 S.E. 2d 392.

The above language of the trial judge assigned as error is taken practically verbatim from *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10. Similar language is used in *Brown v. Power Co.,* 140 N.C. 333,

52 S.E. 954; *R. R. v. Armfield,* 167 N.C. 464, 83 S.E. 809; *Commander v. Smith,* 192 N.C. 159, 134 S.E. 412.

Further on in the charge the judge instructed the jury as follows: "The value of the property is the yardstick by which compensation for the taking of land or any interest therein is to be measured. And the market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell and is bought by one who is under no necessity of having it. In estimating its value, all of the capabilities of the property and all the uses to which it may be applied or for which it is adapted which affect its value in the market are to be considered by the jury and not merely the condition it is in at the time of the taking and the use to which it was then applied by the owner. The measure of compensation is the sum which would be arrived at as a result of fair negotiations in a private transaction by an owner willing to sell and a purchaser willing to buy after due consideration of all evidence reasonably affecting value." Petitioner's assignments of error Numbers 7 and 8 relate to the repetition of the definition of market value in the above excerpt from the charge, and to its last sentence.

The last sentence in the above excerpt is in accord with the quotation from 10 R.C.L., § 112—now 18 Am. Jur., Eminent Domain, § 242 — in *Moses v. Morganton, supra.* In 29 C.J.S., Eminent Domain, p. 974, cited by petitioner, it is said: "The market value of property injured or taken for public use is commonly defined as the price it will bring when offered for sale by one who desires, but is not required, to sell, and is sought by one who desires, but is not required, to buy, after due consideration of all the elements reasonably affecting value."

Reading the charge as a whole, and not in detached fragments (*Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356), it leaves us with the opinion that the jury must have understood that market value must be determined by what the land taken by respondent would bring if sold by a willing seller, not required to sell it, to a wanting buyer, not required to buy it, after due consideration of all the evidence reasonably affecting market value. Petitioner's assignments of error Numbers 2, 7 and 8 are overruled.

After the jury was impaneled, and before evidence was introduced, the following stipulation of the parties was dictated in the Record in the jury's presence: "Petitioner was on December 30, 1955, the owner of a 93.29-acre *(sic)* tract as alleged in the petition, and that on that date the respondent entered on the land to construct a highway, and commenced work with machinery." Whereupon, the court held as a matter of law that 30 December 1955 was the date of tak-

ing. Petitioner excepted to this ruling by the court, and assigns it as error Number 4, but offered no evidence in respect to the date of taking. The only evidence as to the date of taking appears in the stipulation, except as appears in the testimony of John R. Taylor hereinafter set forth. The petition does not allege the date of taking. The only reference to the date of taking in the pleadings is in the further answer as follows: "That said project was begun on September 16, 1955, and has not been completed as of the date of the filing of this answer."

Petitioner's assignment of error Number 3 is to the charge of the court to this effect: If the jury believed all the evidence in the proceeding, the day of taking was 30 December 1955, and that the market value of the land taken was to be determined as of that date.

Petitioner contends that it had no notice of what land respondent was taking and what parts of the highway would be a non-access highway, until respondent filed its answer on 13 September 1957, and therefore the date of taking was 13 September 1957. The date of filing of the answer does not appear in the Record, but apparently it was filed about 13 September 1957, because on 15 August 1957, respondent was allowed by the Clerk of the Superior Court thirty days within which to file answer or otherwise plead. Petitioner further contends that the difference in time between 30 December 1955 and 13 September 1957 was material, because on the prior date, according to appellant's evidence, there had been no change in the land and its use from an abandoned dairy farm status, and on the later date construction had begun on a residential subdivision and extensive plans had been laid for the development of valuable industrial property. (Petitioner's contention does not refer to the following testimony of John R. Taylor, president and owner of petitioner corporation, when he was recalled as a witness: "I answered yesterday on cross-examination that the 93.29-acre *(sic)* tract was in the same condition on December 30, 1955, as it was when I bought it. Since then I have checked my records and that statement was incorrect. On December 30, 1955, considerable streets had been roughed out, storm drainage had been installed, water and sewer had been installed, and we had started 27 houses, and received final FHA inspection on 15 houses"). Further, petitioner contends that the court allowed evidence that petitioner paid $55,940.00 for the entire tract of land on 22 October 1954, which evidence he would no doubt have held incompetent, if the date of taking had been 13 September 1957.

The price petitioner paid for the entire tract of land was admitted without objection. All of petitioner's witnesses, as well as respondent's

witnesses, testified as to the fair market value of the property immediately before 30 December 1955, and immediately after that date. John R. Taylor testified: "I am president and owner of petitioner corporation. . . . In my opinion, the fair market value of this property immediately before the taking on December 30, 1955 was $249,210.00." Petitioner, as well as respondent, offered no evidence as to the fair market value immediately before 13 September 1957 and immediately thereafter. There is no evidence in the Record that petitioner did not know until the answer was filed what land respondent had taken and what part of the highway would be a non-access highway. There is no exception to the evidence in the Record.

Petitioner elected to try its case in the lower court on the theory that the date of taking was 30 December 1955, and it will not be permitted to change its attitude with respect thereto on appeal. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222; *Paul v. Neece*, 244 N.C. 565, 94 S.E. 2d 596; *Leggett v. College*, 234 N.C. 595, 68 S.E. 2d 263; *Hargett v. Lee*, 206 N.C. 536, 174 S.E. 498.

The judgment provides that petitioner shall recover interest on the jury verdict of $12,300.00 from 30 December 1955.

Petitioner's assignments of error Numbers 3 and 14 are overruled.

The court charged the jury as follows: "The measure of damages for the taking of part of a tract by the State Highway Commission for highway purposes is the difference between the fair market value of the entire tract, including improvements, if any, immediately before the taking and a fair market value of what is left, including improvements, immediately after the taking; which sum includes compensation for the part taken and compensation for injury to the remaining portion, if any, that is to be offset by both general and special benefits occurring to the property from the construction or improvement of the highway over the property." This part of the charge is in strict accord with what this Court said in *Proctor v. Highway Commission*, 230 N.C. 687, 691, 55 S.E. 2d 479, 482, which is quoted with approval in *Highway Commission v. Black*, 239 N.C. 198, 201, 79 S.E. 2d 778, 781.

Petitioner assigns as error Number 4 that the judge a little later instructed the jury that the elements of just compensation to be paid petitioner can be reduced to a formula, and charged as follows: "Market value of the part of the land that was taken plus damage to the market value of the remainder plus benefits to market value of remainder, if any, plus market value before and market value after plus damages, if any, by reason of limited access or no access to part of the property remaining adjacent to the highway."

G.S. 136-19 provides in part: The State Highway "Commission is hereby vested with the power to condemn the lands . . . , and in all instances the general and special benefits shall be assessed as offsets against damages."

The part of the charge challenged by the petitioner's assignment of error Number 4 is erroneous and prejudicial to respondent, but beneficial to petitioner, because it instructed the jury to consider as an element of compensation benefits resulting to the remainder of the tract of land resulting from the taking, instead of assessing it as an offset against damages. Petitioner must show not only error, but that the alleged error was prejudicial to it. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657; *Rudd v. Casualty Co.,* 202 N.C. 779, 164 S.E. 345. A party cannot justly complain of an error in a charge favorable to him. *Fallins v. Insurance Co.,* 247 N.C. 72, 100 S.E. 2d 214. Assignment of error Number 4 is overruled.

Petitioner assigns as error Number 10 this part of the charge: "All damages naturally and reasonably resulting from the taking, past and future, should be considered by the jury." Petitioner contends in respect to assignment of error Number 10 that "the vice in this instruction is that the court ignored present damages." When the words used are damages past and future, the term "present damages" is practically encompassed in the term "past damages," because all damages incurred up to the present moment are passed damages. All damages that will be incurred after the present moment are included in the term "future damages." The damages of the passing moment would seem to be inconsequential upon the facts of the instant case. Surely the failure of the judge to include the word *present* when charging as to damages *past and future* is not sufficient to cause a new trial.

A charge by a Trial Judge to a jury must be read as a composite whole and not in detached fragments. *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533. Technical error is not sufficient to disturb the verdict and judgment. The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right. *Johnson v. Heath, supra.* Measured by these rules, appellant has not shown prejudicial error sufficient to overthrow the trial below. All the assignments of error have been considered, and are overruled.

No Error.

EDNA LAMM v. JOHN S. GARDNER, ADMINISTRATOR OF BERYL J. FORD AND MRS. THELMA GRANTHAM.

(Filed 12 June, 1959.)

1. Automobiles § 40: Evidence § 11—

In an action by a passenger in a car against the driver thereof and the administrator of the driver of the other car involved in the collision, testimony of a declaration of plaintiff to the effect that she saw the other car zigzagging across the road is competent as against the driver of the car in which she was riding in support of plaintiff's contentions that such driver failed to take proper precautions to avoid collision in the emergency, although as against the administrator it is incompetent under G.S. 8-51.

2. Trial § 17—

Testimony which is competent as against one party should not be excluded because it is incompetent as against another party, but its admission should be limited by proper instructions.

3. Automobiles § 38: Evidence § 35—

Testimony of a declaration of plaintiff passenger to the effect that the collision would not have occurred if the driver of the car in which she was riding had stopped the vehicle is incompetent as a mere opinion or conclusion.

4. Automobiles § 7—

The driver of a motor vehicle is at all times under duty to operate the vehicle with due caution and circumspection and at a speed or in a manner so as not to endanger or to be likely to endanger any person or property, which statutory standard of car is absolute. G.S. 20-140.

5. Automobiles § 25—

Notwithstanding that the speed is within the statutory maximum, the operator of a motor vehicle is required to decrease speed as may be necessary to avoid collision with any person or vehicle when special hazards exist by reason of the width or condition of the highway or the exigencies of traffic, which statutory requirement is absolute. G.S. 20-141.

6. Automobiles § 7—

It is the duty of a driver of a motor vehicle not only to look but to keep a lookout in the direction of travel, and he is held to the duty of seeing what he ought to see.

7. Automobiles § 15—

Where a motorist sees, or in the exercise of ordinary care should see a highway sign warning that she was approaching a narrow bridge, and sees, or in the exercise of ordinary care should see, that a vehicle approaching from the opposite direction was zigzagging across the highway, she is under duty to take such action as a reasonably prudent person would take under the circumstances by decreasing speed and having her vehicle under proper control so as to avoid colliding with the approaching vehicle on the highway or on the bridge.

8. Same—

The right of a motorist, who is himself observing the law, to assume that the driver of a vehicle approaching from the opposite direction will remain on his right side of the highway, is not absolute, and when he sees, or should see, in the exercise of due care, that the approaching vehicle was zigzagging across the highway, he may no longer rely upon the assumption.

9. Automobiles § 19—

A motorist confronted with a sudden emergency created by an approaching vehicle zigzagging across the highway is not held by the law to the wisest choice of conduct but is required to make such choice as a person of ordinary care and prudence, similarly situated, would have made.

10. Negligence § 5—

There can be more than one proximate cause of injury.

11. Negligence § 7—

Negligence of one party cannot be insulated by the negligence of another so long as the negligence of the first continues to be a proximate cause of the injury.

12. Automobiles § 43— Evidence held not to justify nonsuit on ground of intervening negligence.

Plaintiff's evidence was to the effect that the driver of the car in which she was riding saw, or in the exercise of due care should have seen, as she approached a long, narrow bridge, a vehicle approaching from the opposite direction which was zigzagging across the highway, and that the driver of the car in which plaintiff was riding, although she kept her car on the right side of the highway at all times within the statutory maximum speed, increased her speed and collided with the other car on the bridge after the other car had struck the side of the bridge on his right and then careened into the path of the car in which plaintiff was riding. *Held*: The evidence was sufficient to be submitted to the jury on the question of whether the driver of the car in which plaintiff was riding acted as a reasonably prudent person would have acted in the light of all the surrounding facts and circumstances, and does not warrant nonsuit on the ground of intervening negligence.

BOBBITT, J., dissenting.

HIGGINS, J., concurs in the dissent.

APPEAL by plaintiff from *Hobgood, J.*, January Civil Term 1959, of ROBESON.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of the defendants.

At the close of plaintiff's evidence, each defendant moved for a judgment of involuntary nonsuit. The motion of the defendant Gardner was denied. The motion of the defendant Grantham was granted.

Whereupon, plaintiff took a voluntary nonsuit as to the defendant Gardner.

From the judgment of involuntary nonsuit as to the defendant Grantham, plaintiff appeals.

Varser, McIntyre, Henry & Hedgpeth and Battle, Winslow & Merrell for plaintiff, appellant.

Anderson, Nimocks & Broadfoot for defendant, appellee, Mrs. Thelma Grantham.

PARKER, J. Plaintiff offered evidence as follows: After supper on 30 November 1956 the defendant Mrs. Grantham was driving a 1955 Dodge Station Wagon north on U. S. Highway 301. Riding as passengers were plaintiff and a Mrs. Knight. Between the towns of Lumberton and St. Pauls the highway crosses Big Marsh Swamp. In this area there is a bridge on the highway 78 feet long. This bridge has solid sides 78 feet long, about 5 feet high, and 15 to 18 inches thick. It is about 20 feet wide. The highway leading up to it varies in width from 20 to 22½ feet. About 500 feet south of the south end of the bridge is a diamond-shaped sign with a yellow background and black letters bearing the words "Narrow Bridge." The bridge abutments are striped black and yellow from top to bottom. At the bridge the embankment on which the highway is built is 6 or 7 feet above the swamp. There is an embankment on each side of the highway leading to the bridge from 2 to 6 or 7 feet.

The headlights on the automobile driven by Mrs. Grantham were burning. She was driving at a normal rate of speed on her side of the highway. A patrolman testified for plaintiff the speed limit in that area was 55 miles per hour. As the automobile driven by Mrs. Grantham traveling north reached the sign south of the bridge bearing the words "Narrow Bridge," an automobile traveling south on the highway was approaching the bridge, and zigzagging in the highway. At this point in the highway plaintiff saw this automobile zigzagging in the highway, and asked Mrs. Grantham to stop, telling her there was something wrong with the approaching automobile. Mrs. Grantham picked up a little speed, and drove on, saying "half the damn highway was hers." As the automobile driven by Mrs. Grantham entered the bridge, with the other automobile swaying in the bridge, the two automobiles collided. The two automobiles were destroyed, and plaintiff and Mrs. Grantham were injured.

After the collision a patrolman talked with Mrs. Grantham in a hospital in Lumberton. She told him she was running about the speed

limit, and saw the other automobile about 50 feet away. She said "something about seeing headlights swaying back and forth across the road."

Mrs. Maude Hinnant testified she heard Mrs. Grantham tell plaintiff "not to talk so much, she might cause her to be tried for murder or manslaughter."

Plaintiff assigns as error the exclusion as against Mrs. Grantham of the testimony of plaintiff that she "saw a car zigzagging across the road." The defendant Gardner moved to strike out the answer on the ground that it violated G.S. 8-51, a party to a transaction excluded, when the other party is dead. The motion was allowed, and the court instructed the jury not to consider this evidence. Plaintiff stated it was competent as to the defendant Grantham. The court refused to admit it as to the defendant Grantham, and plaintiff excepted. The defendant Grantham in her answer admitted as true allegations in plaintiff's complaint to the effect that Gardner's intestate permitted his automobile to wobble from one side of the highway to the other, and to continue in such movements from one side of the center line to the other as it approached the entrance of the bridge, and continued to so operate his automobile after entering the bridge, and continued to drive from one side of the highway to the other and drove into the sides of the bridge, and caused it to rebound and collide with the automobile driven by Mrs. Grantham. This evidence was clearly competent as to Mrs. Grantham. Testimony which is competent as to one party should not be excluded because it is not competent against another party to the suit. In such a case the evidence should be limited by proper instructions. *S. v. Brite,* 73 N.C. 26; *S. v. Collins,* 121 N.C. 667, 28 S.E. 520; *S. v. Cobb,* 164 N.C. 418, 79 S.E. 419; *S. v. Kirkland,* 175 N.C. 770, 94 S.E. 725; *S. v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837; *Olsen v. J. J. Jacobs Motor Co.,* 99 Cal. App. 423, 278 P. 1051; *Illinois C. R. Co. v. Houchins,* 121 Ky. 526, 89 S.W. 530, 1 L.R.A. (N.S.) 375, 123 Am. St. Rep. 205; *Consolidated Ice Machine Co. v. Keifer,* 134 Ill 481, 25 N.E. 799, 10 L.R.A. 696, 23 Am. St. Rep. 688; Jones on Evidence, Civil Cases, 4th Ed., Vol. 1, p. 306; 20 Am. Jur., Evidence, p. 253.

For the reasons stated above the court erred in excluding plaintiff's testimony in respect to what she saw about the approaching automobile and as to what she said to Mrs. Grantham about it, and as to what Mrs. Grantham replied, as against Mrs. Grantham. Later on the court admitted some of this testimony.

The court properly excluded the testimony of Mrs. W. C. Griffin that plaintiff said in the hospital "if Thelma Sue Grantham had

stopped the car, I would not be here." The statement was merely an opinion of plaintiff. *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387; *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *Austin v. Overton,* 222 N. C. 89, 21 S.E. 2d 887.

G.S. 20-140 required Mrs. Grantham at all times to drive the automobile with due caution and circumspection and at a speed or in a manner so as not to endanger or to be likely to endanger any person or property, and G.S. 20-141 made a similar requirement that she shall operate her automobile with due regard to the width, traffic and condition of the highway, and, when special hazards exists by reason of highway conditions, speed shall be decreased as may be necessary to avoid collision with any person or vehicle on or entering the highway. *Singletary v. Nixon,* 239 N.C. 634,80 S.E. 2d 676; *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903. By virtue of the express provisions of G.S. 20-141 the speed of an automobile may be unlawful "under the circumstances of a particular case, even though such speed is less than the definite statutory limit prescribed for the vehicle in the place where it is being driven." *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. These statutes prescribe a standard of care, "and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331.

This Court said in *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330: "It is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

Regardless of statutes regulating the operation of automobiles, it was the duty of Mrs. Grantham in the operation of the automobile to exercise the care which a person of ordinary prudence would exercise under similar conditions to prevent injury to persons on the highway; that is, it was her duty in keeping a proper lookout to see and take notice of a sign advising her that a "Narrow Bridge" was ahead, to see and take notice of an automobile meeting her zigzagging on the highway, and to drive at such a speed as to have the automobile under proper control, so as in the exercise of due care to avoid, if it could be done in the exercise of due care, collision with the approaching automobile on the highway or on the bridge. *Kellogg v. Thomas, supra; Henderson v. Henderson, supra.*

"The driver of an automobile who is himself observing the law (G.S. 20-148) in meeting and passing an automobile proceeding in the opposite direction has the right ordinarily to assume that the driver of the approaching automobile will also observe the rule and avoid a collision." *Morgan v. Saunders,* 236 N.C. 162, 72 S.E. 2d 411.

"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. Mrs. Grantham had no absolute right to act on this assumption for a reasonably prudent man might reasonably have anticipated, that, acting on the ground that half the highway was his, to increase speed and drive into the entrance of a narrow bridge 78 feet long with solid sides 5 feet high, with an automobile meeting him zigzagging in the road and entering and traveling upon the bridge, would lead to a collision between the two automobiles.

Mrs. Grantham contends that she was confronted with a sudden emergency. This Court said in *Ingle v. Cassady*, 208 N.C. 497, 181 S.E. 562: "One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made."

It is settled law in North Carolina that there can be more than one proximate cause of injury. *Moore v. Plymouth*, 249 N.C. 423, 106 S.E. 2d 695; *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844.

If the jury should find from the evidence that Mrs. Grantham was negligent, and such negligence continued to the actual collision of the two automobiles in which plaintiff was injured, it would constitute a proximate cause of plaintiff's injuries. *Graham v. R. R.*, 240 N.C. 338, 82 S.E. 2d 346. "No negligence is 'insulated' so long as it plays a substantial and proximate part in the injury." *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876.

The true and ultimate test of Mrs. Grantham's operation of the automobile is this: What would a reasonably prudent person have done in the light of all the surrounding facts and circumstances?

Considering the evidence in the light most favorable to plaintiff, and giving her the benefit of all legitimate inferences to be drawn therefrom, and in view of the applicable principles of law stated above, it is our opinion that the case against Mrs. Grantham should have been submitted to the jury.

The judgment of involuntary nonsuit is

Reversed.

BOBBITT, J., dissenting. I agree fully with the well settled and well stated principles of law set forth in the Court's opinion. I differ as to their application to the facts in evidence.

There was plenary evidence that the negligence of Beryl J. Ford proximately caused the collision and plaintiff's injuries. Plaintiff having taken a voluntary nonsuit as to Ford's Administrator, Mrs.

Grantham is now sole defendant. Her alleged negligence is based on the fact that she failed to stop or slow down before reaching the bridge and thereby exposed the station wagon she was driving to the danger of collision.

When it was first observed that Ford's car was zigzagging, indicating something was wrong with the car or the driver, the station wagon was some five hundred feet south of the bridge. The evidence is not explicit as to where Ford's car was at that time. It was north of the bridge.

It is well to keep in mind that the highway was on a fill crossing Big Marsh Swamp.

Conceding the evidence was sufficient to cause defendant to apprehend that Ford's car was out of control, and that defendant was required to exercise due care to avoid a collision, what should she have done? In answering this question, we must bear in mind that the danger (sudden emergency) confronting defendant was caused solely by Ford's negligence.

It may be conceded that if defendant had stopped or slowed down she could have avoided a collision *on the bridge*. Whether she could have avoided *a collision* is another matter. If we attempt to answer this question, we find ourselves resorting to theory and conjecture.

Plaintiff contends there would have been no collision if defendant had stopped or slowed down pending Ford's further operations. True, it is possible that Ford might have gone off the fill before reaching the bridge, or wrecked on the bridge irrespective of collision, or gone off the fill south of the bridge before reaching the station wagon. On the other hand, if defendant stopped, passively awaiting the unfolding of events over which she had no control, she would thereby lose all ability to maneuver and expose herself and her companions to the likelihood of being knocked from the road down into the swamp.

Plaintiff contends that defendant, observing that Ford had entered the bridge and that his car was swaying as it proceeded southward, should have stopped before entering upon the bridge. On the other hand, if it appeared that a collision was probable, it would seem consistent with due care to strive to reach the bridge and thus have the protection of the 15-18 inch solid sides when the collision occurred; for if the collision occurred just south of the bridge the danger of being knocked from the road down into the swamp was imminent.

Whether the consequences would have been more or less serious if defendant had stopped in accordance with plaintiff's suggestion will never be known. In view of the circumstances then existing, I reach these conclusions: (1) The evidence is insufficient to support a

finding that a collision between the vehicles would not have occurred if defendant had slowed down or stopped. (2) Defendant's action in proceeding, always on her side of the highway, reasonably appeared to involve less risk, certainly no more, than would be involved by slowing down or stopping before reaching the bridge. In the sudden emergency created by Ford's negligence, I do not think it can be said that defendant's choice of conduct did not accord with what an ordinarily prudent person would or might have done under the same or similar circumstances. Hence, I vote to sustain the judgment of involuntary nonsuit.

I am authorized to say that Higgins, J., concurs in this opinion.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK v. NELLO L. TEER COMPANY.

(Filed 12 June, 1959.)

1. Compromise and Settlement—

An executed agreement terminating or purporting to terminate a controversy is a contract to be interpreted and tested by established rules relating to contracts.

2. Same: Contracts § 12—

Where a contract is in writing and its terms are unambiguous, its construction and effect are questions for the court, and neither party may contend for an interpretation contrary to the express language of the agreement on the ground that the writing did not truly express his intent.

3. Compromise and Settlement—

Where insurer and insured agree as to the amount of premiums due but there is controversy as to credits for refund of unearned premiums and premiums erroneously collected, the acceptance by insurer of a check with covering letter making it clear that the check was in full settlement of the account, settles the controversy, and evidence that insured had been reimbursed for the overpayment set out on the check as a deduction is properly excluded, the determinative question being whether a dispute existed between the parties as to the amount due at the time the check was given and accepted.

4. Same: Insurance § 1—

Where dispute between insurer and insured as to the amount of premiums due is not based upon controversy as to the rates but solely as to credits for unearned premiums and overpayment of premiums, a compromise settlement cannot be avoided on the ground that it was contrary to public policy, since such compromise does not rest upon a

charge of premiums at rates less than those prescribed by statute. G.S. 58-131.18, G.S. 97-104.2.

APPEAL by plaintiff from *McKinnon, J.*, September 1958 Civil Term of DURHAM.

This action was begun in May 1955 to recover the balance alleged to be owing for insurance premiums. The complaint alleges defendant, on 27 February 1954, owed plaintiff $82,938.21 on which it, on that date, paid $70,438.21, leaving a balance owing of $12,500 with interest from 1 September 1953.

Defendant denied any indebtedness to plaintiff, pleading payment of $70,438.21 in full discharge of all liability. To support its claim of payment it alleged: (1) Plaintiff had for many years insured defendant and its subsidiaries; (2) in the fall of 1953 a conference was held between representatives of plaintiff and defendant to determine the amount owing on 1 September 1953; (3) plaintiff asserted the unpaid premiums amounted to $86,371.38; (4) defendant claimed two credits on account of unearned premiums, one for $3,433.17, the other for $12,500; (5) after numerous conferences held to settle and fix the balance owing, defendant, on 27 February, tendered its check for the said sum of $70,438.21 in full settlement, which check was accepted by plaintiff and paid by drawee bank.

Plaintiff replied. It admitted receipt and collection of defendant's check but denied the acceptance constituted a discharge of defendant's liability.

Jury trial was waived. The parties stipulated:

"IT IS STIPULATED that there was due and owing the plaintiff by defendant the sum of $86,371.38 for premiums on policies issued for the period ending September 1, 1953, less a credit as a result of an audit adjustment in the sum of $3,433.17, leaving a balance in the sum of $82,938.21, against which the defendant claimed, prior to the institution of this action, a credit in the sum of $12,500, the date such claim was first made not being agreed."

This stipulation was incorporated as a finding of fact. The court made these additional findings:

"(2) That a controversy and dispute arose and existed between the plaintiff and the defendant prior to February 27, 1954, concerning the item of $12,500 claimed by the defendant as a credit for return of premiums due the defendant; that the account was in dispute before the check dated February 27, 1954, was tendered; and it remained in dispute until the plaintiff accepted and cashed the check tendered by the defendant under date of February 27, 1954.

"(3) That under date of February 27, 1954, the defendant mailed to the plaintiff its check for the sum of $70,438.21, along with a covering letter of the same date. The said letter and check, both dated February 27th, 1954, clearly imported that the check was intended to be, and was tendered, in full settlement of the disputed account embracing the $12,500 item as specified in the letter and check. That the plaintiff promptly received the check of $70,438.21 and accompanying letter of February 27, 1954, retained the check and thereafter immediately endorsed and deposited said check to its account on March 1, 1954; that the said check was paid and the plaintiff received the proceeds of said check in the sum of $70,438.21."

Based on its findings it concluded:

"(1) The letter and check dated February 27, 1954, were intended to be, and were tendered, in full settlement of the disputed account embracing the $12,500 item as specified in the letter and check. That the acceptance by the plaintiff of defendant's check of February 27, 1954, in the amount of $70,438.21 was an acceptance of the conditions upon which it was tendered by defendant, as expressed in defendant's letter to plaintiff of February 27, 1954, and in the check and endorsement thereon, and constituted a full settlement of the disputed account embracing the $12,500 item which is the subject of this action.

"(2) That the plaintiff is barred by such acceptance and settlement from maintaining this action.

"(3) That the defendant's motion for a directed verdict in its favor on its plea in bar should be allowed."

On its findings and conclusions it adjudged plaintiff was not entitled to recover and dismissed the action at plaintiff's cost. Plaintiff excepted and appealed.

Bryant, Lipton, Strayhorn & Bryant for plaintiff, appellant.

Basil M. Watkins, Charles B. Nye, and E. L. Haywood for defendant, appellee.

RODMAN, J. When plaintiff, by its reply, challenged defendant's plea of accord and satisfaction, it did not, nor does it now, claim that it was induced to accept the check for $70,438.21 by fraud or mistake.

Section II of the answer alleged the check on its face computed the amount owing and paid in this manner:

"As per agreed statement as of 9-1-53 between Mr. Adair and Mr. McGarry		$86,371.38
"Less deductions as per letter of 2-27-54	3,433.17	
Less deductions as per letter of 2-27-54	12,500.00	15,933.17
		$70,438.21"

and on the reverse carried this statement:

"In full payment and satisfaction of all amounts owing to The Fidelity & Casualty Company of New York to date of September 1, 1953, (but not including any amounts owing on policies written by The Fidelity & Casualty Company of New York and in effect between the dates of September 1, 1953 and December 31, 1953) on account of policies of insurance issued by The Fidelity & Casualty Company of New York for the account of Nello L. Teer, Individually, Nello L. Teer, Inc., Mecklenburg Construction Company, Nello L. Teer Company, a partnership, and Nello L. Teer Company, a corporation, less the sum of $12,500 for return of premiums due said companies or individual or any of them, as per letter of February 27, 1954."

Plaintiff, in its reply, says:

"Though it is admitted that defendant's check in the amount of $70,438.21 contained thereon the language as set forth in paragraph 2 of the further answer and defense it is specifically denied that said check was accepted by the plaintiff in full and complete settlement of said account, but on contrary it was known to the defendant at that time and at all times prior thereto and subsequent thereto that a dispute existed concerning an item of $12,500 and that the check in question did not constitute settlement of said item. Except as herein admitted, the allegations contained in Paragraph II of the further answer and defense are denied."

Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. *Dobias v. White,* 239 N.C. 409, 80 S.E. 2d 23.

Here the asserted contract is in writing. Its language (the check and accompanying letter) is plain and unambiguous. Its construction and effect are questions for the court. Neither party can obtain an interpretation and result contrary to the express language of a contract by the assertion that it does not truly express his intent.

Barham v. Davenport, 247 N.C. 575, 101 S.E. 2d 367; *DeBruhl v. Highway Com.,* 245 N.C. 139, 95 S.E. 2d 553; *Howland v. Stitzer,* 240 N.C. 689, 84 S.E. 2d 167; *Jones v. Realty Co.,* 226 N.C. 303, 37 S.E. 2d 906; *Coppersmith v. Ins. Co,* 222 N.C. 14, 21 S.E. 2d 838; *Brock v. Porter,* 220 N.C. 28, 16 S.E. 2d 410.

Plaintiff has not by exception challenged the third finding of fact. The intent with which plaintiff accepted the check was immaterial. The reason assigned in the answer to repel defendant's plea is not now assigned as error.

Plaintiff's version of the question for decision is stated in its brief as: "Can a sham or frivolous claim constitute the basis of a valid accord and satisfaction or compromise and settlement so as to bar an insurance company from collecting the balance due on insurance premiums from its insured?"

The reference in the question to a sham or frivolous claim has reference to the sum of $12,500 shown on the face of the check as a deduction. The question as stated assumes the asserted right to the credit is frivolous, a fact not established, and one which the court was not specifically requested to determine.

Plaintiff did request the court to find: "That there was never any dispute between the plaintiff and the defendant as to the remaining amount of $12,500. This amount was claimed by the defendant, Nello L. Teer Company, from W. P. Farthing, t/a Fidelity Insurance Agency, or Fidelity Insurance Agency of Durham, Inc., and was never in controversy between the plaintiff and the defendant in this action." The court declined to make the requested finding but to the contrary made Finding No. 2 set out above. That finding, considered in the light of all the evidence, negatives the assertion that defendant was acting in bad faith or that his claim was frivolous.

The evidence is sufficient to establish these facts: Plaintiff had been writing various types and kinds of insurance protecting defendant for many years. In the summer of 1953 defendant notified plaintiff it would cease to insure with it. Beginning in the fall of 1953 numerous conferences were held to determine the balance due as of 1 September 1953. Defendant employed an insurance accountant to check with plaintiff the correctness of the debits or premium charges. The parties finally agreed that the correct amount of the charges was $86,371.38 as stated on the check of 27 February 1954. Defendant, from the beginning, insisted he was entitled to credits. The credits claimed consisted of (a) $3,433.17 on a policy which expired in 1952, and (b) approximately $12.500 improperly collected in 1943 or 1944. Plaintiff conceded the right to deduct the $3,433.17,

but denied any obligation with respect to the asserted claim for $12,500.

Plaintiff, in its brief, gives as the basis for this claim an overpayment on a premium paid for Mecklenburg Construction Co., on 15 October 1943, in the sum of $9,466.90 and another overpayment on 12 December 1944 in the sum of $5,009.16. These overpayments were at that time admitted by plaintiff, and its local agent in Durham was directed to reimburse the insured for these sums.

Plaintiff contends the local agent reimbursed defendant the amounts overpaid in 1943 and 1944, and thereafter its local agent and defendant entered into a contract with respect to those amounts. It offered evidence to support its contention that its local agent had paid said sums to defendant. The court excluded this evidence. The court was not called upon to determine whether in fact defendant had been reimbursed for the overpayment. All the court was required to ascertain was whether in fact a dispute existed with respect to the amount claimed to be due it when the check was given and accepted. That such dispute did exist is established by the verified reply.

Prior offers of settlement had been made. They had been rejected. Defendant's offers were all conditioned on its right to the asserted credit. Defendant's offer to pay less than the sum claimed was, when accepted, a full discharge. G.S. 1-540; *Moore v. Greene,* 237 N.C. 614, 75 S.E. 2d 649; *Lochner v. Sales Service,* 232 N.C. 70, 59 S.E. 2d 218; *Durant v. Powell,* 215 N.C. 628, 2 S.E. 2d 884; *Bradshaw v. Conger,* 202 N.C. 796, 164 S.E. 347; *Harris v. Kennedy,* 202 N.C. 487; 163 S.E. 458; *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419.

Plaintiff contends the check issued and accepted cannot bar its right to collect the balance claimed to be owing because the debits to defendant's account consist of charges for insurance premiums, and the collection of a sum less than the prescribed rates is prohibited. G.S. 58-131.18 and G.S. 97-104.2.

The answer to this contention is that defendant does not challenge the rates charged. The parties are in agreement in the computation of the charges. The controversy revolves around the amount paid or credits to which defendant is entitled.

The statutes cited by plaintiff are intended to prevent rebating and an unlawful discrimination and favoritism by insurance companies. There is nothing in the record suggestive of an intent by either party to violate the cited statutes. To avoid an otherwise valid compromise on the ground that it is contrary to public policy, there must be some fact on which the asserted invalidity can rest. None here appears.

Affirmed.

HERMAN M. HIATT AND WIFE, SUSIE W. HIATT; AND WORKMEN'S FEDERAL SAVINGS AND LOAN ASSOCIATION, INC. v. AMERICAN INSURANCE COMPANY.

(Filed 12 June, 1959.)

1. Insurance § 79—

Where insured procures other insurance without advising or obtaining the consent of the original insurer, insurer may avoid liability for breach of the provision of the policy prohibiting other insurance unless the amount thereof is inserted in the blanks provided, since breach of provision against additional insurance, both before and after the 1945 amendment (Chapter 378) to G.S. 58-176, does not merely limit the amount for which insurer should be liable, but is a breach of condition defeating recovery.

2. Same

Where decree of alimony without divorce awards the wife property theretofore held by them by the entireties, the procurement of additional insurance on the property by the wife is a violation of the provision of the original policy prohibiting such additional insurance, even though the original insurance was procured by the husband, since the test of double insurance is whether the owner will be directly benefited by recovery on both policies in case of loss.

3. Insurance § 80—

The fact that insurer's adjuster continues investigation of the loss after learning of the procurement of additional insurance cannot constitute a waiver of the condition of the policy prohibiting additional insurance when such further investigation may be related to insurer's liability to the mortgagee named in the loss payable clause and also to insurer's liability under its policy insuring personal property in the insured dwelling.

APPEAL by plaintiffs from *Sharp, Special Judge,* September Term 1958 of SURRY.

Plaintiffs, Herman M. Hiatt and wife, Susie W. Hiatt, owned their home, located in Surry County about five miles west of Pilot Mountain, North Carolina, as tenants by the entireties. They procured a $5,000 fire insurance policy in their joint names from defendant company, $4,000 on the house and $1,000 on its contents, and renewed said policy yearly, the last renewal being 3 November 1955. Plaintiff Loan Association was named in the mortgage clause as the recipient of any payment as its interest might appear under claim of loss.

Marital difficulties between the individual plaintiffs resulted in a law suit for alimony without divorce on the part of the plaintiff wife, the suit ending on 6 June 1956 by the entry of a consent judgment. Under the terms of this judgment the home of the plaintiffs referred

to above was to become the sole property of the plaintiff wife, and plaintiff husband agreed to convey the house and lot to his wife not later than 15 June 1956.

On the same day that this consent judgment was entered, 6 June 1956, plaintiff wife procured two additional policies of fire insurance, in her name alone, on the dwelling, with the United States Fidelity and Guaranty Company and with St. Paul Fire and Marine Insurance Company, each in the amount of $2,500.

On the night of that same day — 6 June 1956 — the house and its contents were destroyed by fire. The parties stipulated that the fair value of the dwelling at the time of the loss was $7,800. Proof of loss was duly made and filed with the defendant company but payment was refused on the ground that the "other insurance" provisions of the policy had been violated. Payment was also refused by the other two insurance companies, issuers of the last two policies of insurance. However, action instituted by the plaintiff Susie W. Hiatt resulted in judgment against each company in the amount of $1,750, the local agent for these two companies having been informed with respect to the defendant's policy and having promised to notify the defendant of the issuance of the additional insurance but not having done so.

Plaintiffs instituted this action on 31 May 1957 to recover $4,600 of the defendant on its policy (the face amount of the policy less the value of some personal property removed pursuant to a removal permit issued to plaintiff Herman M. Hiatt on 13 April 1956).

The cause came on for trial and the parties waived trial by jury and agreed that the court should hear the matter in controversy on the pleadings, exhibits, and the facts as stipulated.

Her Honor considered the pleadings, exhibits, stipulations of the parties and the arguments of counsel, made certain findings of fact and conclusions of law and entered judgment that plaintiff Loan Association recover $412.36 of the defendant and that the individual plaintiffs recover $100.00 of the defendants for loss of personal property.

Judgment was accordingly entered and the plaintiffs appeal, assigning error.

Woltz, Woltz & Faw; G. Motsinger for plaintiffs.

McLendon, Brim, Holderness & Brooks; L. P. McLendon, Jr.; C. T. Leonard, Jr., for defendant.

DENNY, J. The appellants' first assignment of error is directed

to her Honor's conclusion of law, "that the securing of additional insurance by one of the named insureds on the afternoon before the fire, without any notice or knowledge on the part of the defendant, constituted a breach of the 'total insurance' clause of the Dwelling and Contents Form of the policy and voided the defendant's policy coverage on the dwelling with the exception of the amount admittedly due the mortgagee."

The present Standard Fire Insurance Policy of the State of North Carolina, as amended by Chapter 378 of the Session Laws of 1945, contains this provision: "Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto." The policy issued by the defendant has attached thereto an endorsement reading as follows: "Other insurance is prohibited unless the total amount of insurance, including the amount of this policy, is inserted in the blanks provided on the first page of this policy under the caption TOTAL INSURANCE. If no amounts are shown, the total fire insurance is limited to the amount of this policy."

The policy, likewise, with respect to waiver, contains the following: "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein."

There is no provision by endorsement or otherwise in the defendant's policy authorizing any insurance on the dwelling described in its policy other than the $4,000 authorized and limited therein.

Prior to 1945 the Standard Fire Insurance Policy contained this provision: "Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring, * * * (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy * * *."

Appellants contend that the 1945 amendment was intended by the Legislature to make a violation of the any "other insurance" provision a limitation only and not a condition, the breach of which would completely bar a recovery. As it was written prior to 1945, there can be no doubt that a violation of the "other insurance" provision was a condition, the breach of which would completely bar recovery. *Sugg v. Ins. Co.*, 98 N.C. 143, 3 S.E. 732; *Black v. Insurance Co.*, 148 N.C 169, 61 S.E. 672, 21 L.R.A. (N.S.) 578; *Roper v. Insurance Cos.*, 161 N.C. 151, 76 S.E. 869; *Johnson v. Insurance Co.*,

201 N.C. 362, 160 S.E. 454; *Insurance Co. v. Insurance Ass'n.*, 206 N.C. 95, 172 S.E. 875.

The "other insurance" provision of the Standard Fire Insurance Policy as amended in 1945, has not been interpreted heretofore by this Court. However, the Federal courts and the courts of other states have interpreted identical or similar provisions, and held, apparently unanimously, that the result of a violation of the present provision is the same as under the old provision. *Graham v. American Eagle Fire Ins. Co.* (C.A. 4th), 182 F. 2d 500; *Aetna Ins. Co. of Hartford, Conn. v. Jeremiah* (C.A. 10th), 187 F. 2d 95; *Bethune v. New York Underwriters Ins. Co.*, (D.C., E.D.S.C.), 98 F. Supp, 366; *Oates v. Continental Ins. Co.*, 137 W. Va. 501, 72 S.E. 2d 886; *Flowers v. American Ins. Co.*, 223 Miss. 732, 78 So. 2d 886; *Hunter v. United States Fidelity & Guaranty Co.* (Fla.), 86 So. 2d 421; *Watson v. Farmers Co-Operative Fire Insurance Co.*, 1 App. Div. 2d 419, 151 N.Y. Supp. 2d 321.

In *Graham v. American Eagle Fire Ins. Co., supra,* the endorsement with respect to "other insurance" was identical with that contained in the policy now under consideration on this appeal. From an adverse jury verdict in the District Court in South Carolina, the plaintiffs appealed to the Circuit Court of Appeals. The appellants argued for a reversal on the ground that the procurement of additional insurance by them should not defeat recovery, but only limit the amount which they might recover from defendants. *Judge Parker,* speaking for the Court, said: "There would be no question as to the effect of additional insurance under the provisions of the old New York Standard Fire Policy which expressly stipulated that the company should not be liable for loss or damage occurring while the insured had any other contract of insurance on the property covered unless consent in writing was indorsed on the policy. We think that the result is not different where the prohibition or limitation upon the taking of additional insurance is indorsed upon the policy in accordance with the provision of the new form. In the old form, additional insurance was prohibited or limited unless consent was indorsed; in the new form, the prohibition or limitation must be added to the policy by indorsement. In either case, however, the prohibition or limitation imposes, we think, a condition upon the company's liability under the policy.

" * * * A provision forbidding or limiting additional insurance is clearly intended not as prescribing something to be done by the insured but as expressing a condition upon which the company assumes liability; and the law is well settled that, upon the breach of such a condition, there can be no recovery upon the contract in which it is

contained. The principle upon which this conclusion rests is elementary in the general law of contracts. See A.L.I. Restatements of Contracts secs. 250 and 260, and illustration 1 under 260. Applied in the law of insurance, it clearly requires that a provision forbidding or limiting additional insurance be treated as a condition of the policy, breach of which will preclude recovery by the insured," citing numerous authorities.

It was further contended that since Graham and his wife owned the insured property as tenants in common, and since Graham procured the additional insurance, his wife's interest was not affected thereby. In respect to this contention, *Judge Parker* said: " * * * it is too well settled to admit of argument that a policy insuring the interests of tenants in common and providing against additional insurance is avoided if one of the tenants in common procures additional insurance, even though this covers only his interest in the property." (Citations omitted.)

It is stated in 45 C.J.S., Insurance, section 573 f. (3) (a), page 367, et seq.: "In order that the condition against additional insurance be broken, it must appear, not only that the same property is covered, but also that the same interest in such property is doubly insured. Consequently persons having distinct insurable interests in property may each have them insured without infringing the clause now under discussion. If a person has two insurable interests in property he may insure them both without forfeiture, but, where a policy covers separate interests in the property insured, a stipulation against other insurance is violated if any of the owners of such interests procures a subsequent policy which covers any part of the other insured interest. The test in determining whether either interest is doubly insured is whether the owner, in case of loss, can be directly benefited by recovering on both policies; if he can, there is double insurance."

In the test laid down above, there can be no doubt that there is "other insurance" in the case at bar, or that the plaintiff, Susie W. Hiatt, would be directly benefited if these individual plaintiffs were permitted to recover on the policy issued by the defendant.

In the case of *Oates v. Continental Ins. Co., Supra,* the language with respect to "other insurance" is identical with that in our Standard Fire Insurance Policy. The Court held that procurement of "other insurance" in violation of the provision with respect to "other insurance" avoided the first policy in its entirety. Quoting with approval from the case of *Heldreth v. Federal Land Bank of Baltimore,* 111 W.Va. 602, 163 S.E. 50, the Court said: "Such condition (with respect to other insurance) is deemed reasonable and proper because

the moral hazard should not be increased without the knowledge of the insurer. It is considered that not infrequently the motive for the preservation of property decreases as insurance mounts."

This assignment of error is overruled.

The appellants assign as error the conclusion of law, to wit: "The fact that the adjuster for the defendant made 'further investigation of the loss' after June 14, 1956 (this being the date on which the defendant was informed of the additional insurance), did not constitute a waiver by the defendant of the voiding of the dwelling coverage."

There is no evidence on this record to indicate that the defendant had abandoned its defense with respect to additional insurance. In fact, there was no additional insurance on the contents of the dwelling. Moreover, under the provisions contained in the mortgage clause, the defendant was admittedly liable to plaintiff Loan Association for the balance on its mortgage. The mortgage clause provided: "Loss, if any, * * * shall be payable to the mortgagee (or trustee) as provided herein, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property * * *."

Upon the facts revealed on this record, the conclusion of law which the appellants challenge must be upheld and the assignment of error overruled. See *Gouldin v. Insurance Co.*, 248 N.C. 161, 102 S.E. 2d 846; Appleman, Insurance Law and Procedure, Volume 16, sections 9361 and 9365; 29 Am. Jur., Insurance, section 873, page 669.

In section 9361 of Appleman, Insurance Law and Procedure, *supra*, it is said: "An insurance company does not waive any defense it may have under a policy by investigating a loss that has occurred thereunder. The mere sending of an adjuster to investigate would be no waiver, nor would a request for information have that effect, where the plaintiffs were repeatedly informed that the policy had been forfeited, or where liability for certain items is undisputed."

The court's conclusions of law and the judgment entered pursuant thereto will be upheld.

Affirmed.

WILLIAM ROBERT SLEDGE v. BRYCE WAGONER, P. E. HODGES AND J. BERNARD PARKER T/A BUS TERMINAL RESTAURANTS AND MODERN GRILL.

(Filed 12 June, 1959.)

1. Appeal and Error § 60—

Whether the reversal of nonsuit on appeal precludes nonsuit upon the subsequent trial depends upon whether the evidence on the retrial is substantially the same as, or materially different from, that introduced at the previous trial.

2. Principal and Agent § 13c—

Testimony of a declaration of an alleged agent is not admissible to prove either the fact of agency or to establish its nature or extent.

3. Evidence § 24—

An unverified and unsigned excerpt from the reporter's purported transcript of the testimony of a party before the clerk at a hearing on a motion in the cause is properly excluded when there is no testimony that the party made the statements attributed to him in the purported transcript and there is no identification of the transcript by the person who purportedly prepared it.

4. Same—

A purported affidavit of a party is properly excluded when there is no testimony tending to identify the signature to the writing as that of the party.

5. Evidence § 31— Declaration of agent held not pars res gestae and was properly excluded.

This suit was instituted to recover for injuries in a fall resulting when the cuff of plaintiff's trousers caught in the protruding rod of a magazine rack in a restaurant. Plaintiff offered evidence of a statement made by defendants' agent some five or six minutes after the fall to the effect that the agent said he was going to move the rack before somebody else got hurt and that it ought to have been moved before as it was too close to the door. *Held:* The declaration of the agent amounted to a mere expression of opinion as to what should have been done and as to what should be done in the future, and was not a part of the *res gestae* and, therefore, was properly excluded.

6. Negligence § 4f(2)—

The proprietor of a restaurant is under duty to maintain the premises in such condition as a reasonably careful and prudent operator would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety.

7. Same—

The proprietor of a restaurant cannot be held liable for injuries resulting to a patron from a condition of the premises unless the proprietor could and should have reasonably foreseen that such condition was likely to cause injury.

8. Same— Evidence held insufficient to show that proprietor should have anticipated that condition of premises was likely to cause injury.

Nonsuit was reversed on prior appeal in this action by a patron to recover for a fall in defendants' restaurant resulting when plaintiff's trouser cuff caught on a protruding rod of a magazine rack at the door of the restaurant, but at the second trial crucial evidence tending to show that defendants could and should have foreseen injury to a patron from such condition was properly excluded as incompetent, and there were other variations in the evidence as to the condition of the premises. *Held:* In the absence of evidence upon the second trial sufficient to support a finding that defendants could and should have reasonably foreseen that the condition was likely to cause injury to their patrons, nonsuit was properly entered.

APPEAL by plaintiff from *Thompson, Special J.*, September Special Civil Term, 1958, of RANDOLPH.

Civil action to recover damages for personal injuries.

Plaintiff alleged: On September 3, 1955, he, an invitee, was in defendants' restaurant, operated "in close quarters," located at the High Point Bus Terminal. Defendants negligently maintained on said premises a newspaper and magazine rack. An iron rod extended "less than one inch" over the edge of said rack. Plaintiff's trousers caught on the end of this projecting rod. This proximately caused plaintiff's fall and injuries.

The first trial in superior court was conducted at November Term, 1957. Judgment of involuntary nonsuit then entered was reversed by this Court in *Sledge v. Wagoner,* 248 N.C. 631, 104 S.E. 2d 195.

After our former decision, the case was tried *de novo* in superior court at the above designated term. Again, at the close of plaintiff's evidence, judgment of involuntary nonsuit was entered.

Plaintiff excepted and appealed.

Ottway Burton and Don Davis for plaintiff, appellant.
James B. Lovelace for defendants, appellees.

BOBBITT, J. As in *Maddox v. Brown,* 233 N.C. 519, 521, 64 S.E. 2d 864, where the rules applicable are fully stated, decision turns on "whether the evidence on the retrial was substantially the same as, or materially different from, that adduced at the previous trial." See *Jernigan v. Jernigan,* 238 N.C. 444, 78 S.E. 2d 179, and cases cited.

The evidence relating to the cause and circumstances of plaintiff's fall consists of plaintiff's testimony. Except as stated below, it is substantially the same as his testimony at the trial at November Term, 1957, set forth in detail by *Johnson, J.,* in the opinion in

Sledge v. Wagoner, 248 N.C. 631, 104 S.E. 2d 195. Variations in small particulars need not be discussed.

At the first trial, pertinent to his contention that the passageway was obstructed, plaintiff testified he could "open the door 24 inches from the door facing to the corner of the table," and when he pushed on the door it opened just wide enough for him to "sidle in." At the second trial, plaintiff testified: "The width of that door from jamb to jamb is 36 inches." Again: "From the right-hand door facing to the corner of the table was forty-seven inches." Again: "With those chairs here you could open it around thirty-one inches the way the chairs were occupied." Again: ". . . this rack was approximately four inches from the edge of the door. I won't say for sure, it could have been a little more." He did not use the phrase, "sidle in," or testify that he could not or did not open the door sufficiently wide to enable him to walk into the restaurant without coming in contact with the magazine and newspaper rack. We need not determine whether these variations, standing alone, are sufficiently material to require decision contrary to that reached on the former appeal.

According to plaintiff's testimony, the "little snag" or "spur," on which the cuff of his right trouser leg caught, was approximately three inches from the floor and "anywhere from a half to three-quarters of an inch" in length. The complaint alleged "That the side of the projecting rod was too small to detect by the plaintiff, but that it was large enough to catch in his pants leg . . ." He testified he first observed the "snag" from his position on the floor after he fell. The plaintiff had been in this restaurant almost daily during the six months preceding his fall.

At the first trial, plaintiff testified, *without objection,* that Wood, the restaurant manager, told him that "he ought to have moved that magazine rack before somebody got hurt." On former appeal, this was referred to as "the crucial evidence" relative to foreseeability as an element of proximate cause, which, "with other corroboratory evidence suffices to make the question of foreseeability one for the jury."

At the second trial, *on objection by defendants,* the court excluded this proffered testimony: When asked what statement, if any, Wood made with reference to the rack, plaintiff answered: "He said, 'I am going to move this before somebody else gets hurt'; said 'It ought to have been moved before, it is too close to the door.'" Plaintiff insists that this testimony as to Woods declarations was competent and should now be considered. (Note: At the second trial, plaintiff did not testify or proffer testimony that Wood then moved the

rack and carried it out and said he was going to dispose of it.)

Wood worked in defendants' restaurant and served plaintiff on many occasions. On September 3, 1955, plaintiff entered the restaurant and ordered a cup of coffee. Wood served him. Plaintiff left his coffee on the counter and went (through the swinging door) into the waiting room in order to check the bus schedule. He fell when he re-entered the restaurant. Plaintiff testified: "As to how long after I fell before I had any conversation with Mr. Wood about the rack, I don't know the minutes they were, it was a few minutes, he came around, possibly five or six minutes, just a few minutes. I had got up and sitting up on my stool. I was going to drink my coffee and I was hurting so bad I couldn't, made me sick."

Plaintiff assigns as error the exclusion of evidence offered to show that Wood was *the manager* of defendants' said restaurant.

Plaintiff's testimony that Wood *said* he was the manager was incompetent and properly excluded. ". . . extrajudicial declarations of an alleged agent are inadmissible to establish either the fact of agency or its nature and extent, such statements being regarded as heresay and offered for the purpose of proving the truth of the factual matter therein asserted." *Parrish v. Manufacturing Co.*, 211 N.C. 7, 11, 188 S.E. 817, and cases cited; *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716.

The agreed case on appeal states: "Plaintiff offered into evidence a portion of an unverified and unsigned purported copy of a purported reporter's transcript (attached hereto as plaintiff's Exhibit 'H') of the testimony of one Bryce Wagoner at a hearing before the Clerk upon a motion in a civil action entitled: *'Willard Robert Sledge, Plaintiff v. Bus Terminal Restaurant of North Carolina, Inc., defendant.'* " There was no testimony that Bryce Wagoner, a defendant in the present action, made the statements attributed to him in answers set forth in the portion of the purported copy of purported transcript offered by plaintiff. Moreover, there was no identification of this transcript by the person who purportedly prepared it. Under these circumstances, this proffered evidence was properly excluded.

Too, the court properly excluded plaintiff's Exhibit "I," a paper purporting to be an affidavit of J. Bernard Parker, a defendant herein. No testimony was offered to identify the signature of J. Bernard Parker. Moreover, its exclusion did not prejudice plaintiff. Indeed, it sets forth that the said restaurant in High Point was one of the restaurants operated by defendants herein as partners, trading under the firm name of Bus Terminal Restaurants of North Carolina, and that Wood was an employee of the High Point restaurant.

The evidence suffices to show that Wood was an agent of defendants. We consider now whether, as contended by plaintiff, the exclusion of plaintiff's testimony concerning Wood's declarations was erroneous.

Clearly, the statement or remark attributed to Wood was not competent as a spontaneous statement or utterance. VI Wigmore on Evidence, 3rd Ed., § 1746; Stansbury, North Carolina Evidence, § 164; *Staley v. Park*, 202 N.C. 155, 162 S.E. 202; *Johnson v. Meyer's Co.*, 246 N.C. 310, 313, 98 S.E. 2d 315. It was simply Wood's appraisal, *after plaintiff's fall*, of what he *then* thought should have been done and should be done to avoid the possibility of contact by plaintiff and others with the newspaper and magazine rack. It does not suggest that Wood had knowledge or notice of any prior incident in which plaintiff or any other person had encountered any difficulty on account of this rack nor was there evidence that any such prior incident had occurred.

There is no evidence that Wood was authorized by defendants, his principals, to make such a statement or remark. Moreover, it did not relate to a transaction then pending wherein Wood purported to speak for defendants. *Fanelty v. Jewelers*, 230 N.C. 694, 697, 55 S.E. 2d 493, and cases cited. In the *Fanelty* case, a statement by defendant's store manager, made in a casual conversation a month or so after plaintiff had fallen in the store entryway, that "the store had 'a very dangerous front,' " was held properly excluded. Here, as in the *Fanelty* case, the statement or remark appears to be no more than an expression of opinion.

The well settled rule is stated by *Stacy, C. J.*, in *Hubbard v. R. R.*, 203 N.C. 675, 678, 166 S.E. 802, as follows: "It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestae*, and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency and employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer." *Hughes v. Enterprises*, 245 N.C. 131, 135, 95 S.E. 2d 577; Stansbury, North Carolina Evidence, § 169, and cases cited.

In *Staley v. Park, supra*, the plaintiff fell when going down a flight of steps on defendant's premises. She alleged, *inter alia*, that the carpet on the top steps had worn away. Plaintiff testified that, after her fall, the man in charge of the premises said: "We had intended to

fix that carpet, but had just neglected to do so." Evidence of these declarations was held incompetent. Decisions of like import include *Hughes v. Enterprises, supra,* and *Brown v. Montgomery Ward Co.,* 217 N.C. 368, 8 S.E. 2d 199. It is noteworthy that these cases involved an agent's declarations as to what he had observed or done prior to the plaintiff's fall. *A fortiori,* declarations consisting merely of an appraisal or expression of opinion, after plaintiff's fall, as to what should have been done and as to what should be done in the future, are incompetent.

Plaintiff relies largely on *Carlton v. Bernhardt-Seagle Co.,* 210 N.C. 655, 188 S.E. 77, where this Court held competent a report, containing statements of fact, filed by the employer's manager with the North Carolina Industrial Commission. Such report constituted the employer's compliance with the requirements of the statute now codified as G.S. 97-92. Obviously, an employer cannot disavow the authority of the agent who acts in his behalf in filing a report required by statute. With reference to *a compensation claim,* it is noted: "There must be some casual relation between the employment and the injury; but if the injury is one which, *after the event,* may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." (Our italics) *Conrad v. Foundry Co.,* 198 N.C. 723, 726, 153 S.E. 266; *Guest v. Iron & Metal Co.,* 241 N.C. 448, 451, 85 S.E. 2d 596.

For reasons stated, the exclusion of the testimony as to Wood's declarations was correct.

The legal duty of defendants was to maintain their restaurant premises in such a condition as a reasonably careful and prudent restaurant operator would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Skipper v. Cheatham,* 249 N.C. 706, 107 S.E. 2d 625, and cases cited. Defendants are not liable for injuries resulting to plaintiff from his contact with the newspaper and magazine rack unless they could and should have reasonably foreseen that this rack was likely to cause injury to their patrons.

Absent the evidence considered crucial by this Court on former appeal, we have concluded that plaintiff's evidence at the second trial was insufficient to support a finding that defendants could and should have reasonably foreseen that the newspaper and magazine rack described in the evidence was likely to cause injury to their patrons.

It is noted that *Sledge v. Wagoner,* 248 N.C. 631, 104 S.E. 2d 195, has been cited as authoritative, in respect of the principles of law

stated therein, in subsequent cases: *Bemont v. Isenhour,* 249 N.C. 107, 105 S.E. 2d 431; *Skipper v. Cheatham, supra; Little v. Oil Corp.,* 249 N.C. 773, 107 S.E. 2d 729; *Garner v. Greyhound Corp.,* 250 N.C. 151, 108 S. E. 2d 461.

The judgment of involuntary nonsuit is affirmed.

Affirmed.

LESTER BROTHERS, INC., v. POPE REALTY & INSURANCE COMPANY, CHARLES A. POPE, JR., W. R. WINDERS, RECEIVER FOR POPE REALTY & INSURANCE COMPANY.

(Filed 12 June, 1959.)

1. Fraud § 5—

Where the false representations are not made to plaintiff and plaintiff does not rely thereon, plaintiff may not assert any rights based upon the fraud.

2. Corporations § 1—

Prior to the effective date of G.S. 55-3.1 a corporation could not function as such with less than three stockholders, and therefore where there were only two stockholders of a corporation at the time of the sale of goods to it, the seller may hold each stockholder jointly and severally liable for the purchase price upon default of the corporation.

3. Constitutional Law § 25: Statutes § 10—

The statutory provision that fewer than three persons may acquire all the capital stock in a corporation without impairing its capacity to act as a corporation, G.S. 55-3.1, cannot be given retroactive effect so as to divest a party of his vested right to hold the individual stockholders liable in regard to a transaction transpiring prior to the effective date of the statute at a time when there were only two stockholders of the corporation. U. S. Constitution, Article I, Section 10, N.C. Constitution, Article I, Section 17.

BOBBITT, J., dissenting.

APPEAL by the plaintiff from *McKinnon, J.,* October, 1958 Civil Term, DURHAM Superior Court.

Civil action instituted by the plaintiff, a Virginia corporation, to recover $19,681.66 from the defendant Pope Realty & Insurance Company, a corporation (now in receivership), W. R. Winders, Receiver, and Charles A. Pope, Jr., a stockholder. The plaintiff alleged it sold and delivered seven package houses on the following dates: May 14, August 7, October 20, and October 22, all in 1954; and on January 12, February 9, and June 20, all in 1955. There is no controversy

about the liability of the corporation. Its liability is conceded. The controversy is whether Charles A. Pope, Jr., is individually liable.

The parties waived jury trial and consented that the judge should hear the evidence, find the facts, state his conclusions of law, and render judgment. The court found that Pope Realty & Insurance Company was incorporated in June, 1954. Charles A. Pope, Jr., W. J. Darnell, and Marshall T. Spears, Jr., were the incorporators, each with one share of the capital stock. Pope at all times was a director and president of the corporation. Immediately upon organization, Spears sold and transferred his stock to Thomas E. Montjoy. On November 5, 1954, the corporation purchased the share of Thomas E. Montjoy. On October 4, 1955, Pope purchased the one outstanding share from W. J. Darnell. From October 4, 1955, until the corporation went into receivership on March 19, 1956, Pope was the sole stockholder.

The plaintiff, through negotiation with Pope, sold and delivered three bills of merchandise subsequent to November 5, 1954, as follows: No. 55, January 12, 1955, $5,085.82; No. 57-A, February 9, 1955, $385.68; No. 67, June 20, 1955, $295.98. At the time these deliveries were made the corporation had two stockholders and directors — the defendant Pope, and Darnell. The plaintiff alleged the defendant Pope had received the benefits of all the deliveries from the beginning; that he was guilty of fraud in executing lien waivers by making false affidavits to the effect that all materials which went into the construction projects were paid for, when in fact the plaintiff had been paid nothing whatever. Relying on the statements, loan companies advanced money to Pope on the lots and buildings.

The court found that Pope had executed the false affidavits but that they were not made to the plaintiff and it did not rely on them. Therefore, insofar as the plaintiff was concerned, the defendant Pope had not perpetrated a fraud.

The controversial issues raised by the pleadings need not be further detailed in view of the findings of fact made by the trial judge and his conclusions of law based thereon.

Upon the findings, the trial court held that (1) "The plaintiff's claim is valid against the assets of Pope Realty & Insurance Company in receivership." (2) "The plaintiff have and recover nothing of the defendant Charles A. Pope, Jr."

The plaintiff, upon the findings of fact, moved for judgment against Charles A. Pope, Jr., individually. The motion was denied and the plaintiff excepted. From the judgment that Charles A. Pope, Jr., is not individually liable, the plaintiff has appealed.

Broaddus, Epperly & Broaddus, By: John D. Epperly/VSBjr.
Bryant, Lipton, Strayhorn & Bryant, By: Victor S. Bryant, Jr., for plaintiff, appellant.
Spears, Spears & Powe, By: Marshall T. Spears, Jr., for defendant Charles A. Pope, Jr., appellee.

HIGGINS, J. The only question in the case is the individual liability of the defendant Pope. The plaintiff sought to have him held liable for the whole account because of the alleged fraudulent acts on his part. The court found the plaintiff did not rely on the false statements in extending credit. This finding is supported by the evidence. The court's conclusion that Pope is not individually liable on the ground of fraud follows as a matter of course.

However, as to the three purchases made subsequent to November 4, 1954, another question arises. After that date the corporation had only two stockholders, Pope and Darnell. Under the existing law, the two could not function as a corporation. "Thus the concept that a corporation is a combination of three or more persons who may operate as a legal entity when chartered so to do threads its way through the cited and practically every other section of our law on corporations." *Park Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584. When Pope and Darnell became the only stockholders and directors they could no longer operate as a corporation, but only as individuals. They were each, therefore, individually liable for the debts incurred by them in the business. Consequently both Pope and Darnell were jointly and severally liable for the three package deliveries made subsequent to November 4, 1954. Under the court's findings of fact, it should have been concluded as a matter of law that the plaintiff is entitled to recover from Charles A. Pope, Jr., individually, as follows: $5,085.82, with interest from August 5, 1955; $385.68, with interest from June 1, 1955; and $295.98, with interest from May 1, 1955. The legal liability of Pope to the plaintiff attached at the time of the purchase and delivery of the three items above described.

Since the decision in the *Park Terrace* case, the General Assembly has made sweeping changes in the business corporation law of the State. The changes are now codified in Chapter 55 of the 1957 Cumulative Supplement. Section G.S. 55-3.1 provides, among other things, that fewer than three persons may acquire all the capital stock of a corporation without impairing its capacity to act as a corporation: "(d) If any corporation or purported corporation might have been considered dormant or inactive solely in consequence of the acquisi-

tion heretofore of all its shares by one or by two persons, such corporation or purported corporation is hereby declared to have had uninterrupted existence and to have possessed uninterrupted capacity to act as a corporation."

The defendant Pope contends the foregoing statute relieves him from individual liability for the purchases which he made for the corporation when he and Darnell were its only stockholders. The answer is that when plaintiff dealt with Pope the law of this State as declared in the *Park Terrace* case made him individually liable for the debts he thus created. The plaintiff had a vested right in that liability. The liability attached in 1955. The Legislature, in 1957, could not take it away without violating the obligation of the contract. U. S. Constitution, Article I, Section 10; N. C. Constitution, Article I, Section 17. "Indeed, in this State a statute will not be given retroactive effect when such construction would interfere with vested rights, or with judgments already entered." *Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836.

"Indeed, upon reading and analyzing the statutes relied on by the defendants as authority for the corporate amendment - - - and reading therewith the pertinent provisions of the charter, we find nothing in either inconsistent with the view that they are intended to be prospective with respect to dividends to be earned upon the stock. Whether the law itself makes the amendment, or as now, confers the power of amendment to the corporation, it will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. . . . A contrary construction of the statute, giving authority to retrospective provisions of the charter amendment under consideration, would do violence to the Constitution and would compel us to view the proposed action as the taking of property without due process of law." *Patterson v. Hosiery Mills,* 214 N.C. 806, 200 S.E. 906.

"It is settled, that the Legislature cannot pass any declaratory law or act declaring what the law was before its passage, so as to give it any binding weight with the courts. A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void." *Bank v. Derby,* 218 N.C. 653, 12 S.E. 2d 260; *Booth v. Hairston,* 193 N.C. 278, 136 S.E. 879; *Houston v. Bogle,* 32 N.C. 496; *Arnett v. Wanett,* 28 N.C. 41.

The cause will be remanded to the Superior Court of Durham County where judgment will be entered upon the findings of fact already in the record, charging the defendant Charles A. Pope, Jr., with individual liability for the three purchases made from the plaintiff

during the time the Pope Realty & Insurance Company had only two stockholders and directors.

Remanded for Modification of Judgment.

BOBBITT, J., dissenting. The basis of my dissenting opinion, in which *Justice Johnson* concurred, in *Terrace, Inc., v. Indemnity Co.*, 241 N.C. 473, *480*, 85 S.E. 2d 677, is indicated by these quotations therefrom: (1) "A corporation is an entity, distinct from its stockholders, although one individual owns its entire stock, or all but qualifying shares held by directors. 1 Fletcher, Cyc. of Corporations, sec. 25; 18 C.J.S., Corporations, sec. 4." (2) "But a corporation should not be permitted to serve as a device, instrument or agency to enable its beneficial owners, the stockholders, to accomplish by indirection that which their solemn covenant forbids."

Upon rehearing, *Terrace, Inc., v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584, *Justice Johnson* and I concurred *in result*. The result was in accord with our original view. However, we did not agree that a corporation's capacity to function as such in dealings with third parties automatically ceased when one or two individuals acquired all of the capital stock

The present decision, as I understand it, is that the Pope Realty and Insurance Company could not function as a corporation after November 5, 1954, the date on which the corporation purchased Montjoy's share; that from then until October 4, 1955, when Pope purchased Darnell's stock, both Darnell and Pope were liable individually for obligations incurred in the corporate name; and that from October 4, 1955, Pope was individually liable for obligations incurred in the corporate name.

Plaintiff alleged that Pope Realty and Insurance Company was a duly chartered corporation; that, within its authorized corporate powers, it made the purchases from plaintiff; and that, because of its insolvency, a receiver for Pope Realty and Insurance Company was appointed March 19, 1956.

There is no question but that plaintiff understood its dealings were with Pope Realty and Insurance Company, a corporation. The discovery, upon the insolvency of the corporation, that it was in fact dealing with Pope as an individual, must come as a pleasant surprise.

In my opinion, (prior to G.S. 55-3.1(d), 1957 Cumulative Supplement,) where a person deals with a duly chartered corporation which, in its dealings with third parties, conducts affairs as a corporation, the corporate status is at least that of *de facto* corporation, notwith-

standing less than three individuals acquire ownership of all of its corporate stock; and such creditor should not be permitted to hold liable individuals with whom he has had no dealings as individuals. Surely, the corporate status as to third parties does not fade and revive from time to time by reason of transfers of stock reflecting stock ownership at times by three individuals and at other times by less than three individuals.

These further questions arise: If Pope Realty and Insurance Company is not a corporation, why the receivership? What are the corporate assets? Who are the corporate creditors?

BOYCE E. SMALL v. LOUISE THREADGILL MALLORY.

(Filed 12 June, 1959.)

1. Automobiles § 55—

The "family purpose doctrine" applies to liability for the operation of an automobile in this State.

2. Same— Evidence held sufficient under family purpose doctrine to take issue of wife's liability for negligent driving of husband to jury.

Evidence tending to show that the automobile in question was purchased by the wife and the initial payment made by her from her separate earnings, and the car was maintained for pleasure and convenience of both husband and wife *held* sufficient to be submitted to the jury under the family purpose doctrine on the question of the wife's liability for the negligent operation of the car by the husband, notwithstanding evidence that the wife had not worked for some three years prior to the accident and that the money for installment payments for the financing and refinancing of the car was furnished by the husband.

BOBBITT, J., dissenting.

APPEAL by defendant from *Crissman, J.,* at January 19, 1959 Civil Term of GUILFORD— Greensboro Division.

Civil action without formal pleadings commenced by summons issued 8 December, 1958, out of Municipal-County Court, Civil Division of Guilford, commanding the sheriff or other lawful officer of Guilford County to summon Edward R. Mallory and Louise T. Mallory to appear on 16 December, 1958 at 2 o'clock P. M., before the Judge of the Municipal-County Court, Civil Division in the City Hall, Greensboro, N. C., to answer the complaint of Boyce E. Small

for the non-payment of the sum of $451.14 with interest thereon from 20 December, 1957, due by tort and demanded by plaintiff,— a brief statement of the cause of action being as follows:

"The sum demanded represents the damages to the Buick automobile of the plaintiff resulting from a collision on Redding Street, High Point, N. C., between said Buick automobile and a Cadillac automobile operated by defendant Edward R. Mallory and owned by defendant Louise T. Mallory, said collision being proximately caused by the negligence of the defendant Edward R. Mallory in operating said Cadillac automobile on the left and wrong side of the street."

The sheriff returned summons showing service on defendant Louise T. Mallory— but not on Edward.

The record contains certificate of return to notice of appeal from Municipal-County Court to Superior Court of Guilford County showing these proceedings in said Municipal-County Court: "The plaintiff alleges negligence of the defendant, Edward R. Mallory, resulting in damages. The defendant, Louise T. Mallory, was served; failed to appear. Plaintiff takes nonsuit as to Edward R. Mallory.

"Judgment: That the plaintiff have and recover judgment of the defendant Louise T. Mallory the sum of Four Hundred Fifty-One and 14/100 Dollars" with interest and costs as indicated; and that on 16 December, 1958, defendant Louise T. Mallory gave notice of appeal, and the process, pleadings, and other papers in the case are sent.

Upon trial in Superior Court plaintiff testified that Edward R. Mallory was driving the Cadillac automobile with which his (plaintiff's) Buick automobile collided, on the left or wrong side of the street—producing the damage of which complaint is made.

And Edward R. Mallory as witness for plaintiff testified substantially as follows: " * * * At the time of this accident I lived at 222 Gordy Street. This makes three years I have been working at Marietta Paint and Color Company. I am the husband of the defendant, Louise T. Mallory, and have been married 13 years. I do not have any children, she had one daughter * * * who is about 23 years old. She does not live in the home with me and my wife * * * she was not living with me at the time of this accident. She was in school * * * and would come home and spend the summer. At the time of the accident I was driving a 1952 Cadillac automobile, which was owned by my wife for about three years. Yes, I paid money on the car. It was not purchased for cash,— it was financed. I made monthly payments on the car; she is not working. I have to * * * At the time she had been working * * * she ain't worked none for about three

years. She was working at the time the car was bought. I ain't signed no mortgage on the automobile. I had been nowhere on the occasion of the collision. I was leaving home and was going over to the Marietta Paint and Color Company. I was not going to work. I was going to get my money * * * my pay check. Yes, my wife drives. She uses the car and I use the car too. Sometimes I drive the car to work in the mornings, and sometimes I walk. I haven't got my license now. I ain't had a license for about a year. The purpose my wife uses the car is to go to town or anywhere else. When she was working she used the car just like I do. Sometimes she carried me to work and sometimes I took her to work. Both of us used the car. This child she had did not use my automobile when she lived with me during the summer * * * My wife was not working at the time of the accident. She ain't worked none in about three years. Both of us were working at the time the automobile was bought. When both of us were working, we both contributed to paying the household expenses and bills and we both paid together when we would buy certain things that we particularly wanted. She paid the taxes on the car. I buy gas and she buys gas. Me and her both pay the repair bills when she was working, but I pay for all now because she ain't working. I am living with my wife at this time, always have * * * I could use the car any time that I wanted to. At the time of the accident I was driving on my right-hand side of the road, but it was a slick road and I just hit my brake and that pulled me into it. Yes, during the time of the accident I was on the wrong side of the road. My front wheels slid on that side of the road * * * Yes, I made payments on the car. I gave her the money to make them. Yes, the car was refinanced."

Plaintiff offered no other evidence as to ownership and use of the Cadillac automobile.

And under charge of the court the case was submitted to the jury upon these issues which were answered as indicated:

> "1. Was the plaintiff's automobile damaged as a result of the negligence of Edward R. Mallory, as alleged in the summons? Answer: Yes.
> 2. Was the Cadillac automobile operated by Edward R. Mallory owned, maintained and kept by the defendant Louise T. Mallory for the use, convenience and pleasure of her family, and was Edward R. Mallory operating said Cadillac automobile at the time of the collision within the scope of such purpose? Answer: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $450.00."

Judgment was entered in accordance therewith, and defendant excepted thereto and appeals therefrom to Supreme Court and assigns error.

Stern & Rendleman for plaintiff, appellee.
Martin & Whitley for defendant, appellant.

WINBORNE, C. J. The sole question presented for decision on this appeal challenges the correctness of the ruling of the trial court in overruling defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence. In connection therewith it is appropriate to say that the "family purpose doctrine" with respect to automobiles has been adopted as the law in this jurisdiction, and applied in numerous cases— among which are these: *Robertson v. Aldridge,* 185 N.C. 292, 116 S.E. 742; *Allen v. Garibaldi,* 187 N.C. 798, 123 S.E. 66; *Watts v. Lefler,* 190 N.C. 722, 130 S.E. 630; *Grier v. Woodside,* 200 N.C. 759, 158 S.E. 491; *Lyon v. Lyon,* 205 N.C. 326, 171 S.E. 356; *McNabb v. Murphy,* 207 N.C. 853, 175 S.E. 718; *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87; *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603; *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17; *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Elliott v. Killian* 242 N.C. 471, 87 S.E. 2d 903; *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492; *Bumgarner v. R. R.,* 247 N.C. 374, 100 S.E. 2d 830.

This Court has said in *Vaughn v. Booker, supra,* "The very genesis of the family purpose car doctrine is agency, and that the question here presented is governed by the rules of principal and agent and of master and servant."

Moreover, in *Watts v. Lefler, supra,* this Court, in opinion by *Clarkson, J.,* quotes with approval this statement from Berry on Automobiles (4th Ed.) Sec. 1280: "The rule is followed in some of the States in which the question has been decided, that one who keeps an automobile for the pleasure and convenience of himself and family, is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of the family."

Moreover, in *Matthews v. Cheatham, supra,* the Court quotes with approval from Huddy's Encyclopedia of Automobile Law (9th Ed.) Vol. 7-8 p. 324, this rule: "The person upon whom it is sought to fasten liability under the 'family car' doctrine must own, provide, or maintain an automobile for the general use, pleasure, and con-

venience of the family. Liability under this doctrine is not confined to owner or driver. It depends upon control and use." To like import are later decisions cited above.

In the light of these principles applied to the evidence offered by plaintiff on the trial below, taken in the light most favorable to plaintiff, and giving to him the benefit of every reasonable inference and intendment, this Court is constrained to hold that a case against defendant Louise T. Mallory is made for submission to the jury, even though it is not as clear and forceful as it might be.

Hence in the judgment from which appeal is taken there is

No Error.

BOBBITT, J., dissenting. The record discloses this novel situation: Plaintiff's Buick was damaged by Edward R. Mallory's negligent operation of the 1952 Cadillac. Mallory, named as a defendant, was not served; and, as to him, judgment of voluntary nonsuit was entered at trial in the Municipal-County Court. Judgment was entered in said court against Louise T. Mallory, Mallory's wife. She appealed; and, at trial in superior court, plaintiff offered Mallory as his witness. Mallory's testimony is the only evidence relevant to the liability of Louise T. Mallory for his negligence.

Mallory's testimony includes the following: His wife owned the Cadillac "for about three years." She paid the taxes on the car. Both were working when the car was purchased. When she was working both bought gas and paid repair bills. After his wife stopped working, all bills were paid by Mallory. He testified: "She ain't worked none for about three years."

The Cadillac was not purchased for cash; it was financed and refinanced. The details of these transactions are not shown. There is a faint inference (no explicit testimony) that Mrs. Mallory, before she stopped working, may have made some payment on account of the purchase price. After she stopped working, Mallory made all payments.

Presumably, all legal documents (none in evidence) indicate ownership by appellant. Mallory testified: "I ain't signed no mortgage on the automobile." Again: "Yes, I made payments on the car, I gave her the money to make them."

The evidence, considered in the light most favorable to plaintiff, suffices to show Mrs. Mallory's ownership of the Cadillac subject to such liens as might be outstanding. Even so, when the collision occurred, and for some two years prior thereto, possession was retained solely on account of payments made by Mallory. Under these

circumstances, it can hardly be said that Mrs. Mallory had the final say as to the use and control of the car.

Irrespective of technical ownership, it seems to me that, as of the date of collision and for some two years prior thereto, Mallory *provided and maintained* the car for his own and family use. A realistic evaluation of the evidence indicates that through financing and refinancing he was making payments, similar to rentals, to retain the possession and use of the car. Under these circumstances, I do not think Mrs. Mallory is liable under the "family-purpose doctrine" or otherwise for Mallory's negligent operation of the car.

Whether Mallory would be liable for his wife' negligent operation thereof is another matter. In *Matthews v. Cheatham*, 210 N.C. 592, 188 S.E. 87, the minor daughter owned the car (won by her in a newspaper contest) but it was kept and maintained by her father for family use; and under the "family-purpose doctrine," the father was held liable for his wife's negligent operation of said car.

Hence, in my opinion, appellant's motion for judgment of involuntary nonsuit should have been granted.

WILLIAM McKEE NOWELL AND WIFE, SARAH BLANCHE NOWELL v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, A CORPORATION, AND P. S. WEST CONSTRUCTION COMPANY, INC., A CORPORATION.

(Filed 12 June, 1959.)

1. Limitation of Action § 1—

While statutes of limitation are inflexible and operate without regard to the merits, when failure to institute action within the time limited has been induced by acts, representations or conduct which would render the plea of the statute a breach of good faith, equity will deny the right to assert the defense on the principle of equitable estoppel.

2. Estoppel § 4—

The doctrine of equitable estoppel requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed.

3. Limitation of Action § 15—

Where plaintiff in his complaint has alleged matters *in pais* amounting to an estoppel of defendant from asserting the bar of the statute of limitations, it is not required that plaintiff again allege such matters in reply to defendant's answer setting up the plea of the statute.

4. Limitation of Action § 14— Whether action was instituted within three years from date contractor ceased attempts to remedy structural defects held for jury.

In this action to recover for defects in the construction of a building, defendant contractor asserted the bar of the statute of limitations on the ground that the action was not instituted within three years after the completion of the building and its acceptance by the tenant. Plaintiff's allegations and evidence were to the effect that prior to the completion of the building controversy arose as to certain defects, that defendant contractor promised to remedy the same and that efforts to correct the structural errors continued until less than three years prior to the institution of action when defendant contractor advised by letter that he would assume no further responsibility in regard thereto. *Held:* The evidence was sufficient to go to the jury on the issue as to whether the action was barred by the three year statute of limitations.

APPEAL by defendant P. S. West Construction Co., Inc., from *Clark, J.*, September, 1958 Term, WAKE Superior Court.

Civil action for damages the plaintiffs alleged resulted from the defective and faulty construction of a store building and parking lot in the City of Raleigh. The plaintiffs agreed to have constructed a store building and parking lot and to rent them to the Great Atlantic & Pacific Tea Company for a period of ten years at a rental based on the cost of construction. The Tea Company insisted the building should be erected according to its plans and specifications and that its engineer, R. L. Taylor, should supervise the construction.

On August 2, 1950, the plaintiffs entered into a contract with the appellant to do the construction work according to the Tea Company's plans at a price of $74,500.00, to be paid at the time the Tea Company accepted possession as tenant. On April 1, 1951, the Tea Company entered into possession and the plaintiff paid the appellant the contract price. However, in November, 1950, a controversy arose between the plaintiffs and the appellant with respect to the waterproofing of the walls and floors of the building then under construction. On February 26, 1951, the appellant notified the plaintiff by letter, "We have found the trouble and made the necessary corrections. I am certain there will be no water or moisture coming through these walls in the future. However, should there be, my company will be entirely responsible and we will remedy the situation, if it should occur." The plaintiffs also made complaint that the roof and the windows were not constructed in a workmanlike manner, were leaking and required correction. The controversy continued with respect to the building and was extended to include the surfacing of the parking lot, especially the lack of re-enforcing called for by the contract.

On February 22, 1954, the vice president of the appellant wrote plaintiffs' counsel: "I have received a report from Mr. H. C. Thompson (appellant's employee) concerning the above job. He stated that leaks were caused where the parapet wall was flashed and was not due to leaks, or holes in the roof, nor was any water coming through the walls of the building. He advised me that he has fixed this parapet by completely covering it with waterproof felt and mastic, and feels sure that it will give you no more trouble during the length of time this roof should be good. He checked the building with the manager on Sunday, February 21st, . . . and did not find any leaks coming from the roof, or through the wall. However, there was considerable water coming into the sump and drain tile under the floor, and was having to be pumped out . . . We will assume no further responsibility for this condition, and it should give no trouble, except when you have a very large rainfall in a short time."

The plaintiffs instituted this action on August 23, 1956. The defendants pleaded three defenses: (1) That the construction work was according to contract; (2) that the work was supervised by R. L. Taylor, (engineer for the Tea Company) agent of the plaintiffs; and that the building and parking lot were accepted as finished construction jobs in 1951; (3) that more than three years elapsed between the date the plaintiffs' cause of action accrued and the time suit was brought.

The plaintiffs had alleged in the complaint the negotiations and attempts at repair, and their reliance on the promises to correct the defects. The first notice they had of defendant's refusal to carry out its promises was in the letter of February 22, 1954.

At the close of the plaintiff's evidence, judgment of involuntary nonsuit was entered as to the Tea Company on the ground the action was barred by the statute of limitations. Motion to nonsuit as to the appellant was denied. The defendant then introduced evidence and excepted to the court's refusal to enter judgment of nonsuit.

The court submitted three issues: (1) Did the defendant breach the contract? (2) Did the plaintiffs institute the action within three years from the time it accrued? (3) Amount of damage plaintiffs were entitled to recover for the breach.

The defendant did not object to the issues tendered, and did not tender others. The jury answered the first and second issues, yes; and the third issue, $6,500.00. From the judgment on the verdict, the defendant appealed.

Thomas W. Ruffin for plaintiffs, appellees.

James & Speight, W. C. Brewer, Jr., for defendant P. S. West Construction Co., Inc., appellant.

HIGGINS, J. The plaintiffs' evidence disclosed the action against the Tea Company was not brought within three years from the time it accrued. The evidence established the Tea Company's plea in bar. Nonsuit was required. The appellant interposed a like plea which the court overruled. Assignment of Error No. 2 challenges this ruling.

The appellant has contended the nonsuit should have been entered upon two grounds: First, the allegations and the evidence showed that R. L. Taylor, engineer for the Tea Company, was also the agent of the plaintiffs and, as such, had supervised the construction and, with full knowledge of the manner in which the work had been done, accepted the structures. Second, the suit was not brought within three years from the time the action accrued. However, the plaintiff's pleadings and evidence disclosed that before the appellant completed the construction work the plaintiffs had complained of the defects in the walls, roof, and windows. Prior to the time the work was completed and the Tea Company entered into possession, the plaintiffs, by their complaints and objections, gave notice that they did not waive the defects. They relied on the assurances given by the appellant on March 8, 1951, that necessary corrections would be made. "My company will be entirely responsible and we will remedy the situation, if it should occur."

The efforts of the appellant to correct the structural defects continued at intervals until February 22, 1954. On that date, for the first time, the appellant gave notice, "We will assume no further responsibility for this condition." Thus the evidence fails to support the contention the plaintiffs accepted the building and foreclosed their right to have the defects corrected. Their conduct in pressing for repairs denied the claim that Taylor had unconditionally accepted the structure and waived the defects.

The appellant, however, placed its main reliance for nonsuit on the ground the construction was completed, possession was delivered, and the contract price paid on April 1, 1951. The plaintiffs delayed bringing this action until August 23, 1956. Therefore, the defendant contends its plea of the statute of limitation should have been sustained, and a judgment of nonsuit entered. The appellant cites as authority the following: *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508; *Lester v. McLean,* 242 N.C. 390, 87 S.E. 2d 886; *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320; *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d

202; *Aydlett v. Major & Loomis Co.*, 211 N.C. 548, 191 S.E. 31; *Peal v. Martin*, 207 N.C. 106, 176 S.E. 282; *Town of Franklin v. Franks*, 205 N.C. 96, 170 S.E. 113; *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607.

A statute of limitation operates as a complete defense, not for lack of merit, but for security against the attempt to assert a stale claim. "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all." *Shearin v. Lloyd, supra.*

The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play." *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114. The plaintiffs have pleaded the facts showing equitable estoppel in stating their cause of action in the complaint. Having pleaded them once, it was not necessary to repeat them by reply.

The plaintiffs argue they accepted in good faith the defendant's statement: "We have found the trouble and made the necessary corrections. . . . My company will be entirely responsible and we will remedy the situation, if it should occur." They relied upon the promise and did not sue while efforts to correct the structural errors were under way. The appellant, by its promises, invited the delay and should not complain that the invitation was accepted.

However, on February 22, 1954, for the first time, the appellant gave notice it would assume no further responsibility. Suit was brought within less than three years from the date of that notice. *Smith v. Gordon*, 204 N.C. 695, 169 S.E. 634.

The evidence was sufficient to go to the jury on the second issue. The jury's answer was conclusive. The plaintiffs' right to avoid the statutory bar by matters *in pais* is recognized in many cases, among them: *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Hawkins v. Finance Co.*, 238 N.C. 174, 77 S.E. 2d 669; *Washington v McLawhorn*, 237 N.C. 449, 75 S.E. 2d 402; *Long v. Trantham*, 226 N.C. 510, 39 S.E. 2d 384; *Small v. Dorsett*, 223 N.C. 754, 28 S.E. 2d 514; *Scott v. Bryan*, 210 N.C. 478, 187 S.E. 756; *Bank v. Clark*, 198 N.C. 169, 151

S.E. 102; *Wells v. Crumpler,* 182 N.C. 350, 109 S.E. 49; *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824.

The defendant's only assignment of error is to the court's refusal to nonsuit. If the evidence was sufficient to support the issues and the issues were sufficient to support the judgment, the motion to nonsuit was properly denied. The contract was admitted. The evidence before the jury was sufficient to warrant the finding (1) that the contract was breached, (2) that the action was not barred, and (3) that the plaintiff suffered some damage. The issues and the jury's answers to them are sufficient to sustain the judgment.

No Error.

NANCY D. SQUIRES v. TEXTILE INSURANCE COMPANY.

(Filed 12 June, 1959.)

1. **Insurance § 54— Policy held to cover liability of insured for negligent operation of car by employee in scope of employment notwithstanding the car was owned by employee.**

The policy in suit covered automobiles not owned by insured provided they were used in operations necessary or incidental to insured's business, and included in its liability coverage, the operation of an automobile by an employee of insured in the scope of his employment. *Held:* A later provision of the policy that it should not apply to an employee with respect to any automobile owned by him is, in regard to liability to third persons, either in conflict with the prior provisions or ambiguous, and therefore in an action by an injured third party, evidence that her injuries resulted from the negligent operation of an automobile by an employee of insured while acting in the scope of his employment, takes the issue of liability under the policy to the jury, and the issue of whether the automobile was owned by the employee is not determinative.

2. **Insurance § 3—**

Whether the terms of a policy of insurance are conflicting or ambiguous is a question of law for the court.

3. **Same—**

Ambiguities and conflicts in the provisions of an insurance contract are to be resolved against insurer.

4. **Appeal and Error § 45—**

Where the rights of the parties are determined by the verdict upon one issue, alleged error relating to another issue cannot be prejudicial.

5. **Insurance § 65—**

Where judgment is obtained against insured in an action in which in-

surer participated, the judgment is conclusive on insurer as to the questions of agency and damages therein adjudicated, and, in the subsequent action by the injured third persons against insurer to recover the unpaid damage, the only defense available to the insured is that the policy does not cover insured's liability.

6. Same: Evidence § 15—

In an action on a liability insurance policy by the injured third person, another liability policy issued by another insurer to another joint *tort feasor* also liable for the damages in suit, is properly excluded.

7. Insurance § 66½—

The prorating of the recovery of an injured third party between the insurers liable on policies issued respectively to the *tort feasors* causing the injury, *held* not prejudicial.

APPEAL by defendant from *Phillips, J.*, September 22, 1958 Civil Term, GUILFORD Superior Court (Greensboro Division).

This civil action was instituted by the plaintiff to recover on a garage liability insurance policy issued by the defendant in favor of its named insured, Southern Auto Parts, Inc. The maximum liability coverage for each person was Twenty-five thousand Dollars and for each accident Fifty thousand Dollars. The insuring agreement provided: "Coverage A—Bodily Injury Liability.—To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages . . . sustained by any person, caused by accident, and arising out of the hazards hereinafter defined." Among the hazards defined is the following: "Automobiles Not Owned or Hired.—The ownership, maintenance or use of the premises for the purpose of an automobile repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto; and the use in connection with the above defined operations of any automobile not owned or hired by the named insured, a partner therein or a member of the household of any such person."

Under Division III of the policy, the following appears: "Definition of 'Insured.' With respect to the insurance under coverage A, B, and D, the unqualified word 'insured' includes the named insured and also includes (1) any partner, employee, director, or stockholder thereof while acting within the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by this policy; and (2) any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. This policy does not apply: . . . (b) to any partner, employee, direc-

tor, stockholder or additional insured with respect to any automobile owned by him, or by a member of his household other than the named insured."

The plaintiff, Mrs. Nancy D. Squires, was injured in a collision between her automobile and a Ford convertible driven by Louis W. Sorahan. In a civil action for the injury, this plaintiff obtained a judgment for $17,500.00 against Sorahan and against his principals, Southern Auto Parts, Inc., City Motors of Durham, Inc., and Edward S. Massengill, T/A Durham Motor Sales. Upon failure of the defendants to satisfy the judgment in her favor, the plaintiff instituted this action to compel the defendant to pay her judgment. The defendant's policy provided: "Any person . . . who has secured such judgment . . . shall thereafter be entitled to recover . . . to the extent of the insurance afforded by this policy."

The evidence in the instant case disclosed that in the accident in which the plaintiff sustained her injuries, a Mrs. Ruth Bishop Hearn, a guest passenger in her automobile, was also injured. Mrs. Hearn filed a claim against Sorahan and the three principals for whom he was working, which was compromised by the payment of $1,600.00 and her medical bills. The present defendant participated in the settlement of Mrs. Hearn's claim and paid one-third of it.

The defendant denied liability upon the ground that the policy does not apply to an employee who at the time of the injury was operating his own automobile; and that the Ford convertible was owned by Sorahan, an employee of the named insured, and excluded by (b) under the policy. The defendant tendered an issue as to Sorahan's ownership of the Ford convertible which was involved in the accident and excepted to the court's refusal to submit it.

The plaintiff pleaded estoppel by reason of the defendant's having participated in the settlement of Mrs. Hearn's claim for an injury resulting from the same accident, and that the defendant thereby recognized the liability for Sorahan's negligence under the policy.

The defendant moved for judgment of nonsuit and excepted to the court's refusal to grant the motion. The court submitted two issues which the jury answered as here indicated:

> "1. On May 23, 1956, at the time of the plaintiff's injury, was Louis W. Sorahan using an automobile not owned or hired by Southern Auto Parts, Inc., in connection with operations necessary or incidental to Southern Auto Parts, Inc.,'s ownership, maintenance, or use of its premises in Durham, North Carolina, for the purpose of an automobile repair shop, as alleged in the Complaint?

Answer: Yes.

"2. Did the defendant waive its rights, if any it had, to deny that its Policy No. AGL 378 affords coverage for the payment of the judgment which the plaintiff recovered on April 10, 1958, in the Superior Court of Guilford County, Greensboro Division, in that certain action entitled Nancy D. Squires versus Louis W. Sorahan, Southern Auto Parts, Inc., City Motors of Durham, Inc., and Edward S. Massengill, T/D/B/A Durham Motor Sales, as alleged in the plaintiff's Reply?

Answer: Yes."

Upon the jury's answer, the court entered judgment that plaintiff recover of the defendant $14,583.33, being five -sixths of the amount of the judgment, upon the theory that the total coverage of $30,-000.00 was shown by the evidence, ($25,000.00 by the policy here involved, and $5,000.00 by policy issued to City Motors of Durham by the Nationwide Mutual, which policy was concurrent insurance, offered in evidence by the defendant without objection). From the judgment, the defendant appealed, assigning errors.

Jordan, Wright & Henson for plaintiff, appellee.

Sapp & Sapp, By: Armistead W. Sapp for defendant Textile Insurance Co., appellant.

HIGGINS, J. The appellee has moved in this Court to dismiss the appeal for failure of the defendant to comply with the Rules of Practice in the Supreme Court for defective assignments of error, and failure to discuss the assignments in the brief. After careful examination of the record and the brief, we conclude the assignments and their treatment in the brief are sufficient to present for review (1) the propriety of the nonsuit, (2) the admission in evidence of the release agreement procured from Mrs. Hearn by the defendant, (3) the court's refusal to permit the defendant to introduce a garage policy issued by Nationwide Mutual to Massengill, and (4) the failure to submit the issue of Sorahan's ownership of the Ford convertible involved in the accident.

The plaintiff introduced Policy No. 378. Admittedly it was in force on the date the plaintiff sustained her injury. She next introduced the judgment roll showing she had prosecuted successfully an action in the Superior Court and obtained a judgment against Sorahan, Southern Auto Parts, Inc., City Motors of Durham, Inc., and E. S. Massengill, T/A Durham Motor Sales. The issues and judgment in that case established that Louis W. Sorahan was the agent of the

other defendants and was about their business at the time of the plaintiff's injury which resulted from Sorahan's negligence; and that the defendants were liable to this plaintiff for $17,500.00 damages. The plaintiff also introduced evidence that the judgment had not been paid.

Louis W. Sorahan testified for the plaintiff that at the time of the collision between his Ford convertible and the automobile this plaintiff was driving and in which Mrs. Hearn was riding as a guest passenger, he was acting as an employee of Southern Auto Parts, Inc., City Motors of Durham, Inc., and Massengill, T/A Durham Motor Sales, and was on a mission for them as their agent at the time of his collision with the plaintiff's automobile. This evidence was sufficient to make out a case for the jury and to repel the motion for nonsuit.

The first issue submitted to the jury might have been drawn with greater precision. However, in connection with the pleadings, the policy involved, the record evidence, and the charge of the court, enough appears to place the insured's agent Sorahan and the automobile he was using at the time of the injury within the coverage of the defendant's policy under the definition of "Hazards—Division 2," and under the general definition of "Insured—Division III." Under "Division III," the policy says: "The unqualified word 'insured' includes the named insured (Southern Auto Parts, Inc.) and also includes (1) any . . . employee (Sorahan) while acting within the scope of his duties as such, and (2) any person while using an automobile covered by this policy . . . provided the actual use of the automobile is by the named insured or with its permission." Then follows: "This policy does not apply . . . (b) to any partner, employee, director, stockholder, or additional insured with respect to an automobile owned by him."

Does (b) mean the insurer will not pay to a partner, employee, director, stockholder, or additional insured for injury if caused by his own automobile, or does it mean the insured will not indemnify third persons for injury if inflicted by an automobile owned by a partner, employee, etc.?

The defendant contends (b) withdraws from coverage altogether damages to third persons by an employee while using his own automobile. We are not certain what (b) means. If it means what the defendant says it does, it is in conflict with the coverage under "Definition of Hazards," and under the general provisions of "No III—Definition of Insured." If not in conflict, it is ambiguous. The trial court interpreted (b) as in conflict with the general provisions and

refused to submit the issue as to Sorahan's ownership of the Ford convertible. In this we think the trial court was correct because of the conflicting or ambiguous provisions. The determination whether the terms of a policy are conflicting or ambiguous is one of law for the court. The only interpretation of a provision similar to (b) we have been able to find is a decision by an intermediate appellate court of Alabama in the case of *Insurance Co. v. Bedford,* 93 So. 2d 166. We are not prepared to follow the interpretation of (b) made by the court in that case. In policies of insurance, if ambiguous, or if they contain conflicting provisions, the ambiguities and conflicts must be resolved against the insurer. *Johnson v. Casualty Co.,* 234 N.C. 25, 65 S.E. 2d 347; *Electric Co. v. Ins. Co.,* 229 N.C. 518, 50 S.E. 2d 295; and cases cited.

The policy as interpreted by the court and the jury's answer to the first issue were sufficient to support the plaintiff's judgment. The issue of waiver, though found for the plaintiff, may be treated as surplusage. The admission of evidence and the charge of the court on that issue, even if erroneous, which we do not concede, were non-prejudicial. *Johnson v. Casualty Co., supra.*

The defendant had an opportunity to defend in the plaintiff's action against the defendant's named insured. The judgment is, therefore, conclusive as to the insurer on the question of agency and damage. The only defense available to the defendant is that its policy does not cover the insured's liability. *Distributing Co. v. Ins. Co.,* 214 N.C. 596, 200 S.E. 411; *Hall v. Casualty Co.,* 233 N.C. 339, 64 S.E. 2d 160.

The court properly excluded evidence of a garage policy issued to Massengill by Nationwide Mutual. That policy involved parties who are strangers to this action. *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171; *Robbins v. Alexander,* 219 N.C. 475, 14 S.E. 2d 425. The liability of the original parties against whom the plaintiff obtained her judgment are joint and several. The plaintiff could proceed against one, and consequently against the insurance carrier for one. The agreement to prorate in the court's judgment is not prejudicial to the defendant. *Commercial Standard Ins. Co. v. American Employers Ins. Co.,* 209 Fed. 2d 60.

The charge on the controlling issue seems to be free from objection. Careful review discloses

No Error.

ROSCOE BENNETT v. FLOYD J. LIVINGSTON AND WIFE TRUDY LIVINGSTON.

(Filed 12 June, 1959.)

1. **Automobiles § 14: 42c—**

While it is negligence *per se* for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection unless permitted to do so by an officer, G.S. 20-150 (c), the 1957 amendment to the statute defines intersection as one marked by the State Highway Commission by appropriate signs.

2. **Automobiles § 42c—**

Evidence tending to show that plaintiff attempted to pass defendants' vehicle on a four-lane highway at a cross-over to a store on the opposite side of the highway, in the absence of evidence that the place had been marked as an intersection by appropriate signs of the Highway Commission, *held* not to show contributory negligence as a matter of law so as to justify nonsuit.

APPEAL by plaintiff from *Phillips, J.*, at February 13, 1959, Civil Term of CABARRUS.

Civil action to recover for personal injury and property damage allegedly resulting from actionable negligence of defendants in an automobile collision.

Plaintiff alleges in his complaint, in the main in paragraph 3, substantially the following: On or about the 3rd day of November, 1956, plaintiff was operating his 1950 Ford automobile south on Highway # 29, at a point about three miles from the city limits of Charlotte, Mecklenburg County, North Carolina, proceeding in a careful and prudent manner, at a rate of speed of approximately 50 miles per hour, when and where he overtook two automobiles going in the same direction, the front car being owned by defendant Floyd J. Livingston and operated by defendant Trudy Livingston; that as he pulled alongside the rear car, defendants' car was about (in the) middle of the road, which would have been straddle the center line if one were there; that thereupon plaintiff blew his horn twice and defendant Trudy Livingston bore to the right as if to allow plaintiff to pass, but instead she, suddenly and without giving any hand signal or signal otherwise, pulled her car directly to the left in the passing lane of the highway, in the path of plaintiff's car, causing the two cars to collide violently, by reason of which plaintiff sustained personal injuries and his automobile was damaged, in the manner and to the extent alleged.

And plaintiff further alleged that the collision was caused by the negligence of defendants in that: They failed (a) to yield the right

of way to the automobile of plaintiff; (b) to give signal for a turn, as is required by law; (c) to keep a proper lookout for others using the highway, as required by law; and (d) to have said automobile under proper control; and in that they were operating said automobile (e) in the wrong traffic lane, and (f) in a dangerous and reckless manner without regard to the life and safety of others and in such manner as to endanger or to be likely to endanger the lives and property of others using said highway.

And plaintiff further alleges in his complaint that the automobile operated by defendant Trudy Livingston and owned by her husband, Floyd J. Livingston, was operated by the member of the family of Floyd J. Livingston as a "Family Purpose" car and at the time alleged was being operated by and with the consent of the owner and in the course of business or pleasure of the family.

On the other hand, defendants, answering paragraph 3 of the complaint, while admitting that the plaintiff was operating his 1950 Ford automobile in a southerly direction on U. S. Highway # 29 about three miles from the city limits of Charlotte, North Carolina, on or about 3 November, 1956, and that defendant Trudy Livingston was operating the 1941 Chevrolet automobile belonging to defendant Floyd J. Livingston in the same direction on U. S. Highway # 29, denied all other allegations.

And for a further answer and defense defendants say and aver substantially the following: That at the time and place of the collision defendant Trudy Livingston was driving in a careful and prudent manner; that at the same time plaintiff was driving his 1950 Ford automobile— following Mrs. Livingston; that as she approached a cut-off to the left of the highway near the Herrin Store, she signalled of her intention to turn to the left into the said cut-off; that as she began so to turn, the plaintiff, driving in a careless and reckless manner, and at an excessive rate of speed, being unable to bring his car to a stop, ran into and collided with the rear of car operated by Trudy Livingston, without fault on her part, but caused solely by negligence of plaintiff.

And defendants, so answering, aver that if plaintiff was damaged as a result of any negligence on their part, then plaintiff by his own negligence brought about and proximately caused the collision and any and all resulting damages alleged in the complaint, in that: (a) He drove his 1950 Ford automobile at a speed which was greater than was reasonable and prudent under the existing circumstances. (b) He failed (1) to keep the said automobile in proper control (2) to keep a proper lookout (3) to yield the right of way to defendants, and (4) to take any precautions to prevent the collision.

(c) He failed to look and observe the signal given by Mrs. Livingston of her intention to make a left turn off the highway, and to bring his automobile to a stop before striking her automobile.

And (d) he failed to drive his automobile and to so conduct himself as a reasonable and prudent person would have done under similar circumstances, and undertook to drive his automobile at a time when he was not in proper position to do so.

Defendants plead such negligence of the plaintiff as a bar to his right to recover herein.

And as a cross-action against plaintiff, defendant Floyd J. Livingston sets forth a cause of action on the grounds set out in the above further answer and defense, upon which he prays judgment for property damage— and that plaintiff recover nothing of defendants in this action.

Upon the trial in Superior Court, plaintiff testified in pertinent part: "* * * On November 3, 1956, I was the owner and operator of a 1950 Ford automobile. I left home and was going to Charlotte, on Highway 29. It was about 4:30 in the afternoon. The weather * * * was fair * * * the road dry. I was driving down Highway 29 about three miles this side (north) of Charlotte and Mrs. Livingston was driving approximately straddled of the line in the center lane. I slowed down and she didn't move either way * * * I slowed down a little more. She didn't do anything. I blew my horn twice and then she moved over to the right, and when I started she pulled directly across in front of me. At this time my car was as far to the right as I could to keep from getting off. I hit her on the left rear fender * * * Mrs. Livingston did not give any turn signal of any kind, electrically or manually. She was right at the intersection, maybe as far as from here to the street when I saw her driving slow. That is, when I slowed down to see if she was going in the intersection— it was a crossover and not an intersection * * * When I hit the car it turned over in the center lane. My car went off to the side of the road. My automobile was damaged to the extent that it was a total loss * * * I sustained injured."

Then on cross-examination plaintiff continued: "* * * headed towards Charlotte * * * Nobody was with me. When I first saw Mrs. Livingston's car it was a good ways back from that intersection, approximately as far as * * * maybe 300 feet. At that time I was driving right around 50 miles per hour, maybe a mile or two faster * * * she was going at a slow rate of speed, I imagine around 25. I continued in her direction and got up close to her, at a slower rate of speed * * * about 40 miles per hour. I slowed * * * to about 30 miles

per hour and blew my horn. At that time she was farther away from me than here to the door, 50 or 75 feet * * * I did not slow down any more before I hit her, because when I blowed the horn she moved back over to the right and I speeded back up to go by her * * * At time I hit her, I was going about 40 miles per hour. I was skidding when I hit her. I was going about 40 miles per hour before I started skidding— when I started skidding she pulled straight in front of me * * * ."

D. P. King testified for plaintiff, in pertinent part: "I am a State Highway patrolman * * * On November 3, 1956, I investigated an accident (the one in question) on U. S. Highway 29. The highway is a four-lane, divided highway,— two northbound, two southbound, divided by a grass island approximately 15 feet wide * * * "

The record shows that before closing his evidence plaintiff, without objection by defendants, offered in evidence his allegations as to family purpose use of car, and defendants' denial of it. Then plaintiff rested. And defendants moved for judgment as of nonsuit. The court in its discretion permitted defendants to amend their answer to allege that plaintiff was negligent in that he was attempting to pass the defendants' car from the rear at an intersection. And defendants waived the counterclaim and moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted thereto and from judgment in accordance therewith, appeals to Supreme Court and assigns error.

Hartsell & Hartsell, William L. Mills, Jr., C. M. Llewellyn for plaintiff, appellant.

Pierce, Wardlow, Knox & Caudle for defendants, appellees.

WINBORNE, C. J. Taking the evidence shown in the record of case on appeal as offered by plaintiff in the light most favorable to him and giving to him the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is required in such cases, considered under applicable principles of law, a case is made for the jury.

In this connection G.S. 20-150 (c) originally declared that "the driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction * * * at any intersection of highway unless permitted so to do by a traffic or police officer," which as interpreted by the Court meant that a violation of these provisions would be negligence *per se*, and the Court so held. *Donivant v. Swaim*, 229 N.C. 114, 47 S.E. 2d 707 (1948); *Cole v. Lbr. Co.*, 230 N.C. 616,

55 S.E. 2d 86 (1949); *Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401 (1950).

The statute, however, has been amended by the Legislature defining the words "intersection of highway" to mean intersections defined and marked by the State Highway Commission by appropriate signs. See Session Laws 1955, Chapter 862, Sec. 1, and Chapter 913, Sec. 2, and Session Laws 1957 Chapter 65, Sec. 11.

And it is noted that the evidence in the instant case does not show that what is referred to as intersection of highway is designated and marked by the Highway Commission by appropriate signs. Indeed, the plaintiff described it as "a cross-over", and not an intersection.

Hence it appears that the amendment to defendants' answer, allowed by the court, fails to bring the case within the provisions of G. S. 20-150 (c). Therefore, if it be that plaintiff overtook and passed the vehicle of defendants proceeding in the same direction, such violation would not be negligence *per se.*

In our opinion the evidence presents questions of negligence and contributory negligence which should be submitted to the jury.

The judgment below is

Reversed.

BERA BROOKS LONG v. PILOT LIFE INSURANCE COMPANY.
(TWO CASES.)

(Filed 12 June, 1959.)

1. Insurance §§ 10, 25—

Where insured dies on the premium due date, the insurer is entitled to deduct the amount of the unpaid premium for the ensuing year from the face amount of the insurance in making settlement with the beneficiary, since the premium becomes due on the anniversary date of the policy notwithstanding that insured may pay the premium at any time on this date without incurring forfeiture, and notwithstanding the provisions of the policy that it should remain in effect for thirty-one days after its due date, the grace period not having the effect of keeping the policy in force without incurring liability for the premium.

APPEAL by plaintiff from *McKinnon, J.,* January Civil Term 1959 of ALAMANCE.

The facts involved in these actions are not in dispute. The plaintiff's husband, Eugene M. Long, had two policies of insurance issued on his life by the defendant, both of which were dated 8 October 1926,

with premiums payable annually on or before the 8th day of October of each year thereafter. Each policy contains the provision that the designated premium was "to be paid on or before the delivery of the Policy, and annually thereafter on or before the eighth day of October in each year during the continuance of this Policy." Under General Provisions it is provided that " * * * the premiums on this policy are computed on the basis that they will be paid annually, in advance * * *."

The policies involved also contain this further provision: "In the payment of every premium after the first, thirty-one days of grace without interest are allowed, during which time the insurance shall continue in full force. In the event of death occurring within the days of grace, the unpaid premium for the then current year shall be deducted from the amount payable hereunder."

All premiums were paid up to and including the premiums on the policies which fell due 8 October 1956. The insured died on 8 October 1957, and the premiums which fell due on the date of the insured's death were not paid. The defendant promptly tendered to the plaintiff the full amount of the policies, less the amounts of premiums due on 8 October 1957, the date of the insured's death. The proffered settlement was as follows: Defendant issued and delivered its check for $9,673.20 to the plaintiff, representing the face value of Policy No. 78127 in the sum of $10,000.00, less the annual premium of $326.80 due on the date of the insured's death, 8 October 1957; and the defendant issued and delivered its check for $4,836.60, representing the face amount of Policy No. 78128 in the sum of $5,000.00, less the annual premium of $163.40, also due and payable on 8 October 1957.

The plaintiff did not cash and still holds the above checks. In the meantime, she brought these two actions for the face amount of each policy with interest from the date of her husband's death.

The two cases were consolidated and heard by the trial judge without a jury upon stipulated facts, including the policies in question which were incorporated in and made a part of the stipulation by reference thereto.

From the judgment that plaintiff recover only the amounts offered by the insurance company, without interest, the plaintiff appeals, assigning error.

Long, Ridge, Harris & Walker for plaintiff.
Wharton & Wharton for defendant.

DENNY, J. The primary question in this controversy is simply this: Where the insured died on the premium due date and the premium had not been paid, is the insurance company entitled to deduct the amount of that premium from the face amount of the insurance in making settlement with the beneficiary?

The fact that a policy of insurance is not effective until the first premium is paid, and a policy may have been issued but not delivered until sometime thereafter, the payment of the first annual premium does not keep the insurance in effect for one year from the date of the payment thereof, but for one year from the premium due date fixed in the policy. *Wilkie v. Insurance Co.*, 146 N.C. 513, 60 S.E. 427; *Pace v. Insurance Co.*, 219 N.C. 451, 14 S.E. 2d 411. See 44 A.L.R. 2d Anno: — Insurance — Effective Date, page 477, where the authorities are assembled from some thirty jurisdictions and are in accord with the holding in this respect in *Wilkie v. Insurance Co., supra.* See also 169 A.L.R. Anno: — Life Insurance — Premium Periods, page 291, et seq.

The policies involved herein have been in full force and effect as of and since 8 October 1926. Consequently, the first year of insurance expired at the end of the day of 7 October 1927 and the first premiums covered this period only. 8 October 1927 was the beginning of a new year, for which, under the terms of the respective policies, another annual premium was due in advance on each of the policies. This situation with respect to the time covered by each premium continued until the death of the insured. Therefore, the last annual premium paid covered the year beginning 8 October 1956 and continued through 7 October 1957. The insured died on 8 October 1957, the day the annual premium for another year fell due.

In the case of *Marks v. Fidelity Mut. Life Ins. Co.*, 69 Pa. Super. 43, the premium to be paid annually in advance was paid on the date named when the policy was delivered and the contract thus became operative, which was 13 February 1900. Thereafter the annual premiums were regularly paid until on Sunday morning, 13 February 1916, about 6:00 o'clock, the insured died. The insurance company conceded the policy was in force and would be paid after due proof of death was filed, but the company claimed a year's premium had been earned and would be deducted from the face of the policy. To avoid complications and to collect the insurance promptly, the premium was paid without prejudice to the right of the estate of the insured to sue for its recovery. A suit was brought to recover the premium. The trial court held the insurance company was entitled to the premium. Upon appeal, the Court said: "Whilst the obligation of

the defendant was indefinite as to duration, the covenant of the insured to pay was plainly fixed and definite. He was to pay an annual payment in advance. It must necessarily follow the purchasing power of each annual payment would be exhausted with the expiration of the year for which it was made. With the advent of each new year a new annual premium would become due and owing. On February 13, 1900, the day the policy was delivered and the first premium was paid, the contract was in effect. Had the deceased died later on that day, the obligation of the company to pay would have become absolute. But it would do violence to the plain meaning of the terms used to say that an annual premium, payable in advance, which purchased insurance on and during the 13th day of February, 1900, could be carried over into the new year which began on the same date of 1901. This conclusion is in accord with the principle that has been so frequently applied in cases of leases of lands or tenements. *Haines v. Elkman,* 235 Pa. 341; *Adams v. Dunn,* 64 Pa. Superior Ct. 303. If the estate demised ended at midnight of the day in the next year preceding the day on which it begun, it must follow the annual rent reserved in advance had been spent and its purchasing power exhausted at the same moment. Then a new year came on the stage and in the case at bar the obligation of the insured to pay another premium arose."

In *Schwenger-Klein, Inc. v. Pacific Mut. Life Ins. Co.,* 83 Ohio App. 126, 80 N.E. 2d 696, a policy of insurance was issued on 3 January 1921 and the premium of $287.00 per annum was to be paid thereafter on 3 January of each year during the life of the insured. The insured died at 10:00 a.m. on 3 January 1947. The premium had been paid for the policy year beginning 3 January 1946. The policy contained the provision that, upon proof of the death of the insured, the face amount of the policy, less any indebtedness thereon to the company, and "any unpaid portion of the premium for the then current policy year," would be paid to the beneficiary. The appellant contended that "where a premium is to be paid on a day certain, but no particular hour is specified, the policy remains in force during the whole of the day and until midnight thereof without payment of an additional premium. The protection period purchased by the payment of the previous premium does not expire until midnight of the premium date. If the insured dies on such premium date, the company is liable for the face amount of the policy without right of deducting an extra year's premium." The Court said: "There can be no doubt that by virtue of the contract of insurance calling for the annual payment of premiums that upon the expiration of a year for

which the premium has been paid the policy is not in default on the first day of the succeeding year. But this is not because the premiums paid for the previous years insurance extends beyond the year for which it was paid. An annual premium payment is the consideration of one year's coverage for 365 days, not 366 days. The reason that on the anniversary day upon which the premium becomes payable and the insured is not in default is because the insured has all of that day in which to pay if he desires to continue the contract of insurance."

Likewise, in the case of *Callahan v. John Hancock Mut. L. Ins. Co.*, 331 Mass. 552, 120 N.E. 2d 640, 45 A.L.R. 2d 1262, a policy in the amount of $10,000 on the life of the insured was issued by the defendant on 21 January 1947 in consideration of an annual premium of $477.20 and of a like premium "on or before the twenty-first day of January in each succeeding year." The amount of the policy upon the death of the insured was to be paid "less any unpaid balance or premium for the uncompleted policy year."

The insured died on 21 January 1953. The defendant deducted from the amount of the policy the premium of $477.20 payable "on or before the twenty-first day of January" 1953 and paid the balance to the plaintiff, the wife of the insured and the beneficiary named in the policy. She brought an action to recover the amount so deducted. The Court said: "The policy was in force on the day when it was issued, January 21, 1947, and if the insured had died on that very day the defendant would have been liable to pay the amount of the policy. *American National Bank v. Service Life Ins. Co.* 7 Cir., 120 F. 2d 579, 583, 137 A.L.R. 1148, 1154. Therefore a new policy year commenced on the following January 21, and a new policy year commenced on January 21, 1953. See *Hammond v. American Mutual Life Ins. Co.* 10 Gray 306. It is true that the insured would not have been in default if he had paid the premium late in the day on January 21, 1953, but it is equally true that the premium was owed on the first moment of that day. The law takes no account of fractions of a day, upon a question like this. (Citations omitted.) We conclude that in the present case the premium became due on the first moment of January 21, 1953."

In our opinion, there is no difference in the legal effect of the provisions in the policies considered in the above case with respect to the deduction of the unpaid premium, and in the provision in the respective policies under consideration in this case, as follows: "In the event of death occurring within the days of grace, the unpaid premium for the then current year shall be deducted from the amount

payable hereunder." We interpret this provision to mean that the insurance shall remain in full force and effect for 31 days after its due date and in the meantime the policy cannot be declared lapsed and the insured limited to the option provisions, but that it was never intended to keep the insurance in force on the premium date, without incurring liability to pay the premium due if death occurs on that date or in the event of death before the expiration of the grace period.

The judgment of the court below is

Affirmed.

STATE v. CURTIS FOWLER.

(Filed 12 June, 1959.)

1. **Homicide § 27—**

An instruction on self-defense to the effect that defendant must be under actual fear or have reasonable grounds to fear that his life was in danger and that he was in danger of great bodily harm *held* error or ambiguous, since the law does not require the defendant to show that he was actually in danger of death or great bodily harm.

2. **Same—**

An instruction to the effect that if defendant used more force than was necessary in his self-defense defendant would be guilty of manslaughter is erroneous.

3. **Criminal Law § 161—**

Conflicting instructions upon a material point must be *held* prejudicial.

4. **Homicide § 9—**

A defendant, when acting in his proper self-defense, may use such force only as is necessary or reasonably appears to him at the time of the fatal encounter to be necessary to save himself from death or great bodily harm, the reasonableness of the apprehension of necessity to act and the amount of force required to be judged by the jury upon the facts and circumstances as they appear to defendant at the time of the killing.

APPEAL by defendant from *Hobgood, J.*, October Criminal Term, 1958, of ALAMANCE.

Defendant was tried on a bill of indictment charging him with the murder of one Charlie Woods on 20 March, 1958. The Solicitor announced in open court at the commencement of the trial that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or man-

slaughter as the jury should find the facts to be. The defendant entered a plea of not guilty and a jury was chosen and empanelled.

The State offered evidence which tended to show that defendant and Woods had a quarrel and fight a short while before the fatal encounter and that the defendant procured a pistol and shot deceased and thereby inflicted injuries from which death instantly ensued.

The defendant admitted the shooting but contended that he acted in his proper self-defense. He testified that deceased knocked him to his knees with a bottle and was advancing upon him with a knife at the time of the shooting.

The jury returned a verdict of manslaughter. From a judgment of imprisonment defendant appealed and assigned error.

Walter D. Barrett for defendant, appellant.

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

MOORE, J. Defendant's assignments of error challenge the correctness of the judge's instructions to the jury on the law of self-defense.

The court charged the jury as follows:

"Now the defendant has contended that he shot the deceased in self-defense. The Court instructs you that in order to show self-defense the killing with a deadly weapon having been admitted by the defendant as he has in this case, the defendant must show an absence of fault on his part, and that the killing was done while he was under actual fear or had reasonable grounds to fear that his life was in danger and that he was in danger of great bodily harm, and that it was necessary or that it reasonably appeared to him to be necessary to kill his assailant to save his own life or to protect himself from great bodily harm. I charge you further, if you should find beyond a reasonable doubt that more force was used in killing in self-defense than is reasonably necessary under the circumstances even if you find the killing is in self-defense, then the defendant would be guilty of manslaughter."

Near the end of the charge the judge further instructed the jury as follows:

"If you find, after considering all of the evidence that there was self-defense, but that in the self-defense there was justification for self-defense, but in his self-defense, the defendant did use more force than was necessary, if you are satisfied of that beyond a reasonable doubt, then you would return a verdict of Guilty of Manslaughter."

The foregoing instructions, taken as a whole, are inadequate to state the law of self-defense arising upon the facts in this case. More specifically, the explanation of the apprehension of danger which justifies a killing in self-defense and of the amount of force which may be employed in self-defense is insufficient and erroneous.

The charge states that, before the defendant's act in killing deceased may be excused on the ground of self-defense, he "must show . . . that . . . he was under actual fear or had reasonable grounds to fear that his life was in danger and that he was in danger of great bodily harm." At best the statement is ambiguous. We have no way of determining which construction the jury placed thereon. The law does not require the defendant to show that he was *actually* in danger of great bodily harm.

As stated by *Parker, J.*, in *State v. Goode*, 249 N.C. 632, 633, 107 S.E. 2d 70: "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" See also *S v. Ellerbe*, 223 N.C. 770, 773, 28 S.E. 2d 519; *S. v. Johnson*, 184 N.C. 637, 643, 113 S.E. 617.

The pertinent principles of law are clearly set forth in *S. v. Marshall*, 208 N.C. 127, 129, 179 S.E. 427, as follows:

"The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent, and the pertinent decisions are to the effect:

"1. That one may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. (Citing authority.)

"2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. (Citing authority.)

"3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. (Citing authority.)

"4. That the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted. (Citing authority.)" See also *S. v. Goode, supra*, at page 634.

With reference to the amount of force which may be used in self-defense, the court indicated at one point that no more force may be used than is "reasonably necessary." Later in the charge the jury

was instructed that the defendant would be guilty of manslaughter if he used "more force than was necessary."

When there are conflicting instructions upon a material point a new trial must be granted, as the jury is not supposed to be able to determine when the judge states the law correctly or when incorrectly. *S. v. Johnson, supra.* at page 642.

A defendant, when acting in his proper self-defense, may use such force only as is necessary, or as reasonably appears to him at the time of the fatal encounter to be necessary, to save himself from death or great bodily harm. "The reasonableness of the apprehension of necessity to act, and the amount of force required, must be judged by the jury upon the facts and circumstances as they *appeared* to the defendant at the time of the killing." *S. v. Moore,* 214 N.C. 658, 661, 200 S.E. 427; *S. v. Bryant,* 231 N.C. 106, 55 S.E. 2d 922.

New Trial.

STATE OF NORTH CAROLINA v. ROBERT LAWHORN, JR.

(Filed 12 June, 1959.)

APPEAL by defendant from *McKinnon, J.,* March 2, 1959 Criminal Term of ALAMANCE.

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

Major S. High for defendant, appellant.

PER CURIAM. Defendant was indicted and convicted of an attempt to burn the dwelling of his mother, Marcre L. Haith, in violation of G.S. 14-67.

As a witness in his own behalf he testified he started a fire on the porch of the dwelling in the nighttime. He explained that he built the fire to get warm and without any intent to burn the building.

The record has four assignments of error. The first three have not been brought forward and argued in the brief. They are deemed abandoned; and properly abandoned as they are patently without merit.

The remaining assignment of error is directed to the asserted failure of the court to fully state defendant's contention that he started the fire merely as a protection against the extreme cold weather and

not with the intent to burn the building. This assignment is likewise without merit. The court, in plain and explicit language, told the jury an intent to burn was necessary to convict and then stated dedefendant's explanation for starting the fire as negativing the necessary criminal intent. He expressly stated that a mere careless or negligent act would not be sufficient to support a verdict of guilty.

Our examination of the record reveals

No Error.

ROY FRANKLIN KEPLEY, BY HIS GENERAL GUARDIAN, RALPH RAY KEPLEY, AND WIFE, ORA KEPLEY v. TRANSCONTINENTAL GAS PIPE LINE CORPORATION

AND

ORA KEPLEY AND HUSBAND ROY FRANKLIN KEPLEY, BY HIS GENERAL GUARDIAN, RALPH RAY KEPLEY v. TRANSCONTINENTAL GAS PIPE LINE CORPORATION.

(Filed 12 June, 1959.)

APPEAL by defendant in each case from *Preyer, J.*, at March 31, 1958 Civil Term of DAVIDSON— argued at Fall Term 1958 as No. 395.

Two civil actions for the recovery of damages allegedly resulting from fraudulent representations on the part of agents of defendant in respect to rights of way for gas pipe lines obtained from plaintiffs, by consent consolidated for trial.

Defendant pleads three-year statute of limitations in bar of plaintiffs' right to recover.

Upon the trial in Superior Court both plaintiffs and the defendant offered evidence. And at the close of all the evidence motions of defendant for judgments of nonsuit were denied; and the cases were submitted to the jury on these issues, under a charge free from exception and presumed to be correct on every principle of law applicable to the facts,— since it is not in the record:

"I. Was the purported Right of Way Agreement, dated September 20, 1949, and recorded in Book 195, page 468, in the office of the Register of Deeds of Davidson County, obtained by fraud as alleged in the Reply?

"II. Is the plaintiffs' cause of action barred by the statute of limitations?

"III. Was the property of the plaintiffs damaged by the defendant, as alleged in the Complaint?

"IV. What amount are the plaintiffs entitled to recover from the defendant?
all of which are answered in favor of plaintiffs."

And in the Roy Franklin Kepley case a fifth issue as to sufficiency of his mental capacity was submitted to, and answered affirmatively by the jury.

In accordance therewith judgments were signed. Defendant excepts and appeals therefrom to Supreme Court and assigns error.

Walser & Brinkley, Stoner & Wilson, DeLapp & Ward for plaintiffs, appellees.

Charles W. Mauze, Womble, Carlyle, Sandridge & Rice for defendant, appellant.

PER CURIAM. The appellant presents assignment of error on this appeal basically upon two grounds: (1) In overruling demurrer *ore tenus;* and (2) in denying motions for judgment as of nonsuit at the close of all the evidence.

(1) The demurrer is on the ground that the pleading does not state facts sufficient to constitute a cause of action,— taking as true the facts alleged and relevant inference of facts deducible there from, but not admitting inferences or conclusions of law. So considered, it would seem that the pleading is sufficient to state a cause of action, and to withstand the challenge.

And (2) considering the motion for judgment as of nonsuit, taking the evidence in the light most favorable to the plaintiffs, and giving to them the benefit of every reasonable intendment upon the evidence and very reasonable inference to be drawn therefrom as is required in such cases, the court concurs with trial court that the evidence is sufficient to take the case to the jury.

No new principles of law are involved. Therefore, after due and careful consideration of the case on appeal, it is held that in overruling the demurrer and in denying the motions for judgment as of nonsuit the rulings of the trial court were proper.

Hence in the judgments from which appeals are taken, there is
No Error.

STATE v. SAMUEL RICHARD MEDLIN.

(Filed 12 June, 1959.)

APPEAL by defendant from *Johnston, J.*, January Criminal Term, 1959, of MOORE.

The defendant was tried on warrants charging him with an assault upon an officer, resisting arrest, drunken driving and failing to stop for a siren. In apt time defendant interposed a plea in abatement for change of venue as to the alleged offenses of assault and resisting arrest. The court declined to change the venue and defendant entered pleas of not guilty on all charges in the warrants. Evidence was offered both by the State and the defendant. The court submitted the case to the jury only on the alleged offense of operating a vehicle on a public highway while under the influence of intoxicating liquor. The jury found the defendant guilty of the violation of G.S. 20-138.

From a judgment of imprisonment defendant appealed and assigned error.

H. F. Seawell, Jr., for defendant, appellant.

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

PER CURIAM. The action of the court in submitting the case to the jury only upon the charge of operating a vehicle on a public highway while under the influence of intoxicating liquor and the verdict of guilty only as to that offense are tantamount to a verdict of not guilty on the charges of assault, resisting arrest and failing to stop for a siren. *S. v. Wolfe,* 227 N.C. 461, 463, 42 S.E. 2d 515. Thus the question of the correctness of the judge's ruling on the plea in abatement is moot. The evidence in the case was competent on the charge of drunken driving. In the conduct of the trial and the charge of the court no prejudicial error has been made to appear. *S. v. Poolos,* 241 N.C. 382, 383, 85 S.E. 2d 342.

No Error.

MRS. MILDRED G. TANNER v. PAUL R. ERVIN, EXECUTOR OF THE ESTATE OF ERNEST M. TANNER.

(Filed 2 July, 1959.)

1. Courts § 18: Estates § 9—

Treasury Regulations in effect at the time of the purchase of U. S. Savings Bonds become a part of the bonds as a contract between the purchasers and the Federal Government, and therefore where such bonds are issued in the name of two individual co-owners in the alternative, the surviving co-owner is vested with the sole ownership of such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor, and no State court can compel the U. S. Treasury to pay them to anyone else or recognize anyone else's interest in them except as expressly provided by the Treasury Regulations.

2. Same: Husband and Wife § 11: Trusts 4b— Equity will impress resulting trusts on proceeds of U. S. Savings Bonds when surviving co-owner has conveyed her rights therein to other co-owner.

Husband and wife purchase U. S. Savings Bonds, Series E, with money owned and jointly earned by them. The bonds were issued in their names in the alternative. Thereafter they entered into a separation agreement pursuant to which the husband transferred and conveyed to the wife his interest in their joint business, home and certain personal property and in which it was agreed that the husband should have the Savings Bonds and joint checking accounts. The husband died having in his possession the Savings Bonds. *Held:* While only the surviving wife may cash the bonds, when the bonds are cashed the contract between the Federal Government and the purchasers is completely executed and the Federal Government has no further interest therein, and the State court will impress a resulting trust on the proceeds of the bonds and direct that the wife deliver the proceeds to the husband's executor in accordance with her conveyance of the bonds to him during his lifetime for a valuable consideration in the separation agreement.

3. Appeal and Error § 49—

Where there are no exceptions to the findings of fact, it will be presumed that they are supported by competent evidence and they are binding on appeal.

4. Appeal and Error §§ 19, 38—

A question discussed in the brief, which is not supported by any assignment of error based on an exception duly noted, will not be considered.

RODMAN, J., dissenting.

BOBBITT AND HIGGINS, J.J., concur in dissent.

APPEAL by defendant from *Sharp, S. J.*, 5 January 1959, Special Civil Term of MECKLENBURG.

Civil action to determine who is entitled to the proceeds of certain U. S. Government Bonds, Series E.

Pursuant to G.S. 1-184, the parties waived a jury trial.

This is a summary of the crucial findings of fact made by the Judge: Mrs. Mildred G. Tanner, the plaintiff, and Ernest M. Tanner, defendant's testate, intermarried on 4 July 1930, and lived together as husband and wife until 9 October 1956. While living together as husband and wife they purchased during the years 1942, 1943, 1944 and 1945 with money owned and jointly earned by them $16,000.00 at maturity value of U. S. Government Bonds, Series E. All these bonds were issued payable to "Mr. Ernest M. Tanner or Mrs. Mildred M. (sic) Tanner."

On 9 October 1956 Ernest M. Tanner and Mildred G. Tanner executed a deed and separation agreement, which conforms with the requirements of G.S. 52-12 as to contracts of wife with husband affecting corpus or income of estate. The instrument has these recitals: No children were born of the marriage. The parties are engaged in the operation of two Orange Drink Stores in Charlotte, and own a home in Charlotte, certain U. S. Government Bonds, and certain funds deposited to their joint account in one or more banks in Charlotte. In this instrument the parties in consideration of mutual covenants and agreements therein contained covenanted and agreed as follows — we summarize the material parts —: Henceforth, the parties shall live separate and apart. In full, final and complete settlement of all interest which Mildred G. Tanner has in any property real or personal owned by them, and in full settlement of any claim Mildred G. Tanner may have against Ernest M. Tanner for support, Ernest M. Tanner conveys to Mildred G. Tanner all of his right, title and interest to the two Orange Drink Stores in Charlotte, including name, goodwill, inventory on hand, and fixtures, to be hers absolutely, and Ernest M. Tanner likewise conveys to Mildred G. Tanner, all right, title and interest to their home in Charlotte, including all furniture and personal "effects" therein. Since the home was owned by them by the entireties, it was agreed that the parties contemporaneously with the execution of the deed and separation agreement will join in a deed for the property to Edna Glick Andes as trustee for Mildred G. Tanner, who shall hold the title to the home in trust subject to the direction of Mildred G. Tanner.

Paragraph 6 of the instrument reads: "It is agreed between both parties hereto that the remaining assets which are jointly held by the parties hereto and shall consist of the savings account at American Trust Company in the sum of $22,467.00 and the United States Sav-

ings Bonds having a present value of $17,323.00 and two checking accounts at the American Trust Company and the Union National Bank of Charlotte totalling $24,367.45 shall become and are hereby made the sole property of the party of the first part."

Paragraph 7 reads: "It is the purpose of this agreement not only to enter into a separation agreement as between husband and wife to fix and establish the property rights as between husband and wife, but also to effect a complete division of the jointly held properties and property interests of the parties hereto."

Each party relinquishes, quitclaims and conveys to the other any right, title or interest which he or she may have by virtue of the marital relationship in any property now owned, or which may hereafter be acquired by the other. In addition, Mildred G. Tanner renounced her right to administer on the estate of Ernest M. Tanner in the event of his death, together with her right to inherit from him.

Mildred G. Tanner and Ernest M. Tanner accepted and took into their respective possession the property granted them by the deed and separation agreement. They did not live together thereafter.

Ernest M. Tanner died testate on 6 March 1957, after an illness of 52 days. His will dated 10 October 1956, the day after the execution of the deed and separation agreement, was duly probated in Mecklenburg County on 11 March 1957. Item II of the will refers to the separation agreement as the reason for making no provision for his wife Mildred G. Tanner. In Item III of his will he devised and bequeathed all of his property, real and personal, in fee simple to his daughter, Amber F. Isham, by a former marriage. In Item IV he named Paul R. Ervin, the defendant, as executor of his will.

Ernest M. Tanner at the time of his death had in his possession the $16,000.00 at maturity value of U. S. Government Bonds, Series E, above mentioned, and these bonds are now in possession of Paul R. Ervin, Executor. These bonds are the same bonds referred to in the deed and separation agreement.

Upon the facts found, the Judge concluded as a matter of law that plaintiff is the owner of these U. S. Government Bonds, Series E, and entitled to their immediate possession, and entered judgment accordingly.

From the judgment, defendant appeals.

David J. Craig, Jr. and Guy T. Carswell for plaintiff, appellee.

W. Pinkney Herbert, Jr. and McDougle, Ervin, Horack & Snepp for defendant, appellant.

PARKER, J. Defendant has two assignments of error: one to the Judge's conclusion of law, and the other to the judgment.

All these U. S. Savings Bonds contain proper references to the Acts of Congress and to the Circulars and Treasury Regulations under which they are issued, which Regulations are made a part of the bonds by reference.

In the case *sub judice* four of these bonds, each with a value at maturity of $1,000.00, were issued in February 1942, and four similar bonds were issued in December 1942. Two similar bonds were issued in July 1943, and one similar bond in September 1943. One similar bond was issued in July 1944, and another similar bond in December 1944. One similar bond was issued in June 1945, and two similar bonds in December 1945.

The Code of Federal Regulations, Cumulative Supplement, Book 6, 1944, Title 31, Chapter II, Part 315, Subpart K, §315.32, specifies the manner in which these bonds registered in the names of "Mr. Ernest M. Tanner or Mrs. Mildred M. (sic) Tanner" as co-owners during the year 1942 shall be paid. §315.32(a) provides payment will be made to either co-owner upon his individual request during the lifetime of both. §315.32(b) provides, "if either co-owner dies without having presented and surrendered the bond for payment to a Federal Reserve Bank or the Treasury Department, the surviving co-owner will be recognized as the sole and absolute owner of the bond, and payment will be made only to him."

Identical provisions and Regulations apply to the two bonds issued in July 1943 and to the one bond issued in September 1943. Code of Federal Regulations, 1943 Supplement, Book 1, 1944, Title 31, Chapter II, Subchapter B. Part 315, Subpart K, §315.32(a) and (b).

Identical provisions and Regulations apply to the two bonds issued in 1944. Code of Federal Regulations, 1944 Supplement, Book 2, 1945, Title 31, Chapter II, Subchapter B, Part 315, Subpart K, §315.32(a) and (c).

Substantially identical provisions and Regulations apply to the three bonds issued in 1945. Code of Federal Regulations, 1945 Supplement, Book 3, 1946, Title 31, Chapter II, Subchapter B, Part 315, Subpart L, §315.45(a) and (c).

The rule followed by a majority of the Courts, including North Carolina, frequently called the "majority rule," with respect to rights in United States Savings Bonds registered under Treasury Regulations in the names of two individual co-owners in the alternative, is that, upon the death of one of the co-owners, the surviving co-owner is vested with the sole ownership in such bonds, at least in the ab-

sence of fraud or other inequitable conduct on the part of the survivor. *Ervin v. Conn,* 225 N.C. 267, 34 S.E. 2d 402; *Watkins v. Shaw, Comr. of Revenue,* 234 N.C. 96, 65 S.E. 2d 881; *Hubbard v Wiggins,* 240 N.C. 197, 206, 81 S.E. 2d 630, 635-6; Annotation 37 A.L.R. 2d, Rights upon death of co-owners of United States Savings Bonds, II, Right of surviving co-owner generally, §3, Majority View, (a) Generally, pp. 1223-1225, where many cases are cited. See also *Jones v. Callahan,* 242 N.C. 566, 89 S.E. 2d 111; *Wright v. McMullan and Wright v. Wright,* 249 N. C. 591, 107 S.E. 2d 98, where the terms of the bonds fix the legal title to the bonds as between the government and the purchaser of the bonds, but these are not cases where the bonds were issued in the names of two individual co-owners in the alternative. There is a minority view, for which see the same A.L.R. annotation, §5, Minority View, pp. 1233-1236.

The principal basis for the majority view is that solution of the question as to the property rights of the surviving co-owner in a United States Savings Bond is one of contract, and that the Treasury Regulations having the force and effect of federal law, become a part of the bond as a contract between the purchaser and the federal government, and fix legal title to the bond, and are determinative of the property rights of the parties to the bond. *Ervin v. Conn, supra;* Annotation 37 A.L.R. 2d, §4, pp. 1229-1233, where many cases are cited.

"The contract between the United States and a purchaser of government bonds fixes legal title to the bonds for the purpose of protecting the government against suits involving title, but does not and should not affect other legal rights of third parties or change settled rules of law not necessary to effectuate its purpose." 91 C.J.S., United States, p. 318.

In the case of *In re Hendricksen's Estate, Rohn v. Kelley,* 156 Neb. 463, 56 N.W. 2d 711, *certiorari* denied *Rohn v. Kelley,* 346 U.S. 854, 98 L. Ed. 368, $10,000.00 Series G United States Savings Bonds were issued in the names of Mrs. Florence Hendricksen (mother) or Ethel Kelley (daughter) as co-owners. Ethel Kelley, the surviving co-owner had, during her mother's lifetime and for a valuable consideration, sold, assigned and transferred to her mother any interest she may have or purport to have in these bonds. The instrument of assignment recites: "Ethel Kelley further states that she had no interest in these bonds at the time her name was placed thereon and agrees that she shall have only such interest in the bonds as may be given her under the will of Florence Hendricksen." The Court held that the executor of the mother's estate was entitled to the proceeds

of the bonds to the exclusion of any interest in the surviving co-owner other than as provided in the will. In affirming the judgment below the Court said:

"From an examination of the cases cited by the defendant we are unable to find any case in which a conveyance by one co-owner of savings bonds to another was involved. For the most part the cases cited by the defendant refer to a situation where no positive act of the parties themselves, those who are co-owners of the bonds, intervenes between the time the bonds are issued and the time the dispute arises. The government would have no interest as to how the assets of Florence Hendricksen's estate would be distributed, or that by the last will of Florence Hendricksen, Ethel V. Kelley had no further rights in the estate so long as she retained the proceeds of the bonds. It seems clear that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other. In the instant case, as shown by the evidence, Ethel V. Kelley assigned all her right, title, and interest in the bonds to her mother during her mother's lifetime, and for a valuable consideration. The evidence also shows that she acknowledged that the proceeds of the bonds constituted part of the assets of her mother's estate, and her assignment of the bonds clearly indicates such to be true.

"The government's interest is a contractual one. Its obligation was to pay either of the co-owners the amount agreed upon as shown by the bonds upon their proper presentation, in compliance with the federal law. When the Treasurer of the United States satisfied the government's obligation by paying the proceeds of the bonds to Ethel V. Kelley, the government's interest in the matter ended. The government is in no sense a party to this litigation, and under the facts and circumstances could in no event have any interest in the result of this litigation.

"The court decreed that Ethel V. Kelley deliver the proceeds which she obtained from cashing the bonds to the executor in accordance with her assignment of the bonds for a consideration to her mother, whereby she agreed to take her share of the estate as provided for by her mother's will. There is nothing in this phase of the decree contrary to the laws of the United States or the regulations of the United States Treasury Department. Those laws and regulations do not prevent the declaration of a resulting trust in the proceeds of the bonds as shown under the facts in this case."

In *District of Columbia v. Edith Bolling Wilson,* 216 F. 2d 630, the decedent John Randolph Bolling was the brother of Mrs. Wilson,

and Mrs. Wilson, at various times, authorized her brother to purchase $93,000.00 at maturity value of U. S. Savings Bonds, Series G, to be issued in his name payable to her at his death. The District of Columbia contended there had been a taxable transfer within the District of Columbia inheritance tax statute, and that such a finding is dictated by the Treasury Regulations concerning U. S. Bonds. The Court affirmed a judgment of the District of Columbia Tax Court holding that Mrs. Wilson was entitled to a refund of inheritance tax paid with respect to the $93,000.00 of U. S. Bonds assessed under the District of Columbia Statute. In its opinion the Court said:

"Certainly the legal title to the bonds in question stood in the name of the decedent at the time of his death, and Mrs. Wilson acquired it on his death. If we may look only at legal title, excluding the actual, equitable, or true ownership, it follows that there was a taxable transfer. But the principle is firmly established that taxation is concerned with real ownership rather than with refinements of title. * * *

"It (District of Columbia) relies on 31 Code Fed. Regs. §315.2 (Supp. 1945), which provides: '* * * 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. * * *' We do not think, however, that this regulation is applicable as between the brother and sister here. Mrs. Wilson, and not decedent, had furnished the entire funds used to buy the bonds. And the terms of the letter authorizing the decedent to have the bonds issued in his name made it clear that he had the right only to take the income during his lifetime. Had the decedent cashed the bonds during Mrs. Wilson's lifetime, as presumably he could have done under the Treasury regulations, it seems clear that upon application the courts would have declared the proceeds to be held in trust for Mrs. Wilson. Cf. *Harrington v. Emmerman,* 1950, 88 U. S. App. D.C. 23, 186 F. 2d 757; *National Metropolitan Bank of Washington v. Stoner,* 1949, 85 U. S. App. D.C. 157, 177 F. 2d 37; *Haliday v. Haliday,* 1926, 56 App. D.C. 179, 11 F. 2d 565. The Treasury regulations would not have prevented such a decree. They do not purport to be concerned with such a situation. The regulations appear primarily designed to protect the Treasury as against adverse claimants in paying interest and principal of the bonds to the registered owner. The Treasury commonly has no concern with the funds or their disposition once it has paid them to the registered owner. Its contract has then been fulfilled. In the present case, as in the case supposed, no breach of the

regulations is produced. Indeed, where no purpose to defraud the Government has appeared, numerous courts have directed the registered owner to cash United States savings bonds and have ordered the proceeds paid to, and held in trust for, the true owner, notwithstanding the Treasury regulations. See *Makinen v. George,* 1943, 19 Wash. 2d 340, 142 P. 2d 910; *Union Nat. Bank v. Jessell,* 1948, 358 Mo. 467, 215 S.W. 2d 474; *Katz v. Driscoll,* 1948, 86 Cal. App. 2d 313, 194 P. 2d 822; *In re Hendricksen's Estate,* 1953, 156 Neb. 463, 56 N.W. 2d 711."

The facts in *Tharp v. Besozzi,* Ind. App., 144 N.E. 2d 430, (1957), in some respects, are quite similar to the facts here. The appellant, Thelma C. Tharp, and appellee's decedent, Arthur Morrison, were at one time husband and wife, and during the period of such relationship they acquired an equity in real estate, bank accounts, a postal savings account and a number of U. S. Savings Bonds, Series E, all of which property they held in their joint names with right of survivorship. The appellant filed suit for divorce against appellee's decedent 4 April 1946. While this suit was pending, the parties entered into a property settlement agreement, under the terms of which appellee's decedent received the U. S. Savings Bonds. The divorce was granted on 4 October 1946, but the court's decree neither incorporates the agreement, nor ratifies it by reference. Arthur Morrison died 15 November 1953, and the appellee was appointed administratrix *c. t. a.,* and as such she examined the contents of his safety deposit box, and found the U. S. Savings Bonds mentioned in the settlement agreement. The names of the payees had not been changed from the time of their original issue, and are as follows: "Mrs. Thelma Morrison or Mr. Arthur Morrison; Mr. Arthur Morrison or Mrs. Thelma Morrison; Mr. Arthur J. Morrison or Mrs. Thelma C. Morrison." The appellant, Thelma C. Tharp, contended that the Treasury Regulations under which the bonds were issued, and which are the terms of the contract between the United States and Arthur Morrison in his lifetime, bar the appellee from any recovery in the case. The Court after quoting the relevant parts of the Treasury Regulations under which the bonds were issued said:

"We have examined many cases from many jurisdictions and have found none in which the court has permitted a surviving co-owner to repudiate a *bona fide* agreement whereby she has surrendered her interest in bonds to her co-owner for a valuable consideration and upon the co-owner's death claimed the absolute ownership thereof for the sole reason that such deceased co-owner had not, during his

lifetime, cashed the bonds or taken steps to have them reissued in his name alone. * * *

"Our research on the subject convinces us that as far as the United States is concerned the bonds in suit are the absolute property of the appellant and that no state court or legislature can compel the government to pay them to anyone else or to recognize anyone else's interest in them except as expressly provided by the regulations under which they were issued. See notes 140 A.L.R. 1435, 161 A.L.R. 170, 168 A.L.R. 245, and 173 A.L.R. 550. However, this is not a suit against the government for the payment of the bonds nor does it seek directly or indirectly to compel the government to recognize appellee's alleged interest in them. The judgment herein merely enjoins the appellant to surrender the bonds in controversy for cash in compliance with the treasury regulations. After she has done that and the bonds have been paid to her the government has fully and completely discharged its contract and can have no interest whatever in the conclusion of an Indiana court that the proceeds of such bonds, when received by the appellant, shall be impressed with a trust growing out of a contract with which the government had nothing to do and of which equity and fair dealing require performance."

In *Roman v. Smith,* Ark., 314 S.W. 2d 225, (1958), the Supreme Court of Arkansas held that where a property settlement in a divorce action between decedent and his former wife provided for delivery to wife of eighteen U. S. Savings Bonds in decedent's name but payable on death to wife, but in lieu of bonds cash was subsequently given to wife by decedent who neglected to cash bonds or have them reissued, upon decedent's death a constructive trust would be imposed on wife as to proceeds of bonds in favor of decedent's estate. In its opinion the Court said:

"Many cases from other jurisdictions have been examined, and no case has been found where the court permitted a surviving owner of United States Savings Bonds to repudiate a property settlement agreement or a contract of any nature under which a surrender of interest in bonds was made to the other owner for a valuable consideration, and upon the surviving owner's claim to the absolute ownership thereof for the sole reason that such deceased owner had not, during his lifetime, cashed the bonds or taken steps to have them reissued in his name alone. * * *

"In this case, appellee received all that she was to get under the property settlement agreement which was at least approved in part by the Chancery Court, and now she seeks to get a part of that property which was set aside to the appellants' decedent solely because

he neglected to cash the bonds or have them reissued in his name alone during his lifetime pursuant to the Treasury Regulations. Such a construction of the Treasury Regulations is not supported by the authorities, and certainly is contrary to the principles of equity and fair dealing.

"Insofar as the United States of America is concerned the bonds in suit are the absolute property of the appellee, and this Court cannot compel the Government to pay them to anyone else or to recognize the interest of anyone else in them except as expressly provided by the Treasury Regulations under which they were issued. See notes 140 A.L.R. 1435, 161 A.L.R. 170, 168 A.L.R. 245, and 173 A.L.R. 550. But this is not an action against the United States for the payment of the bonds in suit, nor is it a proceeding to compel the United States to recognize the appellants' interest in them. This suit merely seeks to compel the appellee to surrender the bonds in suit for cash in compliance with the Treasury Regulations. The United States will satisfy its obligations under the bonds by paying the proceeds in accordance with the terms of its contract to the named beneficiary—the appellee in this case, and there is nothing in the law or regulations which prevents this Court from declaring a constructive trust in the proceeds of the bonds in order to prevent flagrant and unfair dealings or even fraud. See *Anderson v. Benson, supra; Chase v. Leiter, supra; Ibey v. Ibey, supra; Tharp v. Besozzi, supra; Union National Bank v. Jessell, supra.* Since the federal regulations require that the bonds be cashed 'voluntarily,' the court cannot compel the appellee to cash the bonds. It should, however, enter a money judgment against the appellee for the value of the bonds, which will be surrendered to her upon satisfaction of the judgment."

In *Silverman v. McGinnes,* 259 F. 2d 731, (1958), where a decedent delivered Series E Savings Bonds, registered as payable to himself and his former wife as co-owners or to himself and one or the other of his children as co-owners, to his wife stating that they were outright gifts to her and the children, and confirmed this by letter, the value of the bonds was held not includible in decedent's gross estate for estate tax purposes as an interest in property jointly held, even though Treasury Regulations purported to prohibit transfer of such bonds and decedent did not have bonds reissued in names of respective donees. The Court said in its opinion:

"The point is that with regard to payment by the issuer, the United States Government, the provisions of the contract including the regulations, govern. But the regulations do not apply to individual rights

of persons who under the state law of property have become equitably entitled to the proceeds."

In *Katz v. Driscoll*, 86 Cal. App. 2d 313, 194 P. 2d 822, the Court said in respect to the Treasury Regulations concerning U. S. Savings Bonds:

"The purpose of the treasury regulations is to protect and hold the federal government immune from any attack on its performance of the contract as made in the bond. In other words, they are designed to prevent the implication of the government in any disputes concerning ownership of the bonds, protect it from any suits which might result from payment to a designated beneficiary or co-owner, and, for the purpose of promoting sales, guarantee the performance of the government in strict accord with the contract.

"These laws and regulations are not intended to confer on the beneficiary the right to retain permanently the proceeds from the bonds irrespective of fraud or any illegality in the manner in which the bonds were obtained. To hold otherwise would, in effect, say that the treasury regulations not only guarantee payment to the named beneficiary, but, thereafter, when he receives the proceeds, follow him around indefinitely, and, like a protective halo, render him completely immune from any ordinarily legitimate claims thereto. For the purpose of payment and performance of the government's contract obligation, the beneficiary is recognized as the 'sole and absolute' owner. But 'the rights of survivorship conferred by these (treasury) regulations upon a surviving co-owner or beneficiary' (§315.13 (1)) terminate there."

According to the federal statutes and Treasury Regulations under which the Savings Bonds in suit were issued, Mrs. Mildred G. Tanner, the surviving co-owner, is the sole legal owner of these Savings Bonds, and no State Court can compel the Treasurer of the United States to pay them to anyone else or to recognize anyone else's interest in them, except as expressly provided by the Treasury Regulations under which they were issued. When the Treasurer of the United States pays the proceeds of these bonds to Mrs. Tanner, the United States Government will have discharged its contractual obligations in respect to these bonds.

However, Mrs. Mildred G. Tanner in a deed and separation agreement between her and her husband, Ernest M. Tanner, relinquished, quitclaimed and conveyed for a valuable consideration all of her right, title and interest in these Savings Bonds to her husband, Ernest M. Tanner. Mildred G. Tanner and Ernest M. Tanner accepted and took into their respective possession the property granted them by

the deed and separation agreement. Ernest M. Tanner died about five months later with these bonds payable to "Mr. Ernest M. Tanner or Mrs. Mildred M. (sic) Tanner" in his possession. Upon such facts, the estate of Ernest M. Tanner is equitably entitled to the proceeds of these bonds. The United States Government is in no sense a party to this litigation, and can have no interest in its result. As clearly stated by the authorities we have quoted above, the federal statutes and Treasury Regulations under which these bonds were issued do not apply to the rights of the estate of Ernest M. Tanner, which is the equitable owner of the proceeds of these bonds, when the proceeds of these bonds are paid by the Treasurer of the United States to Mrs. Mildred G. Tanner, and do not prevent this Court from declaring a resulting trust in the proceeds of the bonds in the hands of Mrs. Mildred G. Tanner, when she cashes them, for the benefit of the estate of Ernest M. Tanner. Annotation 51 A.L.R. 2d pp. 163-200, entitled "Imposition or declaration of constructive or resulting trust in United States Savings Bonds"; *Henderson v. Bewley,* (Ky.), 264 S.W. 2d 680, 51 A.L.R. 2d 159, *certiorari* denied 348 U.S. 926, 99 L. ed. 726; *Anderson v. Benson,* 117 F. Supp. 765; *Union Nat. Bank v. Jessell,* 358 Mo. 467, 215 S.W. 2d 474; *Makinen v. George,* 19 Wash. 2d 340, 142 P. 2d 910.

The Superior Court below is directed to enter a judgment that, according to the federal statutes and Treasury Regulations under which the Savings Bonds in suit were issued, Mrs. Mildred G. Tanner, the surviving co-owner, is vested with the sole legal ownership of these bonds and is the only person entitled to receive cash for them from the Treasurer of the United States, and ordering her to cash them, but when she receives payment of these Savings Bonds from the Treasurer of the United States, the proceeds from such bonds in her hands shall be impressed with a resulting trust for the benefit of the estate of defendant's testate, Ernest M. Tanner, and she shall deliver the proceeds obtained from cashing the bonds to the said executor in accordance with her conveyance of these bonds to Ernest M. Tanner during his lifetime for a valuable consideration, which trust grows out of the deed and separation agreement between her and her deceased husband, Ernest M. Tanner, a deed and separation agreement with which the United States Government had nothing to do, and of which equity and fair dealing require performance.

There are no exceptions to the findings of fact by the Judge. Therefore, it will be presumed that they are supported by competent evidence, and are binding on appeal. *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759.

Neither the plaintiff nor the defendant requested the Judge to make any additional findings of fact, and excepted for failure of the Judge to do so. Plaintiff in her brief undertakes to discuss a question which is not supported by any assignment of error based on an exception. In a case like this, the Supreme Court is an appellate court, and it "has universally held that an assignment of error not supported by an exception is ineffectual." *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223.

The findings of fact do not support the Judge's conclusion of law and judgment. Appellant's assignments of error are sustained. The judgment below is reversed.

The Judge's findings of fact are amply sufficient to sustain the judgment we have directed to be entered in the Superior Court.

Reversed and Remanded with Directions.

RODMAN, J., dissenting. When the bonds in question were purchased, a contract was made with the Government which was binding on the parties. *Ervin v. Conn*, 225 N.C. 267; *Watkins v. Shaw*, 234 N.C. 96; *Wright v. McMullan*, 249 N.C. 591. Pertinent Federal regulations provide: "Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in the regulations in this part and then only in the manner and to the extent so provided." 31 C.F.R. 315.15.

"No judicial determination will be recognized which would give effect to an attempted voluntary transfer *inter vivos* of a bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving co-owner of a savings bond, and all other provisions of this subpart are subject to this restriction." 31 C.F.R. 315.20.

The regulations contain ample and explicit provisions for surrender or reissue.

When the separation agreement was signed and plaintiff relinquished her legal right to the bonds, because she had furnished a part of the purchase price, she did not foreclose her right to receive the benefits of a contract which her husband might voluntarily maintain for her benefit.

There is no suggestion that plaintiff did anything to prevent her husband from exercising his right to terminate the contract which required payment to her on his death. The separation agreement surrendering plaintiff's legal right to surrender the bonds and receive payment was an incomplete *inter vivos* transfer which could have been completed at any time by deceased by a mere surrender of the

bonds with a request for payment or reissue. He elected not to exercise his option to terminate plaintiff's contractual rights. Plaintiff's right to cash the bonds for her benefit was complete and became a vested right the moment her husband died. That right ought not to be defeated by mandate of this Court based upon some assumed equity. If we are to follow our own decisions and the majority of the courts of this country, the judgment should be affirmed. My vote is to that effect. If, however, the judgment is not affirmed on the facts found, defendant should not be adjudged the equitable owner and plaintiff a mere trustee until that intent of her deceased husband has been ascertained.

Plaintiff alleges in her pleadings her husband intended that she should receive the bonds or proceeds upon his death. To support her allegation she offered evidence tending to show that the affection engendered by more than a quarter of a century of married life did not terminate the moment the separation agreement was executed but continued until the death of the husband. She also offered evidence to show that her husband was informed of his right to surrender the bonds and the effect of his failure to do so.

The court excluded the evidence offered by plaintiff to establish the alleged intent of her husband to vest her with both legal and beneficial ownership of the funds. Some of the evidence offered was incompetent because of its source, but that was not true as to all the evidence; and the evidence was not excluded because of its source but because the court deemed it irrelevant and immaterial as the rights of the parties were fixed by the provisions of the bonds themselves.

The Court effectively disposes of the question of the intent of Ernest M. Tanner by this sentence: "Plaintiff in her brief undertakes to discuss a question which is not supported by any assignment of error based on an exception." Presumably the quoted sentence is directed to that portion of appellee's brief stating: "We agree with the trial court that the Appellee is entitled to the bonds as a matter of law and the intention of the decedent is not material. However, if we are found to be in error we respectfully urge that the decision of the trial court should not be reversed but the case should be sent back for a new trial in order that this evidence of the decedent's intentions may be considered and appropriate findings made."

Appellees are not expected to assign errors or take exceptions to judgments favorable to them. When, as here, the court has concluded that the facts found suffice for a judgment establishing plaintiff's ownership, plaintiff is not required to except to the failure to find ad-

ditional facts to support the judgment in order to preserve his right to have the essential facts ascertained in accord with the evidence.

If the judgment is not affirmed on the facts found plaintiff is, in my opinion, entitled to have a jury ascertain the intent of deceased. Did he, as alleged by plaintiff, intend that she should in her own right and not as trustee collect the bonds? If such was in fact his intent, the mandate of this Court requiring her to forego that right is not in the furtherance of justice.

BOBBITT AND HIGGINS, J. J., concur in dissent.

STATE v. WILLIAM F. FURMAGE.

(Filed 2 July, 1959.)

1. Indictment and Warrant § 6—

The Constitution of North Carolina does not designate officials who are or may be clothed with authority to issue warrants, and therefore the General Assembly may designate such officials.

2. Constitutional Law § 6—

Matters of public policy are in the exclusive province of the General Assembly.

3. Constitutional Law § 10: Statutes § 6—

Every presumption is to be indulged in favor of the constitutionality of a statute.

4. Constitutional Law § 6—

The General Assembly has full legislative powers unless restrained by express constitutional provision or necessary implication therefrom.

5. Solicitors § 3—

A solicitor is an official of the court and is vested with important discretionary powers some of which, like the power to enter a *nolle prosequi*, are *quasi*-judicial in nature.

6. Constitutional Law § 5: Indictment and Warrant § 6—

The provisions of Chapter 634, Public-Local Laws 1916, sec. 6(f), authorizing the solicitors of the Recorders Courts of Robeson County to issue warrants of arrest are valid and are not in conflict with Article I, Section 8 of the Constitution of North Carolina, since the issuance of warrants does not involve the exercise of the supreme judicial powers within the meaning of that term as used in this section of the Constitution.

APPEAL by the State from *Hobgood, J.*, January Criminal Term, 1959, of ROBESON.

STATE *v.* FURMAGE.

This appeal is from a judgment quashing two warrants, each charging defendant with a misdemeanor of which the Recorder's Court of Red Springs District, Robeson County, had original jurisdiction.

In said Recorder's Court, defendant's motions to quash the warrants, aptly made, were overruled. Thereupon, defendant pleaded not guilty. Upon trial, defendant was found guilty of the criminal offenses charged in the warrants. Judgments were pronounced. Defendant appealed.

In the superior court, defendant's motions to quash the warrants, aptly made, were allowed; and judgment, in accordance with the court's ruling, was entered. The State, pursuant to G.S. 15-179, appealed.

Attorney General Seawell, Assistant Attorney General Love and Bernard A. Harrell, Member of Staff, for the State.

Britt, Campbell & Britt for defendant, appellee.

BOBBITT, J. The Recorder's Court of Red Springs District, Robeson County, is one of six district recorders' courts in Robeson County created by Chapter 634, Public-Local Laws of 1915.

Section 6(f) of the 1915 Act provided: "Warrants may be issued by the recorders of said courts or by any justice of the peace of Robeson County, made returnable to said courts, for any person or persons charged with the commission of any offense of which the said courts have jurisdiction; . . ."

The 1915 Act was amended by Chapter 572, Public-Local Laws of 1925; by Chapter 333, Public-Local Laws of 1927; and by Chapter 22, Public-Local Laws of 1937.

The 1927 and 1937 amendments, in pertinent part, provide: "That the prosecuting attorneys of the recorders' courts of Robeson County, as provided for by Public-Local Laws of one thousand nine hundred and fifteen, chapter six hundred thirty-four, shall have full power and authority to issue warrants, summons, subpoenas, commitments and administer oaths, and all other papers incident to the dispatch of business in said courts, . . ."

The warrants, issued by C. Durham Ratley, Solicitor of the Recorder's Court of Red Springs District, Robeson County, upon his examination under oath administered by him of one J. H. Creech, commanded the arrest of defendant to answer the charges set forth in the appended affidavits of Creech. The warrants were returnable to said recorder's court. "The affidavit and warrant must be read

together, and so construed." *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989; *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729, and cases cited.

There is no contention that the warrants failed to allege facts sufficient to constitute criminal offenses, or that said recorder's court did not have jurisdiction of the criminal offenses therein charged, or that C. Durham Ratley was not the duly qualified solicitor or prosecuting attorney of said recorder's court.

Judge Hobgood, allowing defendant's said motions, quashed the warrants upon the ground that, "insofar as said public-local laws purport to confer authority on Solicitors of the Recorders Courts of Robeson County to administer oaths and to issue warrants for arrest," they are null and void "for that the same are in violation of Article I, Section 8, of the North Carolina Constitution."

Article I, Section 8, Constitution of North Carolina, provides: "The legislative, executive, and *supreme judicial powers* of the government ought to be forever separate and distinct from each other." (Our italics) Originally, this provision (Article I, Section 8) was Section 4 of "A Declaration of Rights" of the Constitution of 1776. See, The Constitution of North Carolina, Connor and Cheshire.

Article I, Section 15, which contains the only specific reference to warrants, provides: "General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted." Originally, this provision (Article I, Section 15) was Section 11 of "A Declaration of Rights" of the Constitution of 1776. See, The Constitution of North Carolina, Connor and Cheshire. It relates to the essentials of a valid warrant. *Brewer v. Wynne,* 163 N.C. 319, 79 S.E. 629.

Article IV, Section 12, of our organic law, incorporated therein by the Convention of 1875, provides: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so

far as the same may be done without conflict with other provisions of this Constitution."

Article II, Section 29, providing, in part, "(T)he General Assembly shall not pass any local, private, or special act or resolution relating to the *establishment* of courts inferior to the Superior Court," (our italics) did not become a part of the Constitution of North Carolina until January 10, 1917, that is, subsequent to the passage of the 1915 Act creating the Recorder's Court of Red Springs District, Robeson County. Defendant makes no contention that said public-local laws are invalid as violative of Article II, Section 29. In this connection, see *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593; *S. v. Horne,* 191 N.C. 375, 131 S.E. 753; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484; *In re Wingler,* 231 N.C. 560, 565, 58 S.E. 2d 372; *S. v. Norman,* 237 N.C. 205, 210, 74 S.E. 2d 602. Compare, *In re Harris,* 183 N.C. 633, 112 S.E. 425, and *S. v. Williams,* 209 N.C. 57, 182 S.E. 711.

No provision of the Constitution of North Carolina designates the officials who are or may be clothed with authority to issue warrants. The officials authorized to issue warrants are those upon whom such authority has been conferred by the General Assembly.

G.S. 15-18 provides: "The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The Chief Justice and the associate justices of the Supreme Court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns."

In addition to the authority conferred by G.S. 15-18, the General Assembly, by said public-local acts, has specifically conferred on the solicitor of the Recorder's Court of Red Springs District, Robeson County, the power to issue warrants. Defendant does not attack these statutes on the ground they are public-local acts. Hence, insofar as Article I, Section 8, Constitution of North Carolina, may be relevant, the said solicitor's authority has the same status as if conferred by G.S. 15-18.

In *S. v. Thomas,* 141 N.C. 791, 53 S.E. 522, the authority of the Mayor of Monroe to issue a valid warrant was not challenged. The office imposed upon the mayor both administrative and judicial duties. The question raised was whether under applicable statutes the board of aldermen could confer the mayor's authority to issue warrants upon the person chosen to act (in the absence of the mayor) as mayor *pro tem.* It was held that the mayor *pro tem.* was authorized, in the

mayor's absence, to execute all the duties of the office, including authority to issue a valid warrant.

In *S. v. Turner,* 170 N.C. 701, 86 S.E. 1019, the appeal was based on defendant's exceptions to the court's refusal to quash the warrant and to arrest judgment. Defendant's motions were interposed "on the ground that the chief of police of High Point had no authority to take the affidavit of the complainant who applied for the warrant and signed as complainant, and, therefore, had no authority to issue the warrant." *Clark, C. J.,* said: "There are several grounds on either of which the judgment was correct. Sec. 9, ch. 569, Public-Local Laws 1913, creating the court at High Point, provides: 'All processes of said court shall be issued by either the judge of said court or by the chief of police, the same to be issued on affidavit and returnable forthwith to said court.' The statute authorizing the chief of police to issue process inferentially confers on him the power to pass upon the sufficiency of the complaint as basis for a warrant and to administer the oath before issuing the process." No reference to Article I, Section 8, appears in the opinion or in the briefs.

It seems appropriate to refer briefly to certain recent decisions of this Court in which the defendant challenged the validity of a warrant, viz.:

This Court held that a defendant's right to challenge as unconstitutional (but not as violative of Article I, Section 8) a statute authorizing the issuance of warrants by a desk sergeant, *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642, and by a police lieutenant, *S. v. St. Clair,* 246 N.C. 183, 97 S.E. 2d 840, was waived when the defendant's objection was first made after trial and conviction in a court having original jurisdiction.

In *S. v. Wilson,* 237 N.C. 746, 75 S.E. 2d 924, it was held that a defendant's right to challenge as unconstitutional (but not as violative of Article I, Section 8) a statute authorizing the issuance of warrants by a police sergeant, was waived when the objection was first made in the Supreme Court.

In *S. v. McHone,* 243 N. C. 231, 90 S.E. 2d 536, and in *S. v. McHone,* 243 N.C. 235, 90 S.E. 2d 539, the justice of the peace who issued the warrants was also a police officer of Mount Airy; and the warrants were issued on affidavit of another police officer of Mount Airy. The latter decision (243 N.C. 235) was based in part on the ground that defendant's plea in abatement, by which he challenged the validity of the warrant, came too late, i.e., after trial and conviction in a court having original jurisdiction. The former decision (243 N.C. 231) was put on different grounds. There it was held that the person who is-

sued the warrant did so as authorized by G.S. 15-18 in his capacity as justice of the peace. *Winborne, J.* (later C. J.), said: "Thus in the light of the factual situation in hand, this Court deems the action of the justice of the peace to be permissible under the proviso of Sec. 7 of Article XIV of the Constitution of North Carolina. And it does not appear that such action is violative of any provision of either the State, or the Federal Constitution." Although no specific reference is made in the opinion to Article I, Section 8, this constitutional provision was brought to the attention of this Court and discussed in the briefs.

In *S. v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703, there was no warrant but "at most an affidavit of a complaining witness upon which a warrant of arrest might be predicated." No question was presented as to the validity of a statute authorizing persons other than those designated in G.S. 15-18 to issue warrants.

In *S. v. Blackwell,* 246 N.C. 642, 99 S.E. 2d 867, the judgment quashing the warrant issued by a police sergeant was upheld on the ground there was no statutory authority authorizing his issuance of the warrant.

Defendant does not challenge the power of the General Assembly under Article IV, Section 12, to regulate the practice and procedure in the Recorder's Court of Red Springs District, Robeson County, "so far as the same may be done without conflict with other provisions of this Constitution." He does not attack as invalid any provision of said public-local laws except that conferring authority on the solicitor of said recorder's court to issue warrants; and the sole ground for this attack is that this particular provision of said public-local laws is violative of Article I, Section 8.

Our question is whether the General Assembly, by reason of Article I, Section 8, is prohibited from conferring such authority upon such solicitor. If not, whether, as a matter of policy, such authority should be conferred is solely for legislative determination.

In undertaking our task of decision, we are mindful that "(I)n considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity." *Stacy, C. J.,* in *S. v. Lueders,* 214 N.C. 558, *561,* 200 S.E. 22. Too, ". . . under our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." *Hoke, J.* (later C.J.), in *Thomas v. Sanderlin,* 173 N.C. 329, *332,* 91 S.E. 1028.

The only decisions cited by defendant in support of his position are *Lewis v. Commissioners,* 74 N.C. 194, *S. v. Crowder,* 193 N.C.

130, 136 S.E. 337, and *S. v. Thomas*, 236 N.C. 454, 73 S.E. 2d 283. Defendant fails to identify the portion of the opinion in *S. v. Thomas, supra*, he deems relevant to the question under consideration.

In *Lewis v. Commissioners, supra*, the opinion of *Bynum, J.*, contains these statements, which are quoted with approval in *S. v. Crowder, supra*, viz.: "A Solicitor is not a judicial officer. He cannot administer an oath. He cannot declare the law. He cannot instruct the grand jury in the law. That function belongs to the Judge alone." *Lewis v. Commissioners, supra*, related to whether a person summoned by the Clerk of the Superior Court of Wake County to appear "to give evidence in a certain matter then and there to be inquired of by the grand jury," was, absent a statute so providing, entitled to prove a witness ticket for his appearance and attendance. In *S. v. Crowder, supra*, this Court held a plea in abatement to the bills of indictment should have been sustained when it appeared that the solicitor was with the grand jury, "participated in the examination of the witness and explained the testimony to the grand jury and advised and procured their action in finding a true bill." No reference is made in the opinions to Article I, Section 8, of our Constitution.

General statements to the effect that a solicitor (prosecuting attorney) is or is not "a judicial officer" must be considered in relation to the legal problem presented in each case. In *Lewis v. Commissioners, supra*, and in *S. v. Crowder, supra*, whether judicial power had been or could be committed to a solicitor was not presented. Nothing in the nature of a judicial act was involved.

In varied factual situations, and in relation to diverse legal problems, a prosecuting attorney has been held "a judicial officer." *Cawley v. Warren* (CA 7th), 216 F. 2d 74; *Tinder v. Music Operating* (Ind.), 142 N.E. 2d 610; *S. ex rel. Freed v. Circuit Court of Martin County* (Ind.), 14 N.E. 2d 910. In other cases, he is referred to as a "*quasi*-judicial officer," or as a public officer acting in a *quasi*-judicial capacity. *Commonwealth v. Ragone* (Pa.), 176 A. 454, 456; *Holder v. State* (Ark.), 25 S.W. 279.

A solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. True, it is his responsibility, upon a fair and impartial trial, to bring forward all available evidence and to prosecute persons charged with crime. Even so, prior to prosecution, if he finds the available evidence insufficient to support a conviction, he may enter a *nolle prosequi* or *nolle prosequi* with leave. G.S. 15-175; *Wilkinson v. Wilkinson*, 159 N.C. 265, 74 S.E. 740. In *S. v. Moody*, 69 N.C 529, *Reade, J.*, said: "It was discussed at the bar whether it is within the power of a Solicitor to dis-

charge a defendant or to enter a *nol. pros.*, etc., or whether that is the province of the court. The rule is that it is within the *control* of the court, but it is usually and properly left to the discretion of the Solicitor." Also, see *S. v. Thompson,* 10 N.C. 613; *S. v. Buchanan,* 23 N.C. 59; *S. v. Conly,* 130 N.C. 683, 41 S.E. 534; 27 C.J.S., District & Pros. Attys. § 14(1).

The contention that the General Assembly had no power to authorize the solicitor to administer an oath is untenable and requires no discussion. Clearly, the administration of an oath does not involve the exercise of judicial powers.

True, a solicitor, absent authorization by the General Assembly, has no authority to administer an oath or to issue a warrant. Our question is whether he may lawfully do so when specifically authorized by the General Assembly.

Since the responsibility of prosecution rests on the solicitor, it would seem he would not be disposed to authorize arrests in the absence of sufficient evidence to justify trial. Indeed, the practice in the federal courts, with certain exceptions, is that no application for the issuance of a warrant is made unless first approved by the office of the district attorney.

In *S. ex rel. Freed v. Circuit Court of Martin County, supra,* the action was for a writ of prohibition to stay the prosecution of a criminal case on the ground that the respondent judge had *ordered* the prosecuting attorney *to approve* the affidavit on which the prosecution was based. The writ was granted. This excerpt from the opinion indicates the basis of decision: "It is clear that the affidavit was approved under coercion, or what seemed to be coercion. The prosecuting attorney is a judicial officer, charged with the administration of justice. Criminal prosecutions cannot be instituted by private individuals. They may be initiated by grand jury indictment. . . . Formerly the only other method was an information. For this latter procedure the Legislature substituted prosecutions by affidavit, approved by the prosecuting attorney. The public policy, evidenced by the requirement that the affidavit must be approved by the prosecuting attorney, is apparent in former statutes. Its purpose is to protect citizens against criminal actions until the charges are investigated and the prosecution approved by the officer who is by law vested with jurisdiction to act for the state. This officer is not the judge. It is the prosecuting attorney. Jurisdiction to approve, and thus make possible, the prosecution of criminal actions lies with the grand jury or the prosecuting attorney, and not elsewhere."

Whether the issuance of a warrant is a ministerial or a judicial act

is the subject of conflicting decisions, based largely on the statutes of the particular jurisdictions. In *State v. Price* (Ohio), 137 N.E. 2d 163, it was held that the issuance of a warrant (by a deputy clerk of a municipal court) was a ministerial act. In *State v. Dibble* (Conn.), 22 A. 155, it was held that the issuance of a warrant by the city attorney was a ministerial act.

In *S. v. McGowan, supra, Higgins, J.*, for this Court, said: "The issuance of a warrant of arrest is a judicial act." As the context plainly indicates, this statement was based on the provisions of G.S. 15-19 and G.S. 15-20 which vest discretionary power in officials authorized to issue warrants. We need not consider whether the General Assembly, within the limitations of Article I, Section 15, of our Constitution, has the power to authorize the issuance of warrants upon proper affidavit as ministerial acts. Relevant to the right of a police officer to arrest without warrant, see G.S. 15-41 as amended by Ch. 58, Session Laws of 1955.

Reference is made to Article I, Section 8, in the following cases:

In discussing Article I, Section 8, in the dissenting opinion in *S. v. Bell*, 184 N.C. 701, *719*, 115 S.E. 190, *Stacy, J.* (later C. J.), aptly described the judicial department of our government as "the department of trial and judgment."

It has been held that the exclusive power to establish its own rules of practice and procedure is vested in the Supreme Court by Article I, Section 8, and Article IV, Section 12, and that the General Assembly has no power to modify the rules so established. *Horton v. Green*, 104 N.C. 400, 10 S.E. 470; *Herndon v. Insurance Co.*, 111 N.C. 384, 16 S.E. 465; *S. v. Johnson*, 183 N.C. 730, 110 S.E. 782; *Cooper v. Commissioners*, 184 N.C. 615, 113 S.E. 569; *S. v. Ward*, 184 N.C. 618, 113 S.E. 775; *Hardy v. Heath*, 188 N.C. 271, 124 S.E. 564; *Lacy v. State*, 195 N.C. 284, 141 S.E. 886.

The Attorney General directs our attention to the statement of *Clark, J.* (later C. J.), in the dissenting opinion in *Wilson v. Jordan*, 124 N.C. 683, *705*, 33 S.E. 139. Referring to Article I, Section 8, he said: "The independence of the Supreme Court only (and not of the entire judicial department) is provided for." When we recall that Article I, Section 8, was a part of the Constitution of 1776, and that the Supreme Court had no constitutional status until the Constitution of 1868, we are not disposed to give full approval to the quoted statement. It is noteworthy that the Supreme Court of North Carolina was established by the General Assembly. Acts of 1818, Chapter 1. As stated by *Clark, J.* (later C. J.), in *Herndon v. Insurance Co., supra:* "The Supreme Court was originally created in 1818 by legis-

lative enactment, and remained till 1868, as to its powers, its duties, its rules, even as to its very existence, subject to control by the Leislature, which could abolish or modify it since it had created it." See, Battle's History of the Supreme Court, 1 N.C. (Reprint) 837, and Clark's History of the Supreme Court, 177 N.C. 617.

In *Cox v. Kinston*, 217 N.C. 391, 8 S.E. 2d 252, the plaintiffs challenged the constitutionality of the statute creating the Kinston Housing Authority on the ground, *inter alia*, that it delegated judicial functions to the city council, a nonjudicial body, in violation of Article I, Section 8. Relevant to this ground of challenge, *Seawell, J.*, said: "As to the judicial function, the Legislature itself has none, and, therefore, the use of the word 'delegation' is not apt as regarding the power of the Legislature to confer judicial powers. The Legislature has always, without serious question, given *quasi*-judicial powers to administrative bodies in aid of the duties assigned to them, without necessarily making them courts. Such powers are given to the Utilities Commission, the Industrial Commission, the Commissioner of Revenue, the State Board of Assessment, and, in lesser degree, to many other State agencies which we might add to the list. The performance of *quasi*-judicial and administrational duties by the same board violates no implication of the cited section of the Constitution, requiring that the supreme judicial power be kept separate from the legislative and executive. Certainly the limited discretion given to these bodies is no part of the 'supreme judicial power' of the State."

A reference to Article I, Section 8, appears in the dissenting opinion of *Seawell, J.*, in *Humphrey v. Churchill, Sheriff*, 217 N.C. 530, *533*, 8 S.E. 2d 810.

This statement appears in 22 C.J.S., Criminal Law § 318: "When so provided by statute the authority to issue warrants may be vested in officers whose other duties are purely ministerial, such as clerks, sheriffs, prosecuting attorneys, coroners, mayors, and the like." Also, see 4 Am. Jur., Arrest § 9; 10 Am. Jur., Clerks of Court § 16.

Legislation authorizing clerks to issue warrants has been upheld on the ground that, although involving the exercise of a judicial or *quasi*-judicial function, the determination is in no sense a final adjudication. *Kreulhaus v. City of Birmingham* (Ala.), 51 So. 297; *Gladden v. State* (Ala.), 54 So. 2d 607; *State v. Van Brocklin* (Wis.), 217 N.W. 277.

In *Holloman v. State* (Ala.), 74 So. 2d 612, the warrant was issued by the County Solicitor upon affidavit executed before him. The court, in opinion by *Harwood, J.*, said: "While the ascertainment of

probable cause upon which to issue a warrant of arrest involves the exercise of a judicial function, as distinguished from merely administrative or ministerial powers, yet the legislature may commit such functions to ministerial officers because it is not final. (Citations)"

In *Ocampo v. United States*, 234 U.S. 91, 34 S. Ct. 712, 58 L. Ed. 1231, the information on which the prosecution was based was signed by the prosecuting attorney, after his preliminary investigation and examination of witnesses under oath, as authorized by the Act of Congress applicable to the City of Manila, Philippine Islands. The accused moved to vacate the order of arrest "upon the ground that it was made without any preliminary investigation held by the court, and without any tribunal, magistrate, or other competent authority having first determined that the alleged crime had been committed, and that there was probable cause to believe the defendants guilty of it." The Supreme Court of the United States, in opinion by Mr. *Justice Pitney*, said: "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function . . . as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. . . . In short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi* judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal." It was held that said motion was properly overruled.

Story, in his Commentaries on the Constitution of the United States (1833), Vol. 2, § 524, said: "But when we speak of a separation of the three great departments of government, and maintain, that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution."

We forbear extended discussion of the term "judicial power." 16 C.J.S., Constitutional Law § 144; 11 Am. Jur., Constitutional Law § 202. This quotation from *Muskrat v. United States*, 219 U.S. 346,

31 S. Ct. 250, 55 L. Ed. 246, indicates its essential nature: "'Judicial power,' says *Mr. Justice Miller,* in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller, Const. 314."

Article I, Section 8, providing that "(T)he legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other," is to be considered as a general statement of a broad, albeit fundamental, constitutional principle.

Defendant has not cited, nor has our research disclosed, any decision in which legislation authorizing the issuance of warrants by officials other than those whose functions are exclusively or primarily judicial in character has been declared void as violative of such a constitutional provision.

While we do not presently undertake to mark out the precise meaning of Article I, Section 8, we have no difficulty in concluding that the issuance of a warrant, whether considered a judicial act, a *quasi*-judicial act, a judicial function, or a ministerial act, does not require or involve the exercise of *supreme judicial power* within the meaning of that term as used in Article I, Section 8.

Therefore, we hold that the said public-local laws are not void as violative of Article I, Section 8; and that the court erred in quashing the warrants.

Reversed.

JOHN JACOB ROWE v. ROOSEVELT MURPHY, MORRIS JOHNSON AND SANFORD W. JOHNSON.

(Filed 2 July, 1959.)

1. Automobiles § 37—

Where the evidence does not disclose that defendant, who had parked his disabled car as far as possible on the shoulder of the road to his right, knew that the shoulder of the road a short distance away was sufficiently wide to permit the parking of the car entirely off the hard surface, evidence of such condition of the highway does not tend to establish negligence on the part of defendant in parking at the place selected by him, and the exclusion of a conclusion of a witness that the car could have been parked completely off the highway at such other point is not error.

2. Appeal and Error § 41—

The exclusion of testimony cannot be prejudicial when the facts

sought to be established thereby are established by the testimony of another witness.

3. Evidence § 20—

Allegations in the complaint as against one defendant, who failed to file answer after service of summons and complaint, which allegations are admitted by the other defendant, are competent in evidence against such other defendant. G.S. 1-159.

4. Same—

Allegations of the answer which are denied by plaintiff are properly excluded on plaintiff's objection.

5. Automobiles § 9—

The parking of a disabled vehicle as far as possible on the right shoulder, leaving more than 15 feet upon the main traveled portion of the highway for the free passage of traffic, at a place where the drivers of other cars have a clear view of the parked automobile for a distance of more than 200 feet in both directions, is not a violation of G.S. 20-161.

6. Same—

The provisions of G.S. 20-161 requiring the setting of warning flares or lanterns to the front and rear of a vehicle parked on the highway applies to trucks, trailers or semi-trailers and not to automobiles.

7. Same—

Any negligence on the part of a defendant in violating the statutory provisions in regard to parking vehicles upon a highway must be a proximate cause of injury in order to entitle plaintiff to recover.

8. Automobiles § 43— Negligence of one defendant in hitting rear of parked car held to insulate any negligence on the part of the other defendant in parking on highway.

The evidence tended to show that one defendant parked his disabled car as far as possible on the right shoulder of the highway with its parking lights burning, that plaintiff stopped his car in front of the parked car with the lights of plaintiff's vehicle shining on the parked car, that plaintiff was standing between the two vehicles, and that the second defendant, driving while under the influence of intoxicating liquor or narcotic drug, struck the rear of the first defendant's car, causing it to move forward and crush plaintiff between the two cars. The evidence further tended to show that both plaintiff and the first defendant were aware of the approach of the second defendant's car. *Held:* Conceding evidence of negligence on the part of the first defendant in parking the car or in failing to flag down the car of the second defendant, the evidence discloses that the heedless and irresponsible conduct of the second defendant was the real and efficient cause of plaintiff's injuries, insulating any negligence on the part of the first defendant, entitling him to nonsuit.

9. Automobiles § 7—

A motorist is not under duty to anticipate negligence on the part of other motorists.

ROWE *v.* MURPHY.

APPEAL by plaintiff from *Bone, J.*, September, 1958 Term of PENDER.

This is a civil action instituted by the plaintiff to recover damages for injuries sustained, resulting from the alleged negligence of the defendants.

The defendant Morris Johnson on the night of 21 June 1957 was driving the 1953 Ford automobile of his father, the defendant Sanford W. Johnson, with his father's permission, on a rural paved road in Pender County, North Carolina, when at a point on said road, about 100 yards west of the intersection of said road and U. S. Highway No. 421, known as Malpass' Corner, the engine developed trouble. At the time, the Johnson automobile was traveling in an easterly direction. Upon discovery of the engine trouble the defendant Morris Johnson stopped on the side of the road and, according to the evidence, parked the car as far toward the right as possible. The left side of the car was over the edge of the pavement approximately 16 or 17 inches. The pavement was 18 feet wide, with four-foot shoulders. At the point where the car was parked, the road was straight and level for approximately two miles to the west; the night was clear and the moon was shining. There was a filling station at Malpass' Corner and, at that point, the shoulders of the road were much wider.

The defendant Morris Johnson, a mechanic, testified that when he stopped his automobile he switched off the headlights and left the parking lights on; that both the parking lights on the front of the car and the tail lights on the rear were burning; that he investigated and discovered that the oil line was broken on the car; that the nature of the break — being under the manifold — necessitated getting under the car to repair the damage; that after he had been at the scene about 25 minutes the automobile of the plaintiff approached headed west; that the plaintiff stopped "in the road alongside my car where I was" without any signal on his part (plaintiff testified that defendant Morris Johnson waved him to stop with his flashlight), and that he asked plaintiff "if he knew where I could get some oil to put back in the motor." Plaintiff parked his car in front of the Johnson automobile, his headlights shining on it, and was leaning over the front end under the hood when the Johnson car was struck in the rear by an automobile being operated by the defendant Murphy.

The evidence is conflicting as to whether the defendant Morris Johnson requested the plaintiff to help repair the broken oil line; whether plaintiff asked him to "signal the other car"; and whether plaintiff was or could have been actually repairing the car in the position that he was standing when the collision occurred.

The automobile being driven by the defendant Murphy was travel-

ing in an easterly direction, approaching the Johnson automobile from the rear. There is no doubt that both the plaintiff and the defendant Morris Johnson were aware that an automobile was approaching and that there was ample room on the paved portion of the road for the Murphy car to pass in safety. According to plaintiff's evidence there was 15 or 16 feet of open paved highway to the north of the two cars and four feet of shoulder on the north side, making a total of 19 or 20 feet available for passing.

The testimony of Morris Johnson with respect to his headlights on the front of the car was corroborated by the plaintiff and there was no testimony contradicting his testimony with respect to the tail lights. According to the evidence in this case, the defendant Murphy was intoxicated.

The Murphy car crashed into the rear of the Johnson car, pushed it forward into the plaintiff's automobile, and crushed plaintiff between the latter two cars, breaking his leg and causing other injuries.

The defendant Murphy did not file answer and, during the course of the trial, the defendants Johnson introduced paragraph five of plaintiff's complaint in evidence, which alleged negligence on the part of the defendant Murphy. At the close of plaintiff's evidence the defendants Johnson moved for judgment as of nonsuit which motion was denied. However, the motion was renewed at the close of all the evidence and was allowed.

Issues were submitted to the jury as to the defendant Murphy and were answered in plaintiff's favor. From the judgment of nonsuit as to defendants Johnson, plaintiff appeals, assigning error.

Isaac C. Wright and Corbett & Fisler for plaintiff, appellant.

Poisson, Campbell & Marshall and L. J. Poisson, Jr., for defendants Johnson, appellees.

DENNY, J. The appellant's first assignment of error is based on exceptions to the ruling of the trial judge in sustaining the defendants' objection to the following question: "At Malpass' Corner could he have gotten his car completely off the hard surface road?" and allowing defendants' motion to strike the answer of the plaintiff which was made voluntarily in the affirmative.

There is no evidence in this record that the defendant Morris Johnson knew anything about the condition of the road at Malpass' Corner or that he knew Malpass' Corner was nearby. In fact, he testified, "I do not frequently drive that road. I did not know exactly where I was as far as side roads or anything else. After the motor almost

stopped it began squealing. I raised the hood and checked the oil line and it was broken."

The proffered evidence was inadmissible, calling for a conclusion and, likewise, in light of the evidence, it was inadmissible to establish negligence on the part of Morris Johnson with respect to the place where he parked his car. Moreover, J. R. Roupe, a State Highway Patrolman, was permitted to testify on behalf of the plaintiff, without objection, as follows: "At Malpass' Corner about 100 yards from the scene the shoulder is approximately 25 feet wide. This extends westwardly from the road intersection about 70 feet."

In *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844, it is pointed out that "an exception is waived when other evidence of the same import is admitted without objection. *Hughes v. Anchor Enterprises, Inc.,* 245 N.C. 131, 95 S.E. 2d 577; *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263; *Wilson v. Commercial Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908; *White v. Price,* 237 N.C. 347, 75 S.E. 2d 244." This assignment of error is without merit and is therefore overruled.

The second assignment of error is directed to the introduction of paragraph five of the complaint over the objection of the plaintiff (exception No. 3), and to the refusal of the court to permit the plaintiff to offer in reply paragraph six of his complaint (exception No. 4).

The defendants Johnson were permitted to read into evidence paragraph five of the complaint wherein plaintiff alleges specific acts of negligence against the defendant Murphy. Defendant Murphy had been served with summons and complaint and did not file answer. Under G. S. 1-159 this constitutes an admission of the allegations. *Wilson v. Chandler,* 235 N.C. 373, 70 S.E. 2d 179. Furthermore, the defendants Johnson had admitted allegations contained in paragraph five of the complaint and had made similar allegations against the defendant Murphy in their further answer and further defense to which the defendant Murphy made no reply. Where an allegation in the complaint is not denied in the answer it is admitted and is as effectual as if found by the jury. *Bonham v. Craig,* 80 N.C. 224. Exception No. 3 is without merit.

The refusal of the court, upon objection, to permit the plaintiff to introduce in evidence in his own behalf paragraph six of his complaint was proper, since the defendants Johnson had denied the allegations contained therein. Exception No. 4 is likewise without merit and therefore the second assignment of error is overruled.

The third assignment of error challenges the correctness of his Honor's ruling in sustaining the motion of defendants' Johnson for judgment as of nonsuit.

The only allegations of negligence made by the plaintiff against the defendant Morris Johnson are set forth in paragraph four of the complaint as follows: "The defendant Morris Johnson was negligent in that he did not have any flares or lights back behind his automobile and did not give any warning to approaching automobiles that he was partly on the hard surface road, and though he had a flashlight he did not flag down the oncoming car though he had ample time to do so; though he could see that the oncoming car and driver was not conscious of the location of his automobile and apparently was not going to turn out to pass.

The plaintiff has elected to allege only two acts or omissions as negligence against the defendant Morris Johnson: (1) The failure to put out flares or lights behind the disabled vehicle, and (2) the failure to warn the approaching vehicle of the position of his vehicle on the highway. There is no allegation with respect to any failure on the part of the defendant Morris Johnson to exercise due care under the circumstances involved, or any failure on his part to warn plaintiff with respect to the approaching car. Plaintiff's evidence clearly established the fact that he was fully aware of the presence of the approaching car but that he paid no attention to it. He testified, "We heard this oncoming car * * *. Both of us heard Roosevelt's car coming * * * I heard the car coming but I did not know how far off it was * * * I stayed between the two cars, as the noise of the oncoming car continued to grow louder. I didn't look up to see where the car was." Furthermore, a failure to warn the plaintiff of what he already knew is without significance. *Petty v. Print Works*, 243 N.C. 292, 304, 90 S.E. 2d 717.

The plaintiff contends that the defendant Morris Johnson violated the provisions of G.S. 20-161 which provides in pertinent part as follows: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway: * * * Provided further that in the event that a truck, trailer or semi-trailer

be disabled upon the highway that the driver of such vehicle shall display, not less than two hundred feet in the front and rear of such vehicle, a warning signal: * * * red flares or lanterns * * * (c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

Under the facts disclosed on this record, it would seem that the defendant Morris Johnson did not violate any of the provisions of the above statute. In the first place, the car was so parked as to leave not less than 15 feet upon the main traveled portion of the highway opposite the parked car for the free passage of other vehicles on the highway. Moreover, the evidence established the fact that a clear view of the parked car could be obtained from a distance of more than 200 feet in both directions upon the highway. Furthermore, the requirement with respect to placing "red flares or lanterns" on the highway applies to trucks, trailers or semi-trailers disabled on the highway and not to automobiles. The provisions of G.S. 20-161 do not "apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

In the instant case, if it should be conceded that it was negligence on the part of the defendant Morris Johnson to park the car in the manner and at the place it was parked, such negligence must have been the proximate cause of plaintiff's injuries or one of the proximate causes thereof before the plaintiff would be entitled to recover against the defendants Johnson. *Burke v. Coach Co.*, 198 N.C. 8, 150 S.E. 636; *Ham v. Fuel Co.*, 204 N.C. 614, 169 S.E. 180; *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88; *Holland v. Strader*, 216 N.C. 436, 5 S.E. 2d 311; *Peoples v. Fulk*, 220 N.C. 635, 18 S.E. 2d 147.

In the case of *Powers v. Sternberg, supra*, this Court, speaking through *Stacy, C. J.*, said: "Even if it be conceded that defendant's truck was negligently parked on the side of the road, * * * which may be doubted on the facts revealed by the record, * * * still it would seem that the active negligence of the driver of the Bedenbaugh car was the real, efficient cause of plaintiff's intestate's death. * * *" (Citations omitted) This case and the cases of *Skinner v. Evans*, 243 N.C. 760, 92 S.E. 2d 209, and *Basnight v. Wilson*, 245 N.C. 548, 96 S.E. 2d 699, as well as many other cases, constitute ample authority in support of the ruling below in allowing the judgment as of nonsuit.

It is regrettable indeed that the plaintiff suffered such serious injuries in the collision involved in this action. However, the record reveals no negligence on the part of the defendant Morris Johnson that would justify the submission of the case to a jury based on the allegations of negligence contained in the complaint and the evidence adduced in the trial below. The plaintiff's injuries resulted from the heedless and irresponsible conduct of the defendant Murphy who was driving his car while under the influence of an intoxicating liquor or narcotic drug. The defendant Morris Johnson was under no duty to anticipate negligence on the part of other motorists upon the highway. *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Skinner v. Evans, supra; Basnight v. Wilson, supra.*

In the trial below there is no error in law.

Affirmed.

IN THE MATTER OF THE WILL OF MARGARET STRADER KNIGHT, DECEASED.

(Filed 2 July, 1959.)

1. Appeal and Error § 38—

The failure to bring forward an assignment of error in the brief effects an abandonment of the assignment and the exceptions upon which it is based. Rules of Practice of the Supreme Court, No. 28.

2. Evidence § 26: Wills § 23b—

The judgment in a lunacy proceeding is itself the best evidence of its contents, and testimony of a witness in regard thereto is properly excluded in a caveat proceeding predicated upon mental incapacity of the testatrix.

3. Wills § 23b—

Evidence of mental incapacity within a reasonable time before and after the execution of the writing offered for probate is competent upon the issue of the mental capacity of testator.

4. Insane Person § 3: Evidence § 4: Wills § 23b—

An adjudication of mental incompetency raises no presumption of mental incapacity anti-dating the adjudication but is competent as evidence upon the question provided such adjudication is rendered within reasonable proximity in time to the date in question, and whether it is within a reasonable time is a question addressed to the sound discretion of the trial court, to be determined upon the facts and circumstances of each particular case.

5. Same—

Testatrix was adjudged mentally incompetent to handle her affairs some eleven months after the date the writing propounded was executed. It appeared that at the time of the adjudication testatrix was aged and infirmed and that she died the day after the adjudication. *Held:* Under the circumstances, the exclusion of the judgment in the lunacy proceeding would not be prejudicial error, since whether the judgment was rendered within reasonable proximity in time to the date in question is a matter addressed to the sound discretion of the trial court.

6. Wills § 23a—

While the probate of a will in common form is incompetent in evidence in a caveat proceeding, even for the purpose of corroborating propounder's witnesses, caveators waived their objection to its admission when they failed to object to testimony of a witness for propounder in reading the entire record of the probate proceeding and in cross-examining the witness in regard thereto.

7. Appeal and Error § 41—

An objection to the admission of evidence is waived when the same evidence or evidence of the same import is thereafter admitted without objection.

8. Same—

The exclusion of testimony cannot be held prejudicial when the record fails to disclose what the witness would have answered if permitted to testify.

9. Wills § 23b—

The admission of evidence of a deed of trust executed by testatrix less than two years prior to the execution of the writing propounded is competent on the issue of mental capacity.

10. Appeal and Error § 42—

An exception to the charge will not be sustained when it is free of prejudicial error when read contextually.

11. Appeal and Error § 24—

Where the court gives correct instructions on all material aspects of the case, the failure to request amplification or additional instructions waives exceptions to the charge in regard thereto.

APPEAL by caveators from *Crissman, J.*, October 1958 Civil Term of ROCKINGHAM.

Margaret Strader Knight died 30 May, 1958. Her husband predeceased her. Her five sons and five daughters survived her. She left an attested writing, dated 26 June, 1957, purporting to be her last will and testament, in which she devised and bequeathed her entire estate to one of her sons, Thomas A. Knight. This paper writing was, on 25 June, 1958, admitted to probate in common form as the last

will and testament of Margaret Strader Knight by the clerk of the Superior Court of Rockingham County. In due time a caveat was filed by eight of the children of testatrix, to wit: O. W. Knight, Hazel K. Johnson, D. F. Knight, Catherine K. Cobb, Juanita K. Pearman, John M. Knight, Dorothy K. Rakestraw and Miriam K. Simpson. The caveat alleged that the paper writing was not the last will and testament of Margaret Strader Knight for that her signature thereto was obtained through undue influence and duress of Thomas A. Knight, and for that she did not have sufficient mental capacity to execute a valid will and testament.

This cause came on for trial and evidence was offered by the propounder and caveators. Appropriate issues were submitted to and answered by the jury. The verdict of the jury was in favor of the validity of the will. Accordingly, the court entered judgment declaring the paper writing to be the last will and testament of Margaret Strader Knight and admitting the same to probate in solemn form.

From said judgment caveators appealed and assigned error.

Brown, Scurry, McMichael & Griffin for Caveators, appellants.
J. C. Johnson, Jr. and Bethea & Robinson for Propounder, appellee.

MOORE, J. In the record on this appeal caveators make eleven assignments of error based on eighteen exceptions. However, they did not bring forward in their brief the fourth assignment of error. Therefore this assignment and the exceptions upon which it is based are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562; *Darroch v. Johnson* and *Colville v. Johnson*, 250 N.C. 307, 311, 108 S.E. 2d 589.

The first assignment of error is based on the exclusion of certain evidence which caveators sought to elicit on cross-examination from the clerk of the Superior Court of Rockingham County. Counsel for caveators propounded the following question:

"I'll ask you, Mr. Clerk, if you didn't declare Mrs. Margaret Strader Knight incompetent?"

Counsel for propounder objected to the question and the court required the jury to retire. In the absence of the jury, it was revealed that there had been a proceeding before the clerk to have the testatrix declared incompetent, that a hearing was had therein before the clerk and a jury on the day before the testatrix died, that she was declared incompetent by the verdict of the jury, and that pursuant to the verdict the clerk signed a judgment declaring her incompetent.

The court ruled the question incompetent but stated that the judgment might be identified for later introduction. Caveators were not offering evidence at this stage of the trial. Counsel for caveators insisted that the question was proper and the witness should be permitted to answer it in the presence of the jury. The court ruled: "You can't ask him anything that is going to reflect that, judgment." For the purposes of the record the following questions were propounded to the witness and answered by him in the absence of the jury:

"Q. Answer that question.

"A. I signed the judgment after the jury brought in the verdict that she was mentally incompetent.

"Q. Was there a jury trial to decide her competency on May 29, 1958?

"A. There was a jury trial. I don't remember the exact date because I don't have the papers before me.

"Q. What was the result of that jury trial as to her competency?

"A. The jury declared her incompetent from want of understanding, to manage her own affairs.

"Q. Did you in accordance with the jury's verdict sign a judgment to that effect?

"A. I did."

Objections to these questions and answers were sustained.

The rulings of the court must be sustained under the "Best Evidence Rule." The judgment in the proceeding before the clerk was in writing and a matter of record. The judgment itself was the best evidence of what it contained. It was improper to have the clerk declare the effect thereof. It is not in the record on appeal and was not offered in evidence. It may well be that it contained matter considered by caveators to be harmful to their cause. In any event, the caveators had an opportunity to identify and offer it but failed to do so. "A writing is the best evidence of its own contents." North Carolina Evidence — Stansbury, sec. 190, p. 411.

If the judgment in the proceeding had been properly identified and offered, it is our opinion that its exclusion by the court would not have been prejudicial error under the circumstances in this case. It is true that this Court has held that "where the issue is the mental capacity of the testator at the time of making the will, evidence of incapacity within a reasonable time before and after is relevant and admissible." *In re Will of Stocks,* 175 N.C. 224, 226, 95 S.E. 360. And this Court has declared that adjudications of insanity are competent in evidence in civil cases. *S. v. Duncan,* 244 N.C. 374, 379, 93 S.E. 2d 421. But an adjudication of mental incompetency raises no pre-

sumption of mental incapacity antedating the adjudication. At most it is merely evidence to be considered by the jury on the issue of mental incapacity and it must not be unreasonably remote in time. Anno: 68 A.L.R. 1310, 1314. "As a general rule, mere proof of the existence of a condition or state of facts at a given time does not raise a presumption that the same condition or state of facts existed on a former occasion." 2 N. C. Index — Strong, Evidence, sec. 4, p. 248; *Sloan v. Light Co.*, 248 N.C. 125, 132, 102 S.E. 2d 822; *Smith v. Oil Corporation*, 239 N. C. 360, 366, 79 S. E. 2d 880; *Childress v. Nordman*, 238 N.C. 708, 712, 78 S.E. 2d 757.

Ordinarily a judgment declaring mental incompetency, rendered eleven months subsequent to the execution of the instrument in question, is relevant and competent. But the question as to whether or not such adjudication was made within a reasonable time depends on the circumstances of the case and is within the sound discretion of the court. *In re Washington's Estate*, 46 S.E. 2d 287, 289 (S.C. 1948); *Ailes v. Ailes*, 11 N.E. 2d 73, 74 (Ind. 1937). In the case at bar, it appears from the record as a whole that the testatrix was 83 years of age at the time of her death, that during the last two years of her life she had been hospitalized a number of times, that she had suffered a broken hip about a year before her death and had been treated for pneumonia and other ailments. She was judicially declared mentally incompetent only when she was *in extremis*. She died the day following the adjudication. Had the judgment been offered in evidence, its admission would not have constituted error, and its exclusion, if error, would not have been prejudicial error under the circumstances.

The second assignment of error relates to the admission in evidence, over the objection of caveators, of the record of the probate in common form of the purported will of Margaret Strader Knight. The record of the probate of a will in common form is incompetent evidence in a caveat proceeding even for the purpose of corroborating propounder's witnesses. *In re Will of Etheridge*, 231 N.C. 502, 504, 57 S.E. 2d 768. However, this Court has held that where the caveators attach to their pleadings a copy of such probate and incorporate it by reference, they cannot be heard to object to its admission in evidence. *In re Will of Crawford*, 246 N.C. 322, 324, 98 S.E. 2d 29. However, in the instant case the probate was not attached to or incorporated in caveators' pleadings, and the ruling in the *Crawford* case does not apply here.

However, the clerk of Superior Court, while testifying for propounder, read to the jury the entire record of the probate in common

form of the purported will of Margaret Strader Knight. Caveators interposed no objection and proceeded to cross-examine the clerk in detail concerning the probate. They thereby waived their right to object to the admission of the probate proceedings. An objection is waived when the same evidence or evidence of the same import is admitted without objection. *Tucker v. Moorefield,* 250 N.C. 340, 344, 108 S.E. 2d 637; *Price v. Gray,* 246 N.C. 162, 165, 97 S.E. 2d 844; *Everett v. Sanderson,* 238, N.C. 564, 567, 78 S.E. 2d 408.

The third and sixth assignments of error are based on exceptions taken by caveators to the rulings of the trial judge in sustaining objections to certain questions propounded to witnesses by counsel for caveators. The record does not disclose what the witnesses would have testified had they been permitted to answer. Therefore, there is no basis for consideration of these exceptions and no prejudicial error has been shown. *Board of Education v. Mann, ante,* 493; *Highway Commission v. Privett,* 246 N.C. 501, 505 99 S.E. 2d 61.

The fifth assignment of error relates to the admission in evidence, over the objection of caveators, of a deed of trust executed by the testatrix on 1 October, 1955. This evidence, tending to show a business transaction of testatrix relative to her property, was competent on the issue of mental capacity. Anno: 82 A.L.R. 973; 68 C. J., Wills, sec. 72, p. 465.

The seventh, eighth, ninth and eleventh assignments of error are based on exceptions to the charge. When read contextually the charge is free of prejudicial error. The court gave the jury full instructions with respect to the principles of law applicable to the issues and evidence and properly placed the burden of proof. Equal stress was given to the evidence and contentions of the parties. Caveators had opportunity to request amplification or additional instructions if deemed advisable. Failure to make the request waived the right to object. *In re Will of Crawford, supra,* at page 325.

The tenth assignment of error is based on exception to the signing of the judgment. It is a formal exception and because of our decision herein requires no discussion.

In the trial of this cause we find

No Error.

J. V. TOMBERLIN v. R. W. LONG, TRADING AND DOING BUSINESS AS LONG CONSTRUCTION COMPANY.

(Filed 2 July, 1959.)

1. Contracts § 19—

A novation is the substitution of a new contract for an existing valid contract by agreement of the parties, and ordinarily the parties must have intended that the new agreement should be in substitution for and extinguishment of the old.

2. Same—

Where a second contract deals with the subject matter of a prior contract between the parties so completely that its legal effect is to rescind or abrogate the prior agreement, the question of novation is one of law for the court, but where the second agreement does not show on its face that it must have been intended as a substitution for the prior agreement, and the facts relating to the intent of the parties are controverted, the question of intent is for the jury.

3. Same— Whether second agreement was intended as a substitution of prior contract held for jury on conflicting evidence.

Plaintiff alleged that defendant agreed to subcontract certain work to plaintiff and to lease certain equipment from plaintiff, and that thereafter defendant leased certain equipment in lieu of subcontracting the work to plaintiff. Defendant averred that he subcontracted the work to plaintiff, that plaintiff commenced performance under the subcontract and then breached said subcontract, forcing plaintiff to lease the equipment. *Held:* Whether the parties intended the lease agreement to be in substitution for the subcontract is a question for the jury upon conflicting evidence, and it was error for the court to hold as a matter of law that the lease agreement constituted a novation.

APPEAL by defendant from *Bone, J.*, at August 1958 Civil Term of NEW HANOVER.

Civil action instituted by J. V. Tomberlin as plaintiff, resident of New Hanover County, North Carolina, against R. W. Long, trading and doing business as Long Construction Company as defendant, resident of Edgecombe County, North Carolina, to recover damages for an alleged breach of contract, and on contract of lease in total sum of $5,452.46, with interest, as set forth in the complaint, to which said defendant filed an answer and cross-action against said plaintiff, alleging a breach of contract by him, and praying judgment against him in sum of $16,065.43.

Plaintiff alleges in his complaint, and defendant admits in his answer substantially the following:

(1) Plaintiff, J. V. Tomberlin, as of matters here in controversy, operates a grading, contracting and road building business, together

with the leasing of heavy equipment and moving of same to New Hanover County and throughout the State of North Carolina.

(2) Defendant is engaged in the contracting business doing road work throughout the State of North Carolina, taking contracts from the State of North Carolina for particular types of road work and hiring men to perform such contracts, and also subcontracting certain of the work contracted by him, and leasing equipment with which to perform such contract jobs.

(3) Defendant entered into a contract or contracts with the North Carolina Highway Commission to perform certain highway construction in connection with the widening and repairing of N. C. Highway #350 between Ahoskie and Aulander in the counties of Hertford and Bertie, North Carolina,—being N. C. Highway Project #1479, and

(4) During the early part of April, 1957, defendant through his agent contacted plaintiff in reference to subcontracting certain of the work defendant had so contracted to perform on said highway; and plaintiff was asked to forward to defendant certain estimates on certain phases of the construction work to be done, and to come to Ahoskie and to look over the situation; and as a consequence plaintiff did go to Ahoskie and examine the work which defendant wanted done on said Project #1479, and submit estimates which defendant had requested of him.

Plaintiff alleges in his complaint, and on trial in Superior Court offered evidence tending to show:

I. That defendant's agent informed plaintiff by phone that his price on hauling stone was a little too high, but that, if he would agree to haul the stone at $1.25 per ton, defendant would give him a contract for the work on which he had given estimates, and at that time rent a "Pay Loader" and "Motor Grader" with operators, and requested these pieces of equipment be sent to the Ahoskie area for work on said Highway #350; that defendant did not give plaintiff a contract based on his estimates, but put off and delayed the execution of one; and that, however, plaintiff did begin work on said project under agreements of defendant to pay, despite the fact that no written contract was entered into other than "the equipment lease" hereinafter set out.

II. That as a consequence of defendant's request and agreements to pay, plaintiff sent to Ahoskie (1) a "pay loader" and a "motor grader", and (2) other equipment and personnel, with operators and they began work, the rental for the equipment for April amounting to $883.88 and for May $662.69, and defendant owes plaintiff this

amount; and plaintiff's employees (1) unloaded stone from railroad cars, and placed same in roadways at an agreed price with defendant for which defendant owed plaintiff $180.00; and (2) removed from dirt and clay pits dirt and clay, and placed same in driveways as directed by defendant at agreed prices for which defendant owed plaintiff $858.75; and (3) removed stripping from dirt and clay pits at agreed price, amounting to $373.20 which defendant owed plaintiff; and (4) hauled for defendant several articles of equipment at agreed prices per unit for which defendant was due plaintiff the sum of $550.00.

III. That on 31 May, 1957, defendant decided to lease equipment of plaintiff in lieu of giving plaintiff a written contract, and on that date an "equipment lease" was entered into by and between plaintiff and defendant for certain of plaintiff's equipment for use on said road project, a copy of which lease is attached to and made a part of the complaint,— the pertinent parts of which follows:

"RENTALS: Lessee shall pay to lessor * * * aggregate rental of $2,600 per calendar month * * * beginning May 31, 1957 * * * REPAIRS: Lessor shall not be obligated to make any repairs or replacements * * * Lessee shall inspect the equipment within 48 hours after the receipt; unless within said time lessee notifies lessor, stating the details of any defects, lessee shall be conclusively presumed to have accepted the equipment in its then condition. Thereafter lessee shall effect and bear the expense of all necessary repairs, maintenance and replacements * * * LIABILITY: Lessee shall indemnify and save lessor harmless for any and all injury to or loss of the equipment from whatever cause * * * damage for any loss or injury shall be based on the then true and reasonable market value of the equipment irrespective of rentals theretofore paid or accrued."

And plaintiff testified that he delivered the articles of equipment listed in the equipment lease including house trailer; that defendant had the use of same during the month of June, 1957, and up until the 15th of July, when he returned a part of it, the rental then due was $2600 and $1300; that thereafter on units in possession of defendant rentals accumulated to a total of $1280.00; that, as to provision about damage or loss of equipment plaintiff enumerated various items, including charges for telephone in the trailer for the time defendant had it, itemized list of which was introduced in the evidence, and by consent, permitted to be inspected by the jury, and that, after crediting payments made, the defendant was indebted to plaintiff in the sum of $5,452.47.

And plaintiff alleges in his complaint, and upon trial testified, that

at time of delivery of articles of equipment under the lease of equipment of 31 May, 1957, there was a telephone installed in the house trailer office included in the lease, and that defendant agreed to have it changed to his name, but did not do so, and a total of $236.75 in charges were made for June and July, 1957, for which defendant is indebted to plaintiff.

And defendant, answering denies that he is indebted to plaintiff, and for further answer, defense and cross-action, sets up counterclaim against plaintiff averring contract by which plaintiff agreed to do certain of the work on said highway project in respect to which defendant had a profit of $16,065.43; and that on or about the 1st day of May, 1957, plaintiff commenced such work and continued working until the 30th day of May, 1957, at which time plaintiff, without any just cause therefor, wilfully and deliberately breached his contract in manner stated; and as a result thereof defendant was forced to enter into the "equipment lease" referred to in the complaint, and to use his own men and equipment and to hire other men and make other expenditures as there related, and as a result thereof defendant has been damaged, and plaintiff is indebted to him in sum of $16,065.43, for which defendant prays recovery.

And plaintiff replying, reiterates his original prayer for relief.

Upon trial in Superior Court both plaintiff and defendant testified, and each offered evidence tending to support his contentions and each moved for judgment as of nonsuit. Plaintiff's motion as to defendant's cross-action was allowed. The case was submitted to the jury under charge of the court on one issue only, to wit: "1. In what amount, if any, is the defendant indebted to the plaintiff?" which the jury answered "$4,451.24."

And to judgment signed in favor of plaintiff in accordance therewith defendant excepted and appealed to Supreme Court, and assigns error.

Addison Hewlett, Jr., Napoleon B. Barefoot for plaintiff, appellee.
Weeks & Muse for defendant, appellant.

WINBORNE, C. J. The pivotal question on this appeal revolves around assignment of error No. 8 based upon exception No. 20 taken to the action of the trial court in sustaining motion of plaintiff for nonsuit of defendant's cross-action or counterclaim on the ground that it is based on an alleged breach of an oral contract which was substituted by the written lease agreement which, as expressed by counsel for plaintiff, brings in the principle of novation.

In this connection "Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished * * * The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract * * *." 66 C. J. S. Novation Secs. 1 and 3.

"Novation implies the extinguishment of one obligation by the substitution of another." *Walters v. Rogers,* 198 N. C. 210, 151 S. E. 188. *Turner v. Turner,* 242 N. C. 533, 83 S. E. 2d 245; *Bank v. Supply Co.,* 226 N. C. 416, 38 S. E. 2d 503.

"Ordinarily," as stated in *Growers Exchange v. Hartman,* 220 N. C. 30, 16 S. E. 2d 398, in opinion by *Devin, J,* later C. J., "in order to constitute a novation the transaction must have been so intended by the parties."

Indeed this headnote in *Bank v. Supply Co., supra,* that "Where the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument, the question is one of law for the courts" epitomizes the holding of this Court.

Now applying these principles to the factual situation in instant case, all the facts and circumstances are not uncontroverted. For instance, while plaintiff alleges in paragraph Twelve of his complaint that "defendant, on May 31, 1957, decided to lease equipment of plaintiff in lieu of giving plaintiff a written contract" this allegation is categorically denied in the answer of defendant. And while there may be other evidence bearing on the question of intent, it appears that a case for the jury is presented. Hence in the ruling made, apparently as a matter of law, the trial court erred in material aspect for which there must be a new trial.

Other assignments of error have been duly considered, and in them prejudicial error is not made to appear. Indeed the matters to which they refer may not recur on another trial. Hence for error pointed out, there will be a

New Trial.

MRS. EDNA GORDON, ADMINISTRATRIX OF THE ESTATE OF CRAWFORD GORDON, DECEASED; GEORGE WASHINGTON ELMORE, ADMINISTRATOR OF THE ESTATE OF JOHN ELMORE, DECEASED; ADA ALLEN, ADMINISTRATRIX OF THE ESTATE OF LASCO WILEY, DECEASED; FRANK GILLIAM, BEN MIXON, AND McKINLEY JUNIOR TUCKER v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 2 July, 1959.)

1. State § 3b—

Evidence tending to show that an employee of the State Highway Commission was driving a truck at a speed of 15 to 20 m.p.h. downgrade, that the brakes suddenly failed, that the truck gathered momentum and that the right front wheel came off at a sharp curve causing the vehicle to overturn, resulting in the injuries in suit, but that the driver did not lose control until after the brakes had failed, and that he then did everything possible to avoid the mishap, *held* insufficient to show negligence on the part of the driver.

2. Same—

The evidence tended to show that the brakes of the truck in question suddenly gave way while it was traveling downgrade, that it gained momentum and a front wheel came off on a sharp curve, causing it to overturn, resulting in the injuries in suit. The evidence further tended to show that the truck had been inspected before being placed in service, and that it had been operated without mishap for one week prior to the occasion in suit, and there was no evidence that the inspection and repair of the truck were improperly done. *Held:* The evidence is insufficient to show that respondent sent the passengers out in a truck known to be in such condition as to endanger their lives or safety.

3. State § 3e—

The findings of fact by the Industrial Commission in a proceeding under the State Tort Claims Act are conclusive when supported by competent evidence even though there be evidence which would support a contrary finding.

APPEAL by claimants from *Campbell, J.*, October, 1958 Civil Term, MADISON Superior Court.

This is a proceeding before the North Carolina Industrial Commission to recover under the Tort Claims Act (G. S. 143-291, *et seq.*) for the deaths of Crawford Gordon and Lasco Wiley, and for injuries to John Elmore, Frank Gilliam, Ben Mixon, and McKinley Junior Tucker, alleged to have been caused by the negligent acts of the respondent North Carolina State Highway & Public Works Commission. The particular acts of negligence upon which the claimants rely are alleged to have been committed by the named employee and agent, Wade Junior Garden, truck driver. Each claimant alleges as a basis for liability, the following negligent acts:

"1. Said truck was being operated at a high and unlawful rate of speed prior to and at the time of collision and upset.
"2. Said truck was not lawfully and properly maintained but was operated in a dilapidated, defective and dangerous condition, and without proper brakes, all of which was known to State Highway Commission, its agents and employees.
"3. That said truck was operated by said employee in a negligent, unlawful and careless manner in his failure to observe and heed existing driving conditions and to keep same under control."

Those killed and injured were prisoners assigned to work on the roads under the State Highway & Public Works Commission. At the time of the accident, June 2, 1955, the prisoners were being returned from work to camp in a State Highway & Public Works truck driven by Wade Junior Garden. In their brief, all claimants state:

"On that date, as the truck was being driven on a mountain road, U. S. Highway 25-70, in Madison County, transporting the above named prisoners, at a speed of about 15 to 20 miles per hour, downgrade, the driver heard a popping noise, attempted to apply the footbrakes and found they were inoperative. One Meadows, an employee of defendant, riding in the cab of the truck, attempted to apply the emergency brake, which had no noticeable effect on the speed of the truck (R. 38). The driver then shifted into second gear, as the truck picked up speed, but the gears apparently broke or stripped and would not hold (R. 39). With no gears and no brakes, the truck and trailer continued down the road, increasing speed, out of control, until the right front wheel came off on a sharp curve, and caused the vehicle to turn over (R. 38, 39), resulting in the death of Lasco Wiley and Crawford Gordon, and injuries to the other prisoners. John Elmore died at a later date, after institution of this action, of causes not related to the accident in question."

After both parties had presented their evidence, the hearing commissioner, Thomas, found as a fact the evidence failed to establish a negligent act on the part of any designated State department or employee and concluded as a matter of law the State Highway & Public Works Commission was not liable. Awards were made denying all claims. Upon review before the full Commission, the findings of the hearing commissioner, his conclusions of law and awards were in all respects approved and affirmed. After hearing on the record pursuant to appeal, the Superior Court of Madison County entered judgment affirming the full Commission, from which the claimants appealed.

Malcolm B. Seawell, Attorney General, Kenneth Wooten, Jr., Asst. Attorney General, Parks H. Icenhour, Trial Attorney, for the State.

Meekins, Packer & Roberts for plaintiffs, appellants.

HIGGINS, J. All claims filed with the North Carolina Industrial Commission alleged the same negligent acts. All the evidence shows the truck involved in the accident was being operated at a speed of 15-20 miles per hour prior to the brake failure, and that the increased speed thereafter was because of that failure. There was no evidence of speed or of the negligent, unlawful, or careless operation of the truck on the part of the driver Garden until the brake failure caused loss of control. Claimants' alleged negligent acts one and three are not supported by evidence.

Claimants rely, in the main, on their claim that the truck was unlawfully maintained and "was operated in a dilapidated, defective and dangerous condition, and without proper brakes, all of which was known to" the respondent. The evidence fails to disclose negligent failure to inspect the truck by any named agent or employee of the State Highway & Public Works Commission charged with that duty. *Lawson v. Highway Commission*, 248 N. C. 276, 103 S. E. 2d 366; *Tucker v. Highway Commission*, 247 N. C. 171, 100 S. E. 2d 514; *Flynn v. Highway Commission*, 244 N. C. 617, 94 S. E. 2d 571.

A case of liability for injury could be made out by showing some designated agent or employee of the respondent sent prisoners out on the highway in a truck known to be in such condition as to endanger their lives or safety. The act of placing prisoners in a place of known danger where injury would probably result would be a negligent act under the cases cited. The evidence disclosed the truck involved in the accident had been inspected and put in storage to be taken out as a spare. When the regular vehicle broke down, the truck was inspected and placed in service and used for transporting prisoners from the camp to the project, operated as a dump truck during the working hours, and then used to return the prisoners to camp at the end of the day. For these operations the truck beds were changed. The vehicle had operated normally for one week during which it was in daily use.

The truck driver, Garden, a witness for the claimants, testified: "I was coming down through there (the mountain), driving 15 to 20 miles per hour. So, I heard something pop and I slammed on the brakes . . . So, I told him (Meadows, the foreman riding in the cab), I didn't have no brakes . . . He reached down to get the emergency brake . . ." The emergency brake did not stop the truck. Meadows jumped out. "All there was for me to do was ride it on and turn up the mountain . . . I

. . . made the sharp curve (about one-half mile from the point where the brake gave way) and the wheel jumped off and it turned over . . . It had an emergency brake on it. It would hold it sitting still, but I did not try to stop with it. . . . I had been driving it about a week. . . . It had good brakes on it till then."

The mechanic for the respondent testified: "Prior to June 2, 1955, we worked on the truck involved in the accident. We did get the truck ready for the job. . . . checked the brakes . . . it was capable of going out on the job and hauling the men. We checked the brakes, the brakes were all right when the truck went out . . . At the time it was one of as good trucks as any we had."

The claimants offered a witness who qualified as an expert mechanic familiar with trucks of the type involved in the accident. In answer to a hypothetical question, he testified: "Could be several reasons that would cause that outer wheel bearing to burst or disintegrate . . . It could be lack of grease, bad adjustment, defective bearing; could be a defective hub, inside where the bearing fits could be defective. . . . The most common causes . . . would be lack of grease. . . . I am of the opinion if that hand brake . . . was in good condition . . . you could stop the truck with it."

The Commission found as a fact there was no evidence when the wheel assembly on the truck was packed with grease or as to what caused the failure of the emergency brake, or that the inspection or repair of the truck were improperly done. "That Garden and Meadows, when confronted with the sudden emergency, took all measures reasonably available . . . to avoid the wreck, and neither . . . was guilty of any negligent act in connection with the wreck."

Upon the facts found, the commission concluded as a matter of law, "The plaintiffs in the subject cases have failed to establish a negligent act on the part of any of the named State employees."

The Commission's findings of fact are supported by competent evidence and they are conclusive on appeal, even though there is evidence to support a finding to the contrary. *Blalock v. Durham*, 244 N. C. 208, 92 S. E. 2d 758, and the many cases there cited.

The judgment of the Superior Court of Madison County is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1959

PAUL T. MENZEL AND WIFE, SARAH E. MENZEL (NEE SARAH E. CREEKMORE) v. LUCILE R. MENZEL AND PAULINE C. MENZEL, INFANT CHILDREN OF PLAINTIFFS; MILES N. OVERTON AND GRANDY B. OVERTON

AND

PAULINE MENZEL WILLIAMS, PETITIONER, MOVANT v. CHARLES CAMDEN BLADES, MELICK WEST BLADES, AND LEMUEL SHOWELL BLADES, JR., TRUSTEES UNDER THAT CERTAIN AGREEMENT RECORDED IN DEED BOOK NO. 98 AT PAGE NO. 402, OFFICE OF THE REGISTER OF DEEDS OF PASQUOTANK COUNTY, AND SARAH E. MENZEL (NEE SARAH E. CREEKMORE).

(Filed 23 September, 1959.)

1. Judgments § 25—

The remedy to obtain relief from an erroneous judgment is by appeal or proceedings equivalent thereto taken in due time. G.S. 1-268, G.S. 1-269.

2. Same—

The remedy to obtain relief from an irregular judgment, including irregularities resulting from fraud, is by motion in the cause.

3. Judgments § 27d—

An irregular judgment is one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and such judgment may be set aside only upon a showing by defendant that he has a meritorious defense and has acted with due diligence.

4. Judgments § 25—

The remedy to set aside a final judgment for fraud is by independent action, since the right to the relief depends upon extraneous facts which the parties are entitled to have found by a jury.

5. Judgments § 27e—

A judgment which is regular on the face of the record is not void for fraud but only voidable.

6. Judgments § 25—

Attack of a judgment by motion in the cause on the ground of want of proper service requires the court to examine the judgment roll to ascertain if on its face it showed proper service, and if the judgment roll would itself disclose vitiating irregularities in service without the necessity of the introduction of evidence *aliunde*, motion in the cause is the proper procedure.

7. Process § 6—

Where the affidavit for service by publication, the order of publication and the published notice, give notice to contingent remaindermen of the institution of an action "concerning real estate of which the Superior Court of the said county has jurisdiction," the service by publication is defective. G.S. 1-98, G.S. 1-99.

8. Judgments § 25—

The procedure to attack a judgment rendered out of term and out of the county on the ground of want of consent to such hearing is by motion in the cause, since the question may be determined by the judgment roll and the court minutes without the necessity of evidence *aliunde*.

9. Estates § 7—

Prior to the enactment of G.S. 44-11 permitting the payment to the life tenant of the value of her estate, it would seem that upon application for sale for reinvestment of an estate subject to remainders the court could only determine the estates which the several parties had in the land and the desirability of sale and reinvestment of the entire proceeds.

10. Judgments § 25—

In order to set aside for irregularities a judgment for the sale of land for reinvestment, the court must find that the irregularities materially prejudiced the rights of the movant, that movant acted with due diligence, and that she is entitled to the relief as against subsequent purchasers of the land, and all who were parties to the original action are entitled to notice and an opportunity to be heard.

HIGGINS, J., not sitting.

APPEAL by movant from *Paul, J.*, April 1959 Term of CAMDEN.

LeRoy, Goodwin & Wells for movant appellant.
Worth & Horner for appellees.

RODMAN, J. On 12 February 1912 summons issued for defendants from the Superior Court of Camden County in an action entitled *"Paul T. Menzel and wife, Sarah E. Menzel (nee Sarah E. Creekmore) v. Lucile R. Menzel and Pauline C. Menzel, Infant Children of Plaintiffs; Miles N. Overton and Grandy B. Overton."* This summons was returned "not to be found" as to all defendants.

In September 1912 plaintiffs filed a complaint alleging in substance: Bailey J. Overton died in 1884 leaving a will which had been duly probated in Camden County, copy of which was annexed to and made a part of the complaint; he left as his heirs his widow, then dead, and a granddaughter, the plaintiff Sarah; Bailey J. Overton died seized of real estate in Camden County, a portion of which descended to plaintiff Sarah as heir at law, subject to the life estate of the widow which had then terminated; the remaining real estate was devised to Sarah for life with remainder to her issue, should she leave any, and if Sarah should die without issue, to his nephews Miles N. Overton and Grandy B. Overton; the plaintiff Sarah was by descent and the terms of the will the owner in fee of all the land of which Bailey Overton died seized; a sale of the property and reinvestment of the proceeds was desirable and to the best interest of the owners. The prayer of the complaint was that plaintiff Sarah be declared the owner in fee of said lands and for a sale and reinvestment of the proceeds. On 24 May 1912 Sarah Menzel made an affidavit that defendants were not residents of the State of North Carolina and could not be found therein; that a cause of action existed in favor of the plaintiffs against the defendants; that the defendants were proper parties to an action relating to real estate described in the will of Bailey J. Overton. At the spring term 1912 the clerk made an order for publication of summons, based on the affidavit of plaintiff Sarah, returnable "at the fall term 1912 of the Superior Court of Camden County, beginning on the second Monday after the first Monday in September, 1912"; on 28 May 1912 the clerk signed a notice for publication in a newspaper notifying defendants that an action had commenced in the Superior Court of Camden County "concerning real estate, of which the Superior Court of the said county has jurisdiction . . ." The notice directed the defendants to appear at a term to be held "on the first Monday after the first Monday in September, 1912." At the spring term 1913 counsel for plaintiffs applied to the clerk for the appointment of a guardian *ad litem* for Lucile and Pauline Menzel. On 12 March 1913 the clerk entered an order reciting: "It appearing to the Court that the defendants Lucille & Pauline Menzel are minors without general or testamentary guardian and it appearing that C. E.

Thompson is a suitable and discreet person to represent their interest in this cause, it is therefore considered and adjudged that . . . . . be and is hereby appointed guardian *ad litem* . . ." On 12 March 1913 C. E. Thompson, guardian *ad litem*, filed an answer for the infants admitting all of the factual allegations of the complaint, denying plaintiffs' conclusions. At the spring term 1913, which convened 10 March 1913 (c. 38 P.L. 1911) Judge B. F. Long, presiding, entered an order reading: "In this cause all parties consenting, it is considered and adjudged that the same be heard out of term and out of the county at spring term 1913 of Chowan County Superior Court." The record presently before us does not disclose the date this order was signed by Judge Long. Judge H. W. Whedbee construed the will and rendered judgment declaring plaintiff Sarah the owner of all the lands for her natural life with remainder over to such issue of Sarah as should be living at her death, and if none should then be living, to the defendants Overton. Judge Whedbee, finding a sale for reinvestment was to the interest of all parties, directed a sale providing "that the proceeds of said sale, less cost of sale be reinvested under order of this Court." The judgment then directed that the value of the life estate be ascertained "and commuted, shall be paid to, or allowed in payment for said land, should she become the purchaser." The commissioner advertised the property for sale on 6 October 1913. Plaintiff Sarah became the purchaser for $3,200. The sale was reported by the commissioner. The value of the life tenant's estate was ascertained to be $2,658.68. The commissioner was, at the November term 1913, directed to execute the deed and disburse the proceeds. Pursuant to this order, deed was made to Sarah Menzel.

In December 1958 Pauline Menzel Williams, nee Pauline Menzel, filed in the Superior Court of Camden County a motion, service of which was accepted by L. S. Blades, Jr., Charles C. Blades, and Melick W. Blades, and Sarah E. Menzel. The motion so filed asserts that the original summons issued in February 1912, the complaint, the affidavit for publication of 24 May 1912, the order of publication, the order of appointing guardian *ad litem*, the answer of the guardian *ad litem*, the order directing the hearing at Chowan Superior Court, judgment signed by Judge Whedbee, the order determining the life estate of Sarah Menzel, the confirmation of the sale, and all other orders, judgments, and proceedings in said action should be set aside and declared null and void, including the deed from the commissioner to the life tenant. As reasons for the motion she asserted the action was never in fact instituted by Sarah E. Menzel, no guardian *ad litem* was ever properly appointed for movant, no proper answer was ever filed in

said action by any guardian *ad litem*, "the orders and judgments entered and the proceedings had in the aforesaid 1912 proceeding were improperly and improvidently had and entered, without legal authority, basis or justification," Paul T. Menzel, plaintiff, perpetrated a fraud upon Sarah E. Menzel, the other plaintiff, and for other reasons assigned in her affidavit, copy of which she attached to her motion and notice. In the affidavit it is asserted that Lucile Menzel was dead, leaving movant Pauline, who had intermarried with F. Webb Williams, as her heir at law; that movant was only five years of age when summons issued for her in 1912, that movant did not know until the latter part of 1957 of the action instituted in 1912; that she had not been properly served with process; and the appointment of guardian *ad litem* and filing of the answer were improper; "at no time was any consent or approval given or accorded to any step, order, or part of the above-entitled 1912 proceeding by this affiant, her mother, Sarah E. Menzel, any properly appointed guardian of the minor defendants therein, any properly employed attorney, nor any other person connected therewith." The affidavit charges there were "no proper notice of hearings, consent to hearings, advertisement for service or for sale, nor any other proper or legal step taken in said proceeding which might in any way or manner accord to the same the validity or support of law or justice." She further states facts tending to show that Paul T. Menzel, her father and one of the plaintiffs, perpetrated a fraud on the court and on her and her mother. She asserts that the property was sold for far less than its value, that she never received anything from the proceeds of sale, that it was subsequently acquired by Dr. L. S. Blades with knowledge of the defects in the proceeding. Respondents claim under L. S. Blades.

Sarah Menzel filed no answer to the motion. Respondents Blades filed a "Request for Denial of Motion." As a basis for the motion to dismiss, they asserted movant based her motion on fraud, and since a final judgment had been entered and the action terminated, relief could not be obtained by motion in the cause, but an independent action was the proper and exclusive means to obtain relief. Respondents further asserted that movant was barred by the lapse of time—45 years—since the judgment was entered and deed made.

At the spring term 1959 of Camden all parties in interest consented that Judge Paul, who was then presiding over the Superior Court of Camden County, should hear the matter at the May term of Pasquotank Superior Court and enter judgment to the same effect as if heard and entered in Camden.

Movant, at the hearing in Pasquotank, offered in evidence the

judgment roll in the Camden action of 1912. Upon objection of respondents it was excluded. The judgment states: "After hearing the reading of Pauline Menzel Williams' Notice and Motion and her Affidavit and Petition, and after hearing the reading of the named Respondents' Request for Denial of Motion, and after hearing argument of counsel, the Court being of the opinion that respondents' Motion should be determined on the petition and pleadings themselves and that it should rule on respondents' Request for Denial of Motion, treating respondents' Motion and contentions as being that if the allegations or averments of said movant's Motion and Affidavit be admitted, she is not entitled to the relief sought by her in the manner presented, and the Court being of the opinion that movant's Motion and Affidavit are based upon allegations of fraud allegedly practiced in the suit in Camden County in 1912-13, and that more than forty (40) years have elapsed since the seeking of any relief in said suit of said 1912-13, SUSTAINED Respondents' OBJECTION . . ." The court thereupon entered judgment allowing the respondents' motion to dismiss. It is from this judgment that movant appealed.

The proper procedure to obtain relief from a judgment depends on the reason asserted for its invalidity.

To obtain relief from a mistaken interpretation of the law resulting in an erroneous judgement the complaining party has his remedy by appeal or proceedings equivalent thereto taken in due time. G.S. 1-268 and 269; *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460; *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409; *Crissman v. Palmer*, 225 N.C. 472, 35 S.E. 2d 422; *Dail v. Hawkins*, 211 N.C. 283, 189 S.E. 774.

To obtain relief from an irregular judgment, that is, one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law and not a mere erroneous interpretation of the law, the injured party should proceed by motion in the original cause. *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E. 2d 709; *Simms v. Sampson*, 221 N.C. 379, 20 S.E. 2d 554; *Cox v. Boyden*, 167 N.C. 320, 83 S.E. 246; *Massie v. Hainey*, 165 N.C. 174, 81 S.E. 135; *Houser v. Bonsal*, 149 N.C. 51; *Simmons v. Box Co.*, 148 N.C. 344; *Whitehurst v. Transportation Co.*, 109 N.C. 342; *Williamson v. Hartman*, 92 N.C. 236. To obtain relief from an irregular judgment, movant must allege and show that he has a meritorious defense and acted with diligence upon discovering the wrong done him. *Franklin County v. Jones*, 245 N.C. 272, 95 S.E. 2d 863; *Duffer v. Brunson*, 188 N.C. 789, 125 S.E. 619; *Gough v. Bell*, 180 N.C. 268, 104 S.E. 535.

Where a judgment has been obtained by fraud and the action has

terminated, an independent action to vacate the judgment is proper. *Williamson v. Hartman, supra; Sharp v. R.R.*, 106 N.C. 308; *Carter v. Rountree*, 109 N.C. 29; *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315. The reason for this rule is aptly stated in *Simmons v. Box Co., supra*: "When it is sought to set aside a judgment for fraud, that must be done by an independent action, because it depends upon extraneous facts, which the parties are entitled to have found by a jury. The judgment is not void for fraud, but voidable. On the face of the record it is regular. But when it is sought to set aside a judgment for irregularity, in that there has been no service of summons, it is for the court to find the facts and correct the record to speak the truth, and if in fact there was no service of summons or appearance by the defendant (which would waive service of summons), the judgment is void."

Material irregularities, which result from fraud, to a party's prejudice are properly corrected by motion in the cause. *McLean v. McLean*, 233 N.C. 139, 63 S.E. 2d 138; *Henderson v. Henderson*, 232 N.C. 1, 59 S.E. 2d 227.

The motion asserts the orders on which the court assumed jurisdiction were entered "without legal authority, basis or justification." The affidavit states movant had not been properly served with process. True movant does not elaborate on her statement that she had not been properly served, but we are of the opinion and hold that this averment was sufficient to require the court to examine the judgment roll to ascertain if it, on its face, showed service of process. Such an examination would be made with the provisions of the Rev. 442 and 443, now in substance G.S. 1-98 and 99, in mind. Such an examination would, we think, disclose questions as to the sufficiency of the affidavit, the order of publication, and the published notice, which merely notifies defendants of the institution of an action "concerning real estate, of which the Superior Court of said county has jurisdiction." *Bacon v. Johnson*, 110 N.C. 114; *Comrs. of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144; 72 C.J.S. 1099.

The motion is also sufficient to challenge the validity of the judgment rendered by Judge Whedbee on at least two grounds: (1) Was there consent to a hearing outside of Camden County? This would seem to raise the factual question: Was the order signed by Judge Long entered before or after the answer was filed by C. E. Thompson as guardian *ad litem*? That fact could be determined by an examination of the minutes of the court. No parol evidence would be required to find the answer. A judgment rendered out of the county without consent is subject to attack by motion in the cause. *Cox v. Boyden*, 167 N.C. 320, 83 S.E. 246. (2) Conceding consent to a hearing, could

the court under the complaint and answer and the consent order do more than determine (a) the estates which the several parties took under the will of Bailey J. Overton, and (b) the desirability of a sale and reinvestment of the entire proceeds? Rev. 1590; *Pruitt v. Taylor,* 247 N.C. 380, 100 S.E. 2d 841; *McCullen v. Durham,* 229 N. C. 418, 50 S.E. 2d 511; *Simms v. Sampson, supra; Land Bank v. Davis,* 215 N.C. 100, 1 S.E. 2d 350; *Caudle v. Morris,* 160 N.C. 168, 76 S.E. 17. The statutory authority now given to ascertain and pay over to the life tenant the present value of his interest was inserted in what is now G.S. 41-11 by c. 88 P.L. Extra Session 1921.

It would not seem necessary to take parol testimony to determine whether the irregularities asserted by movant exist. The judgment roll and court minutes should provide the answers. The motion and accompanying affidavits, when liberally construed, were, in our opinion, sufficient to require the court to examine the record for the purpose of determining which, if any, of the asserted irregularities existed. Movant, appellant, insists in her brief and on oral argument that her attack on the judgment and the sale made pursuant thereto is based on the irregularities asserted in the motion and affidavit, and not for fraud, except as it may have caused the irregularities. The language of the motion is admittedly general. The court may, of course, require movant to specifically identify the irregularities on which she relies to vacate the judgment. The court is likewise entitled to be informed of the reasons which movant asserts in support of her claim of irregularities.

If the court, upon an examination of the record, finds irregularities, it must, before affording relief, find: (1) the irregularities materially prejudice the rights of movant; (2) movant has acted with diligence; and (3) she is entitled to relief as against present claimants. *Harris v. Bennett,* 160 N.C. 339, 76 S.E. 217.

We read the affidavit which movant filed with the motion as intended to allege facts on which the court can find these requisites. The fraudulent acts charged to her father, one of the plaintiffs, are not asserted as a basis for relief but merely to explain why movant had not previously acquired knowledge of the judicial proceeding purporting to divest her of her interest in the real estate and hence the long delay in seeking to have the sale declared void. She apparently recognizes that merely because she was a contingent remainderman she would not be permitted to wait until the estate became vested and she had a present right of possession before attacking the judgment. *Harris v. Bennett, supra.*

The motion and affidavit are sufficient to require the court to in-

vestigate the charge of irregularities, hear the evidence, and make proper findings based thereon. Notice of the motion does not appear to have been given to Miles N. Overton and Grandy B. Overton or their successors in interest. As parties to the original action it would appear that they are entitled to be heard and that notice of the motion should be given to them.

Reversed.

HIGGINS, J., not sitting.

PERCELL SKINNER v. CHARLIE H. JERNIGAN AND EDDIE P. AUSTIN

AND

PERCY BROTHERS, A MINOR, BY HIS FATHER AND NEXT FRIEND JAMES BROTHERS, v. CHARLIE H. JERNIGAN AND EDDIE P. AUSTIN.

(Filed 23 September, 1959.)

1. Appeal and Error § 60—

Decision on a former appeal that the evidence was sufficient to be submitted to the jury on the issue of negligence precludes the contention that nonsuit should have been entered upon the subsequent trial upon substantially identical evidence.

2. Negligence §§ 11, 16—

Acts or omissions relied on as constituting contributory negligence must be specifically pleaded by defendant in his answer and proven by him on the trial.

3. Negligence § 19c: Automobiles §§ 44, 49—

Where defendant driver does not allege that plaintiffs, passengers standing on the body of the truck, were guilty of contributory negligence in shifting their weight as defendant was turning a curve, so as to contribute to the truck's overturning upon the curve, the court properly disregards such element of contributory negligence in passing upon the sufficiency of the evidence to require the submission of the issue of contributory negligence to the jury.

4. Automobiles § 42i, 49—

The fact that plaintiff passengers were standing on the body of an unloaded truck holding on to the cab and the sides of the truck, in the absence of any evidence showing circumstances indicating that such position was inherently or apparently dangerous, is insufficient to require the submission of the issue of the contributory negligence of plaintiffs to the jury. Further, even if it be conceded that such acts constituted contributory negligence, the taking of such position could not be a proximate cause of an accident occurring when the truck overturned on a curve because of excessive speed.

SKINNER *v.* JERNIGAN AND BROTHERS *v.* JERNIGAN.

5. Automobiles § 40—

Where the evidence tends to show that the truck overturned when the driver attempted to turn into a paved road from an intersecting dirt road at an excessive speed, that plaintiffs, standing on the body of the truck and holding on to the cab and sides of the truck, remonstrated with the driver about the excessive speed prior to the accident but had no opportunity to leave the truck prior thereto, the evidence is insufficient to support the submission to the jury of an issue of their contributory negligence.

6. Automobiles § 54f—

Where evidence discloses that an employee was driving the vehicle registered in the name of the employer, and there is evidence that the employee was driving on the occasion in question on a purely personal mission without the knowledge or consent of the employer, the court by virture of G.S. 20-71.1, properly submits the issue of the employer's liability to the jury under instructions that if the jury should find that the employee was engaged in a purely personal mission without the knowledge or consent of the employer the jury should answer the issue in the negative.

HIGGINS, J., not sitting.

APPEAL by defendants from *Paul, J.*, January Civil Term 1959 of PERQUIMANS.

Two civil actions instituted to recover damages in each case for personal injuries sustained by the overturning of a motor truck, alleged to have been caused by the actionable negligence of the defendant Austin, who was driving the motor truck at the time as an agent or employee of his co-defendant Jernigan and with his knowledge and consent.

The two alleged causes of action grew out of the same overturning of the motor truck. By consent of the parties the two cases were tried together, and so heard on appeal in this Court.

These cases were before this Court at the Fall Term 1956, upon the appeal of the defendants from judgments based on verdicts awarding the plaintiff Brothers damages in the amount of $35,000.00, and the plaintiff Skinner damages in the amount of $500.00. In the first trial, as in the second trial, the suits of the two plaintiffs were tried together in the Superior Court, and so heard on appeal in this Court. The opinion of this Court on the former appeal is reported in 244 N.C. 441, 94 S.E. 2d 316, where a summary of the evidence of the parties at the first trial is stated, to which reference is hereby specifically made. In the first trial the defendants excepted to the denial of their motions for judgments of nonsuit. This Court on the former appeal held that these motions for judgments of nonsuits were properly denied. However, a new trial was granted because of the

admission of incompetent and prejudicial evidence as to the defendant Jernigan.

The second trial was had at the January Civil Term 1959 of Perquimans County Superior Court. The pleadings of the plaintiffs and the defendant Jernigan were the same in both trials. In 1957 the defendant Austin attained his majority, and by an order of court entered at the October Term 1957 of Perquimans County Superior Court the answers of his *guardian ad litem* were withdrawn, and he filed answers as an adult. The answers of Austin's *guardian ad litem* and his own answers were substantially the same in both trials, with these exceptions: the answers of the *guardian ad litem* admit that on the night referred to in the complaints Austin was driving the motor truck with the general knowledge and general consent of his co-defendant Jernigan, and do not deny allegations in the complaints that he was driving the motor truck as agent, servant or employee of his co-defendant Jernigan: the answers filed by Austin as an adult admit that he was driving the motor truck on the night referred to in the complaints, but deny that his co-defendant Jernigan had any knowledge of the fact, and deny that he was driving the motor truck as the agent, servant or employee of his co-defendant Jernigan. All the parties offered evidence at the second trial, as they did at the first trial. We have carefully studied the evidence offered at both trials, and the evidence of all the parties at the second trial was substantially the same as that presented by all the parties at the first trial, with this exception: the plaintiffs in the second trial did not offer in evidence the admission in the answers of the defendant Austin's *guardian ad litem* that on the night referred to in the complaints Austin was driving the motor truck with the general knowledge and consent of his co-defendant Jernigan, which evidence this Court held on the former appeal was incompetent and prejudicial to the defendant Jernigan. The defendants in their joint brief make no contention that the evidence in both trials was not substantially the same.

In the second trial these issues were submitted to the jury in the case of plaintiff Percy Brothers and answered as appears:

"1. Were the injuries to the plaintiff Percy Brothers proximately caused by the negligence of Eddie P. Austin, as alleged in the Complaint?

ANSWER: Yes.

"2. If so, was Eddie P. Austin at the time the agent or employee of Charlie H. Jernigan and engaged in the discharge of his duties as such?

ANSWER: Yes.

"3. What amount, if any, is the plaintiff Percy Brothers entitled to recover?

ANSWER: $25,000.00."

Identical issues were submitted in the case of plaintiff Percell Skinner, and answered in the same way, except that the amount of damages awarded was $500.00.

The trial judge entered judgments for the plaintiffs in accordance with the verdicts, and the defendants appealed.

Robert B. Lowry and John H. Hall for plaintiffs, appellees.
LeRoy, Goodwin & Wells for defendant, appellant Jernigan.
Walter H. Oakey for defendant, appellant Austin.

PARKER, J. Both defendants assign as error the refusal of the trial court to dismiss both actions upon compulsory nonsuits at the close of all the evidence. G.S. 1-183.

Counsel for the defendants strenuously contend that both actions should have been involuntarily nonsuited in the Superior Court. They made the same contention on the first appeal, and their argument on the second appeal in their brief is merely an elaboration of their argument on the same question in their brief on the first appeal. We are compelled to hold under our decisions that this question is foreclosed against the defendants by our decision on the former appeal adjudging the plaintiffs' evidence sufficient to carry the case to the jury. This is true for the simple reason that the evidence adduced by the plaintiffs at the second trial is substantially the same as that presented by them at the first trial, and considered by us on the former appeal. *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Jernigan v. Jernigan,* 238 N.C. 444, 78 S.E. 2d 179, and the numerous cases there cited. The trial court properly overruled defendants' motions for compulsory nonsuits of plaintiffs' actions.

Defendants assign as error the refusal of the trial court to submit to the jury in each case an issue tendered by them as follows: Did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

Plaintiffs' evidence, and the evidence of defendants favorable to them, in the second trial tended to show that around midnight of 22 May 1954 the plaintiffs were at Southern Shores Beach, that they saw the defendant Austin there driving the defendant Jernigan's motor truck, and he agreed to give them a ride to the Town of Hertford. When they left with Austin driving, Austin and two persons were riding in the cab, and two other young men and the plaintiffs were in the bed of the truck. The truck was a ¾-ton stake body

truck, with the stake body built over the bed to make it a little larger. The stakes were above the bed with boards running along them. These boards or rails were as high as the cab. The wooden boards running across the back of the cab had cracks in them. Percell Skinner was standing in the bed of the truck behind the driver, Austin, holding on to the cab, Percy Brothers was standing in the bed of the truck behind Skinner with one hand on the cab and one hand holding on the rail between the stakes. The other two persons in the bed of the truck were also standing up. There was nothing in the bed of the truck, except these four people. Austin was driving along a dirt road with bumps and holes to Harvey Point Road, a hard-surfaced road. He began driving so fast, 55 to 60 miles an hour, that the four persons in the bed of the truck started beating on the cab, and asked Austin to slow down. At that time Skinner and Percy Brothers leaned on the side of the truck. Austin stuck his head out of the cab, and said, "I am going to dust you boys off." Driving along this dirt road into the Harvey Point Road there is a sharp curve to the right. Austin tried to make this curve at a speed of about 50 miles an hour. The Harvey Point Road, on which the truck was entering, is on a little slant at that point. That slant is lower on the side away from the Southern Shores dirt road, so that a truck coming off this dirt road, and turning to the right, has a slant to its left after it gets to or on the Harvey Point Road. As Austin made his turn, the other persons in the bed of the truck to Skinner's right, according to his testimony, came over to his side. The truck turned over, and threw both plaintiffs out. The three persons in the cab were not thrown out. Skinner testified he did not know how many times it turned over. Percy Brothers testified that to his knowledge the truck turned over twice. It came to rest in a ditch on the left side of the Harvey Point Road going towards the Town of Hertford, about 40 or 50 feet from the intersection of the two roads. Percell Skinner was pinned under its front fender and running board, and Percy Brothers was pinned under the back of the truck. Thomas Jenkins, a witness for plaintiffs, was riding in the bed of the truck, and also David Skinner. When Jenkins saw that Austin was not going to slow down, as he approached Harvey Point Road, he went to the rear of the truck, took hold of its side, and had his right foot in the truck and his left foot on the bumper. When the truck began to turn over he jumped, and landed on his shoulder on the edge of a cotton field near a ditch. David Skinner was not a witness, and the evidence does not show what happened to him, when the truck turned over.

Johnny Johnson, a witness for the defendants, was riding in the

cab. He testified that when the truck turned into the Harvey Point Road "the truck commenced sloping to the left because of the road slanting. As we were turning the weight felt like it shifted to the left. The truck turned over."

The defendant Austin testified in part as follows: "Where you go into the Harvey Point Road, it is a sharp turn, almost at right angles. I turned to the right. . . . It felt as if the weight shifted in my truck to the left as I made the turn onto the hard-surfaced road. The truck turned over very shortly after that. The truck turned over close by the ditch, about 50 feet from the intersection. The highway at that point slopes to the left as you are coming towards Hertford." Austin admitted as he was getting ready to leave, Skinner asked him for a ride home, and he told him it would be all right.

The defendant Jernigan, as a witness for himself, stated the truck was being driven at the time by Austin without his knowledge or consent, and that Austin then was not acting as his agent or employee.

Jernigan's allegations of contributory negligence are in substance that plaintiffs contributed to their injuries by their own negligence in that, without any invitation or permission, they voluntarily placed themselves in a position of danger by riding in a part of the truck not intended for the use of passengers, and by their presence in the bed of the truck with other unauthorized persons, made the truck more difficult to manage, and made injury to them more likely in the event of a mishap. Austin's plea of contributory negligence is the same, with this addition, that the persons in the bed of the truck made the truck more top heavy on a curve.

This Court said in *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326, in respect to a plea of the affirmative defense of contributory negligence: "The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded. Allegation without proof and proof without allegation are equally unavailing to the defendant."

The defendants in their pleas of contributory negligence as a defense and also in their answers, make no mention of the weight in the truck shifting to the left as the truck turned into the Harvey Point Road. In the absence of appropriate allegations on the subject, the presiding judge was neither required nor permitted in deciding as to whether or not to submit issues as to contributory negligence to consider whether the shifting to the left of the weight in the truck, as

it entered Harvey Point Road, proximately contributed to plaintiffs' injuries.

There is no evidence to the effect that the persons riding in the bed of the truck made it top heavy. In our opinion, there is no evidence, and no fair inference to be legitimately drawn therefrom, that the four persons riding in the bed of the truck standing up and holding on as they were, made the truck more difficult to manage.

In *Richardson v. State,* 203 Md. 426, 101 A. 2d 213, the Court said: "It is a matter of common knowledge that laborers are often hauled in trucks to their work, and that young people often ride in trucks for pleasure, without being considered as taking undue risks."

This is said in 5A Am. Jur., Automobiles and Highway Traffic, sec. 804: "The mere assumption of an unconventional position in or upon the vehicle is not of itself, however, a sufficient basis upon which to predicate a finding of contributory negligence."

We are aware of the line of cases in which the action was by one injured while riding in some unusual position (other than on the running board) of a motor vehicle, with a part of the body protruding from the automobile, or while riding in a standing position in the rear of a truck and being thrown from the truck without the truck turning over, against the owner or driver thereof, in which the court held that the question of contributory negligence was for the jury to determine. See cases cited in Annotations 104 A.L.R., p. 332 *et seq.;* 44 A.L.R. 2d 315, *et seq.*

Rollison v. Hicks, 233 N.C. 99, 63 S.E. 2d 190, has an entirely different factual situation. In that case the body of the truck consisted of an enclosed cab for the driver, and an open platform at the rear for the load. The platform was 14 feet in length, and was equipped with side railing extending backwards from the cab for a distance of about 5 feet. Concrete blocks, weighing 40 pounds each comprised two-thirds of the load, were stacked at the bottom, and doors and windows were placed on them, resting on the blocks and not fastened on the truck in any way. The load covered the forepart of the platform, leaving a space four feet long vacant at the rear. The cab, the side railings, and the load were approximately equal in height, for they came up a little above plaintiff's waist when he stood upon the platform of the truck. Plaintiff concluded that "the windows could easily fall and break," and rode on the vacant space at the back of the platform for the purpose of steadying the windows and preventing them from falling. While the truck was being driven by defendant over a bumpy highway at a speed of 40 miles an hour, it struck the elevated ridge just east of Alligator Creek bridge with a

resounding thump actually heard at least 200 yards away. The impact of the truck and elevated ridge hurled one of the unfastened doors against plaintiff, knocking him from the rear of the truck to the paved road and inflicting upon him serious injuries. In that case an issue of contributory negligence was properly submitted to the jury, this Court holding that whether plaintiff was contributorily negligent was one of fact for the jury, and not one of law for the court.

In the instant case Skinner was standing in the bed of the truck holding on to the cab, and Percy Brothers was standing in the bed of the truck behind Skinner with one hand on the cab and one hand holding on the rail behind the stakes. The boards and rails of the bed of the truck were about as high as the cab. The overturning of the truck threw them out. No circumstances are shown by the evidence to indicate, that riding, as these plaintiffs were at the time, was inherently or patently dangerous. Both plaintiffs protested against Austin's dangerous speed on such a road as he was driving on, and had no opportunity to get off the truck with safety to themselves before it overturned.

The overturning of the truck and the injuries to both plaintiffs were not the logical consequences of plaintiffs riding standing in the bed of the truck, but were the sole result of Austin's negligent operation of the truck. Even if it should be conceded — and we do not concede it under the facts here — that plaintiffs failed to exercise due care for their own safety by riding standing in the bed of the truck and holding on as they were, with stakes and railings on the bed of the truck as high as the cab, such riding in that position is not sufficient to support a finding that it proximately contributed to their injuries. The trial court properly refused to submit to the jury the tendered issues as to contributory negligence.

On the second issue in each case Judge Paul properly charged the jury in the same words in part as follows: "I further charge you that if you believe the defendant's evidence that on May 22, 1954, Eddie P. Austin, at about 6:00 P.M., finished his work or employment at Charlie H. Jernigan's wood yard, parked the pickup truck and checked in with Earl Newby at Jernigan's cab stand and went home and that Austin discovered he had the truck keys in his pocket and later went back and drove the pickup truck to Hertford and later to Southern Shores Beach, and that he did so without Jernigan's knowledge or consent, and that on that night, May 22, 1954, Austin was driving Jernigan's truck for his, Austin's, own purpose and in pursuit of his private or personal ends, in visiting his girl friend in Hertford and

going to a dance at Southern Shores Beach and not on business for the defendant Jernigan, but in pursuit of something unrelated and disconnected with his, Austin's, employment with Jernigan, the Court charges you that if you find those things to be true, it would be your duty to answer the second issue NO." *Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295.

All the remaining exceptions and assignments of error, directed principally to the evidence and to the charge, have been carefully examined, and are overruled. They present no new or novel points that have not been discussed in our decisions. The appellants have not shown prejudicial error. The verdicts and judgments will be sustained.

At the October Term 1957 of Perquimans County Superior Court the presiding judge entered an order that as the plaintiff Percy Brothers had come of age, his next friend be discharged, and the action be continued with Percy Brothers as party plaintiff. His complaint in the record before us shows that he is still appearing by his next friend.

No Error.

HIGGINS, J., not sitting.

MRS. BETTY W. JOHNSON v. WAYNE THOMPSON, INC.

(Filed 23 September, 1959.)

1. Automobiles § 54f—

A stipulation of the parties that the vehicle in question at the time of the accident was owned by defendant corporation is sufficient to take the issue of *respondeat superior* to the jury under the provisions of G.S. 20-71.1 in an action brought within one year from the time the cause of action accrued by a guest passenger to recover for the injuries resulting from the negligent operation of the car by an agent of the owner.

2. Negligence § 19c—

A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom.

3. Automobiles § 49— Under the facts of this case the act of plaintiff in voluntarily riding in car with defective brakes was not contributory negligence as a matter of law.

Plaintiff was injured in an accident resulting when the brakes of the car in which she was riding as a passenger completely and suddenly failed, causing the driver to lose control and crash into a tree. The fact that plaintiff was advised that the brakes on the vehicle need-

ed adjustment does not support as a matter of law an affirmative answer to the issue of her contributory negligence in thereafter voluntarily entering the car as a passenger when the evidence further discloses that defendant's agent who advised her of the defective brakes also advised her that the vehicle could be operated at a reasonable speed and to drive it and bring it back for adjustment of the brakes as soon as possible, and that she herself operated the car the day before the accident when the brakes were satisfactory except that she had to pump them up a little, and that on the occasion in question she was riding therein while it was being driven by the wife of the president of the defendant corporation on a personal mission of their own and also to return the car to the defendant so that the brakes could be repaired.

4. Automobiles § 52: Master and Servant § 24—

Liability under the doctrine of *respondeat superior* is predicated upon the employer's liability for the negligence of the employee, and therefore the negligence of the employee or agent of defendant in driving a car with defective brakes cannot constitute intervening negligence insulating the independent negligence of the employer in delivering the car for use with defective brakes.

5. Automobiles § 54b—

Where the evidence discloses that plaintiff was the invited passenger in the car driven by the wife of the president of defendant corporation on a trip to deliver the car to defendant corporation for adjustment of the brakes as requested by the agents of defendant corporation, the plaintiff is a guest passenger in the car and not an unauthorized occupant, and defendant corporation is liable for injuries sustained as the result of the negligent operation of the car by its agent.

HIGGINS, J., not sitting.

BOBBITT, J., concurs.

RODMAN AND MOORE, J.J., concur in concurring opinion.

APPEAL by defendant from *Craven, S. J.*, 20 April 1959 Civil A Term. BUNCOMBE.

Civil action to recover damages for personal injuries caused by an automobile collision with a tree.

This action was instituted, and tried in the General County Court of Buncombe County. At the close of plaintiff's evidence, the court entered a judgment of compulsory nonsuit. To this judgment plaintiff excepted, and appealed to the Superior Court of Buncombe County. G.S. 7-295.

In Superior Court the judge presiding reversed the judgment of nonsuit entered in the General County Court, and remanded the action for further proceedings.

From the judgment of the Superior Court defendant appeals to the Supreme Court.

Uzzell & DuMont By William E. Greene for plaintiff, appellee.
Williams & Williams for defendant, appellant.

PARKER, J. Plaintiff's evidence tends to show these facts:

On 29 December 1956 plaintiff, while riding in an automobile driven by her sister, Lona W. Thompson, was seriously injured, when the automobile ran off the road and crashed into a tree. On that date, W. A. W. Thompson, husband of Lona W. Thompson was president of the defendant company and his wife was treasurer. R. E. Perkins was vice-president, and his wife was secretary. The Thompsons owned 50% of the stock of the defendant, and the Perkins 50%. The board of directors were the officers of defendant corporation. R. E. Perkins was general manager of defendant. Gerald Lacy Johnson, husband of plaintiff, was the used car sales manager, and by the terms of his contract of employment with defendant he was paid a salary, plus commissions, and he and his wife were to be provided by defendant with an automobile. During his several years of employment as used car sales manager, defendant from time to time furnished automobiles for him and his wife to use.

On 28 December 1956 Gerald Lacy Johnson left Asheville with salesmen of the defendant to see the Gator Bowl game in Jacksonville, Florida, as a result of winning a contest put on by defendant. Before leaving he asked Harry Baxley, a salesman of defendant, to take out an automobile of defendant for his wife's use during his absence. On 27 December 1956 Baxley carried a 1950 grey Buick automobile, owned by defendant, to plaintiff's home in Asheville. Defendant received this automobile in a trade the day before. When Baxley delivered the automobile to plaintiff, he testified this conversation took place: "When I delivered the car to Mrs. Johnson I told her I had had a fade-away at the light, that I could stop the car at reasonable speed, I advised her to do the same, drive it at a reasonable speed, but bring the car to me as soon as possible so brakes could be put on it; Mrs. Johnson said she had to come to town in the morning and would come by then; I told her I thought she could drive it."

This is plaintiff's testimony as to the conversation between Baxley and herself: "When Mr. Baxley brought me the car I had a conversation with him; he said when he got to the Grace Methodist Church he discovered that the brakes were worse and if I would bring it in

and have it adjusted at my earliest convenience and I asked him if it would be all right to drive it and he said yes."

When Baxley returned after delivering the automobile to plaintiff, he told plaintiff's husband, "the brake pedal had to be pumped and only had an inch to an inch and a half brake pedal on it when we went out." When plaintiff's husband returned home that night, he saw the automobile in the yard, and asked her did Baxley say anything about the brakes. Plaintiff replied, "Mr. Baxley told me they (the brakes) needed adjusting."

On the morning following delivery of the automobile, plaintiff drove it to her sister's, Lona W. Thompson, home at 14 Club View Road about four or five miles from her home. She had no difficulty with the brakes on the trip, except she had to pump them a little. Upon arrival she told her sister about the brakes.

On cross-examination plaintiff testified as to driving the automobile the morning after its delivery to her as follows: "The next morning around ten o'clock I got into that automobile with my little boy and I came into Asheville from my home by Highway 70 through the tunnel; I am not good on distances but I would say it is about three miles from my home to the tunnel; I came down the long hill in front of the Highway Patrol Office just the other side of Haw Creek and I came down the hill from the Haw Creek light to the Kenilworth Road intersections; at that time the brakes were working perfectly because I had to stop at both stoplights; I did notice some freedom in the pedal; when driving into town that morning, there was about an inch and a half or halfway, of pedal off the floor; that is considerably less than normal pedal. I am accustomed to driving cars with this type brake; the thing I am not accustomed to driving is power brakes; these brakes are the kind I drive pretty regularly."

Plaintiff spent the night at her sister's home. That night when W. A. W. Thompson, president of defendant, came home, he, his wife and plaintiff had a conversation in respect to the brakes of the 1950 grey Buick automobile. Mr. Thompson said they should not drive the automobile, and for his wife to take it back the next day. The next morning it began to snow, and was snowing a little when the collision occurred, but the ground was not white. After Mr. Thompson had left home, plaintiff and her sister, Lona W. Thompson, decided to go and get a sled for plaintiff's little boy and Mrs. Thompson's little girl. Lona W. Thompson said, "first we have got to get the brakes adjusted," and they started to defendant's place of business. Lona W. Thompson was driving. Plaintiff was in the front seat, with her little niece sitting on her lap, and her little boy in the back seat.

In coming down an inclined driveway from the Thompson home into Club View Road, "the brakes worked perfectly." After the automobile entered Club View Road, there is a pretty steep grade going up a hill, and it is about 100 yards from the crest of the hill to Country Club Road. Plaintiff testified on cross-examination: "I don't know if my sister was going more than 35 miles per hour as she crested the top of the hill." When the automobile reached the crest of the hill, plaintiff pushed on the foot brake, and it went all the way to the floor. Her sister said: "Betty, we don't have any brakes." She was trying to find with her left hand the emergency brake. When the automobile was traveling down the hill, and had reached a speed of about 50 miles an hour, it swerved or ran completely off the road, and crashed into a tree near the intersection of Club View Road and Country Club Road.

In the collision plaintiff was seriously injured. It would seem from the evidence before us that Lona W. Thompson was killed in the crash.

Attorneys for plaintiff and defendant stipulated in open court that at the time of the accident the defendant was the owner of the 1950 Buick automobile in which plaintiff was riding.

Plaintiff in her complaint avers *inter alia that* Lona W. Thompson, as an agent, servant and employee of defendant, was negligently operating the Buick automobile within the scope of her employment and with defendant's consent, and alleged specific acts of negligence. Plaintiff further alleges that defendant was negligent in failing to repair the automobile before permitting its use, in failing to exercise reasonable care in furnishing an automobile for the use of Lona W. Thompson, and in other things, and that such negligence proximately caused plaintiff's injuries. Defendant pleads as defenses contributory negligence of plaintiff, and that if defendant were negligent, the negligence of Lona W. Thompson in eight specified acts in the operation of the automobile "was active and insulating negligence, which was the sole direct proximate cause of the plaintiff's injury and damage, if any she sustained, and which said negligence as will be more fully hereinafter set forth insulated any and all conduct of this defendant, and which said insulating negligence is hereby pleaded in bar of this action against this defendant." Defendant alleges *inter alia* that Lona W. Thompson negligently operated the automobile with defective brakes under the conditions then and there existing, and is advised, informed and believes that the negligent acts and omissions of Lona W. Thompson were the proximate cause of the accident in which plaintiff was injured, and "which insulated this action against this defendant."

The defendant having stipulated that it was the owner of the 1950 Buick automobile at the time of the accident, G.S. 20-71.1 provides that such stipulation "shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose." *Whiteside v. McCarson,* 250 N.C. 673, 295 S.E. 2d 110, and cases there cited. Plaintiff was injured on 29 December 1956. A copy of the summons issued in the case on file in the office of the Clerk of the Supreme Court shows that it was issued on 28 December 1957. Plaintiff is allowed the benefit of G.S. 20-71.1, as she brought her action within one year after her cause of action accrued. As the evidence tends to show actionable negligence by Lona W. Thompson, this statute carries the case to the jury on the principle of *respondeat superior,* provided plaintiff is not barred from recovery as a matter of law by contributory negligence.

Defendant contends that plaintiff is guilty of contributory negligence as a matter of law.

A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108.

A somewhat similar situation to the instant case, so far as contributory negligence is concerned, was involved in *Holeman v. Shipbuilding Co.,* 192 N.C. 236, 134 S.E. 647. In the *Holeman* case plaintiff's evidence showed these facts: He discovered, when directed by his foreman to haul timber with the truck, that the truck was in bad condition, due to a radius rod badly worn and bent, and that he knew it was dangerous to drive the truck over the road loaded with lumber. Before beginning work, he informed the foreman of the truck's defect, and the foreman directed him to use it, promising to have it repaired. Plaintiff began work, and a few hours later lost control of the truck because the radius rod was bent, and as a result thereof was injured. Defendant pleaded as defenses contributory negligence and assumption of risk. In affirming a verdict and judgment for plaintiff, this Court said in respect to the defense of contributory negligence: "Defendant cannot complain that this evidence was submitted to the jury upon the issue as to contributory negligence; clearly it cannot be held that all the evidence established the affirmative of the issue."

Plaintiff's evidence shows these facts: Plaintiff knew the brakes on the Buick automobile were defective, and needed adjusting. Baxley, a salesman of the defendant, who brought the automobile to her, told her he had had a fade-away at the light, he could stop the automobile at a reasonable speed, and advised her to drive it at a reasonable speed, but to bring the automobile in as soon as possible so brakes could be put on it, he told her he thought she could drive it. Plaintiff testified that she "asked him (Baxley) if it would be all right to drive it and he said yes." The morning after delivery of the automobile to plaintiff, she drove it some four or five miles to her sister's home, and had no difficulty with the brakes, except she had to pump them a little. That same morning she drove the automobile into Asheville. As to this trip she testified on cross-examination: "I came down the long hill in front of the Highway Patrol Office just the other side of Haw Creek and I came down the hill from the Haw Creek light to the Kenilworth Road intersections; at that time the brakes were working perfectly because I had to stop at both stoplights; I did notice some freedom in the pedal; when driving into town that morning, there was about an inch and a half or halfway, of pedal off the floor; that is considerably less than normal pedal." The night before the collision, W. A. W. Thompson, president of defendant, said they should not drive the automobile, and for his wife to take it back the next day.

In our opinion, under the facts here disclosed, plaintiff's getting into the 1950 Buick automobile to ride into Asheville with her sister driving does not constitute contributory negligence as a matter of law. The issue of contributory negligence should be left to the jury for decision.

Defendant relies upon this statement in *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162: "So, if a guest, with knowledge of the defective condition of the car and appreciation of the hazards involved, voluntary assents to ride therein, he will be precluded from recovery for injuries in an accident resulting from the defects of which he has then been cognizant." Under the facts of the case *sub judice,* particularly in view of plaintiff's testimony as to her driving the automobile and using its brakes the day before the collision, of Baxley's telling her he thought she could drive it, and of W. A. W. Thompson telling his wife to take the automobile back the next day, we think it cannot be held as a matter of law that plaintiff in riding in the automobile with her sister driving voluntarily placed herself in a position of known peril, and cannot be charged as a matter of law with knowledge

and appreciation that the brakes would not work and injury was probable under all the facts then existing.

"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. *Roberts v. R.R.*, 143 N.C., 176, 55 S.E. 509. This upon the doctrine of *respondeat superior*. One who commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. *Qui facit per alium facit per se.*" *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446.

If the jury should find from the evidence and by its greater weight that plaintiff was injured by Lona W. Thompson's actionable negligence in the operation of the 1950 Buick automobile owned by defendant, when Lona W. Thompson was the agent, servant or employee of defendant and at the time was acting within the line of her duty and exercising the functions of her employment, then the defendant would be liable in damages to plaintiff, unless plaintiff is barred from recovery by reason of contributory negligence. Under such circumstances the doctrine of insulating negligence does not apply. Defendant has furnished us no authority that such doctrine is applicable under such circumstances, though he pleads insulating negligence as a bar to recovery from it.

Considering the evidence in the light most favorable to plaintiff, she was a guest passenger in the automobile at the time she was injured, and not as contended by defendant an unauthorized occupant of the automobile to whom defendant is not liable, except for injuries wilfully or maliciously inflicted.

The judgment reversing the judgment of nonsuit entered in the General County Court of Buncombe, and remanding the action for further proceedings is

Affirmed.

HIGGINS, J., not sitting.

BOBBITT, J., concurring. Bearing in mind the evidence tending to show notice to Lona Thompson that the brakes were faulty and in need of prompt repair, I agree that the evidence, taken in the light most favorable to plaintiff, was sufficient to support a finding that Lona Thompson was negligent in the operation of the Buick; and I agree that the evidence does not show contributory negligence of plaintiff as a matter of law.

Whether defendant is liable for Lona Thompson's negligence does not, in my opinion, depend upon G.S. 20-71.1. There is positive evidence which, taken in the light most favorable to plaintiff, tends to show (1) that Lona Thompson was in fact acting as agent of defendant and within the scope of the agency, and (2) that, since the Buick was being driven by Lona Thompson to defendant's place of business to be fixed for plaintiff's use and benefit, plaintiff was a passenger therein with the express or implied consent of defendant.

Does G.S. 20-71.1 make proof of ownership, standing alone, *prima facie* evidence that a passenger in an absent defendant's car is riding therein with such defendant's express or implied consent? I would expressly reserve this question for consideration in a case where determination thereof is necessary to decision.

RODMAN AND MOORE, J.J., concur in concurring opinion.

LOIS WHITESIDE v. MELVIN McCARSON, MINOR, AND ROBERT JOHNSON, AND M. M. REDDEN, JR., GUARDIAN AD LITEM OF MELVIN McCARSON.

(Filed 23 September, 1959.)

1. Trial § 36—

The form of the issues is within the discretion of the trial court and an exception to an issue submitted will not be sustained if the form of the issue is sufficient to present to the jury all determinative facts in dispute and afford the parties an opportunity to introduce all pertinent evidence and apply it fairly.

2. Automobiles § 54h—

The submission of the issue of *respondeat superior* in the form of whether plaintiff was injured by the negligence of the employer, rather than whether the employee was an agent of the employer and acting within the scope of his agency in operating the automobile, will not be held prejudicial when the court's instructions on the issue clearly and accurately present the liability of the employer under the doctrine of *respondeat superior*.

3. Automobiles § 54g— Instruction on issue of respondeat superior under G.S. 20-71.1 held prejudicial.

Where plaintiff relies solely upon G.S. 20-71.1 on the issue of agency and defendants' evidence is to the effect, without contradictions or discrepancies, that the driver of the car at the time of the accident was on a purely personal mission of his own, but defendants' evidence is such as to permit diverse inferences as to whether the driver was using the car with the owner's permission, express or implied, an instruction that if the jury believed all of the evidence to answer the

issue in the negative, without further instructions that if the jury found from all the evidence that the driver was on a purely personal mission of his own they should answer the issue in the negative, must be held prejudicial, since the jury might have found the affirmative upon the issue upon their resolution in favor of plaintiff of the conflict in the evidence as to whether the driver was operating the car with the express or implied permission of the owner.

4. Automobiles § 54f—

G.S. 20-71.1 did not change the elements prerequisite to liability under the doctrine of *respondeat superior*, and the injured party is still required to allege and prove that the operator of the car was the agent of the owner and that this relationship existed at the time and in respect of the very transaction out of which the injury arose, the effect of the statute being merely to make proof of ownership of the vehicle alone sufficient to take the case to the jury upon the issue, but not to compel an affirmative finding thereon.

5. Automobile § 54h— Instruction on issue of respondeat superior under provisions of G.S. 20-71.1.

Where plaintiff relies solely on the provisions of G.S. 20-71.1 on the issue of *respondeat superior* and introduces no evidence, but defendant introduces evidence tending to show that the driver was on a purely personal mission of his own at the time of the accident, there is no evidence upon which the court may instruct the jury in plaintiff's favor on the issue, and the court's explanation of the rule of evidence prescribed by the statute is sufficient, but as to the defendant's evidence the court is required, even in the absence of a request for special instructions, to give explicit instruction applying defendant's evidence to the issue and charging that if the jury should find the facts to be as defendant's evidence tends to show the issue should be answered in the negative.

6. Trial § 31b—

The trial judge is required to apply the law to every factual situation arising on the evidence as to all substantive features of the case, even in the absence of a request for special instructions. G.S. 1-180.

7. Appeal and Error § 54—

Where error in the trial relates to a single issue, which is entirely separable from the other issues, the Supreme Court may order a partial new trial confined solely to that issue.

HIGGINS, J., not sitting.

APPEAL by defendant Johnson from *Patton, J.*, May-June Civil Term, 1959, of HENDERSON.

Civil action growing out of an automobile collision that occurred December 18, 1958, about 9:00 p.m. on U. S. Highway 64, near Edneyville, Henderson County, when a 1953 Pontiac, owned by defendant Johnson, then operated by defendant McCarson, struck the right rear

of a 1949 Chevrolet, owned and then operated by plaintiff. Both cars, the Chevrolet in front, were traveling west, towards Hendersonville; and the collision occurred when plaintiff had slowed down and made a partial right turn from the highway into the driveway of her residence.

The pleadings raised, the court submitted and the jury answered five issues, viz.: "1. Was the plaintiff Lois Whitesides injured and her property damaged by the negligence of the defendant Melvin McCarson, as alleged in the Complaint? ANSWER: Yes. 2. Was the plaintiff Lois Whitesides injured and her property damaged by the negligence of the defendant Robert Johnson, as alleged in the Complaint? ANSWER: Yes. 3. Did the plaintiff Lois Whitesides, by her own negligence, contribute to her injury and damage, as alleged in the Answers? ANSWER: No. 4. What amount of damages, if any, is the plaintiff Lois Whitesides entitled to recover for her personal injuries? ANSWER: $9,580.00. 5. What amount, if anything, is the plaintiff Lois Whitesides entitled to recover on account of her property damage? ANSWER: $330.00."

Judgment for plaintiff, in accordance with the verdict, was entered "against the defendants, and each of them," from which *defendant Johnson* appealed.

M. F. Toms and A. J. Redden for plaintiff, appellee.

Harkins, Van Winkle, Walton & Buck and O. E. Starnes, Jr., for defendant Johnson, appellant.

BOBBITT, J. Plaintiff alleged that, on the occasion of said collision, McCarson was operating Johnson's 1953 Pontiac (1) with Johnson's consent, and (2) as Johnson's agent, servant and employee, for Johnson's use and benefit and within the scope of the agency. Defendants filed separate answers. Johnson denied *all* of plaintiff's said allegations.

Plaintiff offered evidence tending to show the collision was caused by the negligence of McCarson in the respects alleged and Johnson's admission that he was the owner of the 1953 Pontiac. To support the allegations referred to above, plaintiff relied solely on the provisions of G.S. 20-71.1.

Johnson's motion for judgment of nonsuit having been overruled, evidence was first offered by defendant McCarson, to wit, his testimony. (We pass, without discussion, the portion of McCarson's testimony tending to show the collision was caused by the negligence of plaintiff.)

McCarson testified, without objection, that he had borrowed the 1953 Pontiac for use on a date; that, upon arrival at the girl's home, he learned she was at the Edneyville School; that, when he entered the school driveway, the girl was in a car then leaving the school premises; that she asked him to meet her "back in town"; and that he was driving to Hendersonville for this purpose when the collision occurred.

McCarson testified further, on direct examination by his own counsel and on cross-examination by plaintiff's counsel, over objections by counsel for Johnson (Exceptions 10-35, inclusive), in substance, as follows: Minnie Huntsinger lived with the Johnsons. She and Mrs. Johnson, sisters, were aunts of McCarson. McCarson frequently visited and often spent nights in the Johnson home. He and Johnson worked at the same place, to wit, Boyd Pontiac and Cadillac Company. Minnie Huntsinger had the 1953 Pontiac most of the time and kept the keys. McCarson had no car. Often, upon his request, Minnie Huntsinger permitted McCarson to use the 1953 Pontiac. Johnson had seen McCarson drive the 1953 Pontiac on ten or more occasions. He had been present on occasions when Miss Huntsinger gave McCarson permission to use it. He had made no objection to McCarson's use of the 1953 Pontiac. On December 18, 1958, Miss Huntsinger permitted McCarson to borrow and use the 1953 Pontiac in connection with his said date.

Thereafter, evidence was offered by defendant Johnson, to wit, his testimony, his wife's testimony and the testimony of Miss Huntsinger. Their testimony, in substance, was as follows: Johnson's 1953 Pontiac was used principally by Miss Huntsinger in going to and from her place of work. Johnson seldom used the 1953 Pontiac. He owned and used another car. Johnson had knowledge that McCarson had previously used the 1953 Pontiac pursuant to permission granted by Miss Huntsinger. While he said nothing to McCarson concerning McCarson's further use of the 1953 Pontiac, some two or three weeks before the collision Johnson instructed Miss Huntsinger "not to let him have the car in the future." Johnson testified that he did not know McCarson was using the 1953 Pontiac on the night of the collision and that he did not consent to McCarson's use thereof on this occasion. Miss Huntsinger testified that she permitted McCarson to use the 1953 Pontiac on the night of the collision in violation of Johnson's instruction that she should not do so.

Thus, the evidence of both defendants was that McCarson was using the 1953 Pontiac on the night of the collision solely for his own purposes and not on any business or mission for Johnson. The

evidence of the two defendants, if not in direct conflict, was such as to permit diverse inferences and to support diverse findings of fact as to whether McCarson, on the night of the collision, was using the 1953 Pontiac with Johnson's permission, express or implied.

Defendant Johnson excepted (1) to the failure of the court to submit an issue as to whether or not defendant McCarson was acting as agent, servant and employee of defendant Johnson, and (2) to the submission of the second issue.

Plaintiff did not allege that Johnson was negligent in any respect apart from the alleged negligence of McCarson. Hence, an issue relating directly to the *alleged agency* rather than to the *alleged negligence* of Johnson would have more clearly presented to the jury the crux of the case in respect of Johnson's liability, if any, for McCarson's negligence. However, no exact formula is prescribed for the settlement of issues. *Pruett v. Pruett,* 247 N.C. 13, 21, 100 S.E. 2d 296. "Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly." *Winborne, J.* (now C. J.), in *Cherry v. Andrews,* 231 N.C. 261, 56 S.E. 2d 703; *McGowan v. Beach,* 242 N.C. 73, 86 S.E. 2d 763, and cases cited.

The submission of the second issue, in lieu of the requested issue, would not, standing alone, constitute prejudicial error. The court's instructions on the second issue related solely to the liability, if any, of Johnson under the doctrine *respondeat superior.* In so doing, the court properly placed the burden of proof on this issue on plaintiff, explaining fully and accurately, but in general terms, the elements prerequisite to Johnson's liability under the doctrine *respondeat superior;* and thereupon the court instructed the jury, in general terms, as to the legal import of the provisions of G.S. 20-71.1.

Having instructed the jury that, by virtue of G.S. 20-71.1, Johnson's ownership of the 1953 Pontiac constituted *prima facie* evidence, that is, evidence "which would justify you but not compel you to find that McCarson was then and there acting as agent of Johnson within the scope of the agency," the court's final instruction on the second issue, to which defendant Johnson excepted, was as follows: "The burden remains at all times upon the plaintiff, but in this particular case the defendant Johnson has offered evidence and with all the evidence to be considered, the Court instructs you that on this second issue — 'Was the plaintiff Lois Whitesides injured and her property damaged by the negligence of the defendant Robert Johnson, as alleged in the Complaint?' — that if you find the facts to be

as this evidence tends to show, it would be your duty to answer the second issue NO, that is, that Lois Whitesides was not injured and her property damaged by the negligence of the defendant Robert Johnson." Defendant Johnson also excepted to the court's failure to apply the law to the facts relating to the second issue.

No instruction was given to the effect that if McCarson was using Johnson's 1953 Pontiac for his own personal purposes, to wit, on a date with his girl friend, *with or without* Johnson's consent, the jury should answer the second issue, "No." True, Johnson did not request special instructions. The quoted instruction was the only instruction as to the circumstances under which the jury might answer the second issue, "No."

As indicated, the only significant conflict in the testimony related to whether or not McCarson was using the 1953 Pontiac with Johnson's permission, express or implied. We apprehend the quoted instruction, although not so intended, was calculated to cause the jury to answer the second issue, "Yes," if they resolved this conflict against Johnson. Whether McCarson was operating the 1953 Pontiac on the occasion of the collision as Johnson's agent, within the scope of the agency, was the determinative issue. It was the jury's duty to answer the second issue, "No," if they found the facts to be *as McCarson's testimony* tended to show; for, in relation to the crucial question, the testimony of McCarson and of Miss Huntsinger was explicit and in accord *as to the purpose* for which McCarson had borrowed and was using the car. On this point, the testimony of Johnson is silent, his testimony being that he had no knowledge that McCarson had the car.

G.S. 20-71.1 did not change the elements prerequisite to liability under the doctrine *respondeat superior*. To establish liability under this doctrine, the injured plaintiff must allege and prove that the operator was the agent of the owner and that this relationship existed at the time and in respect of the very transaction out of which the injury arose. *Jyachosky v. Wensil*, 240 N.C. 217, 81 S.E. 2d 644. As to the necessity for such *pleading*: *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767; *Parker v. Underwood*, 239 N.C. 308, 79 S.E. 2d 765; *Osborne v. Gilreath*, 241 N.C. 685, 86 S.E. 2d 462.

G.S. 20-71.1 established a new rule of evidence. In passing from the rule stated in *Carter v. Motor Lines*, 227 N.C. 193, 41 S.E. 2d 586, to the rule prescribed by G.S. 20-71.1, the pendulum swung from one extreme to the other; for, under the statutory rule, proof of ownership alone suffices to take the case to the jury for its determination of the ultimate issue, that is, whether the operator was in fact the

agent of the owner and then and there acting within the scope of his agency. In addition to cases heretofore cited: *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598; *Travis v. Duckworth*, 237 N.C. 471, 75 S.E. 2d 309; *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E. 2d 104; *Elliott v. Killian*, 242 N.C. 471, 87 S.E. 2d 903; *Davis v. Lawrence*, 242 N.C. 496, 87 S.E. 2d 915; *Caughron v. Walker*, 243 N.C. 153, 90 S.E. 2d 305; *Brothers v. Jernigan*, 244 N.C. 441, 94 S.E. 2d 316; *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903; *Scott v. Lee*, 245 N.C. 68, 95 S.E. 2d 89.

Our courts are now confronted frequently with automobile cases, such as the present case, where the plaintiff, in order to establish liability of the defendant-owner under the doctrine *respondeat superior*, relies solely on G.S. 20-71.1. In such case, the ultimate issue is for jury determination notwithstanding the only positive evidence tends to show explicitly and clearly that the operator, whether driving with or without the owner's consent, was on a purely personal mission at the time of the collision. This question arises: In such case, is the defendant-owner, absent a special request therefor, entitled to an instruction, *related directly to the evidence in the particular case*, that it is the jury's duty to answer the agency issue, "No," if they find the facts to be as the evidence in behalf of the defendant-owner tends to show? We are of opinion, and so hold, that fairness to the defendant-owner requires that such explicit instruction be given.

When, as here, there is no positive evidence that the operator, on the occasion of the collision, was the owner's agent, then and there acting within the scope of his agency, the evidence affords no basis for an instruction in plaintiff's favor related directly to the evidence in the particular case. As to plaintiff, an explanation of the rule of evidence prescribed by G.S. 20-71.1 must suffice. It is otherwise as to the defendant-owner. In the present case, the positive evidence being that McCarson had borrowed Johnson's car, with or without his consent, solely for use on a mission of his own, to wit, a date with his girl friend, Johnson, absent special request therefor, was entitled to an instruction that if the jury found these to be the facts it would be their duty to answer the second issue, "No."

Under G.S. 1-180, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. *Bank v. Phillips*, 236 N.C. 470, 73 S.E. 2d 323, and cases cited; *Harris v. Greyhound Corp.*, 243 N.C. 346, 351, 90 S.E. 2d 710; *Glenn v. Raleigh*, 246 N.C. 469, 478, 98 S.E. 2d 913; *Brooks v. Honeycutt*, 250 N.C. 179, 108 S.E. 2d 457; *Godwin v. Hinnant*, 250 N.C. 328, 108

S. E. 2d 658. He has ". . . the positive duty of instructing the jury as to the law upon all of the substantial features of the case." *Lewis v. Watson,* 229 N.C. 20, 23, 47 S.E. 2d 484; *Spencer v. Motor Co., supra; Glenn v. Raleigh, supra.* Moreover, in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *Barnes v. Caulbourne,* 240 N.C. 721, 725, 83 S.E. 2d 898; *McNeill v. McDougald,* 242 N.C. 255, 87 S.E. 2d 502; *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727.

Candor compels the admission that these well settled rules have been applied with varying degrees of strictness, depending upon all the circumstances of the particular case. Yet, mindful of what *Chief Justice Devin* aptly called "the vigor of the statute" *(Brothers v. Jernigan, supra),* we think strict adherence to these rules must be required in cases where plaintiff relies on G.S. 20-71.1 as the sole support for his allegations of agency.

In *Travis v. Duckworth, supra,* a new trial was awarded for failure of the trial judge to give a requested peremptory instruction related to the evidence offered in behalf of the defendant-owner.

In *Jyachosky v. Wensil, supra,* and in *Skinner v. Jernigan, ante* 657, the trial judge gave peremptory instructions related directly to the evidence offered in behalf of the defendant-owner.

In *Spencer v. Motor Co., supra,* the plaintiff offered evidence tending to show that the automobile was registered in the name of the corporate defendant and relied on G.S. 20-71.1. In addition to its denial of agency, the corporate defendant denied it was the owner of the automobile when plaintiff was injured. In support of the latter position, it offered documentary evidence tending to show that it had previously sold the automobile to the person who was operating it on the occasion of plaintiff's injury. One of the grounds on which a new trial was awarded (pp. 246-247) was the trial judge's failure, absent special request therefor, "to declare and explain the law arising on the evidence, on the second issue, particularly as it concerns or is addressed to the defendant's documentary evidence, especially the invoice or conditional sales contract, . . ."

The error for which a new trial is awarded relates solely to the second issue. Appellant's assignments of error relating to the first, third, fourth and fifth issues have been fully considered. Suffice to say, we find no error relating thereto sufficient to justify a new trial. Hence, these issues, as against defendant Johnson as well as against defendant McCarson, are determinative of the matters involved therein.

As pointed out by *Walker, J.*, in *Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164, ordinarily this Court will grant a partial new trial "when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585; *Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658.

We are mindful that a somewhat different course was followed in *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366. However, we see no greater reason for a retrial of the fourth and fifth issues, which relate to plaintiff's damages, than for a retrial of the first and third issues, which relate to the alleged negligence of McCarson and the alleged contributory negligence of plaintiff. As to all matters embraced by these issues, defendant Johnson has had a trial free from prejudicial error.

The result: As to defendant Johnson, the judgment and the jury's answer to the second issue are set aside and a partial new trial is ordered. Upon such new trial, the sole issue for determination will be whether McCarson, on the occasion of the collision, was the agent of Johnson and then and there acting within the scope of his agency. If the answer is, "No," plaintiff cannot recover from defendant Johnson; but if answered, "Yes," plaintiff will be entitled to judgment for the amount established as plaintiff's damages at the prior trial.

Partial new trial.

HIGGINS, J., not sitting.

EAST CAROLINA LUMBER COMPANY, INCORPORATED v. PAMLICO COUNTY; T. D. WARREN, JR., RECEIVER; DAVID LUPTON AND WIFE, VETA LUPTON.

(Filed 23 September, 1959.)

1. Pleadings § 19c—

Where plaintiff files an amended complaint, in compliance with the order of the court, stating with particularity the facts relied on as constituting the basis of the action, a demurrer to the amended pleading will be determined on the basis of whether the particular grounds for relief alleged in the amended complaint are sufficient to constitute a cause of action.

2. Receivers § 9—

Where the debtor has executed a deed of trust on certain of his realty prior to the receivership, the receiver duly appointed obtains all right, title, and interest of the debtor in the property and may convey such interest, subject to whatever encumbrances exist against the property,

notwithstanding that the trustee is not a party in the receivership proceedings, although the trustee would be a necessary party to an action to foreclose the deed of trust.

3. Quieting Title § 2—

In an action to remove a cloud on title a complaint alleging that defendants claimed under a receiver's deed and that the trustee in a prior deed of trust executed by the debtor was not a party to the receivership proceedings, is demurrable, since the mere fact that the trustee in the deed of trust was not a party does not in itself render the receiver's deed ineffectual.

4. Same—

Where the complaint in an action to quiet title avers that the deed under which the defendants claim was ineffectual because of the insufficiency of the description, with further averment that the deed purported to convey the land described in the complaint, the complaint is demurrable, since if the description in the deed is ambiguous and insufficient the complaint would seen insufficient for failure to identify the lands claimed by plaintiff.

5. Pleadings § 20½—

Where a demurrer is sustained for failure of the complaint to state facts sufficient to constitute a cause of action, but not because the complaint affirmatively disclosed a defective cause of action, the action should not be dismissed, since plaintiff may move for leave to amend in accordance with G.S. 1-131.

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

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Stevens, J.*, Regular Judge holding the courts of the Third Judicial District, at consent hearing in Chambers during February Term, 1959, of Craven Superior Court. From PAMLICO.

Civil action to remove alleged clouds from title to real estate and to recover damages for trespass. Demurrers to amended complaint were sustained and the action dismissed. Plaintiff excepted and appealed.

Hugh L. Wilcox, Royce C. McClelland and Jones, Reed & Griffin for plaintiff, appellant.

Barden, Stith & McCotter, Thorp, Spruill, Thorp & Trotter, Rodman & Rodman, Ward & Tucker, R. A. Nunn, B. B. Hollowell, R. E. Whitehurst and Norman & Rodman for defendants, appellees.

BOBBITT, J. This action was commenced by summons issued August 12, 1958.

The original complaint herein includes allegations summarized by *Johnson, J.*, in *Lumber Co. v. Pamlico County,* 242 N.C. 728, 89 S.E. 2d 381, a prior action between the same parties relating to the same lands, as follows: "(1) that the plaintiff is the owner and entitled to the immediate possession of the lands described in the complaint; (2) that the following deeds purporting to convey the lands appear of record in the Public Registry of Pamlico County; (a) deed of T. D. Warren, Jr., Receiver of East Carolina Lumber Company, to Pamlico County, dated 11 March, 1935, and (b) subsequent deed of Pamlico County to the defendant David Lupton; (3) that the deed made by the defendant T. D. Warren, Receiver, is void and of no legal force and effect, for that the grantor named therein was not vested with any legal authority to convey the lands; and (4) that the subsequent deed made by the defendant Pamlico County is void and of no legal force and effect, for that the County was not vested with title to the lands; (5) that each deed casts a cloud on plaintiff's title to the lands, entitling it to have 'same removed in the manner prescribed by law.'" In said prior action, notwithstanding plaintiff's failure to allege specific facts showing the Receiver's want of authority to convey, the complaint was held sufficient to meet "minimum requirements" under G.S. 41-10.

In the present action, upon defendants' motion, the court required that plaintiff amend its complaint so as "To allege the particular facts upon which the plaintiff contends that the deeds, orders and other paper writings mentioned in the complaint are void and of no effect and fail to vest title to said lands in the defendants." G.S. 1-153; *Bristol v. R.R.*, 175 N.C. 509, 95 S.E. 850. Plaintiffs did not except to such order but, pursuant thereto, filed an amendment to complaint. Defendants demurred to the amended complaint.

In the original complaint herein, made more specific by the amendment, the particular alleged facts on which plaintiff based its broad allegations as to the Receiver's alleged want of authority to convey, are the following:

1. East Carolina Lumber Company, plaintiff's alleged "predecessor in title," was defendant in a certain action instituted in the Superior Court of Craven County entitled, *"Nina E. Basnight, Stein H. Basnight, Administrators of the estate of J. S. Basnight; Atlantic Bank & Trust Company, Eastman-Gardner Hardware Company, Frederick L. Smith, Watham and Company, C. H. Turner, et al., and all other creditors who may desire to join in this action, v. East Carolina Lumber Company."*

2. East Carolina Lumber Company executed and delivered a deed

of trust dated November 1, 1924, duly recorded, to Citizens Trust Company, of Utica, New York, as Trustee, as security for bonds in the amount of $350,000.00, payable as provided therein, the last maturity date being May 1, 1934, which conveyed all of the real properties owned by it in Pamlico, Craven and Beaufort Counties, North Carolina.

3. Citizens Trust Company, Trustee, "the holder of the legal title to the said lands when the said action was instituted against the said East Carolina Lumber Company, Incorporated," was not made a party to said action; and "the order entered in the said action appointing T. D. Warren, Jr., Receiver, was and is void and of no legal force and effect as to the said Trustee, and did not vest the said Receiver with legal title to any of the properties, real or personal, or interest therein, owned by the said East Carolina Lumber Company, Incorporated, grantor in the said deed of trust."

In its amendment to complaint, plaintiff alleged, for the first time, that the deed from T. D. Warren, Jr., Receiver, to Pamlico County, is void because the description therein "is ambiguous and insufficient to identify the lands or any part thereof, . . ."

The demurrers of defendants Lupton assert that the amended complaint does not state facts sufficient to constitute a cause of action. If this be true, we need not consider the additional grounds asserted in the separate demurrers filed by Pamlico County and T. D. Warren, Jr., Receiver.

Treating the amendment to complaint as compliance with the court's said order, the question now presented is quite different from that considered on appeal in said prior action. Here plaintiff's allegations that the deed from T. D. Warren, Jr., Receiver, to Pamlico County, is void, are based upon, and limited to, two grounds, viz.: (1) Citizens Trust Company, Trustee, was not a party to the receivership action. (2) The description in said deed is ambiguous and insufficient.

The trustee in a deed of trust is a necessary party to an action *for the foreclosure of such deed of trust. Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449, and cases cited. Here, however, no action to foreclose the deed of trust to Citizens Trust Company, Trustee, is involved.

East Carolina Lumber Company was a party to the receivership action. See *Lumber Co. v. West,* 247 N.C. 699, 102 S.E. 2d 248. Upon his appointment, the property of East Carolina Lumber Company vested in the Receiver subject to all liens then outstanding thereon. *Surety Corp. v. Sharpe,* 236 N.C. 35, 50, 72 S.E. 2d 109. As stated in 45 Am. Jur., Receivers § 407: "Where an order of sale is made with-

out notice to lien holders and they are in no way parties thereto, a sale made thereunder will not impair their liens, but the purchaser at the sale will take the property subject to their liens. If the order of sale makes no mention of such prior lien, or of encumbrances of any kind, the sale passes the title in the property as it is in the receiver, and subject to whatever encumbrances exist." In such case, only the debtor's equity is conveyed. 75 C.J.S., Receivers § 231.

The failure to make Citizens Trust Company, Trustee, a party to the receivership action does not invalidate the appointment of the Receiver or his deed to Pamlico County. Whether the Receiver's deed is void and of no legal force and effect *as to the said Trustee* need not be considered. Neither the Trustee nor the bondholders are parties to this action. The failure to make Citizens Trust Company, Trustee, a party to the receivership action, did not affect the validity of the Receiver's deed to Pamlico County as a conveyance of all the right, title and interest of East Carolina Lumber Company in and to the property described therein.

As to whether the description in the deed from T. D. Warren, Jr., Receiver, to Pamlico County, is ambiguous and insufficient: Plaintiff's allegations are that this deed and the deed from Pamlico County to David Lupton *purported to convey the lands described in the complaint.* Nothing in the complaint suggests that the description in said deeds differs from the description set forth in the complaint. Thus, if the description in these deeds is ambiguous and insufficient the complaint would seem insufficient for failure to identify the lands claimed by plaintiff.

The demurrers were properly sustained. Even so, the court was in error in dismissing plaintiff's action. 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. *Elliott v. Goss*, 250 N.C. 185, 189, 108 S.E. 2d 475; *Skipper v. Cheatham*, 249 N.C. 706, 711, 107 S.E. 2d 625, and cases cited.

The portion of the judgment sustaining the demurrer is affirmed, but 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.

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

HIGGINS, J., not sitting.

EAST CAROLINA LUMBER COMPANY v. PAMLICO COUNTY; WARREN LAND AND TIMBER COMPANY, INCORPORATED; H. RATCLIFF TURNER, TRUSTEE; J. R. PASCHALL, AND T. D. WARREN, JR., RECEIVER.

(Filed 23 September, 1959.)

APPEAL by plaintiff from *Stevens, J.*, Regular Judge holding the courts of the Third Judicial District, at consent hearing in Chambers during February Term, 1959, of Craven Superior Court. From PAMLICO.

Civil action to remove alleged clouds from title to real estate and to recover damages for trespass. Demurrers to amended complaint were sustained and the action dismissed. Plaintiff excepted and appealed.

Hugh L. Willcox, Royce C. McClelland and Jones, Reed & Griffin for plaintiff, appellant.

Barden, Stith & McCotter, Ward & Tucker, Rodman & Rodman, Norman & Rodman, Thorp, Spruill, Thorp & Trotter, R. A. Nunn, B. B. Hollowell and R. E. Whitehurst for defendants, appellees.

PER CURIAM. This action was commenced by summons issued August 12, 1958.

While different parties defendant and different lands are involved, plaintiff's appeal presents the questions decided in *Lumber Co. v. Pamlico County, ante,* 681, filed simultaneously herewith. On authority thereof, the portion of the judgment sustaining the demurrers is affirmed, but 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.

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

HIGGINS, J., not sitting.

EAST CAROLINA LUMBER COMPANY, INCORPORATED v. G. A. WHITFORD, JR., ADMINISTRATOR C.T.A. OF THE ESTATE OF G. A. WHITFORD, DECEASED; SARAH LUCRETIA WHITFORD; G. A. WHITFORD, JR. AND WIFE, LULA IPOCK WHITFORD; VERA WHITFORD TOLER AND HUSBAND, ISIAH W. TOLER; CRAVEN COUNTY, A BODY POLITIC AND CORPORATE; B. O. JONES, TRUSTEE, AND T. D. WARREN, JR., RECEIVER.

(Filed 23 September, 1959.)

APPEAL by plaintiff from *Stevens, J.*, February Term, 1959, of CRAVEN.

LUMBER CO. *v.* WHITFORD.

Civil action to remove alleged clouds from title to real estate and to recover damages for trespass. Demurrers to amended complaint were sustained and the action dismissed. Plaintiff excepted and appealed.

Hugh L. Willcox, Royce C. McClelland and Jones, Reed & Griffin for plaintiff, appellant.

Barden, Stith & McCotter, Ward & Tucker, Rodman & Rodman, Norman & Rodman, Thorp, Spruill, Thorp & Trotter, R. A. Nunn, B. B. Hollowell and R. E. Whitehurst for defendants, appellees.

PER CURIAM. This action was commenced by summons issued August 12, 1958. (In *Lumber Co. v. Whitford,* 242 N.C. 730, 89 S.E. 2d 382, this Court passed upon the sufficiency of the complaint in a prior action between the same parties relating to the same lands.)

While different parties defendant and different lands are involved, plaintiff's appeal presents the questions decided in *Lumber Co. v. Pamlico County, ante,* 681, filed simultaneously herewith. On authority thereof, the portion of the judgment sustaining the demurrers is affirmed, but 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.

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

HIGGINS, J., not sitting.

EAST CAROLINA LUMBER COMPANY, INCORPORATED v. IRA E. WHITFORD AND WIFE, SUSAN WHITFORD; A. L. WHITFORD AND WIFE, LUCILLE WHITFORD; B. O. JONES, TRUSTEE, CRAVEN COUNTY, A BODY POLITIC AND CORPORATE; T. D. WARREN, JR., RECEIVER, AND BATES LUMBER COMPANY, INC.

(Filed 23 September, 1959.)

APPEAL by plaintiff from *Stevens, J.,* February Term, 1959, of CRAVEN.

Civil action to remove alleged clouds from title to real estate and to recover damages for trespass. Demurrers to amended complaint were sustained and the action dismissed. Plaintiff excepted and appealed.

Hugh L. Willcox, Royce C. McClelland and Jones, Reed & Griffin for plaintiff, appellant.

Barden, Stith & McCotter, Ward & Tucker, Rodman & Rodman, Norman & Rodman, Thorp, Spruill, Thorp & Trotter, R. A. Nunn, B. B. Hollowell and R. E. Whitehurst for defendants, appellees.

PER CURIAM. This action was commenced by summons issued August 12, 1958.

While different parties defendant and different lands are involved, plaintiff's appeal presents the questions decided in *Lumber Co. v. Pamlico County, ante,* 681, filed simultaneously herewith. On authority thereof, the portion of the judgment sustaining the demurrers is affirmed, but 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.

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

HIGGINS, J., not sitting.

WOODROW EVERETTE t/a WOODROW AVERETTE TRUCK LINE v. D. O. BRIGGS LUMBER COMPANY, INC.

(Filed 23 September, 1959.)

1. Appeal and Error § 49—

The findings of fact by the court in a trial by the court under agreement of the parties are conclusive on appeal if supported by competent evidence.

2. Evidence § 23.1—

The admissibility of a telephone conversation is governed by the same rules of evidence which govern the admission of oral statements made in face to face conversations except that the party against whom a telephone conversation is sought to be used must be identified.

3. Same— Evidence of identity of antiphonal speaker held sufficient.

Where the witness identifies the voice in a series of telephone conversations as one and the same, and in one of the conversations the witness placed the call for the person against whom the conversation is sought to be introduced, and the person answering so identified himself, and on another occasion the witness was advised that the person called was out of his office and would call back later in the day, and that a person identifying himself as the antiphonal party did call back that day, with further testimony of the antiphonal party

that he made one of the calls to the witness, there is ample identification of the antiphonal speaker.

4. Same—

It is not a prerequisite to the admission of evidence of a telephone conversation that the antiphonal party be first identified, but the court in its discretion may admit the evidence subject to later identification.

5. Trial § 18—

The order of proof rests in the discretion of the trial court.

6. Trial § 54—

The proscription of G.S. 1-180 against the expression of opinion on the evidence by the trial court is solely to prevent judges from invading the province of the jury, and *a fortiori* the statute can have no application in a trial by the court under agreement of the parties.

7. Same—

In a trial by the court under agreement of the parties, the court not only has the privilege but the duty in apposite circumstances of asking leading questions for the purpose of clarification and to ascertain the truth.

8. Corporations § 24—

Under the provisions of G.S. 55-18, as rewritten by the Act of 1955, *ultra vires* is not available as a defense to a corporation in a suit against it by an outside contracting party to recover on a contract made with the corporation.

HIGGINS, J., not sitting.

APPEAL by defendant from *Bundy, J.*, May Civil Term, 1959, of BEAUFORT.

This is an action by plaintiff to recover of defendant freight charges in the amount of $840.00 for five loads of lumber transported by truck to points in New Jersey and Pennsylvania in September, 1958. Plaintiff and defendant waived trial by jury and consented that the judge might find the facts, make his conclusions of law and enter judgment.

The plaintiff, Woodrow Everette, operating as Woodrow Everette Truck Line, is engaged in the transportation of commodities by truck for hire. He operates a fleet of tractors and trailers and his office is in Washington, Beaufort County, North Carolina. The defendant, D. O. Briggs Lumber Company (hereinafter called Briggs Company) is a South Carolina corporation with its principal office at Dillon, South Carolina. B & B Lumber Company (hereinafter referred to as B & B Company) is a North Carolina corporation with its principal office at Pantego, Beaufort County, North Carolina. D. O. Briggs is president and general manager of Briggs Company; he owns 90% of the

capital stock and his wife owns the remaining 10%. He is also an officer and owns 30% of the capital stock in B & B Company.

Plaintiff's evidence is substantially as follows:

Plaintiff received a telephone call from Dillon, South Carolina, from a person who identified himself as "D. O. Briggs of D. O. Briggs Lumber Company of Dillon." In the telephone conversation it was agreed that plaintiff would transport by truck a load of lumber from the B & B Company plant at Pantego to a point in New Jersey, have the bill of lading receipted by the consignee and mail the receipted bill of lading to the Briggs Company at Dillon. In the conversation the freight charge was "an agreeable price made by the party who identified himself as D. O. Briggs of Briggs Lumber Company." Plaintiff delivered the lumber and mailed the bill of lading to the defendant as agreed. There were four additional telephone calls from Dillon with similar instructions. Plaintiff made five deliveries of lumber to points in New Jersey and Pennsylvania. In each instance the bill of lading was made out: "Shipper, B & B Lumber Company, Consignee (various), routing D. O. Briggs Lumber Company, Dillon, S. C." (parentheses ours). Plaintiff billed the freight charges to defendant. When the call was made for the fourth shipment of lumber, plaintiff asked if a check had been mailed to him for the freight and was told: "I am getting one off in the mail today." After two days, no check having arrived, plaintiff placed a telephone call to D. O. Briggs at D. O. Briggs Lumber Company in Dillon, S. C., and was told that Briggs was out at the time but would be instructed to call back when he came in. A person identifying himself as D. O. Briggs did call plaintiff from Dillon later in the day. Following this, the fifth delivery of lumber was made pursuant to telephone instructions from one who identified herself as D. O. Briggs' secretary. Thereafter plaintiff placed a call for D. O. Briggs of the D. O. Briggs Lumber Company at Dillon and talked to one who represented himself as D. O. Briggs. In this conversation plaintiff was told that the B & B Company was supposed to pay the freight. Plaintiff called at the office of B & B Company and was shown invoices for the five loads. These invoices showed that the freight had been deducted by the defendant. Plaintiff did not know D. O. Briggs at the time of the telephone conversations and did not know his voice. The voice was definitely the same in all the telephone conversations.

The substance of defendant's evidence is as follows: D. O. Briggs had "never requested Woodrow Everette to make shipments . . . and charge them to the D. O. Briggs Lumber Company" and "did not authorize Woodrow Everette to haul any lumber to New Jersey."

Briggs Company occasionally purchased lumber from B & B Company for delivery to Dillon but never for delivery elsewhere. Briggs had one telephone conversation with plaintiff. Plaintiff called him and asked him to pay for hauling the lumber. "I understood him to say that he went out to B & B's office to collect and they wouldn't pay him and that he was going to make me pay him." Defendant's auditor called plaintiff "to clarify who owned the account" and "explained . . . that the B & B Lumber Company was a corporation duly organized in North Carolina and the D. O. Briggs Lumber Company was a duly organized South Carolina corporation. That these corporations have no connection," except that D. O Briggs owned stock in both. Everette replied that "he had billed B & B Lumber Company for the account, but he still looked to D. O. Briggs Lumber Company for his money." Briggs was personally trying to help the B & B Company. This company did not have any credit and had to have money to operate on. He was trying to help it get started. Briggs Company had established credit with a finance company which discounted invoices after delivery and before payment by the consignees. To help B & B Company, Briggs had the receipted bills sent to him, drew 80% on them from the finance company but sent B & B Company 100% of the invoice less the discount charge of the finance company and less a service charge for bookkeeping. Purchasers sent their remittances to Briggs Company and Briggs Company settled with the finance company. No freight was deducted by Briggs Company.

The pertinent portions of the court's findings of fact, conclusions of law and judgment are as follows:

"3. In September 1958, the defendant D. O. Briggs Lumber Company, Inc., acting through its President, D. O. Briggs, contracted with the plaintiff to haul certain lumber from Beaufort County, North Carolina to certain points, at an agreed price, and upon promise to pay therefor, as follows: (The five transactions are detailed here.) (Parentheses ours.)

"The plaintiff hauled and delivered said lumber as above set out, the total charges being $840.00; no part of same has been paid the plaintiff by the defendant, and is due and owing the plaintiff by the defendant."

CONCLUSIONS OF LAW

"1. The contract for the hauling of said lumber, which the plaintiff fulfilled on his part, is binding upon the defendant D. O. Briggs Lumber Company, Inc.

"2. The defendant is indebted to the plaintiff in the sum of $840.00 with interest from September 22, 1959."

Judgment was rendered in favor of the plaintiff and against the defendant in the sum of $840.00 together with interest and costs.

The defendant excepted and appealed, assigning errors.

Wilkinson & Ward for defendant, appellant.
No counsel contra.

MOORE, J. The parties waived trial by jury and agreed that the judge find the facts, make his conclusions of law and enter judgment. G.S. 1-184 and G.S. 1-185. If the findings of fact by the trial judge are supported by competent evidence, such findings are as binding as a verdict of the jury and are conclusive on appeal. *Bank v. Courtesy Motors,* 250 N.C. 466, 475, 109 S.E. 2d 189; *Milk Commission v. Galloway,* 249 N.C. 658, 663, 107 S.E. 2d 631.

Appellant contends that the telephone conversations admitted in evidence in this case, over his objection, are incompetent. If these telephone conversations are incompetent, it must be conceded that plaintiff's evidence is insufficient to support the findings of fact and there is error.

Telephones are important and necessary mediums of intercommunication in modern business. Courts of justice recognize the importance of telephone transactions in commerce. Subject to reasonable rules and restrictions, telephone conversations are competent and admissible in evidence in our courts. The admissibility of telephone conversations is governed by the same rules of evidence which govern the admission of oral statements made in face to face conversations, except that the party against whom the conversation is sought to be used must be identified; but the identity of the party may be established either by direct or circumstantial evidence. *Sanders v. Griffin,* 191 N.C. 447, 450-1, 132 S.E. 157. The antiphonal party may be identified by his voice if the other party to the conversation is acquainted with and recognizes the speaker's voice. *Manufacturing Company v. Bray,* 193 N.C. 350, 351, 137 S.E. 151; *State v. Hicks,* 233 N.C. 511, 518, 64 S.E. 2d 871.

". . . (T)elephone calls purporting to have been made by a person are never admissible against him without some proof identifying him as the caller." 20 Am. Jur., Evidence, Sec. 366, p. 335. ". . . (W)here the witness answers a telephone call and there is no evidence to authenticate the antiphonal speaker except that he states his name, the evidence is inadmissible as hearsay." 11 N.C. Law Review, 344;

Powers v. Service Company, 202 N.C. 13, 161 S.E. 689; *Manufacturing Company v. Bray, supra.* However, the identity of the person making such call may be shown by facts and circumstances arising after the call is made. ". . . (I)t is not necessary that the witness be able, at the time of hearing the telephone conversation, to identify the person with whom the conversation was had; it is sufficient if the knowledge which enabled him to make the identification was obtained afterward. Nor is it necessary in all instances that the proof of the identification be made before the introduction of the evidence of the conversation; such conversation may, in the discretion of the court, be admitted subject to identification." 20 Am. Jur., Evidence, Sec. 366, p. 334. ". . . (A)uthorities are uniform in holding that the order in which proof may be presented is within the discretion of the court." *State v. Strickland,* 229 N.C. 201, 209, 49 S.E. 2d 469.

"According to the weight of authority, evidence is admissible as to a conversation over the telephone where the witness called for a designated person or firm at his or its place of business and the person answering the call claims to be the person called for, . . . and the conversation carried on is one regarding the business transacted by such person or firm." 20 Am. Jur., Evidence, Sec. 367, p. 335. Cf. *State v. Burleson,* 198 N.C. 61, 150 S.E. 628. "Where . . . the witness testifies that he made a call for a designated individual and was informed that the person called for was not in his office at the time, a later call purporting to come from such person has been held admissible." 20 Am. Jur., Evidence, Sec. 366, p. 335; 11 N.C. Law Review, 345; *Harvester Company v. Caldwell,* 198 N.C. 751, 153 S.E. 325.

When we apply the foregoing principles to the facts of the instant case it is abundantly clear that the telephone conversations admitted in evidence are competent and admissible. Here we are dealing with a series of calls. The five calls received by Everette, if considered alone in disregard of the other evidence in the case, are inadmissible. The two calls made by Everette, if considered alone, are competent. It will be observed that Everette placed calls for D. O. Briggs at the D. O. Briggs Lumber Company in Dillon. In one instance a person purporting to be D. O. Briggs answered. In the other instance Briggs was out of his office at the time but called back later in the day. D. O. Briggs, in testifying for the defendant, stated that he received one call from Everette and that they had a conversation in which he told Everette that B & B Company owed him (Everette) for the freight. This corroborates Everette as to one of the calls and identifies D. O. Briggs. Everette testified that the voice was definitely the same in all the telephone conversations. This evidence tends to iden-

tify the antiphonal party (D. O. Briggs) in all the telephone conversations. The weight of the evidence was for the trier of the facts — the trial judge in this case.

The appellant contends further that the trial judge committed prejudicial error in the course of the trial in that the judge propounded to witnesses leading questions "pertaining to the very heart of this controversy," indicating that he entertained an opinion favorable to plaintiff's cause and thereby constituting himself plaintiff's advocate. Defendant cites no authority in support of its position.

G. S. 1-180 was originally enacted in 1796. There has been little change through the years. The title of the original act was: "An act to secure the impartiality of trial by jury, and to direct the conduct of judges in charges to the petit jury." It provides that no judge in giving a charge shall give an opinion whether a fact is fully or sufficiently proven. It has been construed to include any opinion or even an intimation of the judge at any time during the trial, calculated to prejudice either of the parties with the jury. It is "a departure from the common law rule and from the practice which prevails in the English courts, the federal courts, and in the courts of some of the states." It is to be strictly construed, and the sole purpose of this portion of the act is to prevent judges from invading the province of the jury. McIntosh: North Carolina Practice and Procedure, 2d. Ed., Vol. 2, Sec. 1514, pp. 49, 50.

Obviously the law defendant seeks to invoke has no application to the case at bar. The parties waived trial by jury. "The effect of the submission to the judge is to invest him with the dual capacity of judge and juror. He is to hear the evidence and pass upon its competency and admissibility as judge, and determine its weight and sufficiency as juror. The rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. . . ." McIntosh. North Carolina Practice and Procedure, 2d Ed., Vol. 1, Sec. 1373, p. 759; *Bizzell v. Bizzell*, 247 N.C. 590, 604, 101 S.E. 2d 668.

The record discloses that the trial judge did ask many leading questions at crucial points in the trial. A reading of the entire record leaves the definite impression that the questions were for the purpose of clarification and to ascertain the truth. Under the circumstances of this case it was not only the judge's privilege but his duty. The record discloses that both parties were given full opportunity to present their evidence and contentions, and that the hearing was openly, fairly and fully held. We find no error in the conduct of the trial by the learned judge.

Finally, appellant contends that if "there is sufficient evidence to support the trial court's finding of fact that a contract was entered

into between plaintiff and D. O. Briggs, . . . such contract was *ultra vires* as to defendant corporation and that same was only of benefit to one of its stockholders, D. O. Briggs."

For solution of the question posed by the foregoing argument we need refer only to G.S. 55-18, which is a part of the "Business Corporation Act" of 1955 which became effective 1 July, 1957. The pertinent portion of the Act is as follows:

"Sec. 55-18. Defense of *ultra vires*. — (a) No act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . . but such lack of capacity or power may be asserted:

"(1) In an action by a shareholder against the corporation. . . .

"(2) In an action by the corporation or by its receiver, trustee or other legal representative, or by its shareholders in a derivative suit, against the incumbent or former officers or directors of the corporation.

"(3) In an action by the Attorney General, as provided in this chapter. . . .

"(b) This section applies to acts . . . done . . . by a foreign corporation in this State. . . ."

In view of the foregoing, it is unnecessary to call attention to the fact that D. O. Briggs owned 90% of the capital stock of the D. O. Briggs Corporation and that said corporation received benefits from the transactions with plaintiff.

In this action the findings of fact support the conclusions of law and the judgment based thereon. *Bank v. Courtesy Motors, supra.* The judgment below is

Affirmed.

HIGGINS, J., not sitting.

WILLIAM W. MOORE v. W O O W, INC.

(Filed 23 September, 1959.)

1. Courts § 9: Judgments §§ 27a, 32a—

The fact that a motion to set aside a default judgment is denied for want of evidence of a meritorious defense is not *res judicata* and does not preclude a subsequent motion to set aside the default judgment on the same ground when on the second motion movant introduces evidence of a meritorious defense which evidence was not available at the time of the hearing on the prior motion.

2. Judgments § 27a—

On a motion to set aside a default judgment for excusable neglect, the neglect of the attorney will not ordinarily be imputed to the client who is without fault.

3. Same—

A judgment by default final is properly set aside upon findings of excusable neglect and a meritorious defense.

HIGGINS, J., not sitting.

MOORE, J., concurring in result.

BOBBITT AND RODMAN, J.J., concur in concurring opinion.

APPEAL by plaintiff from *Paul, Resident Judge of the Second Judicial District*, in chambers at Washington on 3 July 1959. BEAUFORT.

Appeal by plaintiff from an order setting aside a judgment by default final.

On 24 January 1959 plaintiff instituted a civil action to recover for the alleged breach of an alleged express contract to pay absolutely a sum of money fixed by the terms of the alleged contract, and further to recover a FM Tuner and FM Booster. On the same day the summons and a verified copy of the complaint were served on defendant.

On 24 February 1959, after the time for answering had expired, and no answer or other pleading having been filed by defendant, and no extension of time to plead having been granted, the Clerk of the Superior Court of Beaufort County, on plaintiff's motion, entered a judgment by default final against defendant in the sum of $2,000.00.

On 25 February 1959 defendant made a motion, pursuant to G.S. 1-220, to set aside the judgment by default final upon the alleged ground that it was taken against it through its excusable neglect, and that it had a meritorious defense.

This motion was heard by Hall, J., at the March Special Civil Term 1959 of Beaufort County Superior Court. Judge Hall's findings of fact are in substance: Defendant within a day or two after service of process upon it employed S. M. Blount, a reputable member of the Beaufort County Bar and of many years practice there, to represent it in the defense of the action. Walter J. Stiles, an officer and manager of defendant, told Blount he had been called to New Mexico on business, and Blount advised him to go, telling him that he would get an extension of time to answer. Within the time to answer, Stiles on different occasions contacted Blount concerning the defense of the action, and furnished Blount various letters, documents and written memoranda to be used in defense of the action. Blount by error and mistake miscalculated the time to answer, concluding that it expired

on 26 February 1959 rather than on 23 February 1959. Judge Hall further found facts from the evidence offered before him as to an alleged meritorious defense. Judge Hall made conclusions of law that while defendant's evidence was sufficient to show excusable neglect, it was insufficient to show that defendant has a valid, meritorious defense to the action. Therefore, he denied the motion. Defendant appealed to the Supreme Court.

Defendant abandoned this appeal, and on 4 April 1959 made a similar motion before Paul, Resident Judge, in chambers to vacate the judgment by default final. In support of this motion defendant filed affidavits by Walter J. Stiles and S. M. Blount, in addition to the affidavits presented at the hearing before Judge Hall. Judge Paul considered the motion on 4 and 30 April 1959, and entered an order on 3 July 1959. Judge Paul in his order found that the identical affidavits in respect to the negligence of Blount offered in evidence before Judge Hall were offered in evidence before him, and that Judge Hall's findings of fact one through eight in respect to defendant's excusable neglect were binding on him, and he adopted and found as facts Judge Hall's findings of fact one through eight. Judge Paul further found as a fact from the affidavit of Stiles and from the new affidavit of Blount that defendant could not procure Stiles' affidavit for the hearing before Judge Hall, due to Stiles' absence in New Mexico, and he found facts from Stiles' affidavit to the effect that defendant had a meritorious defense to the action. Judge Paul made conclusions of law from the facts found that the judgment by default final was taken against defendant through its excusable neglect and that it had a meritorious defense to the action. Whereupon, Judge Paul vacated and set aside the judgment by default final, and allowed defendant 30 days from the date of the order to answer or otherwise plead.

From Judge Paul's order, plaintiff appeals.

Wilkinson & Ward for plaintiff, appellant.
Rodman & Rodman and S. M. Blount for defendant, appellee.

PARKER, J. The question for decision is: Did Judge Paul within one year from the date of entry of the judgment by default final, on motion of defendant, have the power and authority to set it aside by virtue of G.S. 1-220 upon findings of fact and conclusions of law that the judgment by default final was taken against defendant through its excusable neglect, and that it had a meritorious defense to the action, Judge Hall several months prior thereto having denied a similar motion for the reason that while the defendant had shown

that the judgment by default final was taken against it by its excusable neglect, it had not shown it had a meritorious defense, when the evidence upon which Judge Paul based his findings of fact and conclusions of law that defendant had a meritorious defense to the action was not available to defendant at the time of the hearing before Judge Hall?

In *Cox v. Cox,* 221 N.C. 19, 18 S.E. 2d 713, plaintiff at the September Term 1938 of Nash County Superior Court obtained a divorce *a vinculo* from defendant on the ground of two-year separation. On 3 July 1939 defendant filed a motion to set the decree aside alleging that at the time the action was instituted and service of summons made upon defendant she was insane, a fact well known to plaintiff, and that she was not represented by a next friend or guardian *ad litem,* as required by law. The motion was heard by Judge Bone in chambers in Nashville on 26 October 1939, and he dismissed the motion because of failure to allege that movant had a meritorious defense. Whereupon, a next friend was appointed to represent defendant in further proceedings, a new motion was filed to set aside the decree on similar grounds, and the new motion alleged facts which, if true, would constitute a meritorious defense. The new motion was heard by Harris, J., at September 1941 Term of Nash County Superior Court. In addition to resisting the motion on the merits, plaintiff pleaded that the matter in controversy on the motion had been judicially determined by the order of Judge Bone, and had become *res judicata.* After finding certain facts relative to the alleged insanity of defendant at the time the suit was instituted, and relating to the merits of the defense, Judge Harris rendered judgment setting aside the decree of divorce, and plaintiff appealed. This Court affirmed Judge Harris' judgment, and said: "The former dismissal of a somewhat similar motion by Judge Bone cannot be relied upon by the plaintiff as constituting *res judicata.* Generally the doctrine of *res judicata* will not apply where the judgment is rendered on any grounds which do not involve the merits. 30 Am. Jur., Judgments, sec. 208. The first motion was dismissed for the reason that it contained no allegation that movant had a meritorious defense. *Duffer v. Brunson,* 188 N.C. 789, 125 S.E. 619; *Harris v. Bennett,* 160 N.C. 339, 76 S.E. 217. There is no reason why this should estop defendant from making a second motion free from such technical defect. In the present motion there was an allegation respecting a meritorious defense stated with much particularity and sufficient, if found true, to support the allegation."

This is said in 30A Am. Jur., Judgments, §360: "As a general proposition, the doctrine of *res judicata* prevails as to all subsequent ac-

tions. However, a direct proceeding for the purpose of reversing or setting aside a judgment forms an exception to the doctrine that a matter which has been adjudicated by a court of competent jurisdiction must, in any subsequent litigation between the same parties or their privies, where the same question or questions arise, be deemed to have been finally and conclusively settled."

In 49 C.J.S., Judgments, p. 559, it is written: "While the decision on a motion to vacate or set aside a judgment is not in the strict sense *res judicata,* it has been held that a plea of *res judicata* may be sustained where the second application is on the same grounds as the first. . . . A second application to vacate a judgment founded on facts which were known or which should have been known to the applicant at the time of making the first application will not, as a rule, be considered. . . . If, however, the court is satisfied that there was excusable neglect in not bringing forward all the grounds in the first instance, leave may properly be granted to renew the application. A new motion should always be entertained when based on new grounds, not covered by the former motion and not then known or available to the party."

In *Olson v. Advance Rumely Thresher Co.,* 43 S.D. 90, 178 N.W. 141, the Court said: "A motion to open a default judgment once denied by a judge cannot be renewed unless (a) with leave of the judge who denied it; or (b) if made upon presentation of new facts which have occurred since the denial of the previous motion, in which case the renewal may be made as a matter of right. . . . The 'new matter' which will alone justify the renewal of a motion, without leave, must be something which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion." In this case the Court held that the order denying the motion to vacate the default judgment was not *res judicata* on the second motion.

In *Collister v. Inter-State Fidelity B. & L. Assn.,* 44 Ariz. 427, 38 P. 2d 626, 98 A.L.R. 1020, the Court held that a court's denial of a motion to vacate a default judgment is not *res judicata* as to a subsequent motion to vacate it on a different ground.

In *Cox v. Cox, supra,* "The first motion was dismissed for the reason that it contained no allegation that movant had a meritorious defense." In the second hearing before Judge Harris the new motion contained such an allegation, and there was evidence to support it. In the instant case the first motion was dismissed for the reason that the evidence was "insufficient to show that the defendant has a valid, meritorious defense." At the second hearing before Judge Paul defendant produced evidence not available to it at the hearing before

Judge Hall, which if found by the jury to be true, would constitute a meritorious defense. Neither Judge Harris nor Judge Paul reviewed and overruled the judge who entered the previous order. In view of the facts in the instant case, the doctrine of *res judicata* is not applicable, and defendant is not estopped to make its second motion before Judge Paul based on evidence not available to it at the previous hearing.

Rutherford College v. Payne, 209 N.C. 792, 184 S.E. 827, relied upon by plaintiff, is distinguishable. In that case the motion was for a change of venue. *Henry v. Hilliard,* 120 N.C. 479, 27 S.E. 130, also relied on by plaintiff, is distinguishable. In that case Judge Timberlake found that the judgment of Judge Starbuck was made by consent of all the parties, and subsequently Judge Bryan on the same grounds found that the judgment of Judge Starbuck was without the consent of anybody, unless it was Mrs. Hilliard. The Court held that the movants are estopped and said: "He (Judge Bryan) reviewed and overruled Judge Timberlake in his findings of fact and law, and set aside the judgment that Judge Timberlake had refused to set aside but had in effect approved and affirmed."

Judge Hall's order is not a mere interlocutory order. *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351; *Johnson v. Roberson,* 171 N.C. 194, 88 S.E. 231. The principle well established in this jurisdiction that no appeal lies from one Judge of the Superior Court to another (*Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153; *Fertilizer Co. v. Hardee,* 211 N.C. 56, 188 S.E. 623) has no application to a mere interlocutory order. *Cole v. Trust Co.,* 221 N.C. 249, 20 S.E. 2d 54; *Bland v. Faulkner,* 194 N.C. 427, 139 S.E. 835. The *Cole* case relied on by appellee is not in point, though *Cox v. Cox, supra,* relied on by appellee, is.

Judge Paul's findings of fact as to excusable neglect and a meritorious defense are supported by competent evidence, and his findings of fact fully support his conclusions of law and order. Our decisions are uniform to the effect that where the negligence is that of the attorney, and the client against whom the judgment by default is taken has exercised proper care, the client is not ordinarily chargeable with the negligence of his attorney. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507.

All plaintiff's assignments of error have been considered, and are overruled. Upon the record, the evidence and the findings of fact and conclusions of law made by Judge Paul, his order setting aside the judgment by default final is sustained.

Affirmed.

HIGGINS, J., not sitting.

MOORE, J., Concurring in result: The grounds alleged in the second motion and those alleged in the first motion are the same. However, when the first motion was heard, no evidence was offered to support the general allegation that defendant had a meritorious defense.

I would affirm, but on this limited ground. When it appeared, as found by Judge Paul, that evidence relevant to defendant's alleged meritorious defense was not available when the matter was heard by Judge Hall, it was permissible for Judge Paul to consider the matter further in relation to the question of meritorious defense.

If Judge Hall, upon evidence as to facts upon which defendant based its defense, had found that defendant had no meritorious defense, my view is that appeal would have been defendant's sole remedy.

BOBBITT AND RODMAN, J.J., concur in concurring opinion.

CLARENCE H. WATERS v. JESSE LEE HARRIS AND WIFE, ELIZABETH CLARK HARRIS.

(Filed 23 September, 1959.)

1. **Negligence § 4f (2)—**

While the proprietor is not an insurer of the safety of invitees, he is under duty to exercise ordinary care to keep the aisles and passageways where customers are expected to go in a reasonably safe condition so as not unnecessarily to expose them to danger, and to give warning of hidden dangers or unsafe conditions of which the proprietor has knowledge or of which he should have known in the exercise of reasonable supervision and inspection.

2. **Same—**

Where the substance upon which a customer falls is placed on the floor by the proprietor or his employees, no evidence tending to show actual or constructive knowledge of the proprietor is necessary, since a person is deemed to have knowledge of his own or his employees' acts.

3. **Same—**

Where there is no evidence as to the source of a substance on the floor causing the fall of a customer, the customer may not ordinarily recover for the resulting injury unless he makes it appear that the substance had remained on the floor for such length of time that the proprietor knew or by the exercise of reasonable care should have known of its existence.

4. **Same—**

Where the nature of the business is such that the proprietor may reasonably anticipate the presence of grease and oil on the floor, and

the proprietor has personal knowledge of the unkept condition of the floor, and fails to provide adequate light to enable a customer to see where he is going, the proprietor may be liable for a fall of the customer resulting from a greasy substance on the floor without proof that the substance had been on the floor at this particular place for a sufficient length of time to charge the proprietor with constructive knowledge thereof.

5. Same—

Evidence that the proprietor of a warehouse personally conducted a customer on a trip to look at used refrigerating equipment, that there was trash on the floor and that the proprietor failed to provide sufficient artificial light or use available facilities for letting in sufficient natural light to enable the customer to see where he was going *is held* sufficient to overrule a nonsuit in an action by the customer to recover for a fall resulting when he stepped on some greasy substance on the floor.

6. Same—

Evidence tending to show that a customer fell on his hip, fracturing a hip bone adjacent to a thick billfold carried in his pocket, is insufficient to show contributory negligence of the customer in so carrying the billfold, since no injury of such nature could have been foreseen from carrying a billfold in such manner.

7. Same—

A customer will not be held contributorily negligent in walking along a dark aisle with trash on it when the customer is conducted and directed on the trip by the proprietor.

8. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Bundy, J.*, February Civil Term, 1959, of WASHINGTON.

This is an action to recover for personal injuries sustained by plaintiff by reason of the alleged actionable negligence of defendants.

The complaint alleges that plaintiff, as a customer and invitee of the defendants, entered an unlighted warehouse owned and maintained by defendants to store and display secondhand refrigerating equipment for sale, that while there plaintiff slipped in a puddle of grease or oil and fell to the floor and thereby suffered personal injuries. It is alleged that the defendants were negligent in that (1) the warehouse was constructed and maintained without adequate artificial or natural lighting; (2) defendants on the occasion in question did not make use of the available lighting facilities; (3) the

premises were not maintained in a reasonably safe condition; and (4) the defendants did not give warning of the peril which caused plaintiff's injuries.

The answer denies that defendants were negligent in any respect in regard to plaintiff's injuries, and pleads unavoidable accident and contributory negligence. It alleges that plaintiff was contributorily negligent in that (1) he failed to keep a reasonable lookout, and (2) failed to exercise reasonable care for his own safety.

Plaintiff's evidence conforms to the allegations of the complaint and is substantially as follows:

Plaintiff is 45 years of age and resides at Plymouth in Washington County where he operates a combination grocery store and cafe. He desired to purchase for his business a refrigerating "reach in" case to display meats, vegetables and the like. The defendants reside at Hertford in Perquimans County where they conduct a mercantile business. In addition, they own and maintain a warehouse and display therein certain secondhand refrigerating equipment for sale. The warehouse has two doors, each about 6 feet wide, and a window covered by a wooden shutter. All of these openings are on the east side of the building and the window is located between the doors. No part of the doors or window is of glass. On 4 February 1957 plaintiff went to Hertford in search of refrigerating equipment. He had never seen the defendants or the warehouse before that date. Plaintiff contacted the male defendant, who offered to show plaintiff the equipment they had. They proceeded to the warehouse in defendants' truck. The male defendant opened one of the doors but did not open the other door or window. Defendant did not turn on any lights and no lighting equipment was apparent. Defendant did not have a flashlight. It was about midday but "it was kind of dark that day" and it was dark inside the warehouse. Plaintiff inspected a case of the type he was looking for. It was near the open door. Plaintiff inquired the price. Defendant did not reply to the inquiry but said: "Come on, follow me, and let me show you some more equipment." The interior of the warehouse was dark. The floor of the "warehouse was rough, greasy looking, trash all over the floor. . . . The color of the floor was dark." Plaintiff followed behind defendant as close as he could. Defendant led the way. About 30 feet from the door, while only a step or two behind the defendant, plaintiff slipped and fell. Plaintiff was attempting to turn when he slipped. It developed that he had stepped in a puddle of greasy, oily substance. Plaintiff had a billfold, about 5 inches long and 3 inches thick, in his hip pocket "and fell on that." He suffered a fracture of a hip bone.

At the close of plaintiff's evidence, the judge, on motion of defendants, entered a judgment of involuntary nonsuit. Plaintiff excepted and appealed, assigning errors.

W. L. Whitley and W. M. Darden for plaintiff, appellant.
Norman & Rodman for defendants, appellees.

MOORE, J. This appeal poses only one question for decision: Does plaintiff's evidence make out a *prima facie* case of injury by reason of actionable negligence of defendants?

When the competent evidence offered by plaintiff is considered in the light most favorable to him and he is given the benefit of every reasonable inference of fact to be drawn therefrom, we are of the opinion, and so hold, that it is sufficient to have been submitted to the jury and the demurrer to the evidence should have been overruled.

Persons entering a mercantile establishment during business hours to purchase or look at merchandise do so at the actual or implied invitation of the proprietor, upon whom the law imposes the duty of exercising ordinary care (1) to keep the aisles and passageways where customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose the customer to danger, and (2) to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the the exercise of reasonable supervision and inspection should know. However, the proprietor is not an insurer of the safety of customers and invitees while on the premises and is only liable for injuries resulting from his negligence. *Lee v. Green & Co.*, 236 N.C. 83, 85, 72 S.E. 2d 33. Appellees do not challenge these principles of law. On the contrary they quote, in their brief, to the same effect from *Brown v. Montgomery Ward & Co.*, 217 N.C. 368, 371, 8 S.E. 2d 199.

Cases involving injury from slippery substances in the aisles and passageways of stores and other establishments usually fall into one of two categories. (1) Where the substance is placed on or negligently applied to the floor by the proprietor or his servants or employees. In such cases the proprietor is liable if injury to an invitee proximately results. And the injured party is under no duty to show that the proprietor had actual or constructive notice of the presence of the slippery substance. A person is deemed to have knowledge of his own and his employees' acts. The following are illustrative of this type of case: *Copeland v. Phthisic*, 245 N.C. 580, 96 S.E. 2d 697; *Hughes v. Enterprises, Inc.*, 245 N.C. 131, 95 S.E. 2d 577; *Lee v. Green & Co., supra.* (2) Where the slippery substance is placed on the floor by a

third party or where there is no evidence of the source thereof. In such cases an invitee proximately injured thereby may not recover unless it is made to appear that the substance had remained there for such length of time that the proprietor knew or by the exercise of reasonable care should have known of its existence. Examples of this class of cases are: *Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E. 2d 242; *Fox v. Tea Co.*, 209 N.C. 115, 182 S.E. 2d 662; *Cooke v. Tea Co.*, 204 N.C. 495, 168 S.E. 679.

Appellees contend that the instant case is of the second category above and is controlled by the principles laid down in *Pratt v. Tea Co., supra.* Indeed this seems to have been the basis of the court's ruling below.

In the *Pratt* case, a customer in defendant's store was injured when she slipped and fell by reason of a greasy, oily substance on the floor. She alleged that defendant was negligent in permitting the substance to be and remain on the floor. There was no evidence as to how the oil or grease was put there or how long it had been there. A judgment of involuntary nonsuit was affirmed by this Court on appeal. The Court's opinion says in part:

> "When claim is made on account of injuries caused by some substance on the floor along and upon which customers will be expected to walk, in order to justify recovery, it must be made to appear that the proprietor either placed or permitted the harmful substance to be there, or that he knew, or by the exercise of due care should have known, of its presence in time to have removed the danger or given proper warning of its presence. Thus, before plaintiff can be permitted to recover she must first offer evidence tending to show (1) negligent construction or maintenance resulting in a condition which would cause a person of ordinary care to foresee that some injury was likely to result therefrom; and (2) express or implied notice of such condition. (Citing authorities)."

In the instant case, if we consider only the one circumstance, the puddle of grease or oil on the floor, there is an apparent similarity to the facts of the *Pratt* case. In the case at bar there is no *direct* evidence tending to show who put the grease on the floor or how long it had been there. But there is a combination of circumstances here that factually differentiates this case from the *Pratt* case. (1) Plaintiff's evidence tends to show neglect and inattention on the part of the defendants with respect to their duty to maintain the warehouse floor in a reasonably safe condition for customers and invitees. It "was rough, greasy looking, trash all over the floor. . . . The color

of the floor was dark." Besides, it was reasonably foreseeable that grease and oil was likely to leak from motors and other moving parts of the secondhand refrigerating equipment displayed by defendants. (2) Plaintiff's evidence tends to show that defendants failed to provide adequate artificial lighting and failed to use the available facilities for letting in sufficient natural light to enable plaintiff to see where he was walking. (3) Plaintiff's evidence tends to show that the male defendant had personal notice of the condition of the warehouse floor and the lack of adequate lighting since he was present at the time and was personally conducting the plaintiff in the inspection of the equipment.

"Negligence may consist in the failure to so light the premises as to protect from injury by reason of dangerous conditions which would not reasonably be discovered in the absence of such light. . . ." 65 C.J.S., Negligence, Sec. 86, pp. 595-596. The following are cases in which absence of light or inadequacy of light sufficient to disclose unsafe conditions was held to be negligence proximately causing injury: *Thompson v. DeVonde,* 235 N.C. 520, 70 S.E. 2d 424; *Drumwright v. Theatres,* 228 N.C. 325, 45 S.E. 2d 379; *Anderson v. Amusement Co.,* 213 N.C. 130, 195 S.E. 386; *Nelson v Tea Co.,* (N.J. 1958), 137 Atl. 2d 599; *Gunn v. Enterprises, Inc.,* (La. 1939), 192 So. 744; *Lunny v. Pepe,* (Conn. 1933), 165 Atl. 552; *Crouse v. Stacy-Trent Co.,* (N.J. 1933), 164 Atl. 294; *Petera v. Railway Exchange Bldg.,* (Mo. 1931), 42 S.W. 2d 947.

It is our opinion that the record in this case discloses sufficient evidence of negligence proximately causing injury to require submission to the jury. Indeed it seems *prima facie* to satisfy the enumerated prerequisites for recovery set out in the *Pratt* case.

Both in the brief and in the oral argument in Supreme Court defendants seriously contended that plaintiff's evidence showed conclusively that the proximate cause of his injury was the presence of a large billfold in plaintiff's pocket. The evidence disclosed that plaintiff was carrying in his hip pocket a billfold 5 inches long and 3 inches thick, that he fell on this hip and fractured a hip bone adjacent to the billfold. Suffice it to say that the carrying of a billfold in this manner is such an universal practice, attended with consequences of harm so infinitesimal, except for assault and robbery, that the plaintiff was under no duty to foresee that injury would result therefrom. That circumstance was not the proximate cause of the alleged injury in this case.

Appellees also contend that plaintiff was contributorily negligent as a matter of law. *Drumwright v. Theatres, supra,* is a case some-

what similar to the one at bar. In that case the plaintiff was directed by defendant into a dark part of a theatre. This Court said: Unless obviously dangerous, the conduct of a plaintiff which otherwise might be pronounced contributory negligence as a matter of law would be deprived of its character as such, if done at the direction of the defendant or its agent. (Citing authorities). Here, the plaintiff and her companions were directed by defendant's agent to go to the balcony for seats. In following this direction, plaintiff was injured. The case is one for the jury." A nonsuit on the ground of contributory negligence will be granted only when the plaintiff's evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. *Keener v. Beal*, 246 N.C. 247, 252, 98 S.E. 2d 19.

The judgment below is

Reversed.

HIGGINS, J., not sitting.

JAMES MAC GRAY v. MACK F. BENNETT.

(Filed 23 September, 1959.)

1. Master and Servant § 1—

A driver and collector for a laundry on a commission basis who is personally charged with all work brought in by him without any record being kept by the laundry in regard to the individual accounts of the customers, the driver being personally liable for the entire account without regard to whether the customers pay and being personally responsible for the purchase and maintenance of his delivery truck, is a debtor to the laundry on such accounts and not an employee.

2. Embezzlement § 1—

Where the relationship between the parties is that of debtor and creditor and not that of employee and employer, the debtor cannot be guilty of embezzlement of any funds due on the account.

3. Malicious Prosecution § 10—

In this action for malicious prosecution the evidence disclosed that the relationship between the parties was that of debtor and creditor and not that of employee and employer, and that a prosecution for embezzlement was instigated by the creditor against the debtor in regard to the account. *Held*: Nonsuit was erroneous, and *held* further, even had the relationship been that of employee and employer, the evidence in this case disclosed want of probable cause.

HIGGINS, J., not sitting.

GRAY *v.* BENNETT.

APPEAL by plaintiff from *Stevens, J.*, May Civil Term 1959 of CRAVEN.

This is a civil action to recover damages for malicious prosecution. The evidence pertinent to the appeal in substance is as follows:

1. The plaintiff, a young man 22 years of age, entered into an agreement in December 1951 with the defendant, Mack F. Bennett, trading as City Laundry and the Dixie Laundry and Dry Cleaners, Inc., of which the defendant was president and principal stockholder. Prior to the time he entered into the contract, the plaintiff was working for a competitor of the defendant in New Bern. Under the terms of the agreement the plaintiff was to collect and deliver, by truck, laundry and dry cleaning from a route within an area described in the contract. The plaintiff was to furnish his own truck and to maintain it, including public liability insurance thereon.

2. The sole compensation to the plaintiff was to consist of a commission of 25 per cent of all sums collected for the processing of laundry and 40 per cent of all sums collected for the processing of dry cleaning. The agreement required the plaintiff to make an accounting of all sums collected by him, less the commissions set out above, on the 5th and 21st days of each month. According to the plaintiff's evidence, the requirement to settle on any particular date was thereafter waived. The evidence further tends to show that the defendant never furnished the plaintiff a route and never suggested or gave to him the names of any customers in the prescribed area except the Hostess House at Cherry Point. He had to establish his own route, which he did by soliciting the customers he had served previously.

3. In delivering laundry to the defendant and dry cleaning to the Dixie Laundry and Dry Cleaners, Inc. (hereinafter called Dixie), defendant and Dixie never looked to the individual customer for the charges for processing the laundry and dry cleaning, but required the plaintiff to pay 75 per cent of the retail price for laundry and 60 per cent of the retail price for dry cleaning. There was no individual accounting for each customer between the plaintiff and the defendant or the defendant's corporation. The plaintiff collected from his customers and the defendant and Dixie looked to him for their money.

If the plaintiff extended credit to a customer and for any reason the customer did not pay, then the loss fell on the plaintiff and not on the defendant or Dixie.

Neither the defendant nor Dixie ever withheld any income tax or issued the plaintiff any paycheck or receipt for the monies paid by the plaintiff to them.

4. At the time the plaintiff went to work for the defendant, defendant lent the plaintiff money to make a down payment on a truck to be used in picking up laundry and dry cleaning and took a chattel mortgage on the truck, and the plaintiff paid the defendant the sum of $30.00 a month on this account.

5. In March 1952, the defendant suggested that the plaintiff borrow $250.00 from the bank to take care of a loss of $150.00 suffered by the plaintiff on his laundry business due to one of the plaintiff's subcontractors who picked up cleaning for him. This amount overpaid the plaintiff's account with the defendant but the balance was held as an advance on the laundry account. The defendant signed or endorsed the plaintiff's note at the bank and received the money. The plaintiff made monthly payments to the defendant thereafter in the sum of $25.00 to be applied on this note. When the $250.00 note was executed, the defendant, in exchange for signing or endorsing the plaintiff's note, required the plaintiff to give him two signed checks for $125.00 each.

6. On 15 March 1952, the defendant insisted that the plaintiff sign an application for an indemnity bond. The defendant paid the premium for this bond. Thereafter, the laundry solicited by the plaintiff decreased to such an extent due to poor services received from the defendant, that the defendant suggested that plaintiff carry his work to another laundry and to make his own arrangements until he could do the work. The defendant informed him that he had called the Spotless Laundry and suggested that the same arrangement be carried out between him and that laundry that he had had theretofore with the defendant. The plaintiff made such an arrangement with the other laundry.

7. Thereafter, the plaintiff resumed business with defendant. Payments were made to the defendant on the laundry account by the plaintiff, but the defendant applied them on the loan and truck account of the plaintiff, even at times when no payments on such loans were due. The defendant kept all the records, mostly in pencil, and refused to give plaintiff receipts for sums paid.

8. In April 1952, the defendant had the plaintiff give him a $1,000 note secured by a chattel mortgage on his truck to cover all personal loans, and the defendant promised at that time to cancel his other paper, including the chattel mortgage he took to cover the down payment, but they were not canceled.

9. The plaintiff, on or about 4th or 5th of August 1952, went to the defendant to pay him some money but refused to do so because the defendant would not give him a receipt for it. The plaintiff testi-

fied, " * * * I knew he was misapplying the sums I gave him. I knew he was applying them on the personal debt when I wanted them to be applied on the laundry debt. * * * I told him I was putting all the money in the bank until he, we, reached an agreement as to how we were going to apply it, and I did deposit the money that I had. * * * I told him I was going to the bonding company. At this, Mr. Bennett told me, 'I got you right where I want you and you'll work for me like I say!' "

On or about 6 August 1952 the defendant inventoried the laundry on the truck used by the plaintiff and the plaintiff stopped picking up laundry for Mr. Bennett. The evidence further shows that the defendant thereafter deposited a check for $106.65 which had been given to the defendant on 25 March 1952 at his request for an amount due the defendant by the plaintiff on the laundry account and which the evidence tends to show had been paid in full by the plaintiff in cash. The defendant also deposited one of the checks for $125.00 theretofore given on 14 March 1952 in connection with the loan from the bank in the sum of $250.00. These checks were introduced in evidence and show that they had been endorsed by the City Laundry and M. F. Bennett and paid on 7 August 1952. The evidence further shows that an additional deposit was made to plaintiff's account in order to procure payment of the foregoing checks. The evidence is to the effect, however, that the defendant, on 7 August 1952, got all the money the plaintiff had deposited in the bank, which the plaintiff intended to hold until the defendant agreed to accept it and apply it to the proper account.

10. The plaintiff, a citizen and resident of Columbus, Ohio, and who first came to North Carolina as a member of the Marine Corps and was stationed at Cherry Point, returned to Columbus, Ohio and went to work for his father in a cabinet shop. Thereafter, he was notified by the National Surety Company that the defendant and Dixie had filed a claim under his bond for $840.00. Only the sum of $47.00 was claimed by Dixie and the balance by the defendant. The plaintiff advised the Surety Company of the circumstances surrounding the issuance of the bond and his experience with the defendant.

11. In December 1952 the plaintiff was arrested and imprisoned in Columbus, Ohio, until he could make bond. He was arrested on a warrant caused to be issued by the defendant by the Clerk of the Recorder's Court for Craven County, charging him with having embezzled funds from the defendant and Dixie.

After a hearing in Ohio, the Governor refused to extradite plaintiff to North Carolina to stand trial on the charges. However, the plain-

tiff voluntarily returned to North Carolina to stand trial. At the criminal trial in the Superior Court of Craven County, September Term 1954, the Presiding Judge directed a verdict of not guilty at the close of the State's evidence.

S. W. Moore, a stockholder and the secretary and treasurer of Dixie, testified that he had a conversation with the defendant in the present case at or about the time Mr. Gray, the plaintiff, was charged with embezzling funds from Dixie; that he pointed out to Mr. Bennett that in his belief "Mr. Gray was not guilty of the criminal charge of embezzlement, and * * * if he brought him to trial on such a charge" he would so testify. Later, when it appeared that Mr. Moore was going to testify for Mr. Gray in the criminal trial, the defendant herein said, "I'll do anything at all against you if you testify for Mr. Gray." He likewise tried to intimidate this witness before the trial in the present action.

At the close of plaintiff's evidence in the trial below the court sustained the defendant's motion for judgment as of nonsuit. Plaintiff appeals, assigning error.

Ward & Ward for plaintiff.
Cecil D. May, Ward & Tucker for defendant.

DENNY, J. In our opinion, if it should be conceded that the employer-employee relationship existed between the plaintiff and the defendant at the time complained of, the evidence adduced in the trial below is sufficient, if believed by the jury, to support a finding of want of probable cause.

Even so, the contract under which the plaintiff worked and the course of the business as actually conducted pursuant thereto, created the relation of debtor and creditor only. *S. v. Covert*, 14 Wash. 652, 45 P. 304; *Dixie Fire Ins. Co. v. Nelson*, 128 Tenn. 70, 157 S.W. 416; *S. v. Carr*, 169 Wash. 56, 13 P 2d 497; *Chicago Fire & Marine Ins. Co. v. Fidelity & Deposit Co.*, 41 Ariz. 358, 18 P 2d 260.

In the case of *S. v. Covert, supra*, the factual situation, including the manner in which the business was actually conducted, was almost, if not identical to that in the present case. Covert was employed to work as a driver and collector by the owner of the laundry. He was to receive for his services 22 per cent of the amount of laundry work brought in by him. He was permitted to retain the 22 per cent out of the monies in his hand as soon as the same came into his hand, and to turn in the balance to the laundry. The owner testified, "The laundry brought in by each driver was charged to him." He further

testified "that he had told the drivers, including the appellant, that if they trusted anyone, and failed to turn in the money, he would hold them personally responsible for the laundry so charged to them. * * * The cash turned in was not credited to the patrons of the laundry; * * * no account was kept between the laundry and its patrons, but an account was kept between the laundry and the drivers, and on this account the drivers were charged with the bundles brought in by them (according to a fixed schedule of prices), and were credited with 22 per cent of the amount of the goods they handled, and also with such amounts of cash as they from time to time paid." The Court said: "The books at all times showed the amount due from the appellant to the laundry, but not that any sums were due from any of its customers to it. Whether appellant succeeded in collecting the sums owing by patrons for laundry work, or wholly failed to make such collections, was a matter of indifference to the complaining witness, according to the contract between them; and, as already noticed, the work done was charged not to the patrons, but to the appellant, and he was held responsible for the amounts so charged, whether collected by him or not." The Court held that the relation between the owner of the laundry and its driver was that of debtor and creditor and not principal and agent.

It is said in 18 Am. Jur., Embezzlement, section 20, page 580: "Generally, when dealings between two persons create a relation of debtor and creditor, a failure of one of the parties to pay over money does not constitute the crime of embezzlement. For example, a laundry agent who is paid by commissions and who is charged with the entire amount of laundry work done stands in the relation of debtor to the laundry company. He holds money collected in such capacity and cannot be convicted of embezzlement."

In light of the facts revealed on this record, and the authorities cited herein, the judgment as of nonsuit entered below is

Reversed.

HIGGINS, J., not sitting.

J. H. LAMPLEY v. TRENHOLM CLARENCE BELL, JR.

(Filed 23 September, 1959.)

1. Compromise and Settlement: Insurance § 61½—

A settlement made by insurer in liability policy providing that insurer might make such investigation and settlement of any claim as insurer deemed expedient, will not bar insured from thereafter maintaining an action to recover for personal injuries and property damage to his vehicle resulting from the collision when such settlement is made by insurer without the knowledge or consent of insured or over his protest.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Patton, J.*, March Term 1959 of HENDERSON.

The plaintiff instituted this action to recover for personal injuries and property damages resulting from the alleged negligent operation of a motor vehicle by the defendant.

The collision occurred between the plaintiff's Buick automobile while being operated by him, and a Chevrolet pick-up truck owned and operated by the defendant, at the intersection of Justice Street and Sixth Avenue West, in Hendersonville, North Carolina, on 5 April 1958.

The defendant answered the complaint, denying his own negligence and alleging negligence on the part of the plaintiff. In his answer, the defendant also alleged as a plea in bar of the plaintiff's cause of action that a settlement had been made by the plaintiff with the defendant.

The plaintiff replied to the defendant's answer, denying that he had made any settlement with the defendant or that he had authorized anyone to do so for him.

At the hearing below on the plea in bar it was made to appear that the plaintiff's liability insurance carrier had made a settlement with the defendant and his father, who was riding with the defendant at the time of the collision, purportedly on behalf of its insured, the plaintiff.

The court below, among other things, found as a fact, "That the plaintiff was not aware of the settlements until after this action was commenced and the defendant filed his answer and plea in bar. That the plaintiff had told his adjuster, E. C. Powell, prior to said settlements that he, the plaintiff, intended to pursue his claim against the other driver, Trenholm Clarence Bell, Jr."

The court, however, held "that the policy of insurance constituted a binding contract between the plaintiff and his insurance carrier

wherein said insurance carrier was vested with the power to 'make such investigation and settlement of any claim or suit as it deems expedient,' and that said insurance carrrier under and by virtue of said provisions of said policy had the right and power to make settlement with the defendant in behalf of the plaintiff and that the plaintiff is bound thereby, and the court being further of the opinion and concluding as a matter of law that said settlement and release constituted a determination of the respective rights and liabilities of the plaintiff and the defendant, and that neither party thereafter had any right to pursue the other in respect to any liability arising out of any alleged negligence proximately causing the collision which is the subject of this suit."

Judgment was accordingly entered and the plaintiff appeals, assigning error.

Whitmire & Whitmire for plaintiff.
Williams & Williams for defendant.

DENNY, J. As we interpret the record on this appeal, the only question to be determined is whether or not the provision in the plaintiff's policy of insurance, which provides that the insurance carrier shall have the power to "make such investigation and settlement of any claim or suit as it deems expedient," is binding on the insured where the insurer makes the settlement and procures releases either without the knowledge or consent of the insured or over the protest of the insured.

It seems to be well-nigh the universal holding in this country that where an insurance carrier makes a settlement in good faith, such settlement is binding on the insured as between him and the insurer, but that such settlement is not binding as between the insured and a third party where the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such settlement. *Beauchamp v. Clark,* 250 N.C. 132, 108 S.E. 2d 535, and cited cases. See also *Wm. H. Heinemann Cream v. Milwaukee Auto Ins. Co.,* 270 Wis. 443, 71 N.W. 2d 395; *Birkholz v. Cheese Makers Mutual Casualty Co.,* 274 Wis. 190, 79 N. W. 2d 665; *Klotz v. Lee,* 36 N. J. Super. 6, 114 A 2d 746; *Hurley v. McMillan* (Tex. Civil App.), 268 S.W. 2d 229; Anno: Liability Insurer — Settlement — Effect, 32 AL.R. 2d 937.

It is said in 5A Am. Jur., Automobile Insurance, section 117, page 119: "An automobile liability insurer's settlement of a claim against the insured, made without the insured's consent or against his protests

of nonliability, and not thereafter ratified by him, will not ordinarily bar an action by the insured against the person receiving the settlement, on a claim arising out of the same state of facts. Thus, a settlement made by a liability insurer without the knowledge or consent of the insured, for damage to a truck which collided with the insured's vehicle, does not preclude an action by the insured against the truck owner for personal injuries and property damage suffered by the insured, where the policy empowers the insurer to settle claims against the insured but does not authorize it to settle or release the insured's claims. • • • "

Likewise, in *Hurley v. McMillan, supra,* it is said: "Appellant cites no authority holding that the payment by an insurance company of a claim arising under its policy, made without the knowledge or consent of the insured can be taken as any evidence against the insured that he negligently caused the collision. It was held in *Foremost Dairies, Inc. v. Campbell Coal Co.,* 57 Ga. App. 500, 196 S.E. 279, 283, that 'where, under an insurance policy which insures the insured against loss arising from claims for damages growing out of an accident covered by the policy, the company, when settling such claim, although the contract of settlement releases the insured from all liability, does not act as the agent of the insured.' We have found no authorities which hold otherwise. It is manifest that an insurance company, if it admits that its insured is liable, without its insured's knowledge or consent, is acting in its own interest, and not as the agent of the insured. The insurer cannot bar its insured's right to recover $24,000 damages for injuries received in the collision, by settling the claim of the other party to the collision for $1,325."

There is no obligation or authority on the part of the plaintiff's insurance carrier under the terms of its policy issued to plaintiff, to pay anyone for the injuries tortiously inflicted by a third party on its insured. *Fikes v. Johnson,* 220 Ark. 448, 248 S.W. 2d 362, 32 A.L.R. 2d 934. Hence, as pointed out by *Rodman, J.,* speaking for the Court in *Beauchamp v. Clark, supra,* "Logic and a fair interpretation of the policy provision compel the conclusion that under the facts here depicted insurer had no authority to compromise and settle plaintiff's claim for the injuries tortiously inflicted on him."

Although the plaintiff in the instant case was a party to the insurance contract, his insurer had no more authority to compromise for the alleged injuries tortiously inflicted on him by the defendant, without his consent or over his protest, than the insurance carrier had to settle on behalf of the plaintiff in the *Beauchamp* case.

As pointed out in the *Beauchamp* case, the Supreme Judicial Court of Massachusetts reached a different conclusion in the case of *Long*

v. Indemnity Co., 277 Mass. 428, 178 N.E. 737, 79 A.L.R. 1116, which is the only jurisdiction we have been able to find that has held contrary to the conclusion we have reached herein.

The Massachusetts Court, in the *Long* case, upheld the entry of a consent judgment, consented to by the insurance carrier over the protest of the insured. However, it will be noted that the Massachusetts Court handed down its opinion in the above cited case on 14 December 1931, and on 31 March 1932 the Legislature of that State enacted a statute to the effect that "A judgment entered by agreement of the parties, the payment of which is secured in whole or in part by * * * a motor vehicle liability policy, * * * shall not operate as a bar to an action brought by a defendant in the action in which such judgment was entered, unless such agreement was signed by the defendant in person." Acts & Resolves of Massachusetts, Chapter 130, 1932, codified as amended in Ann. Laws of Massachusetts, Volume 8, Chapter 231, section 140A.

The factual situation in the case of *Lumber Co. v. Insurance Co.*, 173 N.C. 269, 91 S.E. 946, relied on by the appellee did not involve the particular question that is herein presented for determination and is, therefore, not controlling on the present record.

This Court has held that where parties compromise and settle their differences growing out of an automobile collision, by contract or consent judgment, that the parties to such contract or consent judgment are bound thereby. *Herring v. Coach Co.*, 234 N.C. 51, 65 S.E. 2d 505; *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805; *Houghton v. Harris*, 243 N. C. 92, 89 S. E. 2d 860. However, in the present case the plaintiff did not consent to the settlement made and there is no evidence of ratification disclosed on the record.

The judgment of the court below is

Reversed.

HIGGINS, J., not sitting.

ROBERT RAY HOLLOWELL v. SIDNEY B. ARCHBELL.

(Filed 23 September, 1959.)

1. Automobiles § 39—

Nonsuit on the ground that the physical facts at the scene of the accident speak louder than the testimony of the witnesses cannot be granted when conflicting inferences can be drawn from the physical

facts, one consonant with plaintiff's evidence and the other consonant with that of defendant.

2. Automobiles § 42f— Evidence held not to show contributory negligence as matter of law in hitting rear of defendant's decelerating vehicle.

Where plaintiff's evidence is to the effect that defendant's car, traveling at a rapid speed in the same direction, pulled around and passed plaintiff's truck, and then, without signal, decelerated so rapidly that plaintiff could not avoid hitting the rear of the defendant's car, the opposite side of the highway being blocked by an oncoming vehicle, *is held* not to disclose contributory negligence as a matter of law notwithstanding skid marks extending 66 feet from where plaintiff's vehicle stopped and the absence of skid marks back of defendant's vehicle, since under plaintiff's evidence the fact that he was following defendant's vehicle so closely was due to defendant's act in passing and cutting in ahead of him, and diverse inferences can be drawn from the physical facts.

HIGGINS, J., not sitting.

APPEAL by defendant from *Paul, J.*, April-May Term 1959 of CHOWAN.

This action grows out of a collision between a Chevrolet pickup truck owned and operated by plaintiff and a Plymouth automobile owned and operated by defendant. The collision occurred about 8:00 a.m., 26 July 1958, on U. S. Highway 17, about one and one-half miles north of Hertford, near a roadside picnic table on the west side of the highway. The highway had a paved surface of 22 feet and dirt shoulders of 18 feet. It was straight for 7/10 of a mile north of the point of collision and 3/10 of a mile south of that point. A tractor-trailer was parked near the picnic table. The tractor-trailer was completely off and five to eight feet west of the paved portion of the highway. Plaintiff and defendant were traveling southwardly. Another vehicle was traveling northwardly and in the east lane. The front of plaintiff's vehicle collided with the rear of defendant's automobile. The truck was damaged as a result of the collision. Defendant sustained personal injuries and his automobile was damaged.

Plaintiff instituted this action to recover his property damage. To support his claim he alleged that he was traveling from Elizabeth City to Hertford, operating his vehicle in a proper and prudent manner at a speed approximating 40 m.p.h.; that defendant, also traveling in a southwardly direction but at a high and unlawful rate of speed, passed plaintiff and, immediately after passing, pulled into the path of plaintiff's vehicle, suddenly and without warning applied his brakes, thereby stopping or so slowing his motor vehicle that plaintiff was unable to avoid a collision. Plaintiff predicated his right to

recover on his assertion of excessive speed, reckless driving, and a failure to give warning of defendant's intention to stop or turn off of the road.

Defendant denied plaintiff's allegations of negligence. He pleaded contributory negligence as a bar to plaintiff's action and asserted a counterclaim for personal injuries and property damage. As the basis for his affirmative pleas he alleged he was at all times to the south of plaintiff and never passed plaintiff's truck; that he decided to stop at the picnic table when he was some distance north of it and for that purpose gradually reduced his speed, which was at all times reasonable and prudent, and in due time gave proper warning by signal of his intention to turn off the highway and stop at the picnic table; and that he was, when the collision occurred, partially off the paved portion of the highway. He charged plaintiff with excessive speed, reckless driving, following too closely, and failing to keep a proper lookout.

Issues were submitted to determine (1) defendant's negligence, (2) plaintiff's contributory negligence, (3) plaintiff's damage, (4) plaintiff's negligence, and (5) defendant's damage. The jury answered the issues in accord with plaintiff's contentions. Judgment was entered thereon, and defendant appealed.

John F. White, William S. Privott, and LeRoy, Goodwin & Wells for plaintiff, appellee.

John W. Graham and John H. Hall for defendant, appellant.

RODMAN, J. The first assignment is to the refusal to sustain defendant's motions to nonsuit.

He waived his motion made at the conclusion of plaintiff's evidence by offering evidence. G.S. 1-183.

The argument in support of the motion made at the conclusion of all the evidence is thus stated in defendant's brief: "The physical facts at the scene of the collision speak louder than the testimony of plaintiff and his witnesses, and upon this basis the defendant was entitled to judgment as of nonsuit."

The physical facts on which defendant relies are depicted in the evidence offered by defendant. His evidence tends to show (1) plaintiff applied his brakes with sufficient force to make them squeal; (2) after the collision, skid marks were found on the pavement extending from the truck 66 feet to the north; (3) the Plymouth left no skid marks; (4) following the collision defendant's car traveled more than 100 feet where it struck a tree on the west side of the highway. De-

fendant contends he was knocked that distance by the violent impact; plaintiff says he traveled that distance by virtue of his own momentum.

Defendant cites and relies on *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209, in support of his motion. The distinction between that case and the case at bar is readily apparent. There, admittedly, plaintiff's truck was following defendant's bus very closely — so closely that plaintiff could not stop in the distance separating the vehicles. Here, if the jury accepted plaintiff's version of the facts, the short distance separating the vehicles was caused by defendant's act in passing and cutting in ahead of plaintiff. There, plaintiff was not confronted with oncoming traffic; he could have turned to his left and prevented the collision. Here, no such choice was open to plaintiff—according to his evidence a vehicle was approaching from the south. There, the physical facts were used to amplify and explain plaintiff's evidence. Here, defendant frankly suggests using his description of the physical facts, with his interpretation of those facts to rob the evidence of plaintiff and his witnesses of probative force. The evidence for plaintiff and defendant painted different pictures. This disagreement with respect to the facts required a submission of appropriate issues to the jury. *Beauchamp v. Clark*, 250 N. C. 132; *Jernigan v. Jernigan*, 236 N. C. 430, 72 S. E. 2d 912; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251.

Defendant assigns as error the court's statement directing attention to two statutes relating to the operation of motor vehicles, which statement is followed by a delineation of the operator's duty under G.S. 20-141 and 154. The contention is made that the court thereby unduly restricted the jury in answering the issue as to contributory negligence. The assignment is without merit. The statement was not specifically directed to the second issue. It was merely a portion of the charge relating to the duties of any operator of a motor vehicle applicable to both the first and second issues. Other portions of the charge, without specifically referring to the statutes by number, accurately and adequately covered the field.

The assignment of error relating to the charge on the issue of contributory negligence is without merit. It gave defendant's contention with respect to the facts and properly and adequately described plaintiff's duty in the operation of his vehicle. The jury were told that a failure on plaintiff's part to perform his duty, thereby proximately contributing to the collision and damages, would require an affirmative answer.

The charge covered the questions at issue and correctly applied the law thereto.

No error.

HIGGINS, J., not sitting.

STATE v. RICHARD D. BRYANT.

(Filed 23 September, 1959.)

1. **Automobiles § 59—**

Evidence tending to show that defendant was traveling approximately 70 m.p.h. on his left side of the highway, partly on the shoulders of the road, and ran into the right side of a vehicle approaching from the opposite direction on its right side of the highway, resulting in the deaths of two occupants of that car, *is held* amply sufficient to be submitted to the jury and to sustain a verdict of guilty of manslaughter.

2. **Automobiles § 38—**

It is competent for witnesses a quarter of a mile from the scene of the accident to testify that defendant's vehicle when it passed the witnesses was traveling approximately 70 m.p.h. and that the vehicle did not seem to slacken in speed before the collision, the witnesses having had an opportunity to observe the speed of the car from the time it passed until the collision.

HIGGINS, J., not sitting.

APPEAL by defendant from *Bundy, J.*, March 16 Criminal Term 1959 of MARTIN.

This is a criminal action in which the defendant, Richard D. Bryant, was tried on two bills of indictment, one charging the felonious killing on 25 October 1958 of Martha Jane Winchester and the other charging the felonious killing on the same date of Mary Carolyn Harris. By consent the two cases were consolidated for trial.

J. B. McKeel testified that he was enroute in his 1958 Chevrolet 4-door sedan from Hassel, North Carolina, toward the Williamston-Scotland Neck highway to Spring Green, on 25 October 1958; that he was driving his car 35 miles an hour on the right-hand side of the road. That he met a car upon his side of the road which appeared to be "riding about half in and half out of the ditch that was" on his (McKeel's) right-hand side; that after he saw the car was over on his side of the road, he started to cut his wheels to go to the left-hand side of the road; that at that time everything went black and he was unconscious for about two days; that Mary Carolyn Harris and

Martha Jane Winchester were in the front seat with him at the time of the collision; that when he next saw them three days later, they were dead.

Delmas Williams and his father, Thurman Williams, testified that they were in front of the house of Delmas Williams, about a quarter of a mile from where the defendant's car collided with the automobile being driven by J. B. McKeel; that the McKeel vehicle was coming toward them while the car of Thurman Williams was parked on the left side of the highway, completely off of the hard surface; that it was night; that defendant's automobile went by, according to Delmas Williams, at about 70 to 80 miles per hour, and about 70 miles per hour according to his father. That they had an unobstructed view of the defendant's car from the time it passed until it collided with the McKeel car; that the defendant's automobile swerved from right to left before it collided with the McKeel vehicle. Thurman Williams testified that he observed the defendant's car from the time it passed him until the collision, and in his opinion the defendant's car was being operated at 70 miles per hour just before the collision. Delmas Williams testified that he observed the defendant's car when it passed his house and continuously thereafter "until it had the accident. The car did not show any signs of slowing down from the time it passed me until the accident."

The testimony of the Highway patrolman is to the effect that the defendant said he was driving his car at the time of the collision about 50 to 55 miles per hour; "that the hood of his car flew up and he was looking out the window and lost control of it * * * he did not know how long he drove that way."

The evidence further tends to show that the defendant's car ran a distance of 18 yards on the left shoulder of the highway before it ran into the right side of the McKeel vehicle. The evidence also tends to show that the McKeel car was still on its right of the center lane of the highway when it was struck by the defendant's car.

The parties stipulated that "Mary Carolyn Harris and Martha Jane Winchester died as a result of injuries sustained in the accident in question." Defendant offered no evidence and rested at the close of the State's evidence after moving for judgment as of nonsuit, which motion was overruled.

The jury returned a verdict of guilty of involuntary manslaughter. From the judgment imposed, the defendant appeals, assigning error.

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

Taylor & Mitchell for defendant.

DENNY, J. The defendant's first assignment of error is directed to the refusal of the court below to sustain his motion for judgment as of nonsuit. There is ample evidence revealed on this record to take the case to the jury and to support the verdict rendered. This assignment of error is without merit.

The defendant also assigns as error the admission of the evidence of Thurman Williams relating to the defendant's speed, which was to the effect that in his opinion the defendant was operating his car at approximately 70 miles per hour immediately prior to the accident involved in this action.

In light of the evidence with respect to the opportunity the witness had to observe the speed of the defendant's car and to observe it from the time it passed him until the collision, the evidence was admissible. *S. v. Leonard,* 195 N. C. 242, 141 S. E. 736; *S. v. Peterson,* 212 N.C. 758, 194 S.E. 498; *S. v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454.

In the case of *Lookabill v. Regan,* 247 N.C. 199, 100 S.E. 2d 521, *Winborne, C. J.,* said: "It is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile." Citations omitted.

It is pointed out in *S. v. Peterson, supra,* that the case of *S. v. Leonard, supra,* is direct authority for the admission of evidence tending to show the speed of a motor vehicle a quarter of a mile from the scene of a wreck in which such motor vehicle is involved. This assignment of error is overruled.

The remaining exceptions and assignments of error, directed to the charge, have been carefully examined and they present no prejudicial error. The verdict and judgment will be upheld.

No Error.

HIGGINS, J., not sitting.

ODELL L. MORTON v. BLUE RIDGE INSURANCE COMPANY.

(Filed 23 September, 1959.)

1. Process § 4—

Where process is never served and no notation for the reason for nonservice or of an extension of time for service is made thereon, and no alias summons issued, there is a discontinuance of the action commenced by the issuance of the summons. G.S. 1-96.

2. Process § 2—

Where process issued to the sheriff of one county is returned without any notation thereon but with an accompanying letter stating that the defendant named is in another county, the act of the clerk in marking through the name of the first county and writing above it the name of the second county, so that the process is directed to the sheriff of the second county, amounts to the issuance of new process and institutes a new action as of the date of the later issuance, and service by the sheriff of the second county meets all the requirements of the law.

3. Same—

Statutory provisions for a chain of process is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or a time limit of an enabling act, G.S. 1-95, and the statute does not preclude the issuance of a second original process after discontinuance of the first.

4. Same:—

The date of summons is *prima facie* evidence of the date of issuance. G.S. 1-88.1, but if the date of issuance is material the court may hear evidence and determine the true date thereof.

5. Process § 1:—Evidence § 1—

Where process issued to the sheriff of one county is returned and the clerk strikes through the name of the county and inserts the name of a second county, so that the process is directed to the sheriff of the second county, the fact that the sheriff of the second county signs it, without striking out the blank form for the signature of the sheriff of the first county, is immaterial, it appearing from the affidavit of the clerk that the summons was served by the sheriff of the second county, and further, the court will take judicial notice of the person who is the sheriff of the county.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Stevens, J.*, June Term, 1959, of CARTERET.

This is a civil action to recover, under the provisions of a policy of insurance issued by defendant to plaintiff, for loss resulting from an alleged collision and "upset" of plaintiff's automobile.

The facts necessary to a decision are set out in the opinion.

George W. Ball for plaintiff, appellant.
C. R. Wheatly and Thomas S. Bennett for defendant, appellee.

MOORE, J. Summons was issued 17 March, 1959, by the clerk of the Superior Court of Carteret County (hereinafter referred to as clerk), directed to the sheriff of Cleveland County. There is no contention that the summons did not fully comply with the formal requirements of G.S. 1-89. The clerk sent the summons to the sheriff

of Cleveland County. It was returned by the sheriff to the clerk without any notation or entry thereon. An accompanying letter from the sheriff gave information that defendant was not in Cleveland County but was in Mecklenburg County.

The clerk did not endorse on the summons an extension of time nor did he issue an alias summons. In the line, "To the Sheriff of Cleveland County — Greeting," the clerk struck through the word "Cleveland" and wrote above it the word "Mecklenburg." He made no other change. He then mailed the summons to the sheriff of Mecklenburg County. It was served on defendant on 25 March, 1959, together with a copy thereof and a copy of the complaint.

Defendant filed no answer or other pleading and did not obtain an extension of time to plead. On motion of plaintiff the clerk entered judgment by default and inquiry on 27 April, 1959. Defendant thereafter moved to vacate the judgment and dismiss the action on the ground that the summons served on the defendant is void. The motion was heard in Superior Court in term and judgment was entered 8 June, 1959, declaring the summons a nullity and dismissing the action. Plaintiff excepted and appealed.

The action was commenced by the issuance of the summons. G.S. 1-88. The summons was issued when it had been filled out and dated and was signed by the clerk. G.S. 1-88.1. The summons directed to the sheriff of Cleveland County was never served and no notation of the reason for nonservice was ever made thereon as required by G.S. 1-89. And with respect to the summons issued to Cleveland County, no notation of an extension of time within which to serve same and no alias summons was issued. This amounted to a discontinuance of the action commenced by the issuance of the summons to Cleveland County. G.S. 1-96. *Hodges v. Insurance Co.*, 233 N.C. 289, 63 S.E. 2d 819; *McIntyre v Austin*, 232 N.C. 189, 59 S.E. 2d 586; *Green v. Chrismon*, 223 N. C. 724, 28 S. E. 2d 215; *Gower v. Clayton*, 214 N.C. 309; 199 S.E. 77; *Neely v. Minus*, 196 N.C. 345, 145 S.E. 771.

The question for decision is: What was the effect of the substitution of "Mecklenburg" for "Cleveland" County in the original summons and the sending of same to the sheriff of Mecklenburg County? It is our opinion that this worked a discontinuance of the action commenced on 17 March, 1959, by issuance of summons to Cleveland County and instituted a new action at the time of the issuance of the summons to Mecklenburg County.

The summons sent to Mecklenburg County meets every formal requirement of law. G.S. 1-89. The defendant received all notice the law requires and could not have mistaken the meaning and purpose

of the process. The rights of no third party had intervened so far as the record discloses. "The purpose and aim of service of summons are to give notice to the party against whom the proceedings or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice." *Jester v. Packet Co.*, 131 N.C. 54, 42 S.E. 447.

The case of *Phillips v. Holland*, 78 N.C. 31, is in point. The clerk of Davie County issued summons and requisition (now claim and delivery) for mules to the sheriff of Davidson County. They were not served. Thereafter, upon information that the mules were in Forsyth County, the clerk struck out "Davidson" and inserted "Forsythe" in the processes. With respect to the alteration this Court said: "The alteration in the summons and requisition was not the act of an unauthorized person . . . but it was made by the Clerk who issued them at the instance of the plaintiff. When they were altered by being directed to the Sheriff of Forsythe, they became new and original process of the same force and effect as if they had been originally written as they then stood. . . . When these papers were delivered to the sheriff of Forsythe he became bound to obey them."

In *Mintz v. Frink*, 217 N.C. 101, 6 S.E. 2d 804, the clerk, with intent to issue an alias summons, used an original form and wrote the word "alias" at the top thereof. The Court said: "The issuance of a second summons in the form of an original . . . has the force and effect of initiating an independent action." See also *Gower v. Clayton, supra; Neely v. Minus, supra.* "An alias or pluries summons, improperly issued as such, may still be sufficient as an original summons." *Ryan v. Batdorf*, 225 N.C. 228, 34 S.E. 2d 81.

The real purpose of the provisions of law with respect to keeping up the chain of summonses (G.S. 1-95) is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or the time limit of an enabling act.

We hold that the summons issued by the clerk to the sheriff of Mecklenburg County was a valid original summons in an action commenced on the date of the issuance of the same. This summons bears date 17 March, 1959, and this is *prima facie* evidence of the date of issuance. G.S. 1-88.1. If it is of importance herein, the court may hear evidence and determine the true date of the issuance thereof. *Williamson v. Cooke*, 124 N.C. 585, 32 S.E. 963.

Appellee's motion contained the further contention that the service of the summons is void for appellee asserts that the summons shows it was served in Mecklenburg County by the sheriff of Cleveland

County. This argument was brought forward in the brief. However this contention was apparently not made below for the judge found no facts with respect thereto. Suffice it to say that the record does not bear out the contention. The form for the sheriff's return had a place thereon for signature of the sheriff of Cleveland County. This portion of the form is unsigned. The return indicates it was served by J. Clyde Hunter, Sheriff, E. Banks Mayhew, deputy Sheriff. An affidavit of the clerk, which is a part of the record, indicates that summons was served by the sheriff of Mecklenburg County. Indeed, this Court takes judicial notice that J. Clyde Hunter was sheriff of Mecklenburg County on 25 March, 1959. 20 Am. Jur., Evidence, Secs. 27 and 79, pp. 54 and 100.

The record discloses that other motions are pending in this cause. These apparently have not been heard below. They are not before us.

The judgment entered at the June Term, 1959, and dated 8 June, 1959, is

Reversed.

HIGGINS, J., not sitting.

ROYLE & PILKINGTON COMPANY, INCORPORATED v. JAMES S. CURRIE, COMMISSIONER OF REVENUE.

(Filed 23 September, 1959.)

1. Taxation § 29—

The 1957 amendment of G.S. 105-147(9)d enlarges the time for a loss carry-over and permits a taxpayer in computing its income tax for the year 1957 to bring forward losses for the prior five years as a credit against income, and the contention that the 1957 act is prospective in effect only is untenable since the 1957 act has no saving clause and therefore a prospective interpretation would deny taxpayers the right to deduct any losses for the years prior to its effective date.

HIGGINS, J., not sitting.

APPEAL by defendant from *Huskins, J.*, February 1959 Term of HAYWOOD.

This action was instituted to recover income taxes assessed by defendant and paid under protest. The facts were stipulated. Plaintiff sustained economic losses as defined by statute (G.S. 105-147(9)d) for 1953, $16,062.96, 1954, $27,436.18, and 1955, $1,003.39. It had net income in 1956, $15,269.05, 1957, $18,078.87.

When plaintiff filed its tax returns for the year 1956 it applied that portion of its 1954 loss which equaled its 1956 income to relieve it of income tax liability for that year. In preparing its return for the year 1957 it carried forward as a deduction from income the 1953 loss of $16,062.96 and $2,015.91 of its 1954 loss, leaving it with an unused loss of $10,151.22 for 1954 and $1,003.39 for 1955 to be applied as a credit against income in years subsequent to 1957. The Commissioner disallowed the deduction as made by plaintiff but deducted the loss sustained in 1955 from the income earned in 1957 and computed the tax on this balance. Plaintiff paid the tax so assessed under protest and in apt time demanded a refund. His demand was refused. He thereupon instituted this action. Judgment was rendered on the stipulated facts for plaintiff and defendant appealed.

William I. Millar for plaintiff, appellee.

Attorney General Seawell and Assistant Attorneys General Abbott and Pullen for defendant, appellant.

RODMAN, J. Prior to 1943 our statutes permitted a taxpayer, in determining his income tax liability, to deduct from his income only those losses sustained during the income year. c. 158 §322 P.L. 1939.

This provision was enlarged by c. 400 §4 S.L. 1943. That Act amended subsection 6 of §322 of the Revenue Act (G.S. 105-147) by adding a paragraph reading: "Losses may be carried forward by the taxpayer for two succeeding tax years as a credit against income received in either of the two succeeding years subject to the following limitations: (Not here material). The deduction herein authorized shall be permitted in determining any income tax which shall become due and payable on or after January first, one thousand nine hundred and forty-four."

This provision limiting the right to carry losses forward for a period of two years remained in effect until 1957. Plaintiff, when it filed its tax return, did not therefore seek to offset its 1953 loss against its 1956 income, but used for that purpose a part of the 1954 loss.

The Legislature, by c. 1340 §4 S.L. 1957, amended the statute relating to deductions by striking out the phrase "either or both of the two preceding income years" inserted by the 1943 amendment and inserted in lieu thereof the words "any or all of the five preceding income years," making the statute read as now appears in G.S. 105-147(9)d.

Defendant contends this amendment is prospective in its operation and has no application to losses sustained prior to 1957. This contention requires us to ascertain legislative intent.

When the amending statute is examined in its entirety, we think it clear that the Legislature intended that a taxpayer, beginning with the year 1957, might deduct from his income losses sustained during any of the preceding five years. It provides in subsection (bg): "Except as otherwise expressly provided herein, this Section shall take effect for income years beginning on or after January first, one thousand nine hundred fifty-seven."

There is nothing to suggest that the Legislature intended to diminish the right granted taxpayers in 1943 to reduce their taxable income by the amount of losses sustained in prior years. Clearly it intended to enlarge the right. What may be deducted is prescribed by §147. If, as defendant contends, the 1957 amendment is prospective in its operation and only permits the deduction of losses occurring subsequent to 1957, taxpayers having incomes in 1957 and 1958 would be denied the privilege of deducting any prior losses for there is no provision saving to them the right to deduct losses sustained within two prior years; and the Commissioner was in error in deducting from plaintiff's 1957 income the loss sustained in 1955. We cannot conceive that the Legislature intended any such result. It meant, we think, what the language used plainly says, namely, that deductions may be taken for losses occurring within any of the five previous years.

This view is fortified by subsection (ail) amending paragraph 5 of subsection 6 (now 9) of G.S. 105-147 so as to limit the right of the taxpayer to take credit for the losses there described to those incurred during income years beginning prior to 1 January 1957.

The conclusion here reached conforms with decisive interpretations of the related Federal statute. *Reo Motors v. Commissioner,* 338 U. S. 442, 94 L. ed. 245, 70 S. Ct. 283.

Affirmed.

HIGGINS, J., not sitting.

STATE v. BENTSON GREGORY BANKS
AND
STATE v. CARL CLEO BANKS.

(Filed 23 September, 1959.)

1. Searches and Seizures § 2—

Information radioed by one patrolman to another is sufficient information within the meaning of G.S. 18-13 to authorize the second patrol-

man to make the affidavit and to authorize the clerk of a general County court to issue a search warrant.

HIGGINS, J., not sitting.

APPEAL by defendants from *Pless, J.*, February Term 1959 of BUNCOMBE.

The defendants were tried on separate warrants charging the illegal possession, possession for the purpose of sale, and the illegal transportation of taxpaid whiskey.

The respective defendants entered a plea of not guilty. The cases were consolidated for trial.

The evidence for the State discloses that, on 10 September 1957, State Highway Patrolman W. L. McDonald observed a 1948 Ford automobile parked in front of the ABC store in Biltmore, Buncombe County, North Carolina. As he drove past the store, he saw the defendant Bentson Banks carry a large bag from the store and put it on the back seat of the car. He stopped his car and saw this defendant make eight or nine trips into the store. Each time he went in empty-handed and each time he returned with a large bag in his hands and placed it in the car. Nothing is sold at the store except intoxicating beverages. The last time he came out of the store and put a bag in the car, Carl Cleo Banks came out with him and they both got in the car and drove away. The patrolman followed them a short distance and stopped them. He examined the drivers' licenses of the two defendants. He observed an Army blanket spread over the packages on the floor in the back of the car. He asked them what the packages contained. They refused to tell him. He then asked their permission to search the car and they refused.

The patrolman went back to his car and radioed Patrol Headquarters. As a result of this call, Patrolman McDonald talked to Patrolman Moran and gave him information with respect to what he had observed earlier and requested him to obtain a search warrant for a 1948 Ford, License No. KJ-8705, being driven by Carl Cleo Banks. As a result of this radio conversation with Moran, the search warrant, which appears in the record, was issued by the Clerk of the General County Court of Buncombe County, based upon the sworn affidavit of Patrolman Moran. The search warrant was taken by officers to Virginia Avenue in West Asheville where Patrolman McDonald had again stopped Carl Cleo Banks and placed him under arrest for reckless driving. The search warrant was read to Carl Cleo Banks, and officers found that the bags in the back of his car contained eight gallons of taxpaid whiskey.

The jury returned a verdict of guilty of illegal transportation of taxpaid whiskey. From the judgments imposed, the defendants appeal, assigning error.

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

Henry C. Fisher for defendants.

PER CURIAM. The defendants challenge the validity of the search warrant pursuant to which the automobile described therein and which belonged to Carl Cleo Banks, was searched and the whiskey found therein seized.

We hold that the information furnished by Patrolman McDonald over the radio to Patrolman Moran, who signed the affidavit based on such information, pursuant to which the search warrant was issued, was sufficient *information* within the meaning of G.S. 18-13 to authorize Patrolman Moran to make the affidavit and to authorize the Clerk of the General County Court of Buncombe to issue such warrant. *S. v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537.

No prejudicial error has been made to appear in the trial below; hence, the verdict and judgments will be upheld.

No Error.

HIGGINS, J., not sitting.

HILLIARD GREEN v. THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, A CORPORATION, AND IMPERIAL LIFE INSURANCE COMPANY, A NORTH CAROLINA CORPORATION IN PROCESS OF DISSOLUTION.

(Filed 23 September, 1959.)

1. Appeal and Error § 8: Trial § 5½—

Appeal from a provision of a pretrial order fixing the issue and the rule for the admeasurement of damages is premature and will be dismissed, since the trial judge has the discretionary power to modify same. G.S. 1-169.1.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Pless, J.*, June 1959 regular civil term. BUNCOMBE.

Civil action to recover damages for an alleged unlawful and tortious liquidation and dissolution of the Imperial Life Insurance Company, over the dissent of plaintiff, a minority stockholder.

At a pre-trial hearing (G.S. 1-169.1) the court entered an order

that one issue should be submitted to the jury: "What amount of damage is the plaintiff entitled to recover of the defendant?" In the pre-trial order the court went further, and held what the rule of damages would be and the maximum possible recovery, and gave an explanation for its holding. The last sentence of the pre-trial order reads: "This statement is for the information of the trial judge, and is not intended to constitute a ruling."

Plaintiff excepted to the pre-trial order, and appealed to the Supreme Court.

William J. Cocke for plaintiff, appellant.
Uzzell & DuMont By: William E. Greene for defendants, appellees.

PER CURIAM. G.S. 1-169.1, in respect to Pre-Trial Hearings, reads in part: "Following the hearing the presiding judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case unless in the discretion of the trial judge the ends of justice require its modification."

Judge Pless' pre-trial order is interlocutory, from which an appeal does not lie. The appeal is dismissed, but without prejudice to plaintiff's exception to the order, and to his rights in accordance with procedure and law in such cases. *DeBruhl v. Highway Com.*, 241 N.C. 616, 86 S.E. 2d 200.

Appeal Dismissed.

HIGGINS, J., not sitting.

DANIEL JOHNSON v. LOUIS B. LAMAR.

(Filed 23 September, 1959.)

APPEAL by plaintiff from *Patton, J.*, at February 1959 Mixed Term of HENDERSON.

Civil action to recover for injury sustained by plaintiff in automobile collision at a point in State of South Carolina resulting in judgment as of nonsuit entered when plaintiff rested his case.

Plaintiff excepts thereto and appeals to Supreme Court assigning as error the judgment entered.

Paul K. Barnwell, R. Lee Whitmire for plaintiff, appellant.
Meekins, Packer & Roberts for defendant, appellee.

PER CURIAM. The accident involved in present action having occurred in the State of South Carolina, and the action having been instituted in the State of North Carolina, the substantive law of South Carolina determines the cause of action maintainable by plaintiff as well as the measure of damages. In this light plaintiff cites no authority and makes no argument revealing error in the trial below, but rather files in this Court a motion for new trial on account of newly discovered evidence. This motion fails to sustain its purpose, and is denied.

However, attention is directed to the provisions of G.S. 1-25.

For reasons stated the judgment below is

Affirmed.

HIGGINS, J., not sitting.

CLAY HYDER TRUCKING LINES, INC., A CORPORATION, v. GENERAL REALTY & INSURANCE CORPORATION, A CORPORATION.

(Filed 23 September, 1959.)

APPEAL by defendant from *Patton, J.*, at March 1959 Civil Term of HENDERSON.

Civil action by plaintiff Clyde Hyder Trucking Lines, Inc., to recover of defendant General Realty & Insurance Corporation $2,875.04 had and received on contract arising out of escrow deposits of money made for the purpose of guaranteeing payment of premiums on certain types of insurance.

Defendant set up counterclaim, and pleaded over indebtedness to it by plaintiff for unpaid premium.

The matter was referred to and heard by referee, and then before judge of Superior Court on exception filed by defendant.

The findings of fact made by the referee as modified by judge of Superior Court are (1) that defendant is indebted to plaintiff in the sum of $3,755.20 by reason of such escrow deposits; (2) that insurance premiums accumulated against the account in the sum of $880.16, leaving a net balance of $2,875.04 owing by defendant to plaintiff; (3) that same is due with interest at six per cent per annum from January 1, 1958; and (4) that defendant is not entitled to recover anything on its counterclaim against plaintiff.

And to judgment in accordance therewith defendant excepts and appeals to Supreme Court, and assigns error.

Redden, Redden & Redden for plaintiff, appellee.

Whitmire & Whitmire, Coble & Behrends, Jr. for defendant, appellant.

PER CURIAM. (1) It is settled law in this State that the findings of fact by a referee, approved by the trial judge, are conclusive on appeal if supported by any competent evidence. And (2) the judge of the Superior Court in the exercise of revisory power may modify the report of the referee. These principles are too well settled in this State to require citation of authority.

Applying these principles to case in hand, it appears that the findings of fact made by the referee, modified and affirmed by the trial judge are supported by competent evidence, and, hence, are binding on appeal. In the judgment in accordance therewith there is no error, and it is

Affirmed.

HIGGINS, J., not sitting.

APPENDIX

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

Amend Article X, appearing 221 N.C. 606, by adding a new canon following Article X, to be designated as H as follows:

"H. It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar to practice his or her profession in the Superior Court, or any Recorders Court, Municipal Court, Domestic Relations Court, Juvenile Court, Probate Court, or any other court inferior to the Supreme Court of North Carolina, now established or which may be hereafter established, which court is presided over by his or her spouse."

(Canon G, previously added to Article X, appears in 243 N. C. page 797.)

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted by The North Carolina State Bar in that the said Council did by resolution at a regular quarterly meeting adopt said amendment to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 3rd day of December, 1958.

/s/ Edward L. Cannon

Edward L. Cannon, Secretary
The North Carolina State Bar

The Court is of the opinion that its approval is not required as a condition precedent to the promulgation of canons of ethics by the Council of The North Carolina State Bar. Let the foregoing amendment to the canons of ethics of The North Carolina State Bar, together with the certificate of Edward L. Cannon, Secretary, be published in the forthcoming volume of the Reports.

This 14th day of January, 1959.

/s/ Rodman, J.

For the Court.

APPENDIX.

AMENDMENT TO RULES OF PRACTICE IN THE SUPREME COURT.

Effective 1 December 1959, Rule 25 of the Rules of Practices in the Supreme Court is amended by adding the following:

In criminal actions, counsel for appellant, upon delivering a copy of his manuscript record of the statement of the case on appeal, as agreed to by counsel or as settled by the court, to the Clerk of this Court to be printed or mimeographed, shall file an extra copy with the Clerk for use by the Attorney General.

APPENDIX.

AMENDMENT TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS.

Amend the Rules governing admission to the practice of law in the State of North Carolina appearing 243 N. C. Reports, 785 through and including 794, as follows:

(a) Amend Rule 6, page 786, line 16, by inserting after the words "Rule 17 (a)" the following: "; provided, however, that no petition for deferred registration from a student in a North Carolina Law School desiring to take an examination after 1959 will be considered by the Board where registrant seeks admission to any examination to be given by the Board within one year next following date of the filing of such deferred registration and petition. In such cases deferred registration will not be considered until one year, following the date of the filing thereof, has elapsed."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 3rd day of September, 1959.

/s/ EDWARD L. CANNON, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules of The Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 23rd day of September, 1959.

/s/ J. WALLACE WINBORNE
Chief Justice.

Upon the foregoing certificate, it is ordered that the foregoing

amendment to the Rules of The Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This 23rd day of September, 1959.

/s/ MOORE, J.
For the Court.

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ANALYTICAL INDEX

ABORTION

§ 3. Causing Miscarriage of, Injury to, or Destruction of Pregnant Woman.

The evidence in this case *is held* amply sufficient to be submitted to the jury in a prosecution under G.S. 14-45. *S. v. Perry*, 119.

In a prosecution under G.S. 14-45, hypothetical questions asked an admitted medical expert witness, based upon a full and fair recital of all relevant and material facts theretofore introduced in evidence, as to whether the prosecutrix had had a miscarriage, and if so, what was the cause of it, *held* competent. *Ibid.*

ACCOUNT

§ 1. Nature and Requisites of Account.

Ordinarily the law imposes no greater burden upon the creditor than on the debtor to keep an accurate record of the debits and credits, and it is error for the court to charge, even as a contention, that the law imposed the duty on the creditor not only to keep the records but to keep them in such manner as to disclose that they were accurate and could be relied on by the parties. *Godwin v. Hinnant*, 328.

§ 2. Actions on Account.

In an action on account the burden is upon the creditor to prove the correctness of each controverted charge, and the burden is upon the debtor to establish payments beyond those admitted. *Godwin v. Hinnant*, 328.

In an action on an account it is error for the court to charge that the burden is on the creditor to establish the allegations of the complaint, without applying the law to the facts in evidence, but the court should charge the jury the law applicable upon the evidence as to each controverted item. The mere statement of the contentions of the parties is insufficient. *Ibid.*

ADMINISTRATIVE LAW

§ 4. Appeal, Certiorari and Review.

Certiorari to review action of municipal authorities in applying a zoning ordinance presents the record as certified, and authorizes the Court to review the record for errors appearing on its face, including the questions of jurisdiction, power and authority to enter the order complained of, and objection that the application for the writ failed to specify the particular ground of objection is untenable. *Chambers v. Board of Adjustment*, 195.

ADVERSE POSSESSION

§ 14. Adverse Possession of Public Ways.

Neither the public nor a municipality can aquire the right to use a strip of land as a public way unless there has been twenty years user under claim of right adverse to the owner, and evidence that purchasers of lots to the west of a dead-end street began to use a strip of land equal to the southern half of the dead-end street were the street extended, without any evidence of any further use along any definite or specific line, is insufficient to show adverse use of the northern half of the street extended. *Farmville v. Monk & Co.*, 171.

ADVERSE POSSESSION—*Continued.*

§ 20. Presumption of Possession by Holder of Legal Title, and Necessity of Possession within Twenty Years before Commencement of Action.

Every possession is presumed to be under the true title and permissive rather than adverse. G.S. 1-42. *DeBruhl v. Harvey & Sons Co.*, 161.

In an action for the recovery of possession of realty, the failure of the complaint to allege that plaintiffs had been seized and possessed of the premises at some time within twenty years prior to the institution of the action is not ground for demurrer, since G.S. 1-39 and G.S. 1-42 must be construed together, so that upon proof of title in plaintiffs the possession of others, in the absence of proof that it was adverse, will be presumed to be under the legal title. *Elliott v. Goss*, 185.

AGRICULTURE

§ 9½. Prosecutions for Sale or Offering for Sale Seed without Complying with Regulations.

An indictment under G.S. 106-283 charging the sale or offering for sale seed not labled in accordance with G.S. 106-281 should allege the person to whom defendant sold or offered to sell seed not properly labeled, or that the purchaser was in fact unknown, the particulars in which the label failed to meet the statutory requirements, and where and how the seed were exposed to sale. *S. v. Bissette*, 514.

An indictment under G.S. 106-283 charging that defendant sold or offered for sale tobacco having a false or misleading label should allege the person to whom the seed were sold or offered for sale or that the purchaser was in fact unknown, and the intent to defraud. *Ibid.*

APPEAL AND ERROR

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court will take cognizance *ex mero motu* that appellant is not the party aggrieved. *Dickey v. Herbin*, 322.

§ 3. Judgments Appealable.

Appeal from a provision of a pretrial order fixing the issue and the rule for the admeasurement of damages is premature and will be dismissed, since the trial judge has the discretionary power to modify same. G.S. 1-169.1. *Green v. Ins. Co.*, 730.

§ 4. Parties Who May Appeal.

A party who asserts no authority to speak for others, whose rights are antagonistic to his own, is not a party aggrieved by adjudication that such others have no interest in the subject of the litigation. *Moore v. Lewis*, 77.

Only the party aggrieved is entitled to appeal, and when appellant is not the party aggrieved the Supreme Court obtains no jurisdiction and will dismiss the appeal *ex mero motu*. G.S. 1-271. *Dickey v. Herbin*, 322.

An executor who is also a beneficiary under the will is not, in his representative capacity, the party aggrieved by a judgment designating the fund which should bear the costs of administration, and holding that testator died intestate as to certain lapsed legacies, and the executor may not prosecute an appeal from such judgment in his representative capacity for his benefit as a legatee or devisee. *Ibid.*

While an executor may maintain an action under the Declaratory Judgment Act for direction in the disposition of the estate, that Act does

APPEAL AND ERROR—*Continued.*

not empower him to appeal in his representative capacity from a judgment directing the disposition of the estate as between the beneficiaries and distributees, and which, therefore, does not adversely affect the estate. *Ibid.*

G.S. 1-63, authorizing an executor to sue without joining the person for whose benefit the action is prosecuted, relates to parties and does not authorize an executor to appeal from a judgement entered in an action under the Declaratory Judgment Act when such judgement does not adversely affect the estate. *Ibid.*

§ 14. Costs in Supreme Court.

Upon an appeal by the executor in his representative capacity from a judgment which does not adversely affect the estate, the costs of the appeal, including attorneys' fees, are not proper charges against the estate. *Dickey v. Herbin*, 322.

§ 16. Certiorari as Method of Review.

Certiorari granted by the Supreme Court brings the entire record up and extends the scope of review to all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of. *Turner v. Board of Education*, 546.

§ 20. Parties Entitled to Object and False Exception.

Appellant will not be permitted to complain of an error in the charge favorable to him. *Taylor Co. v. Highway Com.*, 533.

§ 24. Exceptions and Assignments of Error to the Charge.

Objection that the court did not fully state the contentions of appellants will not be considered on appeal when the objection was not brought to the trial court's attention in apt time. *Bank v. Slaughter*, 355.

Where the court gives correct instructions on all material aspects of the case, the failure to request amplification or additional instructions waives exceptions to the charge in regard thereto. *In re Will of Knight*. 634.

§ 35. Matters not Appearing of Record Presumed without Error.

Where the charge is not in the record it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Board of Education v. Mann*, 493; *Wiseman v. Construction Co.*, 521.

§ 38. The Brief.

Exceptions not set out in the brief or in support of which no argument is stated or authority cited, are deemed abandoned. *DeBruhl v. Harvey & Sons Co.*, 161; *Darrock v. Johnson*, 307; *In re Will of Knight*, 634.

A question discussed in the brief, which is not supported by any assignment of error based on an exception duly noted, will not be considered. *Tanner v. Ervin*, 602.

§ 39. Presumptions and Burden of Showing Error.

The burden is on appellant not only to show error, but that the alleged error was prejudicial and amounted to the denial of some substantial right. *Taylor Co. v. Highway Com.*, 533.

§ 41. Harmless and Prejudicial Error in Admission on Exclusion of Evidence.

The admission of evidence over objection cannot be prejudicial when

evidence of the same import is admitted without objection. *Barnes v. Highway Com.*, 378; *In re Will of Knight*, 634.

Exception to exclusion of testimony will not be sustained where the record fails to show what the witnesses would have testified had they been permitted to answer. *Board of Education v. Mann*, 493; *In re Will of Knight*, 634.

The exclusion of testimony cannot be prejudicial when the facts sought to be established thereby are established by the testimony of another witness. *Rowe v. Murphy*, 628.

§ 42. Harmless and Prejudicial Error in Instructions.

Where the charge of the court declares and explains the law arising on all phases of the evidence and is without prejudicial error when considered contextually, an exception thereto will not be sustained. *Nance v. Long*, 96; *Beauchamp v. Clark*, 132; *In re Will of Knight*, 634.

§ 45. Error Cured by Verdict.

The exclusion of evidence which is competent solely upon an issue answered by the jury in appellant's favor cannot be prejudicial. *Boldridge v. Construction Co.*, 199.

Where the rights of the parties are determined by the verdict upon one issue, alleged error relating to another issue cannot be prejudicial. *Squires v. Ins. Co.*, 580.

§ 46. Review of Discretionary Matters.

Denial of motion to set aside verdict as contrary to the weight of the evidence is not reviewable. *Nance v. Long*, 96.

§ 49. Review of Findings or Judgments on Findings.

Findings of fact of the lower court are conclusive on appeal when supported by competent evidence, but a finding which is not supported by sufficient competent evidence will be ordered stricken from the findings. *Ins. Co. v. Lambeth*, 1.

The findings of fact by the trial court are conclusive on appeal if supported by competent evidence, notwithstanding that the evidence is conflicting and would support, also, a contrary finding. *Ins. Co. v. Shaffer*, 45; *Lumber Co. v. Chain Co.*, 71.

Where the parties waive a trial by jury, the rules of evidence are not so strictly enforced as in a jury trial, since it will be presumed that incompetent evidence was disregarded by the court in making its decision. *Ins. Co. v. Shaffer*, 45.

Where, in a trial by the court under agreement of the parties, the court makes no specific findings of fact, but enters judgment of involuntary nonsuit, the only question presented on appeal is whether the evidence, taken in the light most favorable to plaintiff would support findings of fact upon which plaintiff could recover. *DeBruhl v. Harvey & Sons Co.*, 161.

Where there are no exceptions to the findings of fact, it will be presumed that they are supported by competent evidence and they are binding on appeal. *Tanner v. Ervin*, 602.

Assignments of error based on objections to the admission of evidence which could not materially affect the findings of fact need not be considered. *Utilities Com. v. Light Co.*, 421.

Where the findings of fact in a trial by the court under agreement are supported by competent evidence, they are as conclusive as a verdict of a jury, and when such findings support the court's conclusions of law the

APPEAL AND ERROR—*Continued.*

judgment based thereon must be affirmed. *Bank v. Courtesy Motors*, 466. *Everette v. Lumber Co.*, 688.

§ 51. Review of Judgments on Motions to Nonsuit.

Where it is determined on appeal that nonsuit was correctly denied but a new trial is awarded for error in the charge, the Court will refrain from a discussion of the evidence. *Tucker v. Moorefield*, 340.

Where defendant introduces evidence, only the motion to nonsuit made at the close of all the evidence is to be considered. *Jones v. Mills, Inc.*, 527.

§ 54. New Trial and Partial New Trial.

Where error in the trial relates to a single issue, which is entirely separable from the other issues, the Supreme Court may order a partial new trial confined solely to that issue. *Whiteside v. McCarson*, 673.

§ 59. Force and Effect of Decision of the Supreme Court.

An opinion of the Supreme Court must be considered within the framework of the facts of the particular case in which it is rendered. *Lane v. Dorney*, 15; *Barnes v. Highway Com.*, 378.

§ 60. Law of the Case and Subsequent Proceedings.

Reversal of order of Utilities Commission on ground that it was not supported by evidence is not *res judicata* of merits. *Utilities Com. v. State*, 410.

Whether the reversal of nonsuit on appeal precludes nonsuit upon the subsequent trial depends upon whether the evidence on the retrial is substantially the same as, or materially different from, that introduced at the previous trial. *Sledge v. Wagoner*, 559.

Decision on a former appeal that the evidence was sufficient to be submitted to the jury on the issue of negligence precludes the contention that nonsuit should have been entered upon the subsequent trial upon substantially identical evidence. *Skinner v. Jernigan*, 657.

ASSOCIATIONS

§ 5. Right to Sue and Be Sued.

A member of a labor union has a right to sue the union for breach of contract under which the union agreed to prosecute the member's remedies before the National Railroad Adjustment Board for reinstatement of employment. *Glover v. Brotherhood*, 35.

AUTOMOBILES

§ 3. Driving without License or after Revocation or Suspension of License.

In a prosecution of defendant for operating a motor vehicle on the public highways after his operator's license had been revoked or during a period it had been suspended, the State may introduce that part of the certified record of the Department of Motor Vehicles showing that defendant's operator's license had been revoked and that such revocation was in effect at the time the alleged offense was commited. *S. v. Corl*, 258.

In a prosecution of defendant for operating an automobile on the public highways, after his operator's license had been revoked or during a period it had been suspended, the State may introduce the certified record of the Department of Motor Vehicles for the purpose of showing the *status* of defendant's operator's license at the time of the offense charged. G.S. 20-42

(b), and further, objections to preliminary statements of the witness to the effect that the witness had written to the Department of Motor Vehicles for the official record and had received such record from the Department, are feckless. *S. v. Corl*, 256.

Even though the certified record of the Department of Motor Vehicles is competent solely for the purpose of establishing the *status* of defendant's driver's license at the time he is charged with driving after revocation of license or during the period of suspension of his license, the admission of the entire record, showing numerous convictions for speeding and reckless driving, driving after revocation of license, etc., cannot be held for error when defendant does not request at the time that the admission of the record be restricted to the purpose of showing the *status* of his driver's license. *Ibid.*

Testimony of officers to the effect that they flashed a light on an automobile in a field, recognized defendant behind the wheel, saw no other person in the car, that this car pulled around officers' car, that the officers backed up and followed the car along a private road and into a public highway, that the car did not stop and no car entered the highway between that car and the officers' car, and that the officers followed the car for a distance along the public highway at speeds up to 120 miles per hour, *is held* sufficient indentification of defendant as the driver of the car on the public highway. *Ibid.*

§ 7. Attention to Road, Look-out and Due Care in General.

The driver of a motor vehicle is at all times under duty to operate the vehicle with due caution and circumspection and at a speed or in a manner so as not to endanger or to be likely to endanger any person or property, which statutory standard of car is absolute. *Lamm v. Gardner*, 540.

It is the duty of a driver of a motor vehicle not only to look but to keep a lookout in the direction of travel, and he is held to the duty of seeing what he ought to see. *Ibid.*

A motorist is not under duty to anticipate negligence on the part of other motorists. *Rowe v. Murphy*, 627.

§ 8. Turning and Turning Signals.

A vehicle turning left at an intersection is required to approach the intersection in his lane of travel nearest the center of the highway and pass as closely as practicable to the right of the center of the intersection. G.S. 20-153 (a). *Hudson v. Transit Co.*, 435.

The driver of a vehicle desiring to turn left at an intersection of highways controlled by traffic control signals is entitled to move into the intersection when the traffic signal facing him is green, but before turning left across the lanes of travel of vehicles headed in the opposite direction, is under duty to yield them the right of way. *Ibid.*

§ 9. Stopping, Parking, Signals and Lights.

The parking of a disabled vehicle as far as possible on the right shoulder, leaving more than 15 feet upon the main traveled portion of the highway for the free passage of traffic, at a place where the drivers of other cars have a clear view of the parked automobile for a distance of more than 200 feet in both directions, is not a violation of G. S. 20-161. *Rowe v. Murphy*, 627.

The provisions of G.S. 20-161 requiring the setting of warning flares or lanterns to the front and rear of a vehicle parked on the highway applies to trucks, trailers or semi-trailers and not to automobiles. *Ibid.*

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Any negligence on the part of a defendant in violating the statutory provisions in regard to parking vehicles upon a highway must be a proximate cause of injury in order to entitle plaintiff to recover. *Ibid.*

§ 14. Passing Vehicles Traveling in Same Direction.

While it is negligence *per se* for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection unless permitted to do so by an officer, G.S. 20-150 (c), the 1957 amendment to the statute defines intersection as one marked by the State Highway Commission by appropriate signs. *Bennett v. Livingston*, 586.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

The failure of a motorist to keep his car on his right side of the center of the highway in passing a vehicle traveling in the opposite direction is negligence *per se*, and whether such negligence is a proximate cause of a collision is ordinarily for the jury to determine. *Boyd v. Harper*, 334.

Where a motorist sees, or in the exercise of ordinary care should see a highway sign warning that she was approaching a narrow bridge, and that a vehicle approaching from the opposite direction was zigzagging across the highway, she is under duty to take such action as a reasonably prudent person would take under the circumstances by decreasing speed and having her vehicle under proper control so as to avoid colliding with the approaching vehicle on the highway or on the bridge. *Lamm v. Gardner*, 540.

The right of a motorist, who is himself observing the law, to assume that the driver of a vehicle approaching from the opposite direction will remain on his right side of the highway, is not absolute, and when he sees, or should see, in the exercise of due care, that the approaching vehicle was zigzagging across the highway, he may no longer rely upon the assumption. *Ibid.*

§ 17. Right of Way at Intersections.

G.S. 20-155 (a), providing that the vehicle on the right has the right of way at an intersection which has no stop signs or traffic signals, applies only when two vehicles approach or enter the intersection at approximately the same time. *Downs v. Odom*, 81.

The vehicle first reaching an intersection which has no stop signs or traffic signals has the right of way over a vehicle subsequently reaching it, irrespective of their directions of travel, and it is the duty of the driver of the later vehicle to delay his progress and allow the vehicle which first entered the intersection to pass in safety. *Ibid.*

G.S. 20-155 does not apply to an intersection of a servient highway with a dominant highway, but the driver along the servient highway or street upon which a stop sign has been duly erected is required not only to stop, but to exercise due care to see that he may enter or cross the dominant highway or street in safety before he enters the intersection, G.S. 20-158 (a), and an instruction charging the law under G.S. 20-155 in an action involving a collision at an intersection of a dominant and servient highway, must be held for prejudicial error. *Jordan v. Blackwelder*, 189.

Where a street has not been designated a through street by city ordinance but stop signs along an intersecting street have been erected by order of the city traffic engineer under authority of ordinance, but prior to the accident the stop sign on the metal post on one side of the intersection had been removed, the mere fact that the city engineer had designated the intersection one of special hazard under the ordinance does not constitute

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the intersecting street a servient one, and a motorist entering the intersection along the street having no stop sign is not under duty to stop before entering the intersection. *Tucker v. Moorefield*, 340.

Where the evidence discloses that electric traffic control signals were maintained at the intersections within a municipality but no ordinance of the municipality in regard thereto is introduced in evidence, G.S. 20-158 (c) is not applicable, and the rights of way of motorists at such intersection must be determined upon the basis of the well-recognized meaning of such signal lights, and motorists will be required to give that obedience to them which a reasonably prudent operator would give. *Hudson v. Transit Co.*, 435.

The driver of a vehicle desiring to turn left at an intersection of highways controlled by traffic control signals is entitled to move into the intersection when the traffic signal facing him is green, but, before turning left across the lanes of travel of vehicles headed in the opposite direction, is under duty, to yield them the right of way. G.S. 20-155. *Hudson v. Transit Co.*, 435.

A motorist approaching an intersection controlled by traffic lights is entitled to proceed straight across the intersection when faced by the green signal, and, in the absence of anything which gives or should give him notice to the contrary, is not under duty to anticipate that a motorist approaching along the intersecting highway from his left will fail to yield the right of way as required by statute. *Ibid.*

§ 19. Sudden Emergencies.

A motorist confronted with a sudden emergency created by an approaching vehicle zigzagging across the highway is not held by the law to the wisest choice of conduct but is required to make such choice as a person of ordinary care and prudence, similarly situated, would have made. *Lamm v. Gardner*, 540.

§ 25. Speed in General.

Notwithstanding that the speed is within the statutory maximum, the operator of a motor vehicle is required to decrease speed as may be necessary to avoid collision with any person or vehicle when special hazards exist by reason of the width or condition of the highway or the exigencies of traffic, which statutory requirement is absolute. *Lamm v. Gardner*, 540.

§ 33. Pedestrians.

A motorist has the right to assume and act on the assumption that pedestrians crossing the street between intersections where no marked crosswalk has been established will recognize the motorist's right of way. *Grant v. Royal*, 366.

§ 35. Pleadings in Auto Accident Cases.

The complaints alleged that plaintiffs were guests in an automobile, traveling westwardly at a lawful speed on its right side of the highway, that two cars traveling easterly, close together, approached on a curve at excessive speed, that the first car was partly to the left of the center of the highway and sideswiped the car in which plaintiffs were riding, and that immediately thereafter it was struck by the second car, which was also partly over its center of the highway. *Held*: The allegations are sufficient to support the averments that plaintiffs were injured by the joint and concurring negligence of the drivers of the east-bound cars and to support the submission of an appropriate issue thereon. *Darroch v. Johnson*, 307.

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§ 36. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact of injury. *Lane v. Dorney*, 15; *Boyd v. Harper*, 334; *Grant v. Royal*, 366.

The doctrine of *res ipsa loquitur* does not apply to evidence showing merely that an automobile suddenly and for some unexplained reason ran off the highway and overturned, there being no evidence of excessive speed, reckless driving or failure to exercise reasonable control and lookout. *Ibid; Ivey v. Rollins*, 89.

§ 37. Relevancy and Competency of Evidence in General.

Photographs of the scene of the accident are properly admitted in evidence to explain and illustrate the testimony of the witnesses. *Boyd v. Harper*, 334.

Evidence as to the existence of a stop sign along a street on the west side of its intersection with another, and the existence of a metal post or portion thereof on the east side, is competent to be shown in evidence under the rule that the physical facts and other circumstances and conditions existing at the time and place of the collision are for the consideration of the jury on the question of due care; but evidence that a stop sign had been erected on the metal post on the east side of the intersection, that it had been removed, etc., is irrelevant on the question of the negligence of a motorist entering the intersection from the east, in the absence of evidence that such motorist knew that a stop sign had been erected there. *Tucker v. Moorefield*, 340.

Where the evidence does not disclose that defendant, who had parked his disabled car as far as possible on the shoulder of the road to his right, knew that the shoulder of the road a short distance away was sufficiently wide to permit the parking of the car entirely off the hard surface, evidence of such condition of the highway does not tend to establish negligence on the part of defendant in parking at the place selected by him, and the exclusion of a conclusion of a witness that the car could have been parked completely off the highway at such other point is not error. *Rowe v. Murphy*, 626.

§ 38. Opinion Evidence as to Speed.

Testimony of a witness that when the car driven by defendant passed the car in which the witness was riding defendant's car was traveling 50 to 60 miles per hour, and that from the way in which the car "pulled on away from us" and the flash of the car's tail lights, observed almost to the moment of the accident, the car was traveling 70 to 80 miles per hour, is competent, the weight to be given the witness' estimate of speed being a matter for the jury. *S. v. Hart*, 93.

Testimony of witness, who had observed a car approaching for a distance of some 75 to 100 yards, that the car was traveling at a speed of 60 miles per hour or more, is competent, its weight and credibility being for the jury. *Darroch v. Johnson*, 307.

Testimony of a witness that a vehicle was traveling some 65 m.p.h. is without probative value when it is made to appear that the witness' estimate of speed was based solely upon seeing the lights of such vehicle as it approached her from the opposite direction at night time. *Hudson v. Transit Co.*, 435.

It is competent for witnesses a quarter of a mile from the scene of the accident to testify that defendant's vehicle when it passed the witnesses was traveling approximately 70 m.p.h. and that the vehicle did not seem to slacken in speed before the collision, the witnesses having had an op-

AUTOMOBILES—*Continued.*

portunity to observe the speed of the car from the time it passed until the collision. *S. v. Bryant*, 720.

§ 39. Physical Facts at Scene of Accident.

In view of the great weight of the respective vehicles, the physical damage resulting from the collision in suit *held* not to establish as a matter of law that plaintiff's vehicle was being operated at such a high rate of speed as to constitute a violation of statute or the rule of the prudent man, plaintiff's vehicle being a ton and a half truck, loaded with cinders, and defendants' vehicle being a tractor-trailor with a load weighing some 33,000 pounds. *Beauchamp v. Clark*, 132.

Nonsuit on the ground that the physical facts at the scene of the accident speak louder than the testimony of the witnesses cannot be granted when conflicting inferences can be drawn from the physical facts, one consonant with plaintiff's evidence and the other consonant with that of defendant. *Hollowell v. Archbell*, 716.

§ 40. Declarations and Admissions.

A statement by defendant to the injured man's wife at the hospital, after the accident in suit, that he would take care of the matter because he was at fault, is not an admission of negligence, but is a mere conclusion. *Jones v. Hodge*, 227.

In an action by a passenger in a car against the driver thereof and the administrator of the driver of the other car involved in the collision, testimony of a declaration of plaintiff to the effect that she saw the other car zigzagging across the road is competent as against the driver of the car in which she was riding in support of plaintiff's contentions that such driver failed to take proper precautions to avoid collision in the emergency, although as against the administrator it is incompetent under. *Lamm v. Gardner*, 540.

Testimony of a declaration of plaintiff passenger to the effect that the collision would not have occurred if the driver of the car in which she was riding had stopped the vehicle is incompetent as a mere opinion or conclusion. *Ibid.*

§ 41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence tending to show merely that a person driving an automobile at a lawful speed along a dry paved highway, ran off the highway to his right just beyond a bridge, after a curve, causing the car to go over an embankment and overturn, killing two passengers therein, without any evidence of any obstruction or defect in the road, prior swerving of the car, traffic, or any unusual happening prior to the accident, *is held* insufficient to be submitted to the jury on the issue of the negligence of the driver as the proximate cause of the accident. *Lane v. Dorney*, 15.

To the same effect, *Ivey v. Rollins*, 89.

The physical facts at the scene of a collision cannot warrant nonsuit if they are not in harmony and diverse inferences can be drawn therefrom. *Beauchamp v. Clark*, 132.

§ 41c. Sufficiency of Evidence of Negligence in Passing Vehicles Traveling in Opposite Direction.

Conflicting evidence as to which vehicle was on wrong side of highway requires submission of the issue to the jury. *Beauchamp v. Clark*, 132.

The testimony of the witness, together with photographs admitted in

evidence for the purpose of explaining their testimony, as to a "dug" place in the center of the highway, marks on the shoulder, debris, glass and dirt on the highway, and the position of the cars after the accident, *is held* to leave in conjecture and surmise whether defendants' car was partially to the left of its center of the highway when it struck the car driven by plaintiff's intestate, and therefore nonsuit was properly entered in plaintiff's action for wrongful death based on asserted negligence in this respect. *Boyd v. Harper*, 334.

Defendant's allegations and evidence on his counterclaim tended to show that his intestate, operating her vehicle in a westerly direction, had stopped, with the vehicle standing entirely in the northern half of a street and turned on her signals indicating her intention of turning left into the parking area of a store on the south side of the street, that plaintiff, traveling east on his motorcycle at an excessive speed, failed to keep a proper lookout and was heading directly into the stationary vehicle, and that when plaintiff again looked to the front he attempted to stop but lost control and crashed into the front end of the automobile. *Held*: Nonsuit on defendant's counterclaim was erroneously entered. *Fox v. Albea*, 445.

§ 41g. Sufficiency of Evidence of Negligence at Intersections.

Evidence of defendant's negligence in failing to yield right of way at intersection held sufficient to be submitted to jury. *Downs v. Odom*, 81.

Evidence tending to show that a motorist slowed almost to a stop before entering an intersection, that she looked and did not see any vehicle approaching along the intersecting street, and that she proceeded into the intersection and was about half-way across when she saw defendant's car approaching from her right, that defendant's car entered the intersection without slowing down, that defendant did not look to his left and struck plaintiff's car when it was three-fourths across the intersection, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Ins. Co. v. Moore*, 351.

Negligence of driver turning left at intersection accross lanes of travel of vehicles having green light held sole proximate cause of collision. *Hudson v. Transit Co.*, 435.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian.

Evidence held not to disclose negligence in hitting pedestrian. *Grant v. Royal*, 366.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Plaintiff's testimony to the effect that she was traveling at a lawful rate of speed at night, and, blinded by the lights of a vehicle traveling in the opposite direction, failed to see an automobile standing without lights in her lane of travel until within approximately fifty feet thereof, and that she turned left, but was unable to avoid striking the left rear of the standing vehicle, precludes nonsuit on the ground of contributory negligence under the 1953 amendment to G.S. 20-141 (e). *Brooks v. Honeycutt*, 179.

§ 42e. Nonsuit for Contributory Negligence in Passing Vehicle Traveling in Same Direction.

Evidence tending to show that plaintiff attempted to pass defendants' vehicle on a four-lane highway at a cross-over to a store on the opposite side of the highway, in the absence of evidence that the place had been marked as an intersection by appropriate signs of the Highway Commission,

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held not to show contributory negligence as a matter of law so as to justify nonsuit. *Bennett v. Livingston*, 586.

§ 42f. Nonsuit for Contributory Negligence in Hitting Rear of Vehicle.

Where plaintiff's evidence is to the effect that defendant's car, traveling at a rapid speed in the same direction, pulled around and passed plaintiff's truck, and then, without signal, decelerated so rapidly that plaintiff could not avoid hitting the rear of defendant's car, the opposite side of the highway being blocked by an oncoming vehicle, *is held* not to disclose contributory negligence as a matter of law notwithstanding skid marks extending 66 feet from where plaintiff's vehicle stopped and the absence of skid marks back of defendant's vehicle, since under plaintiff's evidence the fact that he was following defendant's vehicle so closely was due to defendant's act in passing and cutting in ahead of him, and diverse inferences can be drawn from physical facts. *Hollowell v. Archbell*, 716.

§ 42i. Contributory Negligence in Taking Position of Peril on vehicle.

Fact that plaintiff's were standing on body of empty truck holding onto cab and sides does not raise issue of their contributory negligence in absence of evidence that such position was inherently or apparently dangerous, certainly when there is no evidence that such position could have been proximate cause of vehicle's overturning on curve. *Skinner v Jernigan*, 657.

§ 42g. Nonsuit for Contributory Negligence at Intersection.

Evidence held not to show contributory negligence of plaintiff as a matter of law in entering intersection. *Downs v. Odom*, 81.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

The evidence, considered in the light most favorable to the original defendants, *held* sufficient to carry the case to the jury on their cross action against the additional defendant joined for contribution. *Jordan v. Blackwelder*, 189.

The form of the issue as to whether the plaintiff's injuries were the result of the joint and concurrent negligence of defendants held unobjection on the facts of this case. *Darroch v. Johnson*, 307.

Negligence of driver turning left at intersection across lanes of travel of vehicles having green light held sole proximate cause of collision. *Hudson v. Transit Co.*, 435.

Evidence held not to justify nonsuit on ground of intervening negligence. *Lamm v. Gardner*, 540.

Negligence of one defendant in hitting rear of parked car held to insulate any negligence on the part of the other defendant in parking on highway. *Rowe v. Murphy*, 627.

§ 44. Sufficiency of Evidence to Require Submission of Contributory Negligence to Jury.

In determining the sufficiency of evidence to require the submission of contributory negligence to the jury, the court properly diregards evidence relating to a contention of contributory negligence not supported by allegation. *Skinner v. Jernigan*, 657.

Evidence that plaintiffs were standing on body of empty truck, holding on to cab and sides, without evidence that such position was inherently or apparently dangerous, is insufficient to raise issue of contrubutory negligence. *Ibid.*

AUTOMOBILES—*Continued.*

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Evidence held not to raise issue of last clear chance of motorist to avoid hitting old women crossing street. *Grant v. Royal*, 366.

§ 46. Instructions in Auto Accident Cases.

An instruction stating the principles of law involved in the action and the respective contentions of the parties, but failing to apply the principles of law to the various state of facts arising on the evidence, must be held for prejudicial error. G.S. 1-180. *Brooks v. Honeycutt*, 179.

The charge of the court in this case on the aspect of joint and concurrent negligence and proximate cause *held* without error. *Dorroch v. Johnson*, 307.

§ 47. Liabilities of Driver to Guests and Passengers.

Evidence held insufficient to show that passenger's fall from truck was caused by negligent operation of the truck. *Jones v. Hodge*, 227.

§ 49. Contributory Negligence of Guests or Passengers.

Where defendant driver does not allege that plaintiffs, passengers standing on the body of the truck, were guilty of contributory negligence in shifting their weight as defendant was turning a curve, so as to contribute to the truck's overturning upon the curve, the court properly disregards such element of contributory negligence in passing upon the sufficiency of the evidence to require the submission of the issue of contributory negligence to the jury. *Skinner v. Jernigan*, 657.

The fact that plaintiff passengers were standing on the body of an unloaded truck holding on to the cab and the sides of the truck, in the ababsence of any evidence showing circumstances indicating that such position was inherently or apparently dangerous, is insufficient to require the submission of the issue of the contributory negligence of plaintiffs to the jury. Further, even if it be conceded that such acts constituted contributory negligence, the taking of such position could not be a proximate cause of an accident occurring when the truck overturned on a curve because of excessive speed. *Ibid.*

Where the evidence tends to show that the truck overturned when the driver attempted to turn into a paved road from an intersecting dirt road at an excessive speed, that plaintiffs, standing on the body of the truck and holding on to the cab and sides of the truck, remonstrated with the driver about the excessive speed prior to the accident but had no opportunity to leave the truck prior thereto, the evidence is insufficient to support the submission to the jury of an issue of their contributory negligence. *Ibid.*

Under the facts of this case the act of plaintiff in voluntarily riding in car with defective brakes was not contributory negligence as a matter of law. *Johnson v. Thompson*, 665.

§ 52. Liability of Owner for Driver's Negligence in General.

Negligence of the employee cannot insulate the original negligence of the employer since the employer is also liable for the negligence of the employee under the doctrine of respondeat superior. *Johnson v. Thompson*, 665.

§ 54b. Liability of Owner to Passengers or Inviters of Driver.

Where the evidence discloses that plaintiff was the invited passenger in the car driven by the wife of the president of defendant corporation on a trip to deliver the car to defendant corporation for adjustment of the brakes

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as requested by the agents of defendant corporation, the plaintiff is a guest passenger in the car and not an unauthorized occupant, and defendant corporation is liable for injuries sustained as the result of the negligent operation of the car by its agent, though not for injuries willfully or maliciously inflicted. *Johnson v. Thompson*, 665.

§ 54f. Sufficiency of Evidence and Presumptions on Issue of Respondeat Superior.

G.S. 20-71.1 applies only to establish *prima facie* agency in those instances in which the vehicle causing damage is operated by a person other than the owner, and proof that the vehicle, driven by the wife, was registered in the name of the husband and wife or survivor, does not tend to establish that the wife was driving as agent of the husband, since the statute can have no application where the operator of the vehicle is the owner as shown by the registration. *Fox v. Albea*, 445.

Where evidence discloses that an employee was driving the vehicle registered in the name of the employer, and there is evidence that the employee was driving on the occasion in quetion on a purely personal mission without the knowledge or consent of the employer, the court by virture of G.S. 20-71.1, properly submits the issue of the employer's liability to the jury under instructions that if the jury should find that employee was engaged in a purely personal mission without the knowledge or consent of the employer the jury should answer the issue in the negative. *Skinner v. Jernigan*, 657.

A stipulation of the parties that the vehicle in question at the time of the accident was owned by defendant corporation is sufficient to take the issue of *respondeat superior* to the jury under the provisions of G.S. 20-71.1 in an action by a guest passenger to recover for the injuries resulting from the negligent operation of the car by an agent of the owner. *Johnson v. Thompson*, 665.

G.S. 20-71.1 did not change the elements prerequisite to liability under the doctrine of *respondeat superior*, and the injured party is still required to allege and prove that the operator of the car was the agent of the owner and that this relationship existed at the time and in respect of the very transaction out of which the injury arose, the effect of the statute being merely to make proof of ownership of the vehicle alone sufficient to take the case to the jury upon the issue, but not to impel an affirmative finding thereon. *Whiteside v. McCarson*, 673.

§ 54g. Instructions on Issue of Respondeat Superior.

Where plaintiff relies solely on the provisions of G.S. 20-71.1 on the issue of *respondeat superior* and introduces no evidence, but defendant introduces evidence tending to show that the driver was on a purely personal mission of his own at the time of the accident, there is no evidence upon which the court may instruct the jury in plaintiff's favor on the issue, and the court's explanation of the rule of evidence prescribed by the statute is sufficient, but as to the defendant's evidence the court is required, even in the absence of a request for special instructions to give explicit instruction applying defendant's evidence to the issue and charging that if the jury should find the facts to be as defendant's evidence tends to show the issue should be answered in the negative. *Whiteside v. McCarson*, 673.

§ 54h. Form of Issue of Respondeat Superior.

The submission of the issue of *respondeat superior* in the form of whether plaintiff was injured by the negligence of the employer, rather than whether

AUTOMOBILES—*Continued.*

the employee was an agent of the employer and acting within the scope of his agency in operating the automobile, will not be held prejudicial when the court's instructions on the issue clearly and accurately present the liability of the employer under the doctrine of *respondeat superior*. *Whiteside v. McCarson*, 673.

§ 55. Family Purpose Doctrine.

Where the husband is sought to be held liable under the family purpose doctrine for the alleged negligent operation of a vehicle by his wife, the uncontradictory evidence to the effect that the vehicle was registered in the name of the husband and wife, or survivor, that the wife alone negotiated the purchase and made the initial and installment payments out of her separate funds, earned in her separate employment, and that the husband had no control or supervision of the operation of the vehicle by his wife, justifies peremptory instructions in his favor on the question. *Fox v. Albea*, 445.

The "family purpose doctrine" applies to liability for the operation of an automobile in this state. *Small v. Mallory*, 570.

Evidence tending to show that the automobile in question was purchased by the wife and the initial payment made by her from her separate earnings, and the car was maintained for pleasure and convenience of both husband and wife *held* sufficient to be sumitted to the jury under the family purpose doctrine on the question of the wife's liability for the negligent operation of the car by the husband, notwithstanding evidence that the wife had not worked for some three years prior to the accident and that the money for installment payments for the financing and refinancing of the car was furnished by the husband. *Ibid.*

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Evidence tending to show that defendant stated immediately before the trip in question that if the car would not make 115 miles per hour from that point to a certain curve, he would give the car to his companion, that defendant thereupon drove the car, with his companion as a passenger, and that the car turned over on the hard surface at the curve, resulting in the death of the passenger, that the State Highway Commission had erected a 35 mile per hour speed zone before the curve in question, together with testimony of a witness that the car was traveling 70 to 80 miles per hour just prior to the wreck, *is held* sufficient to be submitted to the jury in a prosecution for involuntary manslaughter, and further, the opinion testimony as to speed, if accepted by the jury, is alone sufficient to support the verdict. *S. v. Hart*, 93.

Evidence tending to show that defendant was traveling approximately 70 m.p.h. on his left side of the highway, partly on the shoulders of the road, and ran into the right side of a vehicle approaching from the opposite direction on its right side of the highway, resulting in the deaths of two occupants of that car, *is held* amply sufficient to be submitted to the jury and to sustain a verdict of guilty of manslaughter. *S. v. Bryant*, 720.

§ 63. Prosecutions for Speeding.

The general maximum speed limit in this State is 55 miles per hour, and in a prosecution for speeding the court properly charges the jury to the effect that the operation of a motor vehicle at a speed greater than 55 miles per hour is a misdemeanor, since G.S. 20-141(b) (5) merely provides an exception to the general law in those instances in which the Highway Commission has erected appropriate signs giving notice of a maximum speed of not more than 60 miles per hour. *S. v. Brown*, 209.

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Evidence of identity of defendant as driver of speeding car held sufficient, *S. v. Corl*, 252.

BANKS AND BANKING

§ 9. Collection of Checks.

Evidence held to raise issue of fact as to whether bank of deposit was holder in due course or collecting agent of check deposited. *Bank v. Courtesy motors*, 466.

BILLS AND NOTES

§ 8. Endorsers.

The payee of a note is not called upon to elect whether to pursue his remedy against the maker or against the endorsers, but is entitled to call on the maker to pay the full amount of the debt and thereafter call upon the endorsers to pay any unpaid balance. *Paving Co. v. Speedways, Inc.*, 358.

Acceptance by payee of note of third person does not discharge endorsers on original note in absence of intent that second note should constitute payment. *Ibid.*

§ 9. Holders in Due Course.

Evidence held to raise issue of fact as to whether bank of deposit was holder in due course or collecting agent of check deposited. *Bank v. Courtesy Motors*, 466.

§ 17. Defenses and Competency of Parol Evidence.

Where a note and deed of trust contain an express promise by the makers to pay the sums loaned by the bank not in excess of a stipulated amount, the makers, in an action on the note for the amount loaned, may not defend on the ground that in prior negotiations it was agreed that they and their property should be liable for only that portion of the money borrowed by them individually, and that the corporation, which they controlled, would alone be liable for any credit extended on its behalf, since such agreement is in direct conflict with the writings. *Bank v. Slaughter*, 355.

Where bank of deposit is a purchaser and holder in due course of a negotiable cheque deposited by the payee, the bank can recover thereon as against the drawer who had stopped payment on the cheque, notwithstanding that the drawer had a complete defense as against the payee. *Bank v. Courtesy Motors*, 466.

Unless the negotiable instrument is void by application of statute, legal incapacity of the parties of contract, or fraud in the *factum*, a *bona fide* holder thereof in due course without notice holds title valid as against all the world, G.S. 25-58, free from any defense available as between the original parties. *Ibid.*

BROKERS AND FACTORS

§ 6. Right to Commissions.

Evidence tending to show that property was listed by the owners with plaintiff broker, that the broker procured a client interested in the property and advised the owners of the name of the client, and that the owners sold the property to the client at the agreed price before the broker had opportunity to complete the negotiations and show the property to the client, *is held* to preclude involuntary nonsuit in the broker's action for commission. *Cromartie v. Colby*, 224.

BROKERS AND FACTORS—*Continued.*

Broker is entitled to commissions notwithstanding mistake of purchaser that timber on land of another was included in purchase. *Tarlton v. Keith*, 298.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 1. Nature and Essentials of Remedy in General.

Where the purchasers of timber have in turn sold the timber to a third party, the remedy of rescission is not available to them, since they cannot put the parties *in statu quo*. *Tarlton v. Keith*, 299.

§ 4. For Mistake.

Unilateral mistake, unaccompanied by fraud, imposition, undue influence, or other equity, is insufficient to avoid a contract. *Tarlton v. Keith*, 299.

CARRIERS

§ 1. State and Federal Regulation and Control.

Evidence tending to show that the truck in question at the time of the collision was engaged in hauling the household goods of a customer from a municipality in this State to a municipality in another state, supports a finding that the truck was engaged in interstate commerce and under the authority if the I. C. C., notwithstanding the testimony of one witness that some automobile accessories were included in the load. *Ins. Co. v. Lambeth*, 1.

§ 5. Rates and Tariffs.

An order of the Utilities Commission granting an increase in intrastate rates of carriers upon its finding that such increase was necessary to give the carriers a reasonable return on their investment of properties used in their intrastate businesses, upon supporting evidence as to the proportion and valuation of the properties used in the intrastate business, operating costs, etc. conforms to G.S. 62-124, and will be upheld. *Utilities Com. v. S.*, 410.

COMPROMISE AND SETTLEMENT

Authority of the person negotiating a compromise settlement is necessary for the settlement to bar the alleged principle. *Beauchamp v. Clark*, 132.

Provisions of a policy of liability insurance authorizing insurer to make investigation, negotiation and settlement of any claim against insurer as it deems expedient, and including in its coverage a person driving the vehicle with the permission of insured, do not authorize insurer, in obtaining a compromise settlement with the other party involved in the collision for damage to the other vehicle, to settle the claim for serious personal injuries sustained by the person driving the insured vehicle with the permission of insured, even though he was advised by insurer's agent that insurer was going to settle the claim for damages to the other car, there being nothing to indicate that he was informed that insurer was planning to give away his claim for personal injuries, and it appearing that he consistently denied that he was at fault. *Ibid.*

An executed agreement terminating or purporting to terminate a controversy is a contract to be interpreted and tested by established rules relating to contracts. *Casualty Co. v. Teer Co.*, 547.

Where insurer and insured agree as to the amount of premiums due but there is controversy as to credits for refund of unearned premiums and premiums improperly collected, the acceptance by insurer of a check with covering letter making it clear that the check was in full settlement of the

account, settles the controversy, and evidence that insured had been reimbursed for the overpayment set out on the check as a deduction is properly excluded, the determinative question being whether a dispute existed between the parties as to the amount due at the time the check was given and accepted. *Ibid.*

A settlement made by insurer in liability policy providing that insurer might make such investigation and settlement of any claim as insurer deemed expedient, will not bar insured from thereafter maintaining an action to recover for personal injuries and property damage to his vehicle resulting from the collision when such settlement is made by insurer without the knowledge or consent of insured or over his protest. *Lampley v. Bell*, 713.

CONSTITUTIONAL LAW

§ 5. Separation of Powers.

The provisions of Chapter 634, Public-Local Laws 1916, sec. 6(f), authorizing the solicitors of the Recorders Courts of Robeson County to issue warrants of arrest are valid and are not in conflict with Article I, Section 8 of the Constitution of North Carolina, since the issuance of warrants does not involve the exercise of the supreme judicial powers within the meaning of that term as used in this section of the Constitution. *S. v. Furmage*, 616.

§ 6. Legislative Powers in General

The General Assembly has full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. *S. v. Furmage*, 616.

Matters of public policy are in the exclusive province of the General Assembly. *Ibid.*

§ 10. Judicial Powers.

Arguments that a proposed housing project should be permitted under the zoning regulations of the city because of the urgent housing needs, and *contra*, that it should be denied because of the annoyance and loss of property values which would result to land owners in the area, involve policy and relate to political and not legal matters, it being the function of the court to construe a zoning ordinance as written. *Chambers v. Board of Adjustment*, 195.

Every presumption is to be indulged in favor of the constitutionality of a statute. *S. v. Furmage*, 616.

§ 11. Police Power in General.

Neither the General Assembly nor a municipality may exercise the police power unless its exercise relates to the public health, safety, morals or general welfare. *S. v. Brown*, 54.

In the exercise of the police power by the State or by a municipal corporation, the thing required to be done must have a real and substantial relation to the object to be attained, otherwise it is an invalid exercise of the police power. *Ibid.*

§ 13. Police Power — Safety, Sanitation and Health.

G.S. 14-399, making it unlawful to place, temporarily or permanently, any trash, refuse, garbage, or scrapped motor vehicles within 150 yards of a hard-surfaced highway unless concealed from view of persons on the highway, with further provision that the statute should not apply to junk yards which are properly screened from the view of persons on the highways,

CONSTITUTIONAL LAW—*Continued.*

is held unconstitutional in that the requirements of the statute have no substantial relationship to the public health, safety, morals or general welfare, since the mere screening of the proscribed materials from the public view can relate only to aesthetic grounds which alone are insufficient predicate for the exercise of the police power. *S. v. Brown*, 54.

§ 17. Personal and Civil Rights in General.

A property owner is entitled to use his lands for any lawful purpose unless proscribed by valid restrictive covenant or prohibited by valid exercise of the police power. *S. v. Brown*, 54.

§ 23. Rights and Interests Protected by Due Process Clause.

An opportunity to be heard as an essential of due process applies with respect to an asserted tax liability. *Kirkpatrick v. Currie*, 213.

§ 24. What Constitutes Due Process.

A party whose rights have been infringed contrary to law is entitled to his day in court. *Willard v. Huffman*, 396.

Statutory provision precluding injunction against the collection of a tax unless assessed for an illegal or unlawful purpose, but permitting the taxpayer to pay a tax under protest and bring action to recover the monies so paid, accords the taxpayer due process and is constitutional. *Kirkpatrick v. Currie*, 213.

§ 25. Impairment of Obligations of Contract or Vested Right.

The statutory provision that fewer than three persons may acquire all the capital stock in a corporation without impairing its capacity to act as a corporation, G.S. 55-3.1, cannot be given retroactive effect so as to divest a party of his vested right to hold the individual stockholders liable in regard to a transaction transpiring prior to the effective date of the statute at a time when there were only two stockholders of the corporation. U. S. Constitution, Article I, Section 10, N.C. Constitution, Article I, Section 17. *Lester Brothers v. Ins. Co.*, 965.

§ 28. Necessity for and Sufficiency of Indictment.

A valid bill of indictment is required as an essential of jurisdiction in all prosecutions for crime originating in the Superior Court. *S. v. Bissette*, 514.

§ 29. Right to Jury Trial.

Evidence held to support finding that there was no racial discrimination in selection of grand jury. *S. v. Perry*, 119.

CONTRACTS

§ 1. Nature and Essentials of Contracts in General.

A contract is an agreement between two or more parties on sufficient consideration to do or refrain from doing a particular act. *Bank v. Slaughter*, 355.

§ 12. General Rules of Construction.

The heart of a contract is the intention of the parties. *Bank v. Courtesy Motors*, 466.

Where a contract is in writing and its terms are unambiguous, its construction and effect are questions for the court, and neither party may contend for an interpretation contrary to the express language of the agree-

CONTRACTS—*Continued.*

ment on the ground that the writing did not truly express his intent. *Casualty Co. v. Teer Co.*, 547.

§ 19. Novation and Substitution.

A novation is the substitution of a new contract for an existing valid contract by agreement of the parties, and ordinarily the parties must have intended that the new agreement should be in substitution for and extinguishment of the old. *Tomberlin v. Long*, 640.

Where a second contract deals with the subject matter of a prior contract between the parties so completely that its legal effect is to rescind or abrogate the prior agreement, the question of novation is one of law for the court, but where the second agreement does not show on its face that it must have been intended as a substitution for the prior agreement, and the facts relating to the intent of the parties are controverted, the question of intent is for the jury. *Ibid.*

Whether second agreement was intended as a substitution of prior contract held for jury on conflicting evidence. *Ibid.*

§ 26. Actions on Contracts — Competency and Relevancy of Evidence.

Where the terms of a contract are established, prior negotiations are merged therein, and evidence of the negotiations is incompetent to enlarge or restrict its provisions. *Bank v. Slaughter*, 355.

Parol evidence is incompetent to explain intent of party at variance with the unambiguous terms of the written agreement. *Casualty Co. v. Teer Co.*, 547.

CORPORATIONS

§ 1. Incorporations and Corporate Existance.

Prior to the effective date of G.S. 59-3.1 a corporation could not continue to exist as such with less than three stockholders. *Lester Brothers v. Ins. Co.*, 565. Therefore, when goods are purchased by a corporation having only two stockholders, the stockholders are individually liable therefore as partners. *Ibid.*

§ 2. Registration of Foreign Corporations.

Statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read *in pari materia*, but provisions of G.S. 1-79 and G.S. 55-118 relating to the residence of domestic and domesticated corporations have no application to foreign insurance companies, since G.S. 58-150 does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business. *Crain and Denbo, Inc., v. Construction Co.*, 106.

§ 4. Authority and Duties of Stockholders, and Directors.

The directors of a corporation are entrusted with the actual management of the corporate affairs by the shareholders, and no external authority should interfere with their exercise of the power so entrusted to them when the power is honestly exercised for the benefit of the corporation and all of its shareholders. *Belk v. Department Store*, 99.

§ 19. Dividends.

Courts will not interfere with the discretionary power vested in the directors of a corporation with respect to the declaration of dividends when such power is honestly exercised, but a court of equity will intervene only

CORPORATIONS—*Continued.*

when it is made to appear that the directors are acting in bad faith and clearly abusing their discretion for some ulterior and improper purpose. *Belk v. Department Store*, 99.

Our court will entertain an action to compel a foreign corporation to declare a dividend when the court has power to enforce a decree by order to a majority of directors who are residents of this State. *Ibid.*

§ 24. Contracts.

Under the provisions of G.S. 55-18, as rewritten by the Act of 1955, *ultra vires* is not available as a defense to a corporation in a suit against it by an outside contracting party to recover on a contract made with the corporation. *Everette v. Lumber Co.*, 688.

§ 25. Actions by or against Corporations.

A judgment *in personam* can be rendered against a foreign corporation only when it exercises its corporate functions within the State. *Belk v. Department Store*, 99.

COURTS

§ 3. Original Jurisdiction of Superior Courts in General.

There is a distinction between the power of a court of equity to exercise jurisdiction and the expediency of exercising its jurisdiction, and ordinarily a court of equity will not exercise its jurisdiction if it lacks the power to enforce its decree. *Belk v. Department Store*, 99.

The Superior Court is a court of statewide jurisdiction, and venue is not jurisdictional. *Crain and Denbo, Inc., v. Construction Co.*, 106.

§ 9. Jurisdiction of Superior Court after Judgments or Orders of Another Superior Court Judge.

Denial of motion to sit aside a default judgment does not preclude subsequent motion to set aside the judgment when the second motion is supported by evidence of meritorious defense not available at time of first motion. *Moore v. W O O W, Inc.*, 695.

§ 14. Jurisdiction of Courts Inferior to Superior Court.

The General County Court of Wilson County is given statutory jurisdiction of actions for divorce and alimony concurrent with that of the Superior Court. *Nelms v. Nelms*, 237.

It may try an action for divorce notwithstanding neither party is a resident of the county, the matter relating to venue and not jurisdiction. *Ibid.*

§ 18. Conflict of Laws — State and Federal Courts.

State Court has jurisdiction of action in tort for discharge in violation of Right to Work Act even though employer's business affects interstate commerce. *Willard v. Huffman*, 396.

Treasury regulations govern payment of U. S. Savings Bonds, but State Court may impose resulting trust on proceeds when serving co-owner had conveyed her rights therein by contract supported by consideration. *Tanner v. Ervin*, 602.

§ 20. Conflict of Laws — Laws of This and Other States.

In an action in this State involving an automobile accident in another state, the substantive law of the state in which the accident occured determines the cause of action and measure of damages, and the law of this

COURTS—*Continued.*

State governs in regard to matters of evidence, including the application of the doctrine of *res ipsa loquitur* and the joinder of causes. *Ivey v. Rollins*, 89.

CRIMINAL LAW

§ 9. Aiders and Abettors.

An aider and abettor cannot be convicted of a higher degree of the crime than the principal. *S. v. Hamilton*, 85.

§ 16. Jurisdiction and Venue — Degree of Crime

In a prosecution in a county not excepted from the provisions of G.S. 7-64, the Superior Court has original jurisdiction of misdemeanors and may try a defendant on a bill of indictment even when no warrant for such offense has been issued. *S. v. Brown*, 209.

§ 32. Burden of Proof and Presumptions.

While the State has the burden of establishing the *corpus delicti*, if the statute creating the offense contains an exception constituting a proviso and not a part of the description of the offense, the burden is on defendant to bring himself within the exception when relied on by him. *S. v. Brown*, 209.

§ 33. Facts in Issue and Relevant to Issues.

In a prosecution on a warrant charging a number of distinct criminal offenses in one count, the court is compelled to permit the introduction of evidence which is competent and pertinent on any of the charges. *S. v. Williamson*, 205.

Where it is in issue whether a person placed whiskey on defendant's premises with defendant's knowledge, testimony that defendant was seen in the presence of such other person on the day before the whiskey was found is material to the issue irrespective of whether such evidence was competent to contradict defendant's testimony. *S. v. Taylor*, 363.

§ 38. Evidence of Like Facts and Transactions.

Testimony of an expert as to the amount of powder burns left on white blotting paper when similar ammunition was fired from the death pistol at various distances is competent in explaining his testimony, based upon powder burns in deceased's clothing and in deceased's body around the wound, as to the distance the pistol was from deceased's body when the fatal shot was fired. *S. v. Atwood*, 141.

§ 52. Examination of Experts.

In a prosecution under G.S. 14-45, hypothetical questions asked an admitted medical expert witness, based upon a full and fair recital of all relevant and material facts theretofore introduced in evidence, as to whether the prosecutrix had had a miscarriage, and if so, what was the cause of it, *held* competent. *S. v. Perry*, 119.

§ 53. Medical Expert Testimony.

Expert may testify as to minimum distance pistol was away from body when fatal shot was fired, and as to angle of entry, and may illustrate testimony with his own person and testify as to experiments as to powder burns left in blotting paper when pistol was fired at varying distances. *S. v. Atwood*, 141.

§ 79. Evidence Obtained by Unlawful Means.

Where defendant aptly moves to suppress evidence on the ground that it was illegally procured, and the State is permitted to introduce in evidence, over defendant's objection, whiskey found during a search of defendant's home, and the State does not introduce the search warrant in evidence, or any evidence that the warrant was lost, or as to its contents, or that it was duly issued, a new trial must be awarded. *S. v. Cobb*, 234.

§ 85. Rule That Party May Not Discredit His Own Witness.

The State, in offereing in evidence statements of defendant that deceased had the pistol in his own hand and had himself fired the fatal shot, is not precluded from showing by the testimony of other witnesses that the facts in regard to the firing of the pistol were otherwise. *S. v. Atwood*, 141.

Where there is testimony that the intoxicating liquor in question was placed on defendant's premises by another, and defendant has testified that on the day before the whiskey was found on defendant's premises he had not been in the presence of such other person, testimony by a State's witness that on the day before the occurrence defendant was seen in the presence of such other person is competent as material to the issue as to whether the liquor was placed on defendant's premises with his consent, and whether the State was concluded by the defendant's testimony as to a collateral matter is inapposite. *S. v. Taylor*, 363.

§ 87. Consolidation and Severance of Courts for Trial.

Separate indictments for rape are properly consolidated for trial when the charges relate to successive rape of the same person by defendants, and each of the convicted defendants, in the presence of the others, confesses that in the presence of the others he had sexual intercourse with the prosecuting witness forcibly and against her will, since the crimes are the same and are so connected that evidence at the trial upon one of the indictments would be competent and admissible in the trial of the others. G.S. 15-152. *S. v. Bryant*, 113.

Where the evidence tends to show that defendant, the discovery of liquor on his premises being imminent, sped away in his car, leading the officers a chase at an illegal speed, the court may properly consolidate for trial a bill of indictment charging unlawful possession of non-taxpaid liquor and unlawful possession of such liquor for the purpose of sale with an indictment charging reckless driving and speeding. *S. v. Brown*, 209.

§ 90. Admission of Evidence Competent for Restricted Purpose.

The admission generally of evidence competent for a restricted purpose will not be held for error in the absence of a request by defendant at the time that its admission be restricted. *S. v. Corl*, 256.

§ 94. Expression of Opinion on Evidence by Court During Progress of the Trial.

The statutory prohibition against an expression of opinion on the evidence by the court in the hearing of the jury applies at any time during the trial, and whether the language of the court amounts to an expression of opinion on the facts is to be determined by its probable meaning to the jury and not by the motive of the judge. G.S. 1-180. *S. v. Williamson*, 205.

In this prosecution for violations of the liquor laws, the court, in explaining its ruling admitting testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's

house, stated that "they both go hand in hand." *Held*: The statement of the court must be held prejudicial as intimating that evidence of the intimacy of the girls and men was direct proof of liquor dealings by defendant. *Ibid.*

A statement by the court at the conclusion of the evidence that counsel might argue the case but that the court was going to instruct the jury peremptorily, must be held for prejudicial error as a prohibited expression of opinion as to whether a fact had been fully or sufficiently proven. Such statement may not be held harmless even when the evidence is sufficient to support a peremptory instruction, since a peremptory instruction should be given directly to the jury at the proper time in the orderly progress of the trial and not during a discourse with attorneys in the presence of the jury. *Ibid.*

§ 99. Consideration of Evidence on Motion to Nonsuit.

On defendant's motion to nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *S. v. Corl*, 252.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Discrepancies and contradictions, even in the testimony of the prosecuting witness, do not justify nonsuit, but are for the jury and not the court to resolve. *S. v. Bryant*, 113.

§ 103. Withdrawal of a Count or Degree of Crime from Jury.

The act of the court in submitting to the jury only one count in the bill of indictment has the effect of a directed verdict of not guilty on the other count contained therein. *S. v. Cobb*, 234.

§ 114. Instructions on Right of Jury to Recommend Life Imprisonment.

In a prosecution for murder in the first degree it is prejudicial error for the court, after giving correct instructions on the discretionary right of the jury to recommend life imprisonment, to charge further on the contentions of the State that in view of the manner in which the offense was committed the jury should not recommend life imprisonment. *S. v. Pugh*, 278.

§ 116. Additional Instructions after Initial Retirement of Jury.

The court may not give additional instructions as to a defendant against whom the jury has brought in a sensible, responsive verdict, and additional instructions as to the right of the jury to convict the other defendant of aiding and abetting held erroneous. *S. v. Hamilton*, 85.

§ 120. Acceptance or Rejection of Verdict.

The court, in the exercise of a limited legal discretion, may refuse to accept a verdict only when the verdict is incomplete, imperfect, insensible, repugnant or non-responsive to the issues or indictment. *S. v. Hamilton*, 85.

§ 133. Concurrent and Cumulative Sentences.

Where cumulative sentences are imposed upon convictions for separate offenses, the judgment in the second sentence should provide that it should begin at the expiration of the first sentence, and when the judgment merely provides that the sentence in each case should run consecutively and not concurrently with the other, without specifying the order in which the sen-

tences should be served, the cause must be remanded for proper sentences. *S. v. Corl*, 252; *S. v. Corl*, 258; *S. v. Corl*, 262.

§ 135. Suspended Sentences and Executions.

Where no error is found on the count upon which sentence is suspended, the judgment must be set aside and the cause remanded for proper judgment. *S. v. Taylor*, 363.

§ 149. Certiorari.

Certiorari allowed to correct sentence, it appearing that defendant's sentence was in excess of that allowed by law. *S. v. Fain*, 117.

§ 154. Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error to the action of the court in discharging certain jurors cannot be considered when the record fails to show any exception to the action of the court, since an assignment of error must be supported by an exception duly noted. *S. v. Corl*, 262.

§ 156. Exceptions and Assignments of Error to the Charge.

An assignment of error that the court failed to instruct the jury in accordance with the provisions of G.S. 1-180, is ineffectual as a broadside assignment of error. *S. v. Corl*, 256; *S. v. Corl*, 262.

Ordinarily an exception to an excerpt from the charge does not present asserted error of the court in failing to charge further on the same or another aspect of the case. *S. v. Taylor*, 363.

§ 159. The Brief.

Assignments of error not supported by any reason or argument or citation of authority in the brief are deemed abandoned. *S. v. Perry*, 119; *S. v. Corl*, 256; *S. v. Corl*, 262.

§ 161. Harmless and Prejudicial Error in Instructions.

Conflicting instructions upon a material point must be *held* prejudicial. *S. v. Fowler*, 595.

§ 162. Harmless and Prejudicial Error in Admission and Exclusion of Evidence.

Where the State introduces an exhibit without objection, but defendant's objection to testimony of witnesses in regard thereto is sustained, and the court charges the jury not to consider the exhibit or any evidence relating thereto, defendant's objection to the admission of the exhibit is untenable. *S. v. Atwood*, 141.

§ 164. Whether Error Relating to One Count Alone is Prejudicial.

Where concurrent sentences are imposed upon each of two counts contained in a bill of indictment, if no error is found in respect to the trial of one of the counts, exceptions relating to the other count need not be considered. *S. v. Booker*, 272.

§ 167. Review of Findings and Discretionary Orders.

Where the crucial findings of fact are supported by the evidence and support the court's conclusions of law, the order will not be disturbed even though the evidence is not sufficiently clear to justify a subordinate finding, and such subordinate finding will be amended in conformity with the evidence, and the order affirmed. *S. v. Perry*, 119.

CRIMINAL LAW—*Continued.*

Where the findings of the trial court are amply supported by the evidence, they will not be disturbed on the ground that some incompetent evidence was introduced, since it will be presumed that the court disregarded the incompetent evidence in making its findings. *Ibid.*

§ 169. Determination and Disposition of Cause.

Conviction of aider and abettor of graver offense that that of which principal was convicted held to require new trial. *S. v. Hamilton*, 85.

Where it appears on *certiorari* that defendant's sentence is excessive, both as to its maximum and its minimum, but that defendant has not served for a period in excess of that to which he might have been lawfully sentenced, the cause must be remanded for the imposition of a sentence not in excess of that authorized by law, and the defendant having been subsequently sentenced for escape with provision that the sentence should begin at the expiration of the prior sentence, the cause must then be remanded to the county in which the second sentence was imposed for appropriate sentence to begin at the expiration of the first. *S. v. Fain*, 117.

Where the record discloses that judgment imposing sentences for two separate offenses each provided that the sentences should be cumulative and should not run concurrently, the Supreme Court will take notice *ex mero motu* of the want of definite provision as to when each sentence should begin, and remand the cause for proper sentences. *S. v. Corl*, 252; *S. v. Corl*, 258; *S. v. Corl*, 262.

DEATH

§ 8. Nature and Grounds of Action for Wrongful Death.

In an action for wrongful death, plaintiff has the burden of showing negligence on the part of defendant and that such negligence was the proximate cause of the fatal injury. *Lane v. Dorney*, 15; *Jones v. Hodge*, 227.

§ 8. Distribution of Recovery in Actions for Wrongful Death.

While recoveries for wrongful death are not assets of the estate in the usual meaning of that term, they are to be distributed as provided for the distribution of personal property in case of intestacy. *Byerly v. Tolbert*, 27.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Ground of the Remedy.

Whether certain property had been dedicated to the public as a street may be determined in an action between the interested parties under the Declaratory Judgment Act. *Farmville v. Monk & Co.*, 171.

§ 2. Proceedings.

While an executor may maintain an action under the Declaratory Judgment Act for direction in the disposition of the estate, that Act does not empower him to appeal in his representative capacity from a judgment directing the disposition of the estate as between the beneficiaries and distributees, and which, therefore, does not adversely affect the estate. *Dickey v. Herbin*, 322.

DEDICATION

§ 1. Acts Constituting Dedication.

A conveyance of land describing its southern boundary as the center of a named street extended, without any reference to a plat or map, there being no street in existence at the southern boundary at the time of the

DEDICATION—*Continued.*

conveyance, is insufficient to show a dedication of any part of the land as a street, the reference to the street extended being merely word of description to make definite the location of the property line. *Farmville v. Monk & Co.*, 171.

If, at the time of the conveyance of land by registered deed calling for the center line of a named street extended as its southern boundary, there is no street existing along the southern boundary and no plat of the subdivision has been registered and no lots sold therein, persons thereafter purchasing lots in the subdivision may not maintain that the southern portion of the land lying south of the extension of the northern line of the street had been dedicated for street purposes, since neither the grantee in the deed nor any of its predecessors in title are in privity with the later purchasers of lots or could have induced them to buy in reliance upon the belief that the existing street would be extended. *Ibid.*

§ 2. Acceptance of Dedication.

A municipality is without power to accept an offer of dedication of a street which lies outside its territorial limits. *Farmville v. Monk & Co.*, 171.

§ 3. Withdrawal and Revocation of Dedication.

Where the owner of a subdivision outside the boundaries of a municipality, prior to the sale of any lots therein, conveys the fee to a northern portion thereof without any reference to a map showing streets, it withdraws such land from any contemplated dedication of a street or portion of a street along the southern boundary of the land conveyed, and neither the later recording of a map showing a street along the southern portion of the land conveyed, nor the later extension of the boundaries of the municipality to include the *locus in quo*, can have the effect of reviving any previous offer of dedication. *Farmville v. Monk & Co.*, 171.

DEEDS

§ 7. Delivery, Acceptance and Registration.

Both delivery of the deed and intention to deliver are necessary to a transmission of title, and when grantors retain possession under agreement that they should hold the instrument until payment of the balance of the purchase price, and the grantee dies before the purchase price is fully paid and the deed delivered, there is no delivery to the grantee and no title can pass to him. *Elliott v. Goss*, 185.

DESCENT AND DISTRIBUTION

§ 4. Time From Which Person Is in Esse for Purpose of Inheriting.

G.S. 35-45 and G.S. 28-154 contemplate that an after-born child of an intestate is entitled to share in his estate, both real and personal. *Byerly v. Tolbert*, 27.

G.S. 29-1(7) applies to the descent of realty and not to the distribution of personalty to an after-born child. Whether the statute relates solely to the descent of realty to collateral heirs, *quaere? Ibid.*

A child born to intestate's widow more than 280 days after intestate's death is presumed not to have been *en ventre sa mere* at the time of intestate's death, but this presumption may be rebutted by evidence tending to show that intestate was in fact the father of the child, although in the absence of such evidence the presumption is determinative. *Ibid.*

Whether the term of pregnancy may extend 322 days or more from the moment of conception is a proper subject of testimony by qualified med-

DESCENT AND DISTRIBUTION—*Continued.*

ical experts, and in a particular case, all relevant facts concerning the particular pregnancy may be considered by such experts as a basis for their opinions. *Ibid.*

Where the wife testifies that her husband was the father of her child, born more than 280 days after the husband's death, her testimony is sufficient evidence to require the submission to the jury of the question of whether the intestate was the child's father for the purpose of determining whether such child is entitled to a distributive share in the personalty of intestate, the burden of proof being upon such child to establish the affirmative of the issue by the greater weight of the evidence. *Ibid.*

DIVORCE AND ALIMONY

§ 6. Venue.

The statutory provision that in an action for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, relates to venue and is not jurisdictional. *Nelms v. Nelms*, 237.

Motion for change of venue as a matter of right must be made in writing within thirty days after service of summons, G.S. 1-125, and where, in an action for divorce instituted in a general county court of a county of which neither of the parties is a resident, defendant demurs to the complaint on the ground of want of juridiction but does not move for change of venue until after the expiration of thirty days from the service of summons, change of venue as a matter of right is waived. *Ibid.*

§ 18. Alimony without Divorce.

Findings of the court to the effect that the parties had been legally married, that defendant for the six months prior to the institution of the action had been an habitual drunkard and had wilfully failed to provide adequate support and maintenance for the plaintiff, and that defendant had wilfully abandoned plaintiff, *held* supported by competent evidence and sufficient predicate for the award of alimony *pendente lite*. *Hall v. Hall*, 275.

The findings of the court, upon the hearing of a motion for alimony *pendente lite*, are not binding upon the trial of the cause upon the merits and are not competent in evidence thereat. *Ibid.*

The amounts allowed for subsistence *pendente lite* and counsel fees are determinable by the trial court in its discretion and not reviewable in the absence of abuse of discretion. *Ibid.*

EASEMENTS

§ 5. Acquisition of Easement by Payment of Permanent Damages.

Where condition cannot be abated, permanent damages may be recovered for wrongful diversion of water by private company. *Wiseman v. Construction Co.*, 521.

EJECTMENTS

§ 7. Presumptions, Burden of Proof and Pleadings.

In an action for the recovery of possession of realty, the failure of the complaint to allege that plaintiffs had been seized and possessed of the premises at some time within twenty years prior to the institution of the action is not ground for demurrer, since G.S. 1-39 and G.S. 1-42 must be construed together, so that upon proof of title in plaintiffs the posses-

EJECTMENT—*Continued.*

sion of others, in the absence of proof that it was adverse, will be presumed to be under the legal title. *Elliott v. Goss*, 185.

ELECTRICITY

§ 3. Rates

The duty of the Utilities Commission to protect the public in reasonable service at just and reasonable rates also requires it to fix rates that are just and reasonable to power companies so that they will have sufficient earnings to enable them to give reasonable service, to expand and improve their facilities as necessary in the public interest, to meet their obligations, to pay their stockholders a reasonable rate, and to compete on the market for capital funds. *Utilities Com. v. Light Co.*, 421.

In a complaint proceeding attacking an order of the Utilities Commission putting into effect a fuel clause applicable to only one class of customers and affecting only a few of the company's rate schedules, the Utilities Commission, upon finding that the fuel clause is not discriminatory, unjust or unreasonable, may consider evidence and find facts in regard to the necessity for the insertion of the fuel clause and as to the sufficiency or insufficiency of the applicable rates thereunder, and has the power to either increase or decrease the base price of the fuel upon which the rates are computed in accordance with exigencies of the financial condition of the power company in a hearing under the provisions of G.S. 62-72, without applying the procedure outlined in G.S. 62-124, and its order retaining the fuel clause, with modification of the base price of fuel, will not be disturbed when its findings are supported by competent, material and substantial evidence. *Ibid.*

EMBEZZLEMENT

§ 1. Nature and Elements of the Offense.

Where the relationship between the parties is that of debtor and creditor and not that of employee and employer, the debtor cannot be guilty of embezzlement of any funds due on the account. *Gray v. Bennett*, 707.

EMINENT DOMAIN

§ 1. Nature and Extent of Power in General.

Our Constitution guarantees payment of compensation for property taken by sovereign authority. Art. I, s. 17. *Braswell v. Highway Com.*, 508.

§ 2. Acts Constituting "Taking" of Property.

Diversion of the natural flow and drainage of streams and surface waters incident to the construction of a highway, resulting in the periodic flooding of the lands of a proprietor, is a "taking" of property for which just compensation must be paid. *Braswell v. Highway Com.*, 508.

§ 5. Measure of Compensation.

Just compensation for the taking of a part of a tract of land is to be measured by the difference between the fair market value of the property as a whole immediately before and the fair market value of the remainder immediately after the appropriation, and in arriving at this difference consideration must be given to the value of the land taken considered as an integral part of the entire tract, and to the general and special benefits accruing to the landowner with respect to the land not taken. *Barnes v. Highway Com.*, 378.

EMINENT DOMAIN—*Continued.*

Separate and independent parcels of land belonging to the same landowner may not be considered in assessing damages to lands not taken or in offsetting benefits resulting thereto. *Ibid.*

Whether two or more parcels of land of the same landowner constitute a single tract or separate and independent tracts for the purpose of assessing damages to lands not taken and the offsetting of special benefits, is one of law for the court, although where there is doubt as to the predicate facts the court may submit issues to the jury under proper instructions. *Ibid.*

Whether several parcels of land of the same landowner constitute but a single tract for the purpose of assessing damages to lands not taken and the offsetting of special benefits is to be determined according to the facts in each case upon the basis of unity of ownership, physical unity and unity of use. It is not required for unity of ownership that a party have the same quantity or quality of estate in all parts of the tract. Unity of use is often applied as controlling although it is limited to present use, and possible future uses may not be considered upon this question. *Ibid.*

Both parcels of petitioners' land held properly considered as a single tract for purposes of assessing special benefits. *Ibid.*

The fair market value of land as the basis for compensation is to be ascertained by assuming the existence of a buyer who is ready, able and willing to buy, but under no necessity to do so. *Ibid.*

The fair market value of land within the rule of ascertainment of compensation is not limited to its value for the use to which the land was put at the time of the taking, but all capabilities of the land and its adaptability to other uses should be considered to the extent that such possible uses affects its then market value. *Ibid.*

It is error for the judgment for the amount fixed by the jury as compensation in condemnation proceedings to award interest from the date the condemnation proceedings were instituted, since it will be assumed that the jury in fixing the amount of the damages included therein any interest properly recoverable, and on appeal the judgment will be amended by striking out the item of interest but will stand for the amount assessed by the jury with interest from the rendition of the judgment. *Board of Education v. McMillan*, 485.

§ 6. Evidence of value.

Petitioners' land consisted of fields and woodland situated within the limits of a municipality and surrounded by high-type residential properties and business areas. *Held*: The fair market value of the land is not limited to its value as undeveloped land, and petitioners were entitled to show that the land was suitable and available for division into lots for business and residential purposes as a prospective use affecting its market value. *Barnes v. Highway Com.*, 378.

Even though the adaptability of undeveloped land to use for residential and business purposes is so feasible as to affect its present market value, and it is competent for witnesses to testify as to its present market value taking into consideration such prospective uses, it is not competent for the jury to consider such undeveloped tract as though a subdivision thereon were an accomplished fact, and witnesses may not testify as to its speculative value based on the aggregate value of all possible lots less the cost of development. *Ibid.*

Even though the adaptability of undeveloped land to use for residential and business purposes is so feasible as to affect its present market

value, a map of the property showing the land divided into lots is not competent as substantive evidence but is competent solely for the purpose of illustrating and explaining the testimony of the witnesses as to the adaptability of the land to such uses. *Ibid.*

It would seem that the reasonable probability that petitioners' land not taken would be rezoned is competent on the question of special benefits thereto resulting from the taking of a part of petitioners' property for highway purposes. *Ibid.*

Whether the price paid in a voluntary sale of nearby property is competent in ascertaining the fair market value of land taken in eminent domain proceedings depends upon whether the two tracts are sufficiently similar for the value of one to be relevant in ascertaining the value of the other, which is a question to be determined in the sound discretion of the trial judge upon the *voir dire*, and exclusion of such evidence in this case is upheld, it appearing that the two tracts were markedly dissimilar in nature, condition and zoning classification. *Ibid.*

An expert who has testified in condemnation proceedings as to the value of the petitioners' land may be cross-examined with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but such cross-examination must be controlled and confined within the rules of competency, relevancy and materiality, and testimony of the witness' appraisal of a dissimilar contiguous tract while competent to impeach the witness' testimony, is incompetent for the purpose of establishing the value of the tract condemned. *Ibid.*

The action of the trial court in sustaining an objection to a question asked an expert witness on cross-examination whether he had not appraised another parcel of land in the vicinity for a stipulated price will not be held for error when the two tracts are so dissimilar that the value of one is not competent and relevant in establishing the value of the other and appellants are given opportunity to cross-examine the witness in regard to the basis of his separate appraisals, it being apparent that appellants, under the guise of cross-examination, were attempting to get before the jury the specific amount of the appraisal of the other tract for the purpose of inducing a more liberal award. *Ibid.*

§ 7b. Proceedings to Take Land for School Sites.

Under G.S. 40-12 allegation that the agency or corporation seeking to acquire land by condemnation had made a *bona fide* attempt to purchase the land by agreement is jurisdictional but presents a question to be decided in the first instance by the clerk, subject to review by the judge, and does not raise an issue of fact for the jury. *Board of Education v. McMillan*, 485.

Where the court finds upon supporting evidence that petitioner negotiated for the purchase of the land and that respondents stated they would not sell at any price, its conclusion that petitioner had complied with the provisions of G.S. 40-12 will not be disturbed, notwithstanding the absence of evidence that petitioner ever made a specific offer, since the law does not require the doing of a vain thing. *Ibid.*

The Court's finding that the petitioner, prior to the institution of condemnation proceedings, negotiated in good faith for the purchase of the property, *held* supported by ample, competent, evidence, and is conclusive. *Board of Education v. Mann*, 493.

§ 9. Exception to Report, Appeal and Trial in Superior Court.

In proceedings to condemn land, the burden is properly placed upon re-

EMINENT DOMAIN—*Continued.*

spondents to prove their damages by the greater weight of the evidence. *Board of Education v. McMillan*, 485.

Where the evidence discloses that the Highway Commission, incident to the construction of a new highway, diverted the flow of a stream and altered the drainage of the land, conflicting evidence as to whether such diversion resulted in the periodic flooding of petitioners' land or whether such flooding was the result of excessive rains, etc. takes the issue to the jury. *Braswell v. Highway Com.*, 508.

A charge to the effect that the petitioner is entitled to recover all damages resulting from the taking, past and future, will not be held prejudicial for failure to include present damages when, construing the charge as a whole, such failure is inconsequential. All damages incurred up to the present moment are encompassed in the term "past damages" and all damages incurred after the present moment are included in the term "future damages." *Taylor Co. v. Highway Com.*, 533.

An instruction to the effect that the market value of property taken by eminent domain should be measured by what the property would bring in voluntary sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of buying, will not be held prejudicial for failure to charge that the buyer must be one desiring to buy, when it appears from the entire charge, construed contextually, that the jury could not have been misled but must have understood that the market value was to be determined by what the property would bring by a willing seller, not required to sell, to a wanting buyer, not required to buy. *Ibid.*

§ 13. Time of Passage of Title.

Where petitioner by stipulation and the introduction of evidence elects to try his case on the theory that the "taking" occurred on a particular date, petitioner will not be allowed to attack the verdict on the ground that the taking occurred at a later date when the value of the property had increased. *Taylor Co. v. Highway Com.*, 533.

ESTATES

§ 7. Sale of Estates for Division or Reinvestment.

Prior to the enactment of G.S. 44-11 permitting the payment to the life tenant of the value of her estate, it would seem that upon application for sale for reinvestment of an estate subject to remainders the court could only determine the estates which the several parties had in the land and the desirability of sale and reinvestment of the entire proceeds. *Menzel v. Menzel*, 649.

§ 9. Joint Estates and Survivorship in Personalty.

Treasury Regulations in effect at the time of the purchase of U. S. Savings Bonds become a part of the bonds as a contract between the purchasers and the Federal Government, and therefore where such bonds are issued in the name of two individual co-owners in the alternative, the surviving co-owner is vested with the sole ownership of such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor, and no State court can compel the U. S. Treasury to pay them to anyone else or recognize anyone else's interest in them except as expressly provided by the Treasury Regulations. *Tanner v. Ervin*, 602.

But State court may impress proceeds with resulting trust where surviving co-owner had conveyed her rights by contract. *Ibid.*

ESTOPPEL

§ 4. Equitable Estoppel.

Where, in the negotiations for the purchase of timber, the seller's agent points out certain timber as standing on defendant's land, but, by mistake, a part of the timber shown is actually on land of an adjacent tract, the fact that the purchaser, in reliance upon the representation that all of the timber stood upon the seller's land, has his own attorney prepare the timber deed from the description of the land owned by the seller does not estop the purchaser from suing for the deficiency as money had and received, since nothing in the deed indicated that the timber in controversy was not in fact on the seller's land, and the doctrine of *caveat emptor* is not applicable. *Dean v. Mattox*, 246.

The doctrine of equitable estopped requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. *Nowell v. Tea Co.*, 575.

EVIDENCE

§ 1. Judicial Notice of Official Facts of this State.

Our courts will take judicial notice of the incumbent of the office of sheriff of a county of this State. *Morton v. Ins. Co.*, 722.

§ 4. Presumptions in General.

An adjudication of mental incompetency raises no presumption of mental incapacity anti-dating the adjudication. *In re Will of Knight*, 634.

§ 11. Transaction or Communications with Decedent.

In an action by a passenger in a car against the driver thereof and the administrator of the driver of the other car involved in the collision, testimony of a declaration of plaintiff to the effect that she saw the other car zigzagging across the road is competent as against the driver of the car in which she was riding in support of plaintiff's contentions that such driver failed to take proper precautions to avoid collision in the emergency, although as against the administrator it is incompetent under G.S. 8-51. *Lamm v. Gardner*, 540.

§ 15. Relevancy and Competency in General and Res Inter Alios Acta.

Where evidence is competent against one party it cannot be excluded because it is incompetent as to another party, but the evidence must be admitted and its admission restricted. *Lamm v. Gardner*, 540.

In an action on a liability insurance policy by the injured third person, another liability policy issued by another insurer to another joint *tort feasor* also liable for the damages in suit, is properly excluded. *Squires v. Ins. Co.*, 580.

§ 16. Similar Facts and Transactions.

An adjudication of mental incompetency raises no presumption of mental incapacity anti-dating the adjudication but is competent as evidence upon the question provided such adjudication is rendered within reasonable proximity in time to the date in question, and whether it is within a reasonable time is a question addressed to the sound discretion of the trial court, to be determined upon the facts and circumstances of each particular case. *In re Will of Knight*, 634.

EVIDENCE—*Continued.*

§ 20. Competency of Allegations of Pleadings in Evidence.

Allegations in the complaint as against one defendant, who failed to file answer after service of summons and complaint, which allegations are admitted by the other defendant, are competent in evidence against such other defendant. G.S. 1-159. *Rowe v. Murphy*, 627.

Allegations of the answer which are denied by plaintiff are properly excluded on plaintiff's objection. *Ibid.*

§ 23.1. Testimony of Telephone Conversations.

The admissibility of a telephone conversation is governed by the same rules of evidence which govern the admission of oral statements made in face to face conversations except that the party against whom conversation is sought to be used must be identified. *Everette v. Lumber Co.*, 688.

Where the witness identifies the voice in a series of telephone conversations as one and the same, and in one of the conversations the witness placed the call for the person against whom the conversation is sought to be introduced, and the person answering so identified himself, and on another occasion the witness was advised that the person called was out of his office and would call back later in the day, and that a person identifying himself as the antiphonal party did call back that day, with further testimony of the antiphonal party that he made one of the calls to the witness, there is ample identification of the antiphonal speaker. *Ibid.*

It is not a prerequisite to the admission of evidence of a telephone conversation that the antiphonal party be first identified, but the court in its descretion may admit the evidence subject to later identification. *Ibid.*

§ 24. Public Records and Documents.

An unverified and unsigned excerpt from the reporter's purported transcript of the testimony of a party before the clerk at a hearing on a motion in the cause is properly excluded when there is no testimony that the party made the statements attributed to him in the purported transcript and there is no identification of the transcript by the person who purportedly prepared it. *Sledge v. Wagoner*, 559.

A purported affidavit of a party is properly excluded when there is no testimony tending to identify the signature to the writing as that of the party. *Ibid.*

§ 26. Best and Secondary Evidence of Writings.

The judgement in a lunacy proceeding is itself the best evidence of its contents, and testimony of a witness in regard thereto is properly excluded in a *caveat* proceeding predicated upon mental incapacity of the testatrix. *In re Will of Knight*, 634.

§ 27. Parol on Extrensic Evidence Affecting Writings.

Where the terms of a contract are established, prior negotiations are merged therein, and evidence of the negotiations is incompetent to enlarge or restrict its provisions. *Bank v. Slaughter*, 355.

§ 29. Admission and Declarations.

A statement by defendant to the injured man's wife at the hospital, after the accident in suit, to the effect that he would take care of the matter because he was at fault, is not an admission of negligence, but amounts to nothing more than a conclusion, and is insufficient to take the issue of negligence to the jury when such conclusion is not actually borne out by the facts in evidence. *Jones v. Hodge*, 227.

EVIDENCE—*Continued.*

A declaration of plaintiff that the accident would not have occurred if the driver had stopped the car upon seeing the other car approaching held incompetent as a mere conclusion. *Lamm v. Gardner*, 540.

§ 31. Admissions or Declarations of Agents.

A declaration of an alleged agent is incompetent to establish the fact of agency or its scope. *Sledge v. Wagoner*, 559.

This suit was instituted to recover for injuries in a fall resulting when the cuff of plaintiff's trousers caught in the protruding rod of a magazine rack in a restaurant. Plaintiff offered evidence of a statement made by defendants' agent some five or six minutes after the fall to the effect that the agent said he was going to move the rack before somebody else got hurt and that it ought to have been moved before as is was too close to the door. *Held*: The declaration of the agent amounted to a mere expression of opinion as to what should have been done and as to what should be done in the future, and was not a part of the *res gestae* and, therefore, was properly excluded. *Ibid.*

§ 35. Opinion Evidence in General.

Testimony of a witness that he would not have fallen over a ridge of dirt if additional dirt had not been put along the ridge is properly stricken as a conclusion. *Boldridge v. Construction Co.*, 199.

Testimony of a declaration of plaintiff passenger to the effect that the collision would not have occurred if the driver of the car in which she was riding had stopped the vehicle is incompetent as a mere opinion or conclusion. *Lamm v. Gardner*, 540.

§ 44. Medical Expert Testimony.

Whether the term of pregnancy may extend 322 days or more from the moment of conception is a proper subject of testimony by qualified medical experts, and in a particular case, all relevant facts concerning the particular pregnancy may be considered by such experts as a basis for their opinions. *Byerly v. Tolbert*, 27.

§ 58. Cross-Examination.

The right to cross-examine a witness upon every phase of his examination in chief is an absolute right and not a privilege, but nevertheless such cross-examination must be controlled and confined within the rules of competency, relevancy and materiality, and party is not entitled to introduce incompetent evidence under the guise of cross-examination. *Barnes v. Highway Com.*, 379.

EXECUTORS & ADMINISTRATORS

§ 12. Dealings by Personal Representative with the Estate.

Purchase by personal representives at foreclosure of mortgage executed by testator will not be set aside when at the time of the role the estate had been settled except for the mortgage and the court has confirmed the sale with knowledge of the facts. *Bolton v. Harrison*, 290.

§ 20. Claims on Notes and Mortgages.

Where the mortgager dies instate after decree of foreclosure but prior to confirmation, the mortgager's heirs at law, to whom the land descends subject to be sold to make assets to pay debts, are necessary parties and are entitled to be heard as to whether the sale by the commissioners should be confirmed, and as to heirs who are not made parties the court is with-

EXECUTORS & ADMINISTRATORS—*Continued.*

out juridiction to decree confirmation, and such heirs are entitled to set aside the foreclosure and to an adjudication that they own their proportionate part of the lands subject to outstanding liens. *Baker v. Murphrey*, 346.

FRAUD

§ 4. Knowledge and Intent to Deceive.

Scienter and intent to deceive are essential elements of an action for fraud. *Tarlton v. Keith*, 298.

Evidence tending to show that brokers, in pointing out the land on which they had a timber option, through mistake, included timber growing on the land of another, but that the brokers stated there was some controversy as to one of the lines which would be cleared by a survey, *is held* insufficient to make out a cause of action against the brokers for fraud in inducing the purchase of the timber by plaintiffs, there being no evidence that the brokers acted in bad faith or knew that the boundaries pointed out by them were incorrect, or that the brokers represented the location of the boundaries as a positive assertion. *Ibid.*

§ 5. Reliance on Misrepresentation and Deception.

Where the false representations are not made to plaintiff and plaintiff does not rely thereon, plaintiff may not assert any rights based upon the fraud. *Lester Brothers v. Ins. Co.*, 565.

GRAND JURY

§ 1. Selection and Qualification.

Findings of fact by the trial court to the effect that persons of defendant's race were not excluded from the jury lists or from the grand jury because of race, and that there had been no racial discrimination in the selection of grand jurors, are conclusive on appeal if supported by competent evidence. *S. v. Perry*, 119.

A Negro objecting to a grand or petit jury because of alleged discrimination against Negros in its selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color. *Ibid.*

A Negro accused of crime has no right to demand that the grand or petit jury shall be composed in whole or in part of citizens of his own race nor has he the right to proportional representation of his race thereon, but only that Negroes not be intentionally excluded threfrom because of their race or color. *Ibid.*

HOMICIDE

§ 6. Manslaughter.

Involuntary manslaughter is the unintentional killing of a human being resulting from the performance of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the performance of a lawful act in a culpably negligent way, or from the culpably negligent omission to perform a legal duty. *S. v. Honeycutt*, 229.

§ 9. Self-Defense.

A defendant, when acting in his proper self-defense, may use such force only as is necessary or reasonably appears to him at the time of the fatal encounter to be necessary to save himself from death or great bodily

harm, the reasonableness of the apprehension of necessity to act and the amount of force required to be judged by the jury upon the facts and circumstances as they appear to defendant at the time of the killing. *S. v. Fowler*, 595.

§ 14. Relevancy and Competency of Evidence in General.

Where, in a homicide prosecution, defendant contends that deceased committed suicide, it is competent for an expert witness who has testified as to the angle the bullet entered the body of deceased, to stand up and point the pistol at his own body at such angle to demonstrate his testimony that it was physically difficult to get his arm in a position to shoot a bullet at such angle. *S. v. Atwood*, 141.

Where, in a homicide prosecution, defendant contends that deceased committed suicide, it is competent for an expert witness to testify from his examination of deceased's clothing, skin tissue taken from deceased's body, the pistol and the ammunition used, that the fatal shot was fired by a pistol not closer than 40 inches from deceased, and that the size of the wound of entry did not indicate a contact shot. *Ibid.*

Testimony of an expert as to the amount of powder burns left on white blotting paper when similar ammunition was fired from the death pistol at various distances is competent in explaining his testimony, based upon powder burns in deceased's clothing and in deceased's body around the wound, as to the distance the pistol was from deceased's body when the fatal shot was fired. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

The State's evidence tending to show that defendant intentionally shot deceased with a pistol, inflicting fatal injury, is sufficient to be submitted to the jury and support a conviction of murder in the second degree. *S. v. Atwood*, 141.

Evidence tending to show that defendant, after inspecting his gun to see if it needed cleaning, reloaded it and aimed it at a tree, and then turned to his left to go up the front steps, when the gun hit a porch post and discharged, fatally wounding deceased, who was standing on the porch, with no evidence that defendant intentionally pointed the gun at any person and with evidence negating malice, *is held* insufficient to be submitted to the jury in a prosecution for involuntary manslaughter. *S. v. Honeycutt*, 229.

§ 27. Instructions on Defenses.

An instruction on self-defense to the effect that defendant must be under actual fear or have reasonable grounds to fear that his wife was in danger and that he was in danger of great bodily harm *held* error or ambiguous, since the law does not require the defendant to show that he was actually in danger of death or great bodily harm. *S. v. Fowler*, 595.

An instruction to the effect that if defendant used more force than was necessary in his self-defense defendant would be guilty of manslaughter is erroneous. *Ibid.*

§ 29. Instructions on Right to Recommend Life Imprisonment.

In a prosecution for murder in the first degree it is prejudicial error for the court, after giving correct instruction on the discretionary right of the jury to recommend life imprisonment, to charge further on the contentions of the State that in view of the manner in which the offense

HOMICIDE—*Continued.*

was committed the jury should not recommend life imprisonment. *S. v. Pugh*, 278.

HUSBAND AND WIFE

§ 5. Contracts and Conveyances between Husband and Wife.

A deputy clerk has authority to take the certificate of a married woman in a conveyance by her to her husband. *Baker v. Murphrey*, 346.

§ 11. Construction and Operation of Separation Agreements.

Husband and wife purchase U. S. Savings Bonds, Series E, with money owned and jointly earned by them. The bonds were issued in their names in the alternative. Thereafter they entered into a separation agreement pursuant to which the husband transferred and conveyed to the wife his interest in their joint business, home and certain personal property and in which it was agreed that the husband should have the Savings Bonds and joint checking accounts. The husband died having in his possession the Savings Bonds. *Held*: While only the surviving wife may cash the bonds, when the bonds are cashed the contract between the Federal Government and the purchasers is completely executed and the Federal Government has no further interest therein, and the State court will impress a resulting trust on the proceeds of the bonds and direct that the wife deliver the proceeds to the husband's executor in accordance with her conveyance of the bonds to him during his lifetime for a valuable consideration in the separation agreement. *Tanner v. Ervin*, 602.

§ 15. Nature and Incidents of Estates by Entireties.

In an estate by the entireties, husband and wife are each seized of the entire estate and neither owns a divisible interest. *Edwards v. Arnold*, 500.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrants.

The Constitution of North Carolina does not designate officials who are or may be clothed with authority to issue warrants, and therefore the General Assembly may designate such officials. *S. v. Furmage*, 616.

The provisions of Chapter 634, Public-Local Laws 1916, sec. 6(f), authorizing the solicitors of the Recorders Courts of Rebeson County to issue warrants of arrest are valid and are not in conflict with Article I, Section 8 of the Constitution of North Carolina, since the issuance of warrants does not involve the exercise of the supreme judicial powers within the meaning of that term as used in this section of the Constitution. *Ibid.*

§ 8. Joinder of Counts, Merger and Duplicity.

Where a warrant charges a number of distinct criminal offenses in one count, defendant may in apt time move to quash on the ground of duplicity, in which event the solicitor may either take a *nol pros* as to all but one charge and proceed to trial thereon, or he may move for leave to amend the warrant and state in separate counts the charges upon which he desires to proceed, provided they are originally set out in the warrant. G.S. 18-10. *S. v. Williamson*, 205.

§ 9. Charge of Crime.

An indictment must charge the offense with certainty so as to identify the offense, protect the accused from being twice put in jeopardy for the same offense, enable the accused to prepare for trial, and support judg-

INDICTMENT AND WARRANT—*Continued.*

ment upon conviction or plea, and it is required that the indictment state the essential facts and not mere conclusions. *S. v. Bissette*, 514.

§ 14. Time of Moving to Quash and Waiver of Defects.

Motion to quash the warrant for duplicity is addressed to the discretion of the court when the motion is not made until after plea, since failure to make the motion prior to plea waives the question of duplicity. *S. v. Williamson*, 205.

INJUNCTION

§ 2. Invasion of or Threat to Rights of Party Suing in General.

In a suit to restrain a county board of education from proceeding with plans for the purchase of a school site and to restrain the board of commissioners of the county from approving a contract therefor, the demurrer of individuals comprising the board of commissioners of the county and of the superintendent of the county schools is properly sustained when the amended complaint contains no allegations that any of these defendants acted or threatened to act in any manner whatsoever. *McLaughlin v. Beasley*, 221.

INSANE PERSONS

§ 2. Inquisition of Lunacy and Appointment of Guardian or Trustee.

The court is under duty to appoint a guardian *ad litem* for a defendant who is *non compos mentis* and who has no general guardian, and an inquisition to determine the sanity of the defendant is not a condition precedent to such appointment. G.S. 1-65.1. *Moore v. Lewis*, 77.

The court may appoint a guardian *ad litem* for a defendant who is *non compos mentis* upon application of any disinterested person, or the court may do so upon its own motion. *Ibid.*

Since the court has power to appoint a guardian *ad litem* for a person who is *non compos mentis*, the court also has power to remove such guardian, and when timely objection is made by the alleged incompetent, the court should afford him ample and adequate opportunity to be heard with respect to the need for a guardian *ad litem* and the fitness of the appointee. *Ibid.*

§ 3. Effect of Adjudication of Incompetency.

An adjudication of mental incompetency raises no presumption of mental incapacity anti-dating the adjudication but is competent as evidence upon the question provided such adjudication is rendered within reasonable proximity in time to the date in question, and whether it is within a reasonable time is a question addressed to the sound discretion of the trial court, to be determined upon the facts and circumstances of each particular case. *In re Will of Knight*, 634.

§ 10. Actions against Insane Persons and Validity of Judgments against them.

Mere failure to revoke appointment of guardian *ad litem* is not sufficient ground to avoid judgment in absence of showing of prejudice. *Moore v. Lewis*, 77.

INSURANCE

§ 1. Control and Regulation in General.

Compliance with G.S. 58-150 by a foreign insurance company gives it

INSURANCE—*Continued.*

the right to sue and be sued in our courts under the rules and statutes applicable to domestic corporations and designates the State Commissioner of Insurance its true and lawful attorney upon whom all lawful process against it may be served, but does not constitute Wake County the principal office of such company for the purpose of determining venue. *Crain and Denbo, Inc., v. Construction Co.*, 106.

Where dispute between insurer and insured as to the amount of premiums due is not based upon controversy as to the rates but solely as to credits for unearned premiums and overpayment of premiums, a compromise settlement cannot be avoided on the ground that it was contrary to public policy, since such compromise does not rest upon a charge of premiums at rates less than those prescribed by statute. *Casualty Co. v. Teer Co.*, 547.

§ 3. Construction and Operation of Policies in General.

A policy cannot be construed to give courage beyond its unambiguous terms unless the policy is reformed. *Ins. Co. v. Lambeth*, 1.

The unambiguous terms of a policy contract are to be taken in their plain, ordinary and popular sense. *Ins. Co. v. Shaffer*, 45.

Whether the terms of a policy of insurance are conflicting or ambiguous is a question of law for the court. *Squires v. Ins. Co.*, 580.

Ambiguities and conflicts in the provisions of an insurance contract are to be resolved against insurer. *Ibid.*

§ 7. Reformation of Policies.

A policy of insurance, in the same manner as other contracts, may be reformed by parol evidence for mutual mistake, inadvertence or mistake induced by fraud or inequitable conduct. *Ins. Co. v. Lambeth*, 1.

Evidence held sufficient to support findings by the court supporting judgment reforming policy for mutual mistake. *Ibid.*

§ 10. Due Date of Premium and Effective Date of Life Policy.

Where insured dies on the premium due date, the insurer is entitled to deduct the amount of the unpaid premium for the ensuing year from the face amount of the insurance in making settlement with the beneficiary, since the premium becomes due on the anniversary date of the policy notwithstanding that insured may pay the premium at any time on this date without incurring forfeiture, and notwithstanding the provisions of the policy that it should remain in effect for thirty-one days after its due date, the grace period not having the effect of keeping the policy in force without incurring liability for the premium. *Long v. Ins. Co.*, 590.

§ 25. Amount of Payment on Life Policies.

Where insured dies on the premium due date, the insurer is entitled to deduct the amount of the unpaid premium for the ensuing year from the face amount of the insurance in making settlement with the beneficiary, since the premium becomes due on the anniversary date of the policy notwithstanding that insured may pay the premium at any time on this date without incurring forfeiture, and notwithstanding the provisions of the policy that it should remain in effect for thirty-one days after its due date, the grace period not having the effect of keeping the policy in force without incurring liability for the premium. *Long v. Ins. Co.*, 590.

§ 27. Permanent and Total Disability.

Testimony held insufficient to show that employee was totally disabled at the time of discharge terminating her insurance. *Andrews v. Assurance Co.*, 476.

INSURANCE—*Continued.*

§ 34. Death or Injury by Accident or Accidental Means.

Plaintiff's evidence tending to show that insured was a taxicab operator, that he picked up a passenger, that several hours thereafter insured was found at a lonely place with a pistol wound in his back and above his left ear, his money, his pistol and his taxicab gone, that tire marks near the body showed that a vehicle had spun its wheels as it left the scene, and that the cab was later found some 22 miles away, *is held* insufficient to show that the death was the result of an accident within the coverage of the policy and does show an intentional and not an accidental killing within the exclusion clause of the policy, and nonsuit was proper. *Slaughter v. Ins. Co.*, 265.

§ 46. Actions on Accident Policies.

In an action on a policy to recover for death by external, violent and accidental means, the burden is on plaintiff to prove not only that the death resulted through external and violent means, but also that it resulted from accidental means, so as to bring his claim within the coverage of the policy, and, upon a *prima facie* showing by plaintiff, the burden is on insurer to relieve itself of liability by showing that insured's death was caused directly or indirectly by the intentional act of insured or any other person within the exclusion clause of the policy. *Slaughter v. Ins. Co.*, 265.

Where plaintiff, in a suit on an accident policy, fails to make out a case of coverage, nonsuit is proper, and if plaintiff's evidence establishes a defense in that the death resulted from a cause within the exclusion clause of the policy, nonsuit is also proper; if insurer's evidence not in conflict with that of plaintiff shows that plaintiff does not have a case or that insurer does have a complete defense, insurer's remedy is by motion for a peremptory instruction. *Ibid.*

§ 53. Collision Insurance — Payment and Subrogation.

Payment by insurer of the damage to insured's car, less $50 deductible under the policy, under agreement that the payment should be a loan without interest repayable only in the event of recovery against the tort-feasor, that insured should cooperate in prosecuting any claim against the tort-feasor and designating insurer as agent and attorney in fact to prosecute any such action, does not authorize insurer to maintain an action in its own name against the tort-feasor, since the claim not having been paid in full, insured continues to be the real party in interest. *Ins. Co. v. Moore*, 351.

§ 54. Vehicles Insured under Liability Policies.

An endorsement certifying that insurer had issued to insured a policy of liability insurance amended to provide coverage to third persons for injuries sustained when the vehicles of insured were being used under his franchise, regardless of whether such vehicles were specifically described in the policy or not, imposes liability on insurer for a trip under the franchise, notwithstanding the vehicle is not described in the policy. *Ins. Co., v. Lambeth*, 1.

An endorsement certifying that insurer had issued to insured a policy of liability insurance amended to provide coverage to third persons for injuries sustained when the vehicles of insured were being used under his franchise, regardless of whether such vehicles were specifically described in the policy or not, imposes liability on insurer for a trip under the franchise, notwithstanding the vehicle is not described in the policy. *Ibid.*

Where a policy of liability insurance does not describe a particular vehicle or extend its coverage to such vehicle, there can be no recovery by

insured for liability to third persons for injuries sustained in the collision of such vehicle, unless the policy is reformed. *Ibid.*

Where insured owns two automobiles covered respectively by policies with different insurers, each providing that the policy should also cover an automobile acquired by insured if it replaces the automobile insured, and insured thereafter acquires another car, which of the two cars the newly acquired car replaces is a mixed question of law and fact, the interpretation of the policy provisions in the light of the facts found being a matter of law for the court. *Ins. Co. v. Shaffer*, 45.

A replacement within the purview of a policy provision that the policy should cover an automobile acquired by the name insured if it replaces an automobile owned by him and covered by the policy, must be a vehicle acquired by insured after the issuance of the policy and during the policy period, and must replace the automobile described in the policy, which must be disposed of or be incapable of further service at the time of the replacement. *Ibid.*

Insured owned two automobiles respectively covered by policies with different insurers, each providing that the policy should also cover an automobile acquired by insured if it replaces the automobile insured. One policy was issued under a rating for operation by the insured and his minor son and the second policy was issued under a rating for operation only by males over 25 years of age. Insured thereafter traded in the second car for a newer car, and this newer car was involved in a wreck while being driven by insured's son. *Held*: The second policy provided liability coverage with respect to the accident under its replacement clause. *Ibid.*

Policy held to cover liability of insured for negligent operation of car by employee in scope of employment notwithstanding the car was owned by employee. *Squires v. Ins. Co.*, 580.

A provision in a policy that it should cover, in addition to the vehicle described, an automobile temporarily used by insured as a substitute while the described vehicle was withdrawn from normal use because of breakdown, repair, servicing, loss or destruction, *is held* not to cover a vehicle of insured's brother, used by insured on the trip because insured's vehicle was "low on gas." The word "servicing" imports at least the necessity for some mechanical adjustment before the car can be used in normal service. Further, in this case, insured was making the trip in company with his brother. *Ransom v. Casualty Co.*, 60.

Where insured and his brother lived in the house of their mother as members of one family, the use of the brother's car by the insured on a particular trip comes within the clause of a policy of liability insurance excluding from its coverage a car other than the one described in the policy and driven by insured, if such other car is furnished by a member of insured's household. In such instance, insured's brother is a member of the "household" within the definition of that word as used in the policy. *Ibid.*

§ 55. Territorial Limitations in Liability Policies.

As between insured and insurer, a policy can afford no protection to insured for liability to third persons injured in a collision more than fifty miles from where the vehicle is principally garaged when the policy expressly stipulates that the vehicles covered by the policy should be used exclusively within a radius of fifty miles. *Ins. Co. v. Lambeth*, 1.

The issuance of an endorsement and the filing of a certificate of insurance with the Utilities Commission stipulating that the liability of

insurer extended to all losses occurring on the route or in the territory authorized to be served by the insured, cannot enlarge the liability of insurer to third persons injured in a collision occurring while the vehicle of insured was being driven on a trip in interstate commerce, since the Utilities Commission did not purport, or have authority, to authorize the operation in interstate commerce. *Ibid.*

§ 57. Drivers Insured under Liability Policies.

The fact that the premium for a liability policy is paid under a rating for the operation of the insured vehicle by a male over 25 years of age will not be given the effect of excluding liability when the vehicle is being operated by the minor son of the insured, there being no provision in the policy excluding liability for accidents occurring while the vehicle is being operated by a person under 25 years of age. *Ins. Co. v. Shaffer*, 45.

§ 61½. Compromise and Settlement of Claim by Insurer.

Provisions of a policy of liability insurance authorizing insurer to make investigation, negotiation and settlement of any claim against insurer as it deems expedient, and including in its coverage a person driving the vehicle with the permission of insured, do not authorize insurer, in obtaining a compromise settlement with the other party involved in the collision for damage to the other vehicle, to settle the claim for serious personal injuries sustained by the person driving the insured vehicle with the permission of insured, even though he was advised by insurer's agent that insurer was going to settle the claim, there being nothing to indicate that he was informed that insurer was planning to give away his claim for personal injuries, and it appearing that he consistently denied that he was at fault. *Beauchamp v. Clark*, 132.

A settlement made by insurer in liability policy providing that insurer might make such investigation and settlement of any claim as insurer deemed expedient, will not bar insured from thereafter maintaining an action to recover for personal injuries and property damage to his vehicle resulting from the collision when such settlement is made by insurer without the knowledge or consent of insured or over his protest. *Lampley v. Bell*, 713.

§ 65. Rights of Injured Party against Insurer after Judgment against Insured.

Where judgment is obtained against insured in an action in which insurer participated, the judgment is conclusive on insurer as to the questions of agency and damages therein adjudicated, and, in the subsequent action by the injured third persons against insurer to recover the unpaid damage, the only defense available to the insured is that the policy does not cover insured's liability. *Squires v. Ins. Co.*, 580.

In an action on a liability insurance policy by the injured third person, another liability policy issued by another insurer to another joint *tort feasor* also liable for the damages in suit, is properly excluded. *Ibid.*

§ 66½. Adjustment of Loss between Insurers Liable.

The prorating of the recovery of an injured third party between the insurers liable on policies issued respectively to the *tort feasors* causing the injury, *held* not prejudicial. *Squires v. Ins. Co.*, 580.

§ 79. Forfeiture of Policy for Breach of Provision against Additional Insurance.

Where insured procures other insurance without advising or obtaining

the consent of the original insurer, insurer may avoid liability for breach of the provision of the policy prohibiting other insurance unless the amount thereof is inserted in the blanks provided, since breach of provision against additional insurance, both before and after the 1945 amendment (Chapter 378) to G.S. 58-176, does not merely limit the amount for which insurer should be liable, but is a breach of condition defeating recovery. *Hiatt v. Ins. Co.*, 553.

Where decree of alimony without divorce awards the wife property theretofore held by them by the entireties, the procurement of additional insurance on the property by the wife is a violation of the provision of the original policy prohibiting such additional insurance, even though the original insurance was procured by the husband, since the test of double insurance is whether the owner will be directly benefited by recovery on both policies in case of loss. *Ibid.*

§ 80. Knowledge of Breach and Waiver of Conditions.

The fact that insurer's adjuster continues investigation of the loss after learning of the procurement of additional insurance cannot constitute a waiver of the condition of the policy prohibiting additional insurance when such further investigation may be related to insurer's liability to the mortgagee named in the loss payable clause and also to insurer's liability under its policy insuring personal property in the insured dwelling. *Hiatt v. Ins. Co.*, 553.

INTOXICATING LIQUOR

§ 5. Possession and Possession for Sale.

While mere knowledge of defendant that intoxicating liquor is on his land does not establish as a matter of law that the whiskey is in defendant's constructive possession, if the whiskey is on defendant's premises with his knowledge and consent, he has constructive possession thereof while it remains on premises under his exclusive control. *S. v. Taylor*, 363.

§ 12. Competency and Relevancy of Evidence.

In a prosecution for possession of intoxicating liquor for the purpose of sale it is competent for the State, after introducing evidence that defendant possessed or sold liquor at his house, to introduce evidence as to the conduct and intoxication of persons found at defendant's house, even including testimony of a statement of the defendant that "he was running a whore-house in his back yard." *S. v. Williamson*, 204.

Where there is testimony that the intoxicating liquor in question was placed on defendant's premises by another, and defendant has testified that on the day before the whiskey was found on defendant's premises he had not been in the presence of such other person, testimony by a State's witness that on the day before the occurrence defendant was seen in the presence of such other person is competent as material to the issue as to whether the liquor was placed on defendant's premises with his consent, and whether the State was concluded by the defendant's testimony as to a collateral matter is inapposite. *S. v. Taylor*, 363.

§ 15. Instructions.

In this prosecution for violations of the liquor laws, the court, in explaining its ruling admitting testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's house, stated that "they both go hand in hand." *Held*: The statement of the court must be held prejudicial as intimating that evidence of the intimacy

INTOXICATING LIQUOR—*Continued.*

of the girls and men was direct proof of liquor dealings by defendant. *S. v. Williamson*, 204.

JUDGMENTS

§ 3½. Construction and Enforcement of Consent Judgments.

The courts, in construing the ambiguous language of a consent judgment, under like rule for the construction of statutes and ordinances, will consider all the facts and circumstances existing at the time of and leading up to the execution of the judgment and the objective or objectives to be accomplished thereby. *Board of Education v. Mann*, 493.

§ 17b. Conformity to Verdict, Proof and Pleadings.

The judgment must conform to the verdict of the jury in all substantial particulars. *Board of Education v. McMillan*, 485.

§ 17d. Inclusion of Interest.

Where the jury renders verdict in a stipulated sum for the amount plaintiff was forced to pay in reimbursement for timber cut from the lands of an ajacent owner, which, through mutual mistake, the parties thought was included in the timber purchased by plaintiff from defendant, judgment awarding interest on the verdict from the date of the payment by plaintiff is proper under the circumstances. *Dean v. Mattox*, 246.

§ 18. Process, Notice, Service and Jurisdiction.

The validity of a judgment *in personam* is dependent upon jurisdiction over the person of the defendant. *Belk v. Department Store*, 99.

The sheriff's return showing service raises a legal presumption of valid service, and stands unless such legal presumption is rebutted by evidence upon motion in the cause. *Bolton v. Harrison*, 290.

§ 25. Procedure to Attack Judgments.

Where the record shows service, the remedy to set the judgment aside for want of service is by motion in the cause. *Bolton v. Harrison*, 290.

The remedy to obtain relief from an erroneous judgment is by appeal or proceedings equivalent thereto taken in due time. G.S. 1-268, G.S. 1-269. *Menzel v. Menzel*, 649.

The remedy to obtain relief from an irregular judgment, including irregularities resulting from fraud, is by motion in the cause. *Ibid.*

The remedy to set aside a final judgment for fraud is by independent action, since the right to the relief depends upon extraneous facts which the parties are entitled to have found by a jury. *Ibid.*

Attack of a judgment by motion in the cause on the ground of want of proper service requires the court to examine the judgment roll to ascertain if on its face it showed proper service, and if the judgment roll would itself disclose vitiating irregularities in service without the necessity of the introduction of evidence *aliunde*, motion in the cause is the proper procedure. *Ibid.*

The procedure to attack a judgment rendered out of term and out of the county on the ground of want of consent to such hearing is by motion in the cause, since the question may be determined by the judgment roll and the court minutes without due necessity of evidence *aliunde*. *Ibid.*

§ 27a. Default Judgments.

On a motion to set aside a default judgment for excusable neglect, the

JUDGMENTS—*Continued.*

neglect of the attorney will not ordinarily be imputed to the client who is without fault. ***Moore v. W O O W, Inc.*, 695.**

A judgment by default final is properly set aside upon findings of excusable neglect and a meritorious defense. *Ibid.*

§ 27d. Irregular Judgments.

An irregular judgment is one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and such judgment may be set aside only upon a showing by defendant that he has a meritorious defense and has acted with due diligence. ***Menzel v. Menzel*, 649.**

In order to set aside for irregularities a judgment for the sale of land for reinvestment, the court must find that the irregularities materially prejudiced the rights of the movant, that movant acted with due diligence, and that she is entitled to the relief as against subsequent purchasers of the land, and all who were parties to the original action are entitled to notice and an opportunity to be heard. *Ibid.*

§ 27e. Fraudulent Judgments.

A judgment which is regular on the face of the record is not void for fraud but only voidable. *Menzel v. Menzel*, 649.

§ 32. Judgments as Bar to Subsequent Action in General.

The reversal of an order of the Utilities Commission because it was not supported by proper evidence does not preclude the filing a petition and offering evidence to support the order, the second having being but a continuation of the first and therefore true doctrine of *res judicata* not being applicable. *Utilities Com. v. S.*, 410.

The fact that a motion to set aside a default judgement is denied for want of evidence of a meritorious defense is not *res judicata* and does not preclude a subsequent motion to set aside the default judgment on the same ground when on the second motion movant introduces evidence of a meritorious defense which evidence was not available at the time of the hearing on the prior motion. *Moore v. W O O W, Inc.*, 695.

JUDICIAL SALES

§ 7. Title and Rights of Purchaser.

Where tax foreclosure proceedings under G.S. 105-392 are instituted in regard to land held by husband and wife by the entireties but the proceedings are solely against the husband without notice to the wife, the tax sale on the certificate-judgment is wholly ineffectual, since the wife is not bound thereby and the husband has no divisible interest in the property which is subject to execution. *Edwards v. Arnold*, 500.

Purchasers at a tax foreclosure sale and those claiming under them are charged with notice of vitiating defects appearing on the face of the record itself. *Ibid.*

JURY

§ 1. Competency, Qualifications and Challenges for Cause.

A defendant may not object to the acceptance of a juror when he has not exhausted his peremptory challenges before the panel is completed. G.S. 15-163. *S. v. Corl*, 258.

§ 3. Challenges to the Array.

A challenge to the array must go to the whole array or panel and will

JURY—*Continued.*

not lie on the ground that eleven of the jurors in the panel were present in court and heard testimony against the defendant in a prior prosecution. *S. v. Corl*, 256.

A challenge to the array must be made before plea. *Ibid.*

Upon defendant's challenge to the array, the burden is upon him to introduce evidence in support of his motion. *Ibid.*

§ 11. Discharge of Juror.

An objection to the action of the court in summarily discharging seven jurors who had been excused by the State and defendant, is untenable, it not appearing that defendant was prejudiced thereby. *S. v. Corl*, 262.

LANDLORD AND TENANT

§ 11. Liabilities for Injuries from Defective or Unsafe Condition.

The fact that a proprietor of a store is a lessee does not relieve him from liability to a customer for a fall caused by the dangerous condition of the entrance to the store resulting from the plan of construction, since the fact that he is a lessee in no way lessens his duty of keeping the premises in a reasonably safe condition. *Garner v. Greyhound Corp.*, 151.

LARCENY

§ 1. Elements of the Crime.

Larceny is the felonious taking and carrying away from any place at any time the personal property of another without the consent of the owner and with the felonious intent to deprive the owner of his property permanently and to convert it to the use of the taker or to some person other than the owner, and an instruction to this effect is without error. *S. v. Booker*, 272.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that the hogs of another were on defendant's land and that defendant took the hogs and sold them to get them off of her property, *is held* sufficient to be submitted to the jury in a prosecution for larceny of the hogs, there being no question raised as to defendant's right to impound the hogs. *S. v. Booker*, 272.

The felonious intent of a person in converting to his own use the property of another at the time of the taking must necessarily be determined by the jury from the statements and conduct of the witnesses and the surrounding circumstances. *Ibid.*

§ 10. Punishment.

A sentence of not less than twelve and not more than fifteen years upon conviction of defendant of storebreaking ad larceny of property of a value of more than $100, is in excess of that allowed by statute, G.S. 14-70, the maximum punishment being imprisonment for not more than ten years. *S. v. Fain*, 117.

LIMITATION OF ACTIONS

§ 1. Nature and Construction of Statutes of Limitation in General.

While statutes of limitation are inflexible and operate without regard to the merits, when failure to institute action within the time limited has been induced by acts, representations or conduct which would render the plea of the statute a breach of good faith, equity will deny the right to assert the defense on the principle of equitable estoppel. *Nowell v. Tea Co.*, 375.

LIMITATION OF ACTIONS—*Continued.*

§ 5a. Accrual of Cause of Actions in General.

Whether action was instituted within three years from date contractor ceased attempts to remedy structural defects held for jury. *Nowell v. Tea Co.*, 575.

§ 5b. Fraud or Ignorance of Cause of Action.

The statute of limitations does not begin to run against an action to reform a deed for fraud until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence, G.S. 1-52(9), and since the statute is not a condition annexed to the cause of action, the bar of the statute can be raised only by answer. *Elliott v. Goss*, 185.

The mere registration of a deed, standing alone, will not start the statute of limitations running against an action for reformation. *Ibid.*

§ 15. Pleading the Statute.

The defense of the statute of limitations must be raised by answer and cannot be interposed by demurrer. *Elliott v. Goss*, 185.

Where plaintiff in his complaint has alleged matters *in pais* amounting to an estoppel of defendant from asserting the bar of the statute of limitations, it not not required that plaintiff again allege such matters in reply to defendant's answer setting up the plea of the statute. *Nowell v. Tea Co.*, 575.

MALICIOUS PROSECUTION

§ 10. Sufficiency of Evidence and Nonsuit.

In this action for malicious prosecution the evidence disclosed that the relationship between the parties was that of debtor and creditor and not that of employee and employer, and that a prosecution for embezzlement was instigated by the creditor against the debtor in regard to the account *Held:* Nonsuit was erroneous, and *held* further, even had the relationship been that of employee and employer, the evidence in this case disclosed want of probable cause. *Gray v. Bennett*, 707.

MARRIAGE

§ 3. Licenses and Certificates of Health.

The failure of parties contracting a marriage to file the health certificate with the register of deeds as required by G.S. 51-14, does not invalidate the marriage, but only subjects the parties to the risk of the statutory penalty. *Hall v. Hall*, 275.

MASTER AND SERVANT

§ 1. The Relationship in General.

A laundry driver and collector on a commission basis who is personally charged with all work brought in by him without any record being kept by the laundry in regard to the individual accounts of the customers, the driver being personally liable for the entire account without regard to whether the customers pay and being personally responsible for the purchase and maintenance of his delivery truck, is a debtor to the laundry on such accounts and not an employee. *Gray v. Bennett*, 707.

§ 2e. Collective Bargaining.

Where a member of a union alleges a contract with the union under which the union was given exclusive authority to prosecute the member's claim for reinstatement of employment after wrongful discharge, the theory

MASTER AND SERVANT—*Continued.*

that the member and the union are co-principals of the union's agents will not preclude recovery on the contract for asserted failure of the officers and agents of the union to discharge the union's contractual obligations to prosecute with due diligence the member's claim, since the union has authority to make such contract and may not defeat recovery thereon by asserting that the member was a co-principal. G.S. 1-69.1. *Glover v. Brotherhood*, 35.

Allegations held sufficient to state a cause of action in favor of union member for failure of the union to prosecute with diligence the member's claim for reinstatement of employment. *Ibid.*

In an action by a railroad employee against his union to recover for the alleged negligent failure of the union to prosecute the member's claim for reinstatement of his employment after wrongful discharge, demurrer on the ground that the employee, as well as the union, was entitled to prosecute the claim under the Railway Labor Act, 45 U.S.C.A. 153(p), is properly overruled when the complaint alleges a contract between the member and the union under which the union was given exclusive right to prosecute the claim administratively and judicially, and the member was required to forego his right to prosecute the claim. *Ibid.*

Where the National Labor Relations Board has declined to exercise jurisdiction in the matter because the amount of interstate and interlining business carried on by the employer is less than the jurisdictional amount fixed by the Board, our State Court has jurisdiction of an action in tort brought by an employee to recover for his discharge because of his membership in a labor union in violation of the State Right to Work Act, G.S. 95-81, G.S. 95-83, irrespective whether the conduct of the employer was an unfair labor practice within the purview of the National Labor Relations Act and notwithstanding that the employer's interstate or interlining business is such as to constitute it an industry affecting interstate commerce within the purview of the Federal decisions. *Willard v. Huffman*, 396.

§ 6f. Actions for Wrongful Discharge.

Where, in an action for wrongful discharge, plaintiff's evidence fails to establish a contract of employment for a fixed term, nonsuit is properly entered, since employment for an indefinite and unfixed duration is terminable at the will of either party. *Wilkinson v. Mills*, 370.

§ 24. Contributory Negligence of Injured Party and Intervening Negligence.

Liability under the doctrine of *respondent superior* is predicated upon the employer's liability for the negligence of the employee, and therefore the negligence of the employee or agent of defendant in driving a car with defective brakes cannot constitute intervening negligence insulating the independent negligence of the employer in delivering the car for use with defective brakes. *Johnson v. Thompson*, 665.

MONEY RECEIVED

§ 1. Nature and Essentials of Right of Action.

Where it is established by the verdict upon supporting evidence that the seller's agent pointed out certain timber as standing upon the seller's land, and that the purchase price was based upon the timber so shown, but that, by mistake, a part of the timber shown was on the land of an adjacent owner and therefore was not conveyed by seller's timber deed, the purchaser, irrespective of fraud, is entitled to recover that proportion of the purchase price represented by the timber standing on the adjacent land on the basis of money had and received. *Dean v. Mattox*, 246.

MONEY RECEIVED—*Continued.*

The general rule that money paid under a mistake of fact may be recovered ordinarily as money had and received, does not apply if the person receiving the payment is entitled in equity and good conscience to retain it. *Tarlton v. Keith*, 298.

Where brokers, having an option on certain timber, point out the boundaries of the timber to the purchasers but through mistake of fact part of the timber pointed out is on the land of an adjacent owner, the purchasers, upon the later discovery of the mistake, are not entitled to recover of the brokers for the shortage, since the brokers in equity and good conscience are entitled to retain the commission for their services. *Ibid.*

MORTGAGES

§ 31g. Decree of Foreclosure.

A decree for the sale of lands under foreclosure of a mortgage or deed of trust is an interlocutory order and the bid at the sale is but a proposition to buy, and confirmation is essential to the consummation of the sale and the transfer of title. *Baker v. Murphrey*, 346.

§ 35c. Parties Who May Purchase — Cestuis.

The *cestui que trust*, either directly or through an agent, may purchase the property at a foreclosure sale conducted by the trustee. *DeBruhl v. Harvey & Sons Co.*, 161.

The purchase of the property by the executors of the mortgagor will not be upset when the estate had been settled except for the mortgage at the time of the sale and the court had duly confirmed the sale with knowledge of the facts. *Bolton v. Harrison*, 290.

§ 39e(1). Grounds of Attack of Foreclosure.

Where a deed of trust covers one tract in fee and the life estate of the *feme* mortgagor in another tract, subject to prior liens, and only the tract conveyed in fee as security is foreclosed and the proceeds of sale are exhausted in the payment of the prior liens, the validity of the foreclosure is not affected by the fact that the *cestui* in the deed of trust foreclosed receives nothing out of the proceeds of sale or the fact that his indebtedness is hereafter discharged by application of the rents and profits from the lands in which the *feme* mortgagor owned a life estate. *DeBruhl v. Harvey & Sons Co.*, 161.

Evidence held insufficient to show that *cestui* purchasing at sale agreed to hold title for benefit of the trustor. *Ibid.*

Decree of confiration is binding on parties, including those represented by members of their class, and will not be set aside for fraud merely on evidence of inadequacy of the purchase price. *Bolton v. Harrison*, 290.

Where the mortgagor dies intestate after decree of foreclosure but prior to confirmation, the mortgagor's heirs at law, to whom the land descends subject to be sold to make assets to pay debts, are necessary parties and are entitled to be heard as to whether the sale by the commissioners should be confirmed, and as to heirs who are not made parties the court is without jurisdiction to decree confirmation, and such heirs are entitled to set aside the foreclosure and to an adjudication that they own their proportionate part of the lands subject to outstanding liens. *Baker v. Murphrey*, 346.

§ 39e(3). Burden of Proof in Action Attacking Foreclosure.

Where the trustee's deed is regular upon its face, was duly executed and contains recitals which show compliance with the statutes regulating foreclosure of deeds of trust, the burden of proof rests upon the party asserting

MORTGAGES—*Continued.*

irregularity in the foreclosure to prove same. *DeBruhl v. Harvey & Sons Co.*, 161.

MUNICIPAL CORPORATIONS—*Continued.*

§ 14a. Defects and Obstructions in Streets and Sidewalks.

A contractor for the demolition of a building, who constructs a covered boardwalk adjacent the sidewalk to provide temporary walkway for pedestrians during the progress of the work, is under substantially the same legal duty to pedestrians as the city would be in the construction of the temporary boardwalk and its ramps at either end. *Ingram v. Libes*, 65.

Neither a municipality nor a contractor, constructing a temporary boardwalk adjacent the sidewalk for use of pedestrians during the demolition of a building, is an insurer of the safety of the boardwalk and its ramps, but is under legal duty to exercise ordinary care in the construction and maintenance of the boardwalk and ramps, and to take reasonable precautions to prevent injuries to pedestrians using them in a proper manner and with due care. *Ibid.*

A contractor for the demolition of a building, who constructs a covered boardwalk with ramps at either end for the temporary use of pedestrians during the time the sidewalk is blocked incident to the work, is not negligent in failing to build a cover over the ramps to protect the ramps from snow and ice, nor does the construction of one of the ramps with a six inch fall in about two and one half feet render such ramp so steep as to constitute negligence or to require the construction of a handrail. *Ibid.*

Evidence held insufficient to be submitted to jury on issue of negligence in causing fall of pedestrian on snow-covered ramp of temporary boardwalk. *Ibid.*

In this action by a pedestrian to recover for injuries sustained when he fell in broad daylight on loose dirt placed in the street incident to street repairs, the evidence *is held* sufficient to warrant the jury's finding that plaintiff's own negligence contributed to his injury, and the court's charge on the issue of contributory negligence *is held* without prejudicial error. *Boldridge v. Construction Co.*, 199.

§ 25b. Control and Authority over Streets and Sidewalks.

A municipal corporation has the authority to repair its streets, notwithstanding that the work necessarily involves inconvenience and annoyance to the public. *Boldridge v. Construction Co.*, 199.

§ 33. Validity of, Objections to, and Appeal from Assessments.

Assessments for public improvements are presumed valid. *Broadway v. Asheboro*, 232.

In an action to have paving assessments levied against plaintiffs' property declared invalid, a complaint alleging that only one of the signatures of abutting property owners to the petition for improvements was valid, without alleging that the assessment was based on the petition, what other signatures appeared on the petition or facts supporting the conclusion that the other signatures were invalid, is insufficient to state a cause of action, and demurrer to the complaint was properly sustained. *Ibid.*

§ 36. Nature, Validity and Construction of Municipal Ordinances in General.

Under the doctrine of *ejusdem generis*, where a statute or ordinance enumerates items by specific words or terms followed by general words or terms, the general refers to the same classification as the specific. Therefore, a pro-

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vision for "garage or other satisfactory automobile storage space" refers to a garage or something in the nature of a garage or of that classification. *Chambers v. Board of Adjustment*, 195.

Arguments that a proposed housing project should be permitted under the zoning regulations of the city because of the urgent housing needs, and *contra*, that it should be denied because of the annoyance and loss of property values which would result to land owners in the area, involve policy and relate to political and not legal matters, it being the function of the court to construe a zoning ordinance as written. *Ibid.*

§ 37. Zoning Ordinance and Building Permits.

Neither a housing authority, nor a planning board, nor a zoning board of a municipality has authority to waive a requirement of a municipal zoning ordinance. *Chambers v. Board of Adjustment*, 195.

Where a municipal ordinance requires that multi-family dwellings in a residential district should have garage or other satisfactory automobile storage space provided on the premises, the municipal zoning board of adjustment is without authority to approve a housing project plan providing only on-street parking. *Ibid.*

A municipal zoning ordinance dividing the city into districts, with uniform requirements in each class of district, is valid, and will not be held void because of power in the board of adjustment to waive side, rear and front yard requirements in a particular type of residential district. *Ibid.*

§ 40. Violation and Enforcement of Police Regulations.

Certiorari to review action of municipal authorities in applying a zoning ordinance presents the record as certified, and authorizes the Court to review the record for errors appearing on its face, including the questions of jurisdiction, power and authority to enter the order complained of, and objection that the application for the writ failed to specify the particular ground of objection is untenable. *Chambers v. Board of Adjustment*, 195.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence in General.

Reasonable care is that degree of care which a reasonably prudent man would exercise under the attendant facts and circumstances to prevent injury to others. *Ingram v. Libes*, 65.

In an action seeking to recover damages solely for personal injury resulting from plaintiff's fall on a ridge of dirt placed in the street incident to the performance by defendant of its contract with the municipality for the repair of the street, plaintiff may not allege, in addition to his cause of action based on negligence, a cause of action based on nuisance, since the asserted nuisance has its origin in negligence, and plaintiff may not avert the consequences of contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance. *Boldridge v. Construction Co.*, 199.

§ 3½. Res Ipsa Loquitur.

While the doctrine of *res ipsa loquitur* applies in proper cases when an instrumentality is shown to be under the control of defendant and the accident is such as does not occur in the ordinary course of things if the person having control of the instrumentality uses proper care, the doctrine does not apply when all the facts are known and testified to, where more than one inference can be drawn from the evidence as to the cause of the injury, where the existence of negligence is not the more reasonable probability or the matter is left in conjecture, where it appears that the accident

was due to an act of God or the tortious act of a stranger, where the instrumentality is not under the exclusive control or management of defendant, or where the injury results from an accident as defined by law. *Lane v. Dorney*, 15.

§ 4f(1). Distinction between Trespasses, Invitees and Licensees.

A person paying the admission fee for the privilege of swimming in a public pond is an invitee. *Wilkins v. Warren*, 217.

§ 4f(2). Liability of Proprietors to Invitees.

The proprietor of a store owes the duty to his customers of exercising ordinary care to keep that portion of the premises designed for their use in a reasonably safe condition so as not to expose them unnecessarily to danger, and to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision should know. *Garner v. Greyhound Corp.*, 151; *Spell v. Smith-Douglas Co.*, 269.

A proprietor is not an insurer of the safety of his customers, but may be held liable only for injuries resulting from negligence on his part. *Ibid.*

The doctrine of *res ipsa loquitur* does not apply to a fall of a customer on the premises of a store. *Garner v. Greyhound Corp.*, 151.

While, in a customer's action to recover for a fall at the entryway of a store, the evidence is to be considered in the light most favorable to her, allegation that the place in question was slippery and uneven is to be disregarded when there is no evidence that the entryway was worn, broken or structurally imperfect. *Ibid.*

Evidence tending to show that the entryway to a store abutting some 12 feet along the sidewalk was even with the sidewalk at one end and was elevated some 6 inches above the sidewalk at the other end because of the grade of the street, does not disclose negligence in the construction or maintenance of the entryway. *Ibid.*

Evidence that the entryway of a store had a declination of some 6/10 of a foot in the 42 inches between the doors of the store and the sidewalk does not disclose negligence in the construction or maintenance of the entryway. *Ibid.*

Evidence held insufficient to show that proprietor of store should have anticipated that customer would fail to perceive difference in levels because of asserted optical illusion. *Ibid.*

The proprietor of a store is not under duty to warn customers of a condition which is obvious, nor under duty to provide handrails at a step-down of some 6 inches to the sidewalk at one end of the entrance to the store. *Ibid.*

The proprietor of a pond maintained for public swimming is not an insurer of the safety of his patrons, but is under duty to exercise ordinary care to maintain the premises in a reasonably safe condition for all ordinary and customary uses by his patrons. *Wilkins v. Warren*, 217.

Evidence held for jury in this action to recover for injuries resulting when plaintiff struck his head on submerged wall after diving from dam of public swimming pond. *Ibid.*

Plaintiff's evidence to show that he was an invitee and fell to his injury while standing on the platform of defendant's warehouse, when his heel crushed through a rotten board, but plaintiff's evidence further tended to show that there was nothing in the appearance of the board to show that it was defective and that it looked sound from both the bottom and top. *Held*: Nonsuit was proper, since the evidence fails to show that a reason-

NEGLIGENCE—*Continued.*

able inspection on the part of the proprietor would have disclosed the hidden defect which caused the injury. *Spell v. Smith-Douglas Co.*, 269.

The proprietor of a restaurant is under duty to maintain the premises in such condition as a reasonably careful and prudent operator would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Wagoner v. Sledge*, 559.

The proprietor of a restaurant cannot be held liable for injuries resulting to a patron from a condition of the premises unless the proprietor could and should have reasonably forseen that such condition was likely to cause injury. *Ibid.*

Evidence held insufficient to show that proprietor should have anticipated that condition of premises was likely to cause injury. *Ibid.*

While the proprietor is not an insurer of the safety of invitees, he is under duty to exercise ordinary care to keep the aisles and passageways where customers are expected to go in a reasonably safe condition so as not unnecessary to expose them to danger, and to give warning of hidden dangers or unsafe conditions of which the proprietor has knowledge or of which he should have known in the exercise of reasonable supervision and inspection. *Waters v. Harris*, 701.

Where the substance upon which a customer falls is placed on the floor by the proprietor or his employees, no evidence tending to show actual or constructive knowledge of the proprietor is necessary, since a person is deemed to have knowledge of his own or his employees' acts. *Ibid.*

Where there is no evidence as to the source of a substance on the floor causing the fall of a customer, the customer may not ordinarily recover for the resulting injury unless he makes it appear that the substance had remained on the floor for such length of time that the proprietor knew or by the exercise of reasonable care should have known of its existance. *Ibid.*

Where the nature of the business is such that the proprietor may reasonably anticipate the presence of grease and oil on the floor, and the proprietor has personal knowledge of the unkept condition of the floor, and fails to provide adequate light to enable a customer to see where he is going, the proprietor may be liable for a fall of the customer resulting from a greasy substance on the floor without proof that the substance had been on the floor at this particular place for a sufficient length of time to charge the proprietor with constructive knowledge thereof. *Ibid.*

Evidence that the proprietor of a warehouse personally conducted a customer on a trip to look at used refrigerating equipment, that there was trash on the floor and that proprietor failed to provide sufficient artificial light or use available facilities for letting in sufficient natural light to enable the customer to see where he was going *is held* sufficient to overrule a nonsuit in an action by the customer to recover for a fall resulting when he stepped on some greasy substance on the floor. *Ibid.*

Evidence tending to show that a customer fell on his hip, fracturing a hip bone adjacent to a thick billfold carried in his pocket, is insufficient to show contributory negligence of the customer in so carrying the billfold, since no injury of such nature could have been foreseen from carrying a billfold in such a manner. *Ibid.*

A customer will not be held contributorily negligent in walking along a dark aisle with trash on it when the customer is conducted and directed on the trip by the proprietor. *Ibid.*

NEGLIGENCE—*Continued.*

§ 5. Proximate Cause in General.

There can be more than one proximate cause of an injury. *Lamm v. Gardner*, 540.

§ 6. Concurring Negligence.

An injury may be the result of separate and distinct proximate causes acting independently of each other if they join and concur in producing the result complained of. *Darroch v. Johnson*, 307.

§ 7. Intervening and Insulating Negligence.

Negligence of one party cannot be insulated by the negligence of another so long as the negligence of the first continues to be a proximate cause of the injury. *Lamm v. Gardner*, 540.

§ 11. Contributory Negligence of Persons Injured in General.

An affirmative finding by the jury on the issue of contributory negligence precludes any recovery based on defendant's negligence. *Boldridge v. Construction Co.*, 199.

The facts constituting the basis of the defense of contributory negligence must be specifically pleaded. *Skinner v. Jernigan*, 657.

§ 16. Pleadings.

Acts or omissions relied on as constituting contributory negligence must be specifically pleaded by defendant in his answer and proven by him on the trial. *Skinner v. Jernigan*, 657.

§ 17. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact of injury. *Boyd v. Harper*, 334.

Negligence is not presumed from the mere fact of injury, but plaintiff has the burden of proving negligence and proximate cause, and when he relies upon circumstantial evidence, he must establish negligence and proximate cause as a reasonable inference from the facts proved and not circumstances which raise a mere conjecture or surmise. *Lane v. Dorney*, 15.

§ 19a. Sufficiency of Evidence — Questions of Law and of Fact.

Whether there is enough evidence to support a material issue is a matter of law. *Lane v. Dorney*, 15.

What is negligence is a question of law, and when the facts are admitted or established it is for the Court to determine whether negligence exists or not, and if so whether it is a proximate cause. *Hudson v. Transit Co.*, 435.

§ 19b(1). Sufficiency of Evidence of Negligence on Nonsuit in General.

While it is not necessary that negligence be established by direct evidence and may be established by attendant facts and circumstances which reasonably warrant the inference of negligence, such inference must be more than a mere conjecture or surmise and be a legitimate inference from established facts. *Boyd v. Harper*, 334.

When all the evidence, considered in the light most favorable to plaintiff, fails to show actionable negligence on the part of defendant, or clearly establishes that the injury was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person, nonsuit is proper. *Hudson v. Transit Co.*, 435.

§ 19c. Nonsuit for Contributory Negligence.

Only evidence of contributory negligence which is supported by allega-

NEGLIGENCE—*Continued.*

tion should be considered on motion to nonsuit. *Skinner v. Jernigan*, 657.

A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. *Johnson v. Thompson*, 665; *Waters v. Harris*, 701.

§ 21. Issues.

In an action alleging the joint and concurring negligence of two drivers as the proximate cause of plaintiffs' injuries, there being no conflict in the evidence as to the negligence of one of the drivers, the submission of an issue as to whether plaintiffs' injuries were the result of the joint and concurring negligence of both defendants enables the other defendant to present his contentions that he was not negligent or that his negligence was not the proximate cause of the injuries, and his objection to the form of the issue cannot be sustained. *Darrock v. Johnson*, 307.

NUISANCE

§ 1. Private Nuisance in General.

In an action seeking to recover damages solely for personal injury resulting from plaintiff's fall on a ridge of dirt placed in the street incident to the performance by defendant of its contract with the municipality for the repair of the street, plaintiff may not allege, in addition to his cause of action based on negligence, a cause of action based on nuisance, since the asserted nuisance has its origin in negligence, and plaintiff may not avert the consequences of contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance. *Boldridge v. Construction Co.*, 199.

A municipal corporation has the authority to repair its streets, notwithstanding that the work necessarily involves inconvenience and annoyance to the public. *Ibid.*

§ 4. Abatement and Damages.

Where a private corporation, in developing a residential area, lays out streets and drains so as to collect and discharge the surface waters through a culvert under a street upon the lands of an ajacent owner, and the streets are thereafter dedicated to and accepted by a municipality, the interest of the public precludes abatement. *Wiseman v. Construction Co.*, 521.

§ 6a. Nuisances Per Se.

A junk yard is not a nuisance *per se*. *S. v. Brown*, 54.

PARTIES

§ 4½. Representation of Class.

Persons in *posse* may be represented by members of their class. *Bolton v. Harrison*, 290.

PARTITION

§ 4c. Sale for Partition.

Where, in partition proceedings, the fact of cotenancy is established and the owners of the land are before the court, the court has the power to order sale for partition. *Moore v. Lewis*, 77.

PAYMENT

§ 7. Application of Payment.

Where a lienholder accepts a chose in action in the sale of the debtor's property by the receivers, discharging the liens, the amount realized upon sale of the chose is not a voluntary payment by the debtor, and the debtor is not entitled to direct the application of the payment, nor is the creditor entitled to do so upon failure of the debtor to make such direction, but the payment must be applied equally to all debts secured by the lien. *Paving Co. v. Speedways, Inc.*, 358.

§ 9. Burden of Proving Payment.

Payment is an affirmative defense which must be established by the party claiming its protection. *Paving Co. v. Speedways, Inc.*, 358.

PLEADINGS

§ 3a. Complaint—Statement of Cause of Action in General.

Where a complaint merely alleges conclusions and not the facts supporting the asserted conclusions, it fails to state a cause of action and is demurrable. G.S. 1-127(6). *Broadway v. Asheboro*, 232.

§ 15. Office and Effect of Demurrer.

A demurrer admits, for the purpose of testing the sufficiency of the pleading, all facts well pleaded in the complaint. *Glover v. Brotherhood*, 35.

A demurrer is apposite in any kind of judicial proceeding to raise the question whether, admitting the facts alleged to be true, the proceeding can be maintained. *Turner v. Board of Education*, 456.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

If the facts alleged in the complaint, taken as true and liberally construed in favor of the pleader, are sufficient to state a cause of action, demurrer should be overruled. *Glover v. Brotherhood*, 35.

Where plaintiff files an amended complaint, in compliance with the order of the court, stating with particularity the facts relied on as constituting the basis of the action, a demurrer to the amended pleading will be determined on the basis of whether the particular grounds for relief alleged in the amended complaint are sufficient to constitute a cause of action. *Lumber Co. v. Pamlico County*, 681.

§ 20½. Form and Effect of Judgment upon Demurrer.

An action should not be dismissed upon demurrer when the complaint states a good cause of action in a defective manner, since plaintiffs' are entitled to move for leave to amend, if so advised. G.S. 1-131. *Elliott v. Goss*, 185.

Where a demurrer is sustained for failure of the complaint to state facts sufficient to constitute a cause of action, but not because the complaint affirmatively disclosed a defective cause of action, the action should not be dismissed, since plaintiff may move for leave to amend in accordance with G.S. 1-131. *Lumber Co. v. Pamlico County*, 681.

§ 21. Necessity for and Time of Motions to be Allowed to Amend.

Plaintiff has the right to move for leave to file an amended complaint upon three days' notice after judgment sustaining a demurrer from which no appeal is taken, but he does not have the right to file such amendment without notice and without leave, G.S. 1-131, and such amended

PLEADINGS—*Continued.*

complaint filed without notice or leave is properly dismissed, and the defendant may thereafter move that the action be dismissed for failure to comply with the statute. *Dudley v Dudley*, 95.

§ 24. Variance.

In a trial by the court under agreement of the parties, as well as in a trial by a jury, it is required that there be both *allegata* and *probata*, and the two must correspond. *Lumber Co. v. Chair Co.*, 71.

A plaintiff must make out his case *secundum allegata. DeBruhl v. Harvey & Sons Co.*, 162.

PRINCIPAL AND AGENT

§ 13c. Relevancy and Competency of Evidence of Agency.

Testimony of a declaration of an alleged agent is not admissible to prove either the fact of agency or to establish its nature or extent. *Sledge v. Wagoner*, 559.

PROCESS

§ 2. Issuance and Time of Service.

Where process issued to the sheriff of one county is returned without any notation thereon but with an accompanying letter stating that the defendant named is in another county, the act of the clerk in marking through the name of the first county and writing above it the name of the second county, so that the process is directed to the sheriff of the second county, amounts to the issuance of new process and institutes a new action as of the date of the later issuance, and service by the sheriff of the second county meets all the requirements of the law. *Morton v. Ins. Co.*, 722.

Statutory provisions for a chain of process is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or a time limit of an enabling act, G.S. 1-95, and the statute does not preclude the issuance of a second original process after discontinuance of the first. *Ibid.*

The date of summons is *prima facie* evidence of the date of issuance. G.S. 1-88.1, but if the date of issuance is material the court may hear evidence and determine the true date thereof. *Ibid.*

§ 4. Alias and Pluries Summonses and Discontinuance.

Where process is never served and no notation for the reason for nonservice or of an extension of time for service is made thereon, and no alias summons issued, there is a discontinuance of the action commenced by the issuance of the summons. G.S. 1-96. *Morton v. Ins. Co.*, 722.

§ 4½. Officers who May Serve.

Where process issued to the sheriff of one county is returned and the clerk strikes through the name of the county and inserts the name of a second county, so that the process is directed to the sheriff of the second county, the fact that the sheriff of the second county signs it at the place for the signature of the sheriff of the first county is immaterial, it appearing from the affidavit of the clerk that the summons was served by the sheriff of the second county, and further, the court will take judicial notice of the person who is the sheriff of the county. *Morton v. Ins. Co.*, 722.

§ 6. Service by Publication.

Where the affidavit for service by publication, the order of publication

PROCESS—*Continued.*

and the published notice, give notice to contingent remaindermen of the institution of an action "concerning real estate of which the Superior Court of the said county has jurisdiction," the service by publication is defective. *Menzel v. Menzel*, 649.

§ 8c. Service on Foreign Corporation by Service on Officer or Agent in This State.

Findings to the effect that the majority of the officers and directors of a foreign corporation maintained their offices in this State, that meetings of its board of directors was held here except for one meeting a year under the requirement of the state of its incorporation, that its officers within this State purchased substantial quantities of merchandise here for the corporation, that its accounting is performed here, etc., are sufficient to support adjudication that service on the corporation by service on its president and executive officer in this State constituted valid service. *Belk v. Department Store*, 99.

§ 8e. Service on Foreign Insurance Companies.

Compliance with G.S. 58-150 by a foreign insurance company gives it the right to sue and be sued in our courts under the rules and statutes applicable to domestic corporations and designates the State Commissioner of Insurance its true and lawful attorney upon whom all lawful process against it may be served, but does not constitute Wake County the principal office of such company for the purpose of determining venue. *Crain and Denbo, Inc., v. Construction Co.*, 106.

§ 16. Actions for Abuse of Process.

The issuance of execution against the person of defendant on order to show cause after defendant had failed to pay in full in judgment awarding punitive damages against him, even though the execution was issued after defendant's refusal to convey to plaintiff his homestead, cannot be made the basis of an action for abuse of process, since there is no evidence of abuse or misuse of execution after its issuance. *Benbow v. Caudle*, 371.

QUIETING TITLE

§ 2. Proceedings.

In action to quiet title, defendants' pleas of the bar of statute of limitations and the acquisition of title by them by adverse possession are affirmative defenses and not a cross-action. *Edwards v. Arnold*, 500.

G.S. 1-52(10) is not applicable to actions to remove cloud on title. *Ibid.*

In an action to remove a cloud on title a complaint alleging that defendants claimed under a receiver's deed and that the trustee in a prior deed of trust executed by the debtor was not a party to the receivership proceedings, is demurrable, since the mere fact that the trustee in the deed of trust was not a party does not in itself render the receiver's deed ineffectual. *Lumber Co. v. Pamlico County*, 681.

Where the complaint in an action to quiet title avers that the deed under which the defendants claim was ineffectual because of the insufficiency of the description, with further averment that the deed purported to convey the land described in the complaint, is demurrable, since if the description in the deed is ambiguous and insufficient the complaint would seem insufficient for failure to identify the lands claimed by plaintiff. *Ibid.*

RAPE

§ 4. Sufficiency of Evidence and Nonsuit.

The evidence tending to show the guilt of each defendant, including the confession of each in the presence of the others, *is held* sufficient to show that each had sexual intercourse with the prosecutrix by force and against her will, and discrepancies in the testimony of the prosecuting witness as to circumstances preceeding the commission of the offenses do not justify nonsuit. *S. v. Bryant*, 113.

RECEIVERS

§ 9. Title and Possession of Property.

Where the debtor has executed a deed of trust on certain of his realty prior to the receivership, the receiver duly appointed obtains all right, title, and interest of the debtor in the property and may convey such interest, subject to whatever encumbrances exist against the property, notwithstanding that the trustee is not a party in the receivership proceedings, although the trustee would be a necessary party to an action to foreclose the deed of trust. *Lumber Co. v. Pamlico County*, 681.

REFERENCE

§ 9. Exceptions to Referee's Report and Preservation of Grounds of Review.

The objective of a compulsory reference is to eliminate uncontroverted items so as to simplify the scope of the jury's inquiry, and therefore the exceptions to the findings should be specifically directed to those relating to the particular items controverted, and a party may not take broadside exceptions to the findings. *Godwin v. Hinnant*, 328.

§ 14a. Preservation of Right to Jury Trial.

A provision in an order of re-reference that the parties should have twenty days from the referee's report in which to file exceptions cannot have greater force than the statutory limitation, G.S. 1-195, and does not impair the discretionary authority given the court by G.S. 1-152 to extend the time for filing such exceptions. *Godwin v. Hinnant*, 328.

Defendant may waive his right to trial by jury on appeal in a compulsory reference by failing to comply with the statutory procedure for the preservation of such right, and likewise the plaintiff may waive defendant's failure to follow the statutory procedure by failing to challenge the sufficiency of defendant's exceptions and by failing to object to the submission of the issue to the jury. *Ibid.*

An exception to an order of the court extending the time for filing exceptions to the report of the referee is not a challenge to the sufficiency of defendant's exceptions to the findings or to the submission of the issue to the jury. *Ibid.*

REFORMATION OF INSTRUMENTS

§ 1. Nature and Grounds of Remedy in General.

Where the intended grantee has died before delivery so that no title could pass to him under the deed, the heirs cannot have the deed reformed by inserting the name of the ancestor. *Elliott v. Goss*, 185.

§ 8. Burden of Proof.

In order to correct an instrument on the ground of mutual mistake of

REFORMATION OF INSTRUMENTS--*Continued.*

the parties, the evidence must be clear, strong and convincing, and whether a party has offered the requisite intensity of proof is for the determination of the jury, or for the court when a trial by jury is waived. *Ins. Co. v. Lambeth*, 1.

SALES

§ 15. Implied Warranties.

When the seller has knowledge of the use for which the buyer purchases the goods, and the buyer relies on the skill and experience of the seller for the suitability of the goods for such purpose, there is an implied warranty that the goods are reasonably fit for such purpose, but there is no implied warranty that the goods sold are fit for a particular purpose if the seller is not informed thereof or has no express or implied knowledge of such purpose. *Lumber Co. v. Chair Co.*, 71.

Findings that the law implies a warranty that the goods are reasonably suitable for the purpose for which sold, but that there is no implied warranty of fitness for a particular purpose if the seller has no express or implied notice thereof, are not inconsistent. *Ibid.*

The burden is upon the buyer to prove by the greater weight of the evidence the warranties of the seller relied on, the breach thereof by the seller, and the resulting damage. *Ibid.*

Findings of fact by court held to relate to issues of express and implied warranties raised by pleadings. *Ibid.*

Where goods are bought and sold for a particular use there is an implied warranty that the goods are reasonably fit for such use. *Jones v. Mills, Inc.*, 527.

Circumstantial evidence held sufficient to show that feed bought and sold for laying mash contained nicarbazin, rendering it unfit for feeding to a laying flock. *Ibid.*

Ordinarily the measure of damages for the breach of implied warranty is the damage proximately caused by such breach, but when, at the conclusion of the evidence, the parties stipulate the measure of damages, an instruction in strict accord with such stipulation will not be held for error. *Ibid.*

SCHOOLS

§ 4b. County and City Boards and Superintendents.

A county board of education is a body corporate and may sue and be sued in its corporate name. *McLaughlin v. Beasley*, 221.

In a suit to restrian a county board of education from proceeding further with its plans for the purpose of a school site and from erecting a consolidated school thereon, the demurrer *ore tenus* is properly sustained as to the individual members of the board in their individual capacity, since as individuals they possess no authority to exercise any of the powers sought to be enjoined. *Ibid.*

Local boards of education are given general control and supervision of all matters pertaining to the public schools in their respective units except such as the law assigns to the State Board of Education or other authorized agency, G.S. 115-54, G.S. 115-8, and local boards have authority to select, hire, direct and supervise employees to care for school buildings and grounds within their respective units, and an employee engaged to perform such duties and paid by a City Board of Education is an employee of the City Board and not the State Board of Education. *Turner v. Board of Education*, 456.

SCHOOLS—*Continued.*

§ 6a. Selection of School Sites.

The selection of school sites is a discretionary power vested in the county board of education alone, which authority it may exercise only at a duly constituted meeting, and therefore a suit to restrain the selection of a particular school site is properly dismissed upon demurrer *ore tenus* when the suit is not instituted against the board of education as a corporate entity and such board, as distinguished from the individual members comprising the board, is not served with process. The filing of answers by the board of education and the board of commissioners of the county can have no effect upon the sufficiency of the complaint to state a cause of action. *McLaughlin v. Beasley*, 221.

Consent judgment was entered that the site for a consolidated school should be within ½ mile of the junction of two highways. The highway terminating at its juncture with the other divided into two prongs before it joined the other, and it appeared that the site selected by the board of education to the west of the junction had all but 150 feet of its 1,000 foot frontage within ½ mile radius of the west prong of the junction, and that the area to be served by the consolidated school was some 22 miles across. *Held:* The site was within the intent and purpose of the consent judgment. *Board of Education v. Mann*, 493.

§ 8e. Liability for Injury to Employees.

In proceedings to recover for injury to a school pupil resulting from the alleged negligence of an employee while operating a power mower on the school ground in the course of his employment, the demurrer of the City Board of Education is properly sustained when the injury occurred prior to the effective date of Chapter 1256, Session Laws of 1955, since the City Board was then clothed with governmental immunity. The Statute lifting the governmental immunity of such local boards for such injuries, has prospective effect only and waives governmental immunity only on condition and to the extent that the local board has obtained liability insurance. *Turner v. Board of Education*, 456.

SEARCHES AND SEIZURES

§ 2. Requisites and Validity of Warrant.

Information radioed by one patrolman to another is sufficient information within the meaning of G.S. 18-13 to authorize the second patrolman to make the affidavit and to authorize the clerk of a general County court to issue a search warrant. *S. v. Bass*, 728.

SOLICITORS

§ 3. Duties and Authority.

A solicitor is an official of the court and is vested with important discretionary powers some of which, like the power to enter a *nolle prosequi*, are *quasi*-judicial in nature. *S. v. Furmage*, 616.

STATE

§ 3a. Tort Claims Act—Nature, Scope, and Procedure.

While formal pleadings are not required in a proceeding under the State Tort Claims Act, the jurisdiction of the Industrial Commission must be invoked by affidavit in duplicate setting forth facts sufficient to identify the employee whose alleged negligent act caused the injury and a brief

STATE—*Continued.*

statement of the facts constituting the basis of the claim. *Turner v. Board of Education*, 456.

A claim under the State Tort Claims Act may be challenged by demurrer. *Ibid.*

Where claim under the State Tort Claims Act is filed against both a City Board of Education and the State Board of Education, demurrer thereto cannot be sustained if the proceeding can be maintained against either of respondents. *Ibid.*

§ 3e. Tort Claims Act—Appeals.

The findings of fact by the Industrial Commission in a proceeding under the State Tort Claims Act are conclusive when supported by competent evidence even though there be evidence which would support a contrary finding. *Gordon v. Highway Com.*, 645.

§ 3b. Tort Claims Act—Negligence of State Employee.

A person employed by a City Board of Education to do maintenance work on the city school grounds is not an employee of the State, and demurrer of the State Board of Education is properly sustained in proceeding against it under the State Tort Claims Act to recover for the negligence of such employee in the discharge of his duties. *Turner v. Board of Education*, 456.

Evidence tending to show that an employee of the State Highway Commission was driving a truck at a speed of 15 to 20 m.p.h. downgrade, that the brakes suddenly failed, that the truck gathered momentum and that the right front wheel came off at a sharp curve causing the vehicle to overturn, resulting in the injuries in suit, but that the driver did not lose control until after the brakes had failed, and that he then did everything possible to avoid the hishap, *held* insufficient to show negligence on the part of the driver. *Gordon v. Highway Com.*, 645.

The evidence tended to show that the brakes of the truck in question suddenly gave way while it was traveling downgrade, that it gained momentum and a front wheel came off on a sharp curve, causing it to overturn, resulting in the injuries in suit. The evidence further tended to show that the truck had been inspected before being placed in service, and that it had been operated without mishap for one week prior to the occasion in suit, and there was no evidence that the inspection and repair of the truck were improperly done. *Held:* The evidence is insufficient to show that respondent sent the passengers out in a truck known to be in such condition as to endanger their lives or safety. *Ibid.*

STATUTES

§ 5a. General Rules of Construction.

The primary rule in the construction of a statute is to ascertain the intention of the General Assembly. *Byerly v. Tolbert*, 27.

Under the doctrine of *ejusdem generis*, where a statute or ordinance enumerates items by specific words or terms followed by general words or terms, the general refers to the same classification as the specific. Therefore, a provision for "garage or other satisfactory automobile storage space" refers to a garage or something in the nature of a garage or of that classification. *Chambers v. Board of Adjustment*, 195.

Where a statute employs words of general enumeration following those of specific classification, the general words will be interpreted to fall within the same category as those specifically enumerated under the maxim *ejusdem generis*. *Turner v. Board of Education*, 456.

STATUTES—*Continued.*

§ 6. Construction in Regard to Constitutionality.

Every presumption is to be indulged in favor of the constitutionality of a statute. *S. v. Furmage*, 616.

§ 10. Effective Date and Retroactive Effect.

The statutory provision that fewer than three persons may acquire all the capital stock in a corporation without impairing its capacity to act as a corporation, G.S. 55-3.1, cannot be given retroactive effect so as to divest a party of his vested right to hold the individual stockholders liable in regard to a transaction transpiring prior to the effective date of the statute at a time when there were only two stockholders of the corporation. U. S. Constitution, Article I, Section 10, N.C. Constitution, Article I, Section 17. *Lester Brothers v. Ins. Co.*, 565.

TAXATION

§ 29. Levy and Assessment of Income Taxes.

The 1957 amendment of G.S. 105-147(9)d enlarges the time for a loss carry-over and permits a taxpayer in computing its income tax for the year 1957 to bring forward losses for the prior five years as a credit against income, and the contention that the 1957 act is prospective in effect only is untenable since the 1957 act has no saving clause and therefore a prospective interpretation would deny taxpayers the right to deduct any losses for the years prior to its effective date. *Pilkington Co. v. Currie*, 726.

§ 38c. Recovery of Tax Paid under Protest.

Statutory provision precluding injunction against the collection of a tax unless assessed for an illegal or unlawful purpose, but permitting the taxpayer to pay a tax under protest and bring action to recover the monies so paid, accords the taxpayer due process and is constitutional. *Kirkpatrick v. Currie*, 213.

A taxpayer electing to pursue the remedy provided by G.S. 105-267 must comply with the conditions precedent set forth in the statute for the institution of an action to recover the tax, and if the taxpayer fails to allege and prove demand for refund of the monies paid within thirty days after payment nonsuit is proper, since failure to make such demand forfeits the right to institute the action. *Ibid.*

An action for the recovery of a tax paid under protest, originated in the Superior Court, without compliance with the conditions precedent to the institution of such action, cannot be maintained under the provisions of G.S. 105-266.1, since this statute provides an alternative remedy if the taxpayer elects to seek administrative review instead of instituting action to recover the monies paid, and relates solely to proceedings begun by request for administrative review. *Ibid.*

§ 40c. Foreclosure of Tax Lien.

Foreclosure of taxes against land held by entireties may not be maintained against husband alone. *Edwards v. Arnold*, 500.

§ 42. Validity of Tax, Titles and Deeds.

The purchaser at a tax foreclosure sale and those claiming under him are charged with notice of vitiating objects appearing on the face of the record. *Edwards v. Arnold*, 500.

G.S. 1-52(10) is not applicable to an action to remove cloud from title. *Ibid.*

TORTS

§ 6. Right to Contribution Among Tort-Feasors.

G.S. 1-240 does not contemplate that a party brought in as an additional defendant should pay more than her pro rata part of the verdict rendered against the original defendants. *Jordan v. Blackwelder*, 189.

Where the insurer for the additional defendant has paid medical and hospital bills of the injured person, and the parties stipulate that the court might, in its discretion, deduct such amount from the verdict of the jury, upon the jury's verdict for plaintiff against the original defendants, and in favor of the original defendants against the additional defendant on the cross-action, the court should render judgment for plaintiff against the original defendants for the amount of the verdict and in favor of the original defendants against the additional defendant for one half the amount of the verdict less the sums paid for medical and hospital bills, and it is error for the court to deduct such amount from the verdict before providing for contribution. *Ibid.*

TRESPASS

§ 1g. Intermittent and Continuing Trespass.

Where a private development company collects and discharges surface waters through a drain under a street the continuing damage to the land of the lower proprietor results from the single original wrong in the construction of the drain and is not a continuing trespass. *Wiseman v. Construction Co.*, 521.

TRIAL

§ 5½. Stipulations and Pre-Trial.

Appeal from a provision of a pretrial order fixing the issue and the rule for the admeasurement of damages is premature and will be dismissed, since the trial judge has the discretionary power to modify same. G.S. 1-169.1. *Green v. Ins. Co.*, 730.

§ 13. Order of Proof.

The order of proof rests in the discretion of the trial court. *Everette v. Lumber Co.*, 688.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Testimony which is competent as against one party should not be excluded because it is incompetent as against another party, but its admission should be limited by proper instructions. *Lamm v. Gardner*, 540.

§ 19. Province of Court and Jury in Regard to Evidence.

Whether there is sufficient evidence to support a material issue is a matter of law. *Lane v. Dorney*, 15.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Nonsuit is properly entered when the evidence, considered in the light most favorable to the plaintiff and giving him the benefit of every reasonable intendment thereon and every reasonable inference therefrom, raises only a conjecture or speculation as to the determinative issue. *Lane v. Dorney*, 15.

§ 25. Voluntary Nonsuit.

In a civil action, the plaintiff against whom no counterclaim is asserted and no affirmative relief is demanded, may take a voluntary nonsuit and

TRIAL—*Continued.*

get out of court at any time before verdict, and it is error for the court to refuse to permit him to take a voluntary nonsuit and to enter a judgment of involuntary nonsuit. *Hoover v. Odom*, 235.

§ 26. Form and Rendition of Judgment of Nonsuit.

A judgment as of nonsuit should merely dismiss the action, and it is error for the judgment to go further and purport to adjudicate the rights of the parties without the establishment of the predicate facts by stipulation, verdict or otherwise. *Edwards v. Arnold*, 500.

§ 31b. Instructions—Statement of Evidence and Application of Law thereto.

An instruction stating the principles of law involved in the action and the respective contentions of the parties, but failing to apply the principles of law to the various state of facts arising on the evidence, must be held for prejudicial error. G.S. 1-180. *Brooks v. Honeycutt*, 179.

Under G.S. 1-180 it is mandatory upon the court to charge the jury as to the law applicable to the various factual situations presented by the conflicting evidence, and the failure of the court to so charge the law arising upon the evidence, except in stating the contentions of the parties, must be held for prejudicial error. *Godwin v. Hinnant*, 328.

Objection that the court's definition and explanation of the "greater weight of the evidence" was not as full and complete as defendants desired will not be sustained in the absence of a request for special instructions. *Bank v. Slaughter*, 355.

The trial judge is required to apply the law to every factual situation arising on the evidence as to all substantive features of the case, even in the absence of a request for special instructions. G.S. 1-180. *Whiteside v. McCarson*, 673.

§ 32. Requests for Instructions.

Request for peremptory instructions should be in writing. *Fox v. Albea*, 445.

§ 36. Form and Sufficiency of Issues.

The issues arise upon the pleadings only. *Darroch v. Johnson*, 307.

The form of the issues is within the discretion of the trial court and an exception to an issue submitted will not be sustained if the form of the issue is sufficient to present to the jury all determinative facts in dispute and afford the parties an opportunity to introduce all pertinent evidence and apply it fairly. *Whiteside v. McCarson*, 673.

§ 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 no appeal lies from the court's refusal to grant the motion. *Nance v. Long*, 96.

§ 54. Trial by the Court—Hearings and Evidence.

The proscription of G.S. 1-180 against the expression of opinion on the evidence by the trial court is solely to prevent judges from invading the province of the jury, and a *fortiori* the statute can have no application in a trial by the court under agreement of the parties. *Everette v. Lumber Co.*, 688.

In a trial by the court under agreement of the parties, the court not only has the privilege but the duty in apposite circumstances of asking leading questions for the purpose of clarification and to ascertain the truth. *Ibid.*

TRIAL—*Continued.*

§ 55. Trial by Court—Findings and Judgment.

Where the parties waive trial by jury, the court's findings of fact have the force and effect of a verdict by jury. *Ins. Co. v. Lambeth*, 1.

TRUSTS

§ 4b. Transactions Creating Resulting Trust.

Remaindermen under will held not entitled to have resulting trust declared in the lands foreclosed under the mortgage executed by testator and purchased at the sale by the personal representative when the estate had been completely settled at the time of the sale except for the mortgage and the sale had been confirmed by the court with knowledge of the facts, there being no evidence of fraud. *Bolton v. Harrison*, 290.

Equity will impress resulting trusts on proceeds of U. S. Savings Bonds when surviving co-owner has conveyed her rights therein to other co-owner. *Tanner v. Ervin*, 602.

UTILITIES COMMISSION

§ 2. Jurisdiction and Function of Utilities Commission in General.

The duty of the Utilities Commission to protect the public in reasonable service at just and reasonable rates also requires it to fix rates that are just and reasonable to power companies so that they will have sufficient earnings to enable them to give reasonable service, to expand and improve their facilities as necessary in the public interest, to meet their obligations, to pay their stockholders a reasonable rate, and to compete on the market for capital funds. *Utilities Com. v. Light Co.*, 421.

The Utilities Commission, in the exercise of delegated police power, has been given authority to fix rates for public service companies, including supervision of rates charged and service rendered by corporations furnishing electric light and power, with the exception of municipal corporations, and it has the duty, in the exercise of its *quasi judicial* functions to establish reasonable and just rates therefor. *Ibid.*

§ 3. Hearings, Judgments and Orders.

Where proceedings by railroad carriers for an increase in intrastate rates is heard upon the theory that the rate conditions of the four major carriers were reasonably typical of the others, and the major carriers introduced competent, material and substantial evidence supporting the findings of the Utilities Commission upon which an increase in rates is ordered, protestants may not for the first time on appeal object that the order granting such increase of intrastate rates for all the carriers was not supported by statistical evidence of the smaller carriers, and it is error for the Superior Court to affirm the order as to the major carriers and remand the cause for the introduction of evidence in regard to the other carriers, and the ruling of the Commission granting the increase in rates as to all the carriers is affirmed. *Utilities Com. v. S.*, 410.

Petition for amendment of single rate or small part of rate structure is complaint proceeding in which Commission may determine the sufficiency or insufficiency of the rate without reference to procedure under G.S. 62-124. but on basis of need of power company for income. *Utilities Com. v. Light Co.*, 421.

It is necessary for the Utilities Commission to determine whether a proceeding before it is a general rate case or a complaint proceeding in order that it may apply the proper procedure, and its finding on this point will not be disturbed in the absence of a clear showing that the rights of the parties

UTILITIES COMMISSION—*Continued.*

have been prejudiced. A proceeding which involves only a fuel clause affecting only one class of consumers and only a few of the company's rate schedules is properly heard as a complaint proceeding. *Ibid.*

Where the rate structure of a power company has been established such rates are deemed *prima facie* just and reasonable, and in a subsequent complaint proceeding before the Utilities Commission attacking as discriminatory, unjust and unreasonable, a fuel clause applicable only to one class of consumers and affecting only a few of the rates, the Commission properly holds that the burden is upon complainants to show that the fuel clause and the rates resulting from the application thereof are discriminatory, unjust or unreasonable. *Ibid.*

§ 6. Proceedings after Decision on Appeal.

Where judgment of the Superior Court, reversing an order of the Utilities Commission granting an increase in rates, is affirmed on appeal to the Supreme Court on the ground that the evidence before the Utilities Commission was insufficient to support the order, and on petition to rehear it is expressly provided that the decision did not preclude the carriers from thereafter filing a petition before the Utilities Commission and offering evidence in support of the prior order of the Commission, the decisions become the law of the case and authorize the carriers' petition to reopen the case so that they might offer evidence in support of the order, and such further proceedings being had in the original cause, the order of the Commission putting into effect the increase in rates upon supporting competent, material and substantial evidence does not involve retroactive rate making, and the principle of *res judicata* is inapposite. *Utilities Com. v. S.*, 410.

The establishment of a rate structure for a power company in proceedings under G.S. 62-124 does not come within the doctrine of *stare decisis*, but such rates are subject to modification or change for change of conditions upon proper petition at any time. *Utilities Com. v. Light Co.*, 421.

VENDOR AND PURCHASER

§ 26. Actions for Shortage.

Where it is established by the verdict upon supporting evidence that the seller's agent pointed out certain timber as standing upon the seller's land, and that the purchase price was based upon the timber so shown, but that, by mistake, a part of the timber shown was on the land of an adjacent owner and therefore was not conveyed by seller's timber deed, the purchaser, irrespective of fraud, is entitled to recover that proportion of the purchase price represented by the timber standing on the adjacent land on the basis of money had and received *Dean v. Mattox*, 246.

Where, in negotiations for the purchase of timber, defendant's agent points out certain timber as standing on defendant's land, but, by mistake, a part of the timber shown is on the land of an adjacent owner, and after the timber shown is cut, plaintiff is required to pay a sum to reimburse the owner of the adjacent land for the timber cut therefrom, plaintiff's recovery from defendant is limited to the amount paid to the owner of the adjacent land. *Ibid.*

Where, in the negotiations for the purchase of timber, the seller's agent points out certain timber as standing on defendant's land, but, by mistake, a part of the timber shown is actually on land of an adjacent tract, the fact that the purchaser, in reliance upon the representation that all of the timber stood upon the seller's land, has his own attorney prepare the timber deed from the description of the land owned by the seller does not estop the purchaser from suing for the deficiency as money had and received, since

VENDOR AND PURCHASER—*Continued.*

nothing in the deed indicated that the timber in controversy was not in fact on the seller's land, and the doctrine of *caveat emptor* is not applicable. *Ibid.*

Evidence tending to show that brokers, having an option on certain timber, pointed out the timber to plaintiffs and that in reliance on the representations as to the boundaries, plaintiffs paid the purchase price, including commission, and the owner executed timber deed to them, but that through mistake of plaintiffs and defendant brokers a part of the timber pointed out was on the land of another and was not conveyed by the timber deed, without the joinder of the makers of the timber deed or evidence of mistake on their part, is insufficient to make out a cause of action in favor of plaintiffs against the brokers to recover for the shortage. *Tarlton v. Keith*, 298.

VENUE

§ ½. Nature of Venue.

The Superior Court is one court having statewide jurisdiction, and the question of venue is not jurisdictional. *Crain and Denbo, Inc., v. Construction Co.*, 106

Venue is exclusively statutory. *Ibid.*

§ 1a. Residence of Parties.

Where the evidence discloses that neither the foreign insurance company nor the domestic corporation, sued jointly as defendants, had its principal place of business in Wake County, neither is entitled to have the cause, instituted in another county, removed to Wake County as a matter of right, and the contention of the insurance company that its compliance with G.S. 58-150 rendered Wake County the county of its residence for the purpose of venue, is untenable. G.S. 1-79, G.S. 1-82. *Crain and Denbo, Inc., v. Construction Co.*, 106

§ 3. Objections to Venue and Waiver of Right to Object.

Failure to move for change of venue within thirty days after service of summons waives the right to object, and prior demurrer to the jurisdiction does not preserve the right to object to venue. *Nelms v. Nelms*, 237.

WATERS AND WATER COURSES

§ 2c. Diverting Flow.

Right of lower proprietor to have water flow in natural course is property right and he may recover for wrongful diversion regardless tof negligence. *Braswell v. Highway Com.*, 508.

The charge of the Court to the effect that the upper proprietor may increase or accelerate the natural flow of water but cannot divert it and cause it to flow upon the lands of the lower proprietor in a different manner or in a different place, and that the damages recoverable by the lower proprietor are limited to those proximately caused by such wrongful diversion, *held* not prejudicial. *Ibid.*

A person who wrongfully diverts or collects and discharges surface water on the lands of a lower proprietor is liable for the damages resulting therefrom. *Wiseman v. Construction Co.*, 521.

Where a private corporation, in developing a residential area, lays out streets and drains so as to collect and discharge the surface waters through a culvert under a street upon the lands of an adjacent owner, and the streets are thereafter dedicated to and accepted by a municipality, the interest of the public precludes abatement, and the adjacent owner may recover permanent damages. *Ibid.*

WILLS

§ 23a. Competency and Admissibility of Evidence in Caveat Proceedings in General.

While the probate of a will in common form is incompetent in evidence in a caveat proceeding, even for the purpose of corroborating propounder's witnesses, caveators waived their objection to its admission when they failed to object to testimony of a witness for propounder in reading the entire record of the probate proceeding and in cross-examining the witness in regard thereto. *In re Will of Knight*, 634.

§ 23b. Competency of Evidence on Issue of Mental Capacity.

The judgment in a lunacy proceeding is itself the best evidence of its contents, and testimony of a witness in regard thereto is properly excluded in a caveat proceeding predicated upon mental incapacity of the testatrix. *In re Will of Knight*, 634.

Evidence of mental incapacity within a reasonable time before and after the execution of the writing offered for probate is competent upon the issue of the mental capacity of testator. *Ibid.*

An adjudication of mental incompetency raises no presumption of mental incapacity anti-dating the adjudication but is competent as evidence upon the question provided such adjudication is rendered within reasonable proximity in time to the date in question, and whether it is within a reasonable time is a question addressed to the sound discretion of the trial court, to be determined upon the facts and circumstances of each particular case. *Ibid.*

The admission of evidence of a deed of trust executed by testatrix less than two years prior to the execution of the writing propounded is competent on the issue of mental capacity. *Ibid.*

Testatrix was adjudged mentally incompetent to handle her affairs some eleven months after the date the writing propounded was executed. It appeared that at the time of the adjudication testatrix was aged and infirmed and that she died the day after the adjudication. *Held:* Under the circumstances, the exclusion of the judgment in the lunacy proceeding would not be prejudicial error, since whether the judgment was rendered within reasonable proximity in time to the date in question is a matter addressed to the sound discretion of the trial court. *Ibid.*

§ 31. General Rules of Construction.

The intent of testator as gathered from the whole instrument will be given effect as the paramount aim in the interpretation of a will, unless such intent is contrary to some rule of law or at variance with public policy. *Entwistle v. Covington*, 315.

In ascertaining the intent of testator, the language will be considered in the light of the conditions and circumstances existing at the time the will was made. *Ibid.*

In order to ascertain the intention of testator it is permissible to transpose words, phrases or clauses, or to disregard or supply punctuation, or to supply words, phrases or clauses when the sense of the language used as collected from the context manifestly requires it. *Ibid.*

§ 32. Presumption against Partial Intestacy.

The presumption against partial intestacy is a rule of construction to ascertain testator's intent and does not authorize the court to make a will or to add to a testamentary disposition something which, by reasonable inference, is not there. *Entwistle v. Covington*, 315.

WILLS—*Continued.*

§ 34b. Designation of Devisees and Legatees.

In order to provide against the lapse of a legacy by reason of the prior death of the beneficiary, the testator must provide for the substitution or succession of some other recipient, either expressly or in terms from which it can be ascertained with sufficient clearness what person or persons he intends to take by substitution. *Entwistle v. Covington*, 315.

Will held not to have designated persons who were to take in event of prior deaths of residuary legatees, and testator died intestate in regard thereto. *Ibid.*

§ 39. Actions to Construe Wills.

G.S. 1-63, authorizing an executor to sue without joining the person for whose benefit the action is prosecuted, relates to parties and does not authorize an executor to appeal from a judgment entered in an action under the Declaratory Judgment Act when such judgment does not adversely affect the estate. *Dickey v. Herbin*, 321.

Upon an appeal by the executor in his representative capacity from a judgment which does not adversely affect the estate, the costs of the appeal, including attorneys' fees, are not proper charges against the estate. *Ibid.*

§ 46. Nature of Title of, and Right of Heirs, Legatees and Devisees.

A decree of foreclosure of a mortgage executed by testator, entered in an action in which all heirs are made parties, including the life tenant of the *locus in quo* and the remaindermen *in esse* and *in posse*, who are represented by a guardian *ad litem*, and the decree of confirmation duly entered, are binding on the parties, including a later born remainderman represented by members of his class, and the purchase at such sale takes title under foreclosure of the instrument executed by testator free of claims asserted under the provisions of the will. *Bolton v. Harrison*, 290.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-39; 1-42. Complaint in ejectment need not allege that plaintiffs had been in possession at some time within twenty years before institution of action. *Elliott v. Goss*, 185.

1-42. Every possession is presumed to be under the true legal title and permissive. *DeBruhl v. Harvey & Sons Co.*, 161.

1-52(9) Statute does not begin to run against action to reform deed for fraud until fraud is discovered. *Elliott v. Goss*, 185. Bar of the statute must be pleaded. *Ibid.*

1-52(10). Held not applicable to suit to remove cloud on title. *Edwards v. Arnold*, 500.

1-63. Does not authorize executor to appeal from judgment which does not adversely affect estate. *Dickey v. Herbin*, 321.

1-65.1. Inquisition is not necessary to appointment of guardian *ad litem;* mere failure to revoke appointment is not sufficient to avoid judgment in absence of fraud. *Moore v. Lewis*, 77.

1-69.1. Member is not co-principal of union so as to preclude suit by member against union for failure to prosecute member's claim for reinstatement of employment. *Glover v. Brotherhood*, 35.

1-79; 1-82. Foreign insurance company is not entitled to have action against it moved to Wake County as matter of right. *Crain & Denbo, Inc., v. Construction Co.*, 106.

1-83.; 1-125. Motion for change of venue as matter of right must be made within thirty days of service. *Nelms v. Nelms*, 237.

1-88.1. Actual date of issuance of summons may be shown by evidence *aliunde*. *Morton v. Ins. Co.*, 722.

1-95. Does not preclude issuance of second original process after discontinuance of first. *Morton v. Ins. Co.*, 722.

1-96. Where process is not served or extended and no alias issued, there is a discontinuance. *Morton v. Ins. Co.*, 722. Where clerk strikes through name of one county and writes name of another county above it, it is new process directed to sheriff of second county. *Ibid.*

1-98; 1-99. Affidavit for publication held insufficient in failing to describe land involved. *Menzel v. Menzel*, 649.

1-127(6). Complaint must allege facts and not mere conclusions. *Broadway v. Asheboro*, 232.

1-131. Action should not be dismissed on demurrer when complaint states good cause in defective manner. *Elliott v. Goss*, 185; *Lumber Co. v. Pamlico County*, 681.
Amendment filed without notice and leave is ineffectual. *Dudley v. Dudley*, 95.

1-180. Court must charge law applicable to every factual situation arising on evidence as to all substantive features even in absence of request. *Whiteside v. McCarson*, 673; *Brooks v. Honeycutt*, 179.
Court must charge law applicable to evidence, and charge stating law only in stating the contentions is insufficient. *Godwin v. Hinnant*, 328.
Prohibition against expression of opinion by court on evidence obtains throughout the trial. *S. v. Williamson*, 204. Remark of court during trial held prejudicial expression of opinion on evidence. *Ibid.*
Proscription against expression of opinion by court does not apply to trial by court under agreement of parties. *Everette v. Lumber Co.*, 688.
Exception to charge held ineffectual as broadside exception *S. v. Corl*, 258; *S. v. Corl*, 262.

1-183. Evidence which raises only conjecture is insufficient to be submitted to the jury. *Lane v. Dorney*, 15.

1-195; 1-152. Do not impair court's discretionary power to extend time for filing exceptions. *Godwin v. Hinnant*, 328.

1-240. Tort-feasor is entitled to have sums paid by him to plaintiff prior to judgment deducted from his pro rata share of judgment. *Jordan v. Blackwelder*, 189.

1-258. Statute does not empower executor to appeal in representative capacity from judgment directing distribution of estate as between beneficiaries and distributees. *Dickey v. Herbin*, 321.

1-268; 1-269. Remedy against erroneous judgment is by appeal or proceeding equivalent thereto taken in apt time. *Menzel v. Menzel*, 649.

1-271. Executor may not appeal to present his contentions as beneficiary of the estate. *Dickey v. Herbin*, 321.

7-64. In counties not exempted, Superior Court has original jurisdiction of misdemeanors. *S. v. Brown*, 209.

7-279(6). Wilson County General Court has jurisdiction of actions for divorce and alimony. *Nelms v. Nelms*, 237.

8-51. Testimony incompetent as against administrator may be competent as against other defendant. *Lamm v. Gardner*, 540.

9-1; 9-2; 9-3; 9-24; 9-25. Evidence held to support finding that there was no racial discrimination in selection of grand jury. *S. v. Perry*, 119.

14-17. It is prejudicial error for the court to charge on cention of the State that jury should not recommend life imprisonment. *S. v. Pugh*, 278.

14-45. Expert testimony held competent and evidence held sufficient to sustain conviction of violation of this statute. *S. v. Perry*, 119.

14-70. Sentence of not less than twelve months and not more than fifteen years for storebreaking and larceny is in excess of statutory maximum. *S. v. Fain*, 117.

14-399. Held unconstitutional. *S. v. Brown*, 54.

15-152. Charges of offenses growing out of same transaction may be consolidated in indictment. *S. v. Brown*, 209.
Separate indictments for rape held properly consolidated for trial. *S. v. Bryant*, 113.

15-163. Defendant may not object to juror when he has not exhausted his peremptory challenges. *S. v. Corl*, 259.

18-10. Where warrant charges a number of distinct offenses, defendant may move to quash for duplicity. *S. v. Williamson*, 204.

18-13. Information radioed by one patrolman to another is sufficient to authorize second patrolman to make affidavit. *S. v. Banks*, 728.

20-42(b). State may introduce certified record of Department of Motor Vehicles to show status of defendant's operators license. *S. v. Corl*, 252; *S. v. Corl*, 259; *S. v. Corl*, 262.

20-71.1. Court must submit issue of respondeat superior upon proof of ownership of vehicle, but when evidence shows that employee was on purely personal mission of his own, should charge that if the jury finds the facts to be as the evidence tends to show to answer the issue in the negative. *Skinner v. Jernigan*, 657; *Johnson v. Thompson*, 665; *Whiteside v. McCarson*, 673.
Proof that vehicle was registered in name of husband and wife does not tend to show that wife was driving as agent of husband. *Fox v. Albea*, 445.

20-140. Statutory duty to exercise due care is absolute. *Lamm v. Gardner*, 540.

20-141. Motorist is required to reduce speed below statutory maximum when emergencies require. *Lamm v. Gardner*, 540.

20-141(b). General maximum speed limit is 55 miles per hour with exception when Highway Commission erects signs specifying different limit. *S. v. Brown*, 209.

20-141(e). Hitting of parked vehicle by motorist traveling at lawful speed is not contributory negligence as matter of law. *Brooks v. Honeycutt*, 179.

20-146; 20-148. Failure to keep vehicle on right side of highway in passing vehicles traveling in opposite direction is negligence *per se*. *Boyd v. Harper*, 334.

20-148. Conflicting evidence as to which vehicle was on wrong side of highway requires submission of issue to jury. *Beauchamp v. Clark*, 132.

20-150(c). Cross-over to store not marked by appropriate signs is not intersection within meaning of statute. *Bennett v. Livingston*, 586.

20-155. Applies only when two vehicles approach intersection at approximately same time. *Downs v. Odom*, 81.
Does not apply to intersection of servient and dominant highways. *Jordan v. Blackwelder*, 189.
Negligence of driver in turning left at intersection across lanes of travel of vehicles having green light held sole proximate cause of collision. *Hudson v. Transit Co.*, 435.

20-158(a). Motorist is required to stop at sign and not to proceed until he has ascertained he may do so in safety. *Jordan v. Blackwelder*, 189. Motorist may not rely upon his belief that he is on through street when stop sign on intersecting street has been removed. *Tucker v. Moorefield*, 340.

20-158(c). Where ordinance is not introduced in evidence, the right of motorists at traffic control signal must be determined by well recognized meaning of such signals. *Hudson v. Transit Co.*, 435.

1-159. Admitted allegation of pleading is competent in evidence. *Rowe v. Murphy*, 628.

20-161. Does not apply to automobiles. *Rowe v. Murphy*, 628.

1-169.1. Appeal from pre-trial order is premature. *Green v. Ins. Co.*, 730.

25-31; 25-58. Evidence held to raise issue of fact as to whether bank of deposit was purchaser or agent for collection of check deposited. *Bank v. Courtesy Motors*, 466.

28-173. Recovery for wrongful death is to be distributed in same manner as personalty in case of intestacy. *Byerly v. Byerly*, 27.

35-45; 28-154. After-born child is entitled to share of estate, both real and personal; child born more than 280 days after intestate's death is presumed not to have been in *ventre sa mere*, but presumption is rebuttable. *Byerly v. Tolbert*, 27.

40-12. Evidence held to sufficiently show *bona fide* attempt to purchase land prior to condemnation proceedings. *Board of Education v. McMillan*, 485; *Board of Education v. Mann*, 493.

44-11. Prior to amendment proceeds of sale could not be divided among interested parties. *Menzel v. Menzel*, 649.

50-3. Provision that summons be returnable to county in which either plaintiff or defendant resides is not jurisdictional but relates to venue. *Nelms v. Nelms*, 237.

51-14. Failure to file health certificate does not invalidate marriage. *Hall v. Hall*, 275.

52-12; 47-1. Deputy clerk has authority to take the certificate of a married woman to a conveyance by her to her husband. *Baker v. Murphrey*, 346.

55-3.1 Statute cannot be given retroactive effect. *Lester Brothers v. Ins. Co.*, 565.

55-18. Defense of *ultra vires* is not longer available to corporation in suit by outside contracting party. *Everette v. Lumber Co.*, 688.

55-133(a). Our courts may entertain action to compel foreign corporation to declare dividend. *Belk v. Department Store*, 100.

58-131.18; 97-104.2. Compromise as to amount of premium due held not invalid as involving reduction in premium rate. *Casualty Co. v. Teer Co.*, 547.

58-150. Compliance with statute by foreign insurance company does not make Wake County its residence. *Crain & Denbo, Inc., v. Construction Co.*, 106.

58-176. Breach of condition against additional insurance does not merely limit liability but avoids policy. *Hiatt v. Ins. Co.*, 553.

62-26.5; 62-72; 62-124. Establishment of rate structure does not come within doctrine of *stare decisis;* modification of single rate or small part of rate structure in "complaint proceeding" not governed by G.S. 62-124; Utilities Commission has authority to consider financial status of power company in determining sufficiency or insufficiency of rates. *Utilities Commission v. Carolinas Committee*, 421.

62-30; 62-31; 62-122. Utilities Commission is charged with duty of establishing reasonable and just rates for public service corporations. *Utilities Commission v. Carolinas Committee*, 421.

62-121.23. Since Utilities Commission has no authority to authorize operation of vehicle in interstate commerce, endorsement of insurance certificate stipulating that liability of insurer should extend to all losses occurring on route authorized to be served by insured cannot enlarge liability of insurer while vehicle is used in interstate commerce. *Ins. Co. v. Lambeth*, 1.

62-124. In ordering increase in intrastate rates, Utilities Commission may take statistical evidence of major carriers as typical of all the carriers; order based on proportionment of investment held proper. *Utilities Commission v. S.*, 410.

79-3. Taking and selling hogs running free on one's own land may be larceny. *S. v. Booker*, 272.

105-147(9)d. Is retroactive in effect and extends period for loss carry-over to five years. *Pilkington v. Currie*, 726.

105-266.1. Statutory conditions precedent must be complied with. *Kirkpatrick v. Currie*, 213.

105-267; 105-406. Statutory prohibition against injunction against collection of taxes is constitutional, the taxpayer having adequate remedy by suit to recover tax paid under protest. *Kirkpatrick v. Currie*, 213.

106-283; 106-281. Indictment charging sale or offering for sale seed not properly labeled held insufficient. *S. v. Bissette*, 514.

115-45; 115-27. County board of education is body corporate and may sue and be sued in its corporate name. *McLaughlin v. Beasley*, 221.

115-54; 115-8. Person employed by city board of education to do maintenance work on city school grounds is not employee of State. *Turner v. Board of Education*, 456.

143-291; 143-297. Affidavit must be filed in duplicate stating facts sufficient to establish identity of parties and basis of claim. *Turner v. Board of Education*, 456.

160-78. *et seq.* Complaint held insufficient to state cause to have paving assessments declared invalid. *Broadway v. Asheboro*, 232.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

Art. I, sec. 12. Valid bill of indictment is essential of jurisdiction in all prosecutions originating in Superior Court. *S. v. Bissette*, 514.

Art. I, sec. 8 Statute authorizing solicitor of recorder's court to issue warrant does not violate this section, the issuance of a warrant not involving exercise of supreme judicial powers. *S. v. Furmage*, 616.

Art. I, sec. 17. Statute cannot be given retroactive effect so as to divest vested right. *Lester Brothers v. Ins. Co.*, 565.
Constitution requires payment of just compensation for property taken by sovereign authority. *Braswell v. Highway Commission*, 508.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED

Art. I, sec. 10. Statute cannot be given retroactive effect so as to divest vested right. *Lester Brothers v. Ins. Co.*, 565.

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

S. v. Perry, 250 N.C. 119. Petition for *certiorari* denied Oct. 12, 1959.
Moore v. Lewis, 250 N.C. 77. On appeal on writ of error.